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Introduction



# STREAMLINING DEFENSE ACQUISITION LAWS

Report  
of the  
Acquisition Law Advisory Panel

to the  
United States Congress



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FOREWORD .....	iii
ACKNOWLEDGMENTS .....	v
PANEL MEMBERS .....	vii
TASK FORCE .....	ix
INTRODUCTION .....	1
A. Background .....	1
B. Strategic Changes.....	4
C. Goals & Objectives.....	7
D. Approaches.....	9
E. Overview of Conclusions and Recommendations .....	11
F. Constraints .....	18

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## **FOREWORD**

In section 800 of Public Law Number 101-510 (the National Defense Authorization Act for Fiscal Year 1991), Congress directed the Department of Defense to establish the "DOD Advisory Panel on Streamlining and Codifying Acquisition Laws." In accordance with this directive, the Under Secretary of Defense for Acquisition selected the Panel of recognized experts in acquisition law and procurement policy whose Report follows here.

As contemplated by the Congress in its direction that the Panel represent a balance from the public and private sectors, its members brought both diversity and a wealth of experience to this study. While the Panel members share common responsibility for the views and recommendations which follow, it is unrealistic – given their individual perspectives – to expect complete unanimity in analyzing more than 600 statutes. The many statements made on behalf of the Panel throughout the Report reflect a majority view. The Panel's recommendations, as well as the Report as a whole, do not represent official positions of either the Department of Defense or the United States Government.

Readers are cautioned that the terms "statute," "law," "code," or "provisions" are freely used throughout the report in ways which may not reflect the narrowest legal interpretation. Similarly, pronouns such as "he" or "she," unless used in a specific personal reference, are not intended to convey any connotation of gender.

## ACKNOWLEDGMENTS

This project could not have been done without the extraordinary efforts of the highly professional Task Force formed under the sponsorship of the Defense Systems Management College, which provided direct support to the Panel members as well as administrative support for the study as a whole. The following Defense Department activities contributed to this effort by providing members of their staffs to the Task Force: the offices of the Air Force Judge Advocate General, Headquarters, Air Force Materiel Command, Army Judge Advocate General, Army Materiel Command Headquarters, Army Materiel Command (U.S. Army Communications Electronics Command), Assistant Secretary of the Air Force (Acquisition), Assistant Secretary of the Navy (Research, Development & Acquisition), Office of General Counsel (Defense Logistics Agency) and the Office of Naval Research. On occasion, this Task Force worked around the clock to prepare statutory analyses in time for Panel meetings. They deserve particular credit for their hard work in helping the Panel members draft, assemble, and edit this Report. This monumental effort came from a joint military and civilian team of dedicated people who had never met nor worked together prior to the establishment of the Panel.

Throughout its deliberations, the Panel endeavored to establish a dialogue between its members, the acquisition community, and the general public. A large number of industry associations, Government agencies, public interest groups, and private citizens came forward to offer their thoughts, their expertise, and, in many cases, significant amounts of their time. We must also recognize the excellent support that the Panel received from throughout the Department of Defense, particularly from the Military Services and the Defense agencies. The Panel would like to take this opportunity to thank everyone who participated in this process, because their varied perspectives and generous support were essential to our work.

While the inputs which resulted from this process were invaluable, the analyses and recommendations presented in the following Report are the sole responsibility of the Panel.

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# "STREAMLINING DEFENSE ACQUISITION LAW"

## REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION LAWS

### INTRODUCTION

#### A. Background

Hundreds of individual laws create the underpinnings of the defense acquisition system. Large and small, significant and trivial, new and old, these laws emanate from the fundamental Constitutional responsibility of the Congress "To raise and support Armies (and) . . . To provide and maintain a Navy."<sup>1</sup> Expanded many times by regulations, by supplements to regulations, by directives, and by established practice, these laws have been interpreted and applied by various courts, boards of contract appeals, and the General Accounting Office. Separately and together, they govern the way tens of thousands of Government workers buy -- and hundreds of thousands of Americans manufacture, perform, and sell -- the millions of items and services required by a modern fighting force -- literally everything from desert camouflage uniforms to precision-guided munitions.

With the passage of the National Defense Authorization Act for FY91, Congress declared that the time had come to start the process of rationalizing, codifying, and streamlining this body of laws. Section 800 of that Act directed the official responsible for administering acquisition law and regulation -- the Under Secretary of Defense for Acquisition -- to appoint an advisory panel of Government and civilian experts. Under the leadership of the Commandant of the Defense Systems Management College,<sup>2</sup> this panel was to review all laws affecting DOD procurement, "with a view toward streamlining the defense acquisition process," and to issue a report for transmission by the Secretary of Defense to the Congress in January 1993. The report was to be a practical plan of action for moving from present law to an understandable code containing specific recommendations to Congress: to eliminate any laws "unnecessary for the establishment of buyer and seller relationships in procurement;" to ensure the "continuing financial and ethical integrity" of defense procurement programs; and to "protect the best interests of

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<sup>1</sup>U.S. CONST. art I, § 8.

<sup>2</sup>The Defense Systems Management College is a DOD educational institution which has, since 1971, trained program managers and program executives from the uniformed services, defense industry, and all branches of the Federal Government.



the Department of Defense." Finally, the panel was asked to "prepare a proposed code of relevant acquisition laws."<sup>3</sup>

Maintaining a fair, efficient, and open system of defense procurement has been a fundamental public policy since the earliest days of the Republic, as well as a specific congressional goal since DOD was created by the National Security Act of 1947. In the decades that followed, six major executive branch commissions separately examined the perennial problem of defense management. In addition to serving as benchmarks for reform, these commissions also resulted in some significant improvements. The recommendations of the 1972 Commission on Government Procurement concerning the need for a uniform procurement system "led to the establishment of the Office of Federal Procurement Policy and the development of the Federal Acquisition Regulations." <sup>4</sup> In 1986, a new wave of change resulted in the passage of the Goldwater-Nichols Act -- a landmark law that resolved entrenched issues of defense structure and command authority -- as well as the creation of yet another commission -- the President's Blue Ribbon Commission on Defense Management headed by David Packard.<sup>5</sup>

The Packard Commission provided a comprehensive analysis of the major problem areas affecting defense management, and it also made a specific recommendation to recodify the Federal laws governing procurement:

. . . the legal regime for defense acquisition is today impossibly cumbersome. . . . At operating levels within DOD, it is now virtually impossible to assimilate new legislative or regulatory refinements promptly or effectively. For these reasons, we recommend that Congress work with the Administration to recodify Federal laws governing procurement into a single, consistent, and greatly simplified procurement statute.<sup>6</sup>

Although the Packard Commission's recommendations attracted wide public attention, they nevertheless failed to prompt the sweeping legislative changes that many had thought possible in the aftermath of the Goldwater-Nichols reforms. A 1988 congressional report noted that the Packard Commission's status as the sixth major study of defense acquisition over four decades meant that it was merely the latest to address continuing problem areas in defense procurement. As House Armed Services Committee Chairman Les Aspin stated in his foreword to the report, "Perhaps the next executive commission on acquisition should be created, not to propose the reforms, but to

<sup>3</sup>Pub. L. No. 101-510, § 800, 104 Stat. 1587. See H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 107 (1990) to accompany H.R. 4739 (National Defense Authorization Act for Fiscal Year 1991).

<sup>4</sup>Defense Policy Panel and Acquisition Policy Panel of the H.R. Comm. on Armed Services, 100th Cong., 2d Sess., *Defense Acquisition: Major U.S. Commission Reports (1949-1988)* (Comm. Print 1988), vi.

<sup>5</sup>Pub. L. No. 99-433, 100 Stat. 992. See H.R. CONF. REP. NO. 824, 99th Cong., 2d Sess., (1986) to accompany H.R. 3622 (Goldwater-Nichols Department of Defense Reorganization Act of 1986).

<sup>6</sup>*A Quest for Excellence: Final Report by the President's Commission on Defense Management* 55 (June 1986).

implement them."<sup>7</sup> In June 1989, Secretary of Defense Dick Cheney set forth just such a plan in his Defense Management Review (DMR), an ambitious effort not only to implement the recommendations of the Packard Commission, but to provide a framework for continuing improvements in Pentagon acquisition practices.<sup>8</sup>

One of the Packard Commission's findings, endorsed by the DMR, was the need for broad changes in the acquisition statutes:

With the enactment of additional major legislation since 1986, when the Packard Commission finished its work, there is increased urgency to addressing the body of procurement law in its totality – in order to simplify, and clarify the framework under which DOD and other departments operate, and more broadly . . . to make the acquisition process fundamentally more effective.<sup>9</sup>

The DMR subsequently provided a benchmark for a number of important acquisition initiatives: the identification of almost 400 acquisition directives for cancellation or consolidation; the streamlining of the Defense Federal Acquisition Regulation Supplement to a document less than half the size of its predecessor; and, in response to a DMR White Paper, congressional action to cancel 30% of the recurring reports that it had originally required for oversight purposes.<sup>10</sup>

This executive-legislative branch partnership was implicitly recognized by the Senate in approving the legislation which authorized the formation of the "Advisory Panel on Streamlining and Codification of the Acquisition Laws:"

The Packard Commission and Secretary Cheney's Defense Management Review represent the most recent efforts to promote efficiency in Government procurement practices. The purpose of this Advisory Panel will not be to plow the same ground as previous studies; rather, it will be to take the general principles set forth in these studies and prepare a pragmatic, workable set of recommended changes to the acquisition laws.<sup>11</sup>

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<sup>7</sup>Defense Policy Panel and Acquisition Policy Panel of the H.R. Comm. on Armed Services, 100th Cong., 2d Sess., *Defense Acquisition: Major U.S. Commission Reports (1949-1988)* (Comm. Print 1988), vii.

<sup>8</sup>U.S. Dep't of Defense, *Defense Management Report to the President by Secretary of Defense Dick Cheney* (1989).

<sup>9</sup>*Id.* at 26.

<sup>10</sup>U.S. Dep't of Defense, *Annual Report to the President and the Congress 28-29* (1992). Hereafter, *92 Annual Report*.

<sup>11</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 819 (1990) to accompany S. 2884 (National Defense Authorization Act For Fiscal Year 1991).

## **B. Strategic Changes**

The authorization of the Panel took place in the midst of fundamental changes in the international security environment, highlighted by the unification of Germany, the transformation of Eastern Europe, and the break-up of the Soviet Union. Before the Panel could even begin its deliberations, however, the United States found itself at war in the Persian Gulf, the results of Operation Desert Storm providing another clear demonstration that procurement decisions made in peacetime have life-or-death consequences in combat. Those lessons were still being absorbed when the failed coup d'état of August 1991 heralded the end of Soviet communism, the collapse of the Soviet Union, and the emergence of the new Commonwealth of Independent States. The United States thus emerged victorious from a short, hot war and a much longer Cold War -- all in the space of six months.

These strategic changes had profound implications for the American defense establishment. Not only could U.S. military forces be reduced, but the money spent on defense could be redirected toward other national priorities. Those changes in turn had equally profound implications for the Panel. The dramatic reductions in defense spending were sufficient by themselves to create a presumption that the acquisition system of the future would demand better management by fewer people of far fewer tax dollars. "Better" in this case was synonymous with the simpler, more flexible, and more responsive procedures needed to match the sweeping personnel reductions and management realignments that had become the order of the day. Under the blueprint established by the DMR, for example, cost reductions of more than \$70 billion between 1990 and 1997 had to come as the result of "improved business practices . . . not from program or force level cuts."<sup>12</sup> In its review, therefore, the Panel had a clear obligation to seek out legislative reforms which would enable both Government and industry to operate more efficiently with reduced budgets.

Other major influences upon the Panel's deliberations were the changes occurring in the defense industrial base. Operation Desert Storm demonstrated that an industrial base built around the global requirements of the Cold War had the capacity to respond to the demands of a regional conflict. However, as a study by the Air Force Association noted, this industrial base,

. . . no longer exists. Even as the nation watched the war on television, the companies that produced the impressive weapons were releasing workers, closing plants, and searching for nondefense business.<sup>13</sup>

This exodus from the defense marketplace was not solely due to the downturn in defense spending:

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<sup>12</sup>U.S. Dep't of Defense, *Implementation of the Secretary of Defense's Defense Management Report to the President: Progress Report 19* (1992).

<sup>13</sup>Air Force Ass'n., Arlington, VA, *Lifeline Adrift: The Defense Industrial Base in the 1990's* (1991).

Firms, particularly subcontractors and suppliers of system components, are moving from defense to the commercial market, where the profits are better and where business is conducted in a more stable, less adversarial manner.<sup>14</sup>

Two congressional studies completed in the aftermath of the Gulf War simultaneously praised the performance of U.S. weapons systems while citing the burden of regulatory controls imposed through the DOD acquisition system as an important factor in the decline of the industrial base.<sup>15</sup>

While the Panel's charter called for legislative rather than regulatory reform, there is an important linkage, often missed in public and congressional criticism of DOD contracting methods: many of the regulations which impose the most burdensome controls are specifically mandated by statute.<sup>16</sup> With widespread public perceptions that the term "Government procurement" is synonymous with "scandal," the stakes have never been higher for DOD administrators understandably determined to avoid the appearance of wrongdoing or, worse yet, any controversy suggesting the need for still more legislation. Risk aversion leads in turn to a search for safety through the ever tightening knot of restrictive rule making and detailed regulations. This "missing link" between law and regulation overlooked by so many analysts was addressed in a study specially prepared in 1992 for the Panel by the American Defense Preparedness Association. It found that acquisition laws represented the apex of a "cascading pyramid" of restrictive regulations, overly detailed military specifications, and common procurement practices that typically added 30-50% to the costs of doing business with the Department of Defense.<sup>17</sup>

Although these costs have customarily been measured in both time and money, they also burden technological innovation. Ironically, it is technological sophistication which has characterized American weapons development for more than a generation, and is an essential component of our continued military superiority. It is also important to remember that these laws are part of a system that has been successfully applied for almost a half century to procure the weapons and materiel used by American armed forces in actual combat in Korea, Vietnam, and the Persian Gulf, as well as a host of Cold War

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<sup>14</sup>*Id.*

<sup>15</sup>Office of Technology Assessment, *U.S. Congress, Redesigning Defense: Planning the Transition to the Future U.S. Defense Industrial Base*, OTA-ISC-500, (1991); H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of US Defense Industrial Base Panel* (Comm. Print 1992).

<sup>16</sup>One notable exception to the usual "missing link" between law and regulation was provided by the report of a 1992 congressional panel studying the industrial base which charged that "Defense Department provisions requiring compliance with Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department." H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of US Defense Industrial Base Panel* 13 (Comm. Print 1992).

<sup>17</sup>George K. Krikorian, Presentation to the Acquisition Law Advisory Panel, Ft. Belvoir, VA (June 3, 1992). See also Mr. Krikorian's statement before the House Armed Services Committee Subcommittee on Investigations, July 22, 1992, and his article, *DOD's Cost Premium Thirty to Fifty Percent*, *National Defense* (Journal of the American Defense Preparedness Association) 12-13 (Sept. 1992).

confrontations. By the early 1990s, however, this record of success could not completely offset a growing concern among lawmakers and procurement experts who worried about the system's ability to respond to future scientific challenges. For one thing, the procurement process typically operated at a pace which was far slower than the technological developments it sought to capture. Worse yet, it imposed bureaucratic requirements which were so unique and intrusive (e.g., cost accounting standards) that many contractors totally separated their Government and commercial production facilities. These barriers not only added to the costs of doing business with the Government, but they also "walled off" the rapid advances being made in commercial research and development from easy exploitation and use in military systems.

A particularly vivid example of this barrier occurred during the Gulf War. According to a story cited by Donald A. Hicks, a former Under Secretary of Defense for Research and Engineering, the U.S. Army placed an emergency order for 6,000 commercial radio receivers, waiving all military requirements and specifications. Because of the urgency of preparations for war -- as well as the ever present threat of second-guessing once that urgency had faded -- no responsible procurement official could be found who would waive the requirement for the company to certify that the Army was being offered the lowest available price. Since the radio was widely marketed and any misstatement might constitute a felony, no company official would make this certification. The impasse was resolved only when the Japanese Government bought the radios without a price certification, donated them to the U.S. Army, and credited the purchase against Japan's financial contribution to Operation Desert Storm.<sup>18</sup>

The Gulf War demonstrated the devastating tactical effect of sophisticated weaponry of all kinds, particularly when precision munitions were coupled with advanced command and control systems. If these developments truly represent what DOD referred to as a "military technological revolution," then the innovations needed to hone the American combat edge will increasingly depend on developments in the commercial sector.<sup>19</sup> A number of public and private studies have documented the need for more effective integration of commercial and military technology. These analyses have pointed out that this linkage is not only needed to ensure a stable, viable defense industrial base as Government spending is reduced, but is equally important to ensure a wartime surge capability as traditional defense plants are eliminated. Recognizing this trend, Congress has given clear guidance in a series of defense authorization bills that it too is concerned with this objective. Unfortunately, this guidance has not reduced the barriers to commercial access. The impediments to civilian-military integration, therefore, became a topic of continuing interest to the Panel, typifying in many ways the overriding need to streamline the defense procurement laws in a new era of fiscal austerity and great strategic uncertainty.<sup>20</sup>

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<sup>18</sup>Donald A. Hicks, "Requirements for a Viable Defense Industrial Base", Speech to the Economist Conference on Defense Spending Retrenchment, London, UK (Oct. 21, 1991).

<sup>19</sup>1992 Annual Report, at 6.

<sup>20</sup>H.R. Comm. on Armed Services, 102d Cong., 2d Sess., *Future of the Defense Industrial Base, Report of the Structure of U.S. Defense Industrial Base Panel 13-16* (Comm. Print 1992). See also two reports by

### C. Goals & Objectives

At the first meeting of the Panel, the members established the basic framework for the conduct of this study. As a result of that discussion, they agreed that their congressional charter (Public Law 101-510, section 800) provided the following goals for their efforts:

- **Streamline the defense acquisition process and prepare a proposed code of relevant acquisition laws.**
- **Eliminate acquisition laws that are unnecessary for the establishment and administration of the buyer and seller relationships in procurement.**
- **Ensure the continuing financial and ethical integrity of defense procurement programs.**
- **Protect the best interests of DOD.**

During several of its initial meetings, the Panel heard testimony from a wide variety of experts representing Government, the military, and industry. Noted defense analyst Dr. Jacques S. Gansler spoke of the need for closer integration of commercial and military technologies, while Senator William Roth was equally forthright in urging the members to propose dramatic changes in the laws governing the procurement process. In his presentation to the Panel, Senator Jeff Bingaman also acknowledged that many acquisition laws enacted in the 1980s had been passed without careful consideration for their impact on the existing framework. Because Congress was clearly concerned with its ultimate accountability for the procurement system, he pointed out, a comprehensive revamping of the system of acquisition laws was now in order. General officers from the military services, as well as senior civilian executives representing such key procurement elements as the Defense Logistics Agency, were also invited to testify as the Panel sought to identify the most critical problem areas. Industry groups, such as the Council of Defense and Space Industry Associations, the American Bar Association, and the U.S. Chamber of Commerce, were also contacted during this phase of the review.

Although individual perspectives varied, there was surprising agreement on the burden placed upon the acquisition community by the increasingly complex web of procurement laws. Many of these viewpoints were summarized in a timely article by Professor William E. Kovacic of George Mason University:

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the Center for Strategic and International Studies, *Deterrence in Decay: The Future of the U.S. Industrial Base* Washington, DC (May 1989) and *Integrating Commercial and Military Technologies for National Strength: An Agenda for Change*, Washington, DC (March 1991). For a DOD perspective, see Robert B. Costello, *Bolstering Defense Industrial Competitiveness*. Report by the Under Secretary of Defense (Acquisition) to the Secretary of Defense (July 1988).

The perceived imperative to embrace immediate statutory cures for apparent (procurement) deficiencies in the 1980s inspired several enactments of sweeping scope and questionable draftsmanship. . . . Once adopted, such enactments typically resist subsequent retrenchment, as any suggested ex post weakening of requirements usually is successfully attacked by advocates of the original legislation as an unwarranted dilution of congressional efforts to discourage fraud and otherwise improve procurement performance. There is, in effect, an upward statutory ratchet in procurement regulation that ensures that regulatory commands become ever more restrictive.<sup>21</sup>

In the early months of the Panel's activities, its members sought to amplify their original goals and to identify more specific criteria to guide their recommendations for statutory change. The key to this effort was a broadly based pattern of outreach activities, all aimed at ensuring a review process that was open to the widest possible variety of public access and comments. Monthly Panel meetings, held in several locations at Fort Belvoir, Virginia and the District of Columbia, were regularly advertised in the Federal Register and became the venue for both formal presentations and more informal consultations between the concerned public and the members. Federal Register announcements and widely distributed letters were also used as a means of soliciting public comments in the principal functional areas selected for review. Panel members and their staffs routinely provided briefings on their work to both the executive and legislative branches as well as to a wide variety of public interest and industry groups. Through these individual and collective efforts, the Panel was able to establish from its inception a remarkably free-ranging dialogue with both the acquisition community and the general public.

One of the first concrete results of that dialogue was the Panel's agreement on the 10 objectives that would help to guide its review:

(1) Acquisition laws should identify the broad policy objectives and the fundamental requirements to be achieved. Detailed implementing methodology should be reserved to the acquisition regulations.

(2) Acquisition laws should promote financial and ethical integrity in ways that are:

(a) simple and understandable;

(b) not unduly burdensome; and

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<sup>21</sup>William E. Kovacic, *Regulatory Controls as Barriers to Entry in Government Procurement*, 25 POLICY SCIENCES 31 (1992).

**(c) encourage sound and efficient procurement practices.**

**(3) Acquisition laws should establish a balance between an efficient process and**

**(a) full and open access to the procurement system; and**

**(b) socioeconomic policies.**

**(4) Acquisition laws should, without alteration of commercial accounting or business practices, facilitate:**

**(a) Government access to commercial technologies; and**

**(b) Government access to the skills available in the commercial market place to develop new technologies.**

**(5) Acquisition laws should, without requiring contractors to incur additional costs, facilitate the purchase by DOD or its contractors of commercial or modified commercial products and services at or based on commercial market prices.**

**(6) Acquisition laws should enable companies (contractors or subcontractors) to integrate the production of both commercial and Government-unique products in a single business unit without altering their commercial accounting or business practices.**

**(7) Acquisition laws should promote the development and preservation of an industrial base and commercial access to Government developed technologies**

**(8) Acquisition laws should provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.**

**(9) Acquisition laws should encourage the exercise of sound judgment on the part of acquisition personnel.**

**(10) Acquisition laws should, when generating reporting requirements, permit as much as possible the use of data that already exists and is already collected without imposing additional administrative burdens.**

#### **D. Approaches**

Before these goals and objectives could be applied to the task of streamlining, it was necessary to define the universe of laws affecting defense acquisition. The last attempt to compile these laws had occurred in the early 1970s, when the Commission on



Government Procurement identified over 4,000 statutes (Public Laws and U.S. Code sections) thought applicable to the procurement process.<sup>22</sup> In addition to being outdated, however, the criteria used in making those judgments could not be readily determined or easily applied. More helpful was the biennial report prepared by the House Armed Services Committee, LAWS RELATING TO FEDERAL PROCUREMENT.<sup>23</sup> The statutes identified there were correlated with a key word search on acquisition related terms contained in a FAR/DFARS data base.<sup>24</sup> Fiscal laws accompanying acquisition related statutes were also included in this initial compilation, as well as various executive orders. Throughout their search, the researchers routinely included any laws of possible applicability in order to minimize the risk of overlooking any pertinent statute.

From these sources, the Panel initially identified 889 provisions of law that appeared to have some relationship to DOD acquisition. In reviewing this list, however, the Panel soon decided that some of these statutes did not warrant further consideration. Laws relating to basic DOD organizational structure, the operation of the defense commissary system and nonappropriated fund activities, as well as traditional supply functions were determined to have only a minimal impact on the buyer-seller relationship which was the main focus of the Panel's efforts. Fiscal laws were similarly excluded from more detailed review because the Panel decided that they affected defense budgeting more than defense acquisition. Recently passed legislation dealing with the acquisition work force, although considered both relevant and important, was not considered because it was still in the implementation process. The provisions of the public contract statutes in Title 41 of the U.S. Code were generally excluded from review in favor of a tighter focus on their parallel provisions in Title 10, the primary reference for DOD.<sup>25</sup> Several exceptions to this rule included the Office of Federal Procurement Policy Act and certain other provisions of Title 41 which have a direct impact upon DOD acquisition. Following this initial winnowing process, the Panel continued to filter out laws when subsequent review revealed them to be of only marginal importance to its declared objectives.

Even after this screening, the Panel was left with a universe of over 600 DOD-related procurement laws that it was required to review in line with its congressional charter. Those numbers highlighted the importance of approaching defense acquisition as a system. Defined doctrinally, the defense acquisition system is "a single uniform system whereby all equipment, facilities, and services are planned, developed, acquired, maintained, and disposed of within the Department of Defense."<sup>26</sup> The requirement to think systemically, combined with the need to divide the labor of reviewing so many

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<sup>22</sup>Report of the Commission on Government Procurement, *Table and Digest of Procurement-Related Laws*, (1973)

<sup>23</sup>H.R. Comm. on Armed Services, 102d Cong., 1st Sess., *Laws relating to Federal Procurement As Amended Through April 6, 1991* (Comm. Print 1991).

<sup>24</sup> The data base used was originally compiled by the Logistics Management Institute for the DMR and reported as *Regulatory Relief: Simplifying and Eliminating Contract Clauses*, Report PL903R1 Prepared for the Defense Management Review Regulatory Relief Task Force, Bethesda, MD (Nov. 1989).

<sup>25</sup>A list of the statutes considered but excluded from further review is at Appendix E of this Report.

<sup>26</sup>U.S. Dep't of Defense, Defense Systems Management College, *Introduction to Defense Acquisition Management*, 1 (Ft. Belvoir, VA, 1989)

statutes, led the Panel to establish working groups covering six major functional areas: contract formation; contract administration; service-specific and major systems statutes; socioeconomic requirements, small business, and simplified acquisition; standards of conduct; and intellectual property. In addition, two ad hoc working groups addressed commercial procurement and international defense cooperation.

The functional working groups each consisted of two Panel members, one from the public sector and one from the private sector. They quickly became the focal points for research and analysis in these functional areas, reviewing the laws assigned to them and preparing recommendations for decision by the Panel as a whole. In reviewing the major statutes, the working groups typically began the process with a legislative history and a literature search. Building upon the wide public contacts that had already been established, comments were solicited from the acquisition community and other interested parties, often through the use of Federal Register notices or questionnaires. Minutes of Panel meetings, legislative abstracts, and various position papers were also distributed through the extensive mailing and telefax lists that were eventually developed by each working group and the Panel as a whole. Specific inputs were also obtained from departmental staffs, trade associations, and Governmental agencies with particular expertise, such as the Air Force Contract Law Center. Where appropriate, public meetings on issues being examined by the working groups were also held to ensure that a wide range of opinions was considered. Similarly, when specific issues were scheduled for discussion at Panel meetings, interested groups from both the public and private sectors were routinely invited to speak.<sup>27</sup> These inputs eventually became a kind of dialogue between the Panel, the acquisition community, and the general public that was important in framing recommendations. The tentative decisions reached throughout this process were then reviewed *in toto* by the Panel at the conclusion of its deliberations. This "last look" was intended to ensure that the individual decisions made over many months were consistent with one another -- and with the Panel's goals and objectives.

## **E. Overview of Conclusions and Recommendations**

The Panel's review of the major functional areas it chose for this study produced specific recommendations to retain, amend, or repeal individual statutes.<sup>28</sup> In a number of other instances, the Panel recommended the consolidation of several statutes or even the

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<sup>27</sup>Examples included: the National Association of Minority Business when the Small Business Act was under discussion; the Management Reviews Division of the General Services Administration during discussion of the Brooks Act; an industry coalition, the Integrated Dual-Use Commercial Companies, during several discussions of commercial products and services; and the General Accounting Office during discussions of protests.

<sup>28</sup>In those cases where an amendment (including recodifications) was recommended, the analysis of that statute contains a subsection entitled "Proposed Statute". This subsection contains or references the current statutory language together with the proposed changes highlighted by underlining (for additions) or strikeouts (for deletions).

creation of new laws. The principal conclusions reached in each of these areas are highlighted here:

**Contract Formation:** The 80 statutes in this area include the fundamental statutes that require and implement the policy of full and open competition on which the DOD procurement system is based. These laws cover the critical path of procurement, including publicizing requirements, competing or justifying the absence of competition, soliciting offers, evaluating bids or proposals, and pricing and awarding contracts. The Panel analyzed alternatives to the policy of full and open competition, and concluded that this standard should be retained. It also concluded that the competitive statutes continue to provide a sound framework for conducting the DOD procurement process in an open, fair, and ethical manner -- while still meeting mission requirements.

The Panel has proposed changes to the baseline statement of congressional procurement policy in 10 U.S.C. § 2301 and the accompanying definitions in section 2302. These changes stress the need for an appropriate balance between an efficient procurement system, full and open access to that system, and sound implementation of socioeconomic policies. They also stress a clear priority for meeting DOD requirements through the procurement of commercial or other nondevelopmental items, both as end items and as components. A significant change to section 2304 recommends deletion of the authority for master agreements for advisory and assistance services as well as the substitution of a new rule structure for contracts that do not procure or specify a firm quantity of supplies or services and involve delivery or task orders. The Panel also made two important recommendations for amendment of 41 U.S.C. § 416, "Procurement Notices." The first would allow exemption of commercial items from the minimum statutory time periods that offerors have to submit bids or proposals after publication in the Commerce Business Daily by permitting the Administrator for Federal Procurement Policy to issue more flexible rules prescribing appropriate time periods. The second seeks to improve the use of automated means of providing notice for purchases made under the Panel's recommended "simplified acquisition threshold." The Administrator for Federal Procurement Policy would be required here as well to issue rules for notice procedures through the use of automated means, taking into account the costs and availability of these means to potential offerors, especially small businesses.

The Panel also made two important recommendations to modify the Truth in Negotiations Act (10 U.S.C. § 2306a). The first is to stabilize the threshold for cost or pricing data at \$500,000. The second is to utilize more effectively the forces of the commercial market place by expanding and clarifying the use of the exception for adequate price competition. The new wording would allow a broadened exemption from cost or pricing data requirements if: (1) a product or service is purchased from a company or business unit which produces the same or similar products for the commercial market; (2) the company uses the same or similar production processes for the commercial market; and (3) the price is fair and reasonable.

In the area of procurement protests, the Panel has recommended amendments to a number of statutes in order to promote efficiency, improve information flow, encourage the filing and settlement of protests with procuring agencies, and speed the resolution of protests under the current system administered by the General Accounting Office (GAO) and the General Services Administration Board of Contract Appeals (GSBCA). The Panel also recommends that Congress consolidate into a single judicial forum the current bid protest jurisdiction of the Court of Federal Claims and the District Courts. A further recommendation is that Congress consider and further study whether competition policy might be better served through the resolution of protests by a single agency located within the executive branch whose powers would be comparable to those exercised by the four existing forums. With proper authority, this single forum might provide more uniform and cost-effective treatment of protests. It could also provide two different methods for consideration of protests: first, a procedure similar to the relatively inexpensive and expeditious one now provided by the GAO; and second, a procedure which would be similar to the adjudicatory process provided by the GSBCA. The GSBCA-type procedure would be available for all types of procurements over \$100,000, if elected by the protester.

**Contract Administration:** The major task in this area involved bringing some order to the 107 statutes which affect the basic business relationship between DOD and its contractors. The extensive duplications and repetitions throughout the U.S. Code suggested the need to focus on seven key areas: payment; cost principles; audit and access to records; cost accounting standards; administration of contract provisions; claims and disputes; and extraordinary contractual relief. Many of the Panel's recommendations in these areas involve merging duplicative code sections into a single major statute in order to clarify and simplify its requirements. The proposed statute on contract payment (10 U.S.C. § 2307), for example, will consolidate similar provisions from three other statutes. Such clarifications also permit the elimination of statutory detail more appropriately covered by regulation. That objective underlies the Panel's recommendation on 10 U.S.C. § 2324 (cost principles) which would retain only those provisions delineating that law's basic policy and penalty provisions – and eliminating the excessive detail found in this statute today. The Panel's review in this area also concentrated on removing obstacles to the participation of small business and commercial entities in general. One example is the law (41 U.S.C. § 422) establishing the Cost Accounting Standards Board, which promulgates criteria for allocating costs and therefore affects financial reimbursements under Government contracts. Although this statute is recommended for retention, the Panel urged the Board to waive or modify cost accounting standards for most transactions involving commercial entities. A related area involves claims certification requirements, a problem which has caused seemingly endless litigation at the Court of Federal Claims and boards of contract appeals. In conjunction with the recent changes in the Defense Authorization Act for FY93 and its anticipated regulatory implementation, the Panel's recommendations should help to achieve a simplified, unified set of certification requirements. All of these recommendations are consistent with one of the Panel's key objectives for streamlined acquisition laws: statutes should identify broad policy objectives and fundamental requirements while leaving matters of implementation to be covered by regulations.

**Service-Specific and Major Systems Statutes:** The 220 statutes falling under this heading highlight the difficulty of reducing the defense procurement code from its present condition to a more workable instrument. The consolidations recommended as a result of the Panel's review of this area are intended to streamline a process which has often been made needlessly complex by obsolete or overlapping statutes. These recommendations affect the following major procurement functions:

- Modifications are suggested to the reporting requirements concerning major defense programs (such as Selected Acquisition Reports and Unit Cost Reports) mandated by several different statutes. Those recommendations reflect the need for a common baseline for both executive management and legislative oversight.
- Four major testing laws are recommended for consolidation into a single streamlined statute which retains existing fundamental policies but provides greater flexibility.
- Similar recommendations for consolidation are submitted for numerous service-specific chapters within Title 10, both to eliminate obsolete authorities -- some dating from before World War II -- and to provide a common framework for those authorities which are still necessary.
- Changes are suggested to a number of fuel and energy-related statutes detailing the procurement authority exercised by the DOD in order to enhance their coherence and efficiency.
- The numerous provisions affecting DOD commercial and industrial activities were recommended for consolidation into three distinct statutes setting forth clearer guidelines for A-76 contracting and core defense logistics functions.
- The Brooks Act was closely studied to determine its impact upon DOD's authority to procure automatic data processing equipment (ADPE). While the Panel presents no formal recommendations on this issue, it suggests that Congress consider modifying the oversight authority of the General Services Administration in order to permit DOD to exercise greater internal responsibility in ADPE procurements below a designated threshold.

The specific solutions suggested by the Panel in each of the areas affecting major systems and the procurement authorities of the uniformed services reflect its objectives concerning the basic attributes of acquisition laws: that they should identify broad policy objectives and fundamental requirements; that they should encourage the exercise of sound judgment by procurement personnel; and that reporting requirements generated in law should insofar as possible not impose additional administrative burdens. Taken together, these recommendations represent an essential step in rationalizing a body of law which is at present too large, too diffuse, and far too complex.

**Socioeconomic Laws, Small Business, and Simplified Acquisition Threshold:** In assessing the 114 laws that impose various socioeconomic requirements upon the acquisition process, the Panel determined that the overriding need in this area was to establish uniform thresholds and criteria for applying socioeconomic laws to DOD procurements. The principal recommendation in this area concerns the adoption of a "simplified acquisition threshold" that would exempt DOD contracts below \$100,000 from most socioeconomic requirements and corresponding contract clauses. The exemption from these contract clauses would permit the use of expedited procurement procedures for contracts at or below the \$100,000 level, reducing paperwork and overhead costs for both the Government and its suppliers. The new threshold would streamline over 50% of all DOD contract actions above \$25,000, while affecting only 5% of all contract dollars, thus paving the way for more effective management of DOD's increasingly limited manpower resources.<sup>29</sup> Perhaps most significant, however, is the recommendation that procurements in this range be reserved under most conditions for small businesses. The primary rationale for this recommendation is that smaller contracts provide the best opportunities for small businesses, especially those which are both small and disadvantaged. The Panel's recommendations are also linked to the gradually increased use of electronic contracting and advertising methods, not only to improve the efficiency of the acquisition process, but also to provide better notification of procurement opportunities. Equally important, these recommendations take place within a context that reaffirms and is intended to improve DOD's capability to support the small business and minority contracting goals established by the Congress. The combination of simpler procedures with wider public notice also provides stronger incentives for small businesses of all kinds to compete for Government contracts. Finally, the Panel recommends that Congress adopt a consolidated chapter in Title 10 which clarifies and streamlines the labor, environmental, small business, and minority contracting requirements applicable to DOD. These recommendations promote several of the Panel's key objectives: that acquisition laws should establish a balance between an efficient process and socioeconomic policies; and that acquisition laws should, without requiring contractors to incur additional costs, facilitate the purchase by DOD or its contractors of commercial products and services based on commercial market prices. Because Government and business have a common interest in reducing overhead, the Panel's intent is to maintain the socioeconomic balance while streamlining its statutory requirements.

**Standards of Conduct:** The 119 statutes falling within this field reflect the fundamental importance of ethics and integrity in the defense acquisition process -- as well as the fact that this issue has frequently received congressional attention. Consequently, the Panel was more concerned with the consolidation of existing ethical requirements, rather than the addition of new ones. Particular attention was given to those statutes covering post-employment restrictions of Government personnel, the operation of the rule making process affecting Government procurement, contractor certifications, and false claims. The Panel's recommendations consistently aim at eliminating the duplication of related requirements and the pyramiding of penalties that occur frequently throughout the

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<sup>29</sup>This discussion is presented more fully in Chapters 4.0 and 4.1 of this report.

current code. Those recommendations also address various administrative procedures -- often mandated by statute -- which add both confusion and cost, but do not demonstrably promote integrity. Those recommendations are consistent with one of the Panel's main objectives: that acquisition laws should promote financial and ethical integrity in ways that are simple, understandable, not unduly burdensome, and which encourage sound and efficient procurement practices. The amendments and other clarifications recommended here are especially important in view of the personal and institutional stakes that are always present in matters relating to procurement integrity.

**Intellectual Property:** The Panel examined seven key areas in this fast developing field: patent infringement; secrecy; university research patents; recoupment; copyrights; technology transfer; and technical data. Its findings reflect the fact that modern technology is heavily dependent upon proprietary invention and entrepreneurial innovation: to have access to this technology, the Government must respect these market-driven norms. Accordingly, the Panel recommends:

- Statutory changes which allow the Secretary to utilize technical data rights policies that provide protection for commercially valuable technology;
- Amendment of the Bayh-Dole Act to encourage the prompt filing of patent applications by inventors working on federally sponsored research;
- The elimination of mandatory Government recoupment of non-recurring costs in defense products being offered through the foreign military sales program;
- New limitations on the imposition and duration of secrecy orders applied to certain inventions by Title 35 of the U.S. Code; and
- Enhancements to the Federal Government's authority to secure copyright protection for computer programs developed under Government auspices.

These recommendations specifically implement the Panel's objectives of integrating civilian and military procurement. More importantly, however, they also reflect the urgency expressed in Congress and the acquisition community that procurement efficiency in high technology is essential for the competitiveness and development of the national industrial base.

**Commercial Procurement:** The centerpiece of the Panel's effort to promote more effective integration between the military and civilian markets is a consolidated new subchapter on commercial procurement which is recommended for inclusion in Title 10. The draft statute, which is closely coordinated with the changes being recommended to the Truth in Negotiations and Competition in Contracting Acts, states that commercial items are to be used whenever they will satisfy the requirements of DOD. This policy statement is reinforced by broader definitions of such key terms as "commercial item" and "component" and is implemented with due regard to nondevelopmental items and existing

sources of supply. However, the most important part of the new statute may be the list of related laws which it specifically exempts from any DOD contract for the purchase of a commercial item. Simply stated, any commercial item meeting the definition of that term would be exempt from statutory contract requirements listed in the law. Another significant feature of the draft statute is its reliance on commercial standards and practices, such as established catalogues or prevailing market prices, in determining if the cost of a commercial product is reasonable. These practices are also reflected in a limitation on the Government's rights to audit or to require additional documentation beyond prevailing market practices. The Panel's overall thrust is to make DOD's buying processes conform more closely to the norms of the commercial marketplace. Those changes are intended not only to fulfill the Panel's objectives regarding commercial-military integration, but also to apply long standing and repeated congressional guidance on this subject as well.

**Defense Trade and Cooperation:** The Panel reviewed this functional area because of a conviction that international considerations will play an increasingly important role in the defense acquisition system. Recognizing the importance of a team approach, Secretary of Defense Dick Cheney has repeatedly advocated greater cooperation between the NATO allies in all phases of the procurement process, particularly in research and development.<sup>30</sup> In examining those statutes which affect DOD's ability to play a constructive role in defense trade, the Panel found that there were almost as many legislative barriers to cooperation in the international arena as there were to military-civilian cooperation on the domestic scene. In addition to the Buy American Act, there were numerous product and source restrictions on the books, barriers that were continued or augmented with the passage of each appropriations or authorization act.<sup>31</sup> The Panel determined that its advice in this area would be guided by three principles.

First, DOD acquisition policy should be consistent and reciprocal with the acquisition and trade policies of its allies. DOD should have, for example, the statutory authority to purchase NATO-standard items -- which may or may not be available from American sources. The Panel's principal recommendations on the Buy American Act -- to substitute the "substantial transformation" test of the Trade Agreements Act for the current "component test" -- are intended to foster the use of American commercial items, as well as to adjust the critical balance between flexibility and reciprocity. Second, DOD's acquisition policy should be consistent with the promotion of a strong U.S. defense technology, industrial, and mobilization base. Because military-commercial integration is not the solution to all problems, DOD must have the ability to restrict acquisitions to domestic sources when it is in the nation's interest. The Panel's recommendations on 10 U.S.C. § 2504 will ensure that future agreements concluded between the United States and foreign Governments will be coordinated with defense industrial base requirements. Third, DOD acquisition policy must be coordinated with international operational agreements, allied logistics support, standardization, and sales of U.S. equipment to foreign countries. Because foreign military sales are an important factor in maintaining the

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<sup>30</sup>See, e.g., 92 Annual Report, at 15-17.

<sup>31</sup>U.S. Office of the Secretary of Defense, *The Impact of Buy American Restrictions Affecting Defense Procurement: Report to the Congress*, 18-22, Table 3.1 (July 1989).



American defense industrial base, DOD should have the authority to coordinate the buying and selling of products and services in order to negotiate with our allies and other foreign countries. The repeal of recoupment for non-recurring research and development costs contained in the Panel's review of 10 U.S.C. § 2761 is an example of the flexibility needed in this area.

In summary, while civilian-military integration, like charity, begins at home, promoting and developing the U.S. defense industrial base also means adjusting to the twin realities of competition and cooperation in the global defense marketplace.

#### **F. Constraints**

It will ultimately be for the Congress to decide how well the Panel's recommendations met its declared objectives as well as the goals suggested by the original mandate. However, in assessing those results, both Congress and the general public should be aware of the constraints which affected the Panel's work.

The key constraint was time, especially when measured against the magnitude of the task. The 16 months between the convening of the Panel and the printing of this Report obviously constrained the process of considering the 889 statutes comprising the universe of acquisition laws -- a number so high that it surprised even veteran observers of these matters. While an extension of the statutory deadline of January 15, 1993 could have been justified, the Panel members strongly believed that it was more important to place their recommendations squarely on the agenda of a new Administration and a new Congress. Inevitably, priorities were set in order to bring the greatest analytical attention to the most obvious and best understood problems, especially in those areas that offered the greatest prospects for improvement. In addition to focusing on the most relevant acquisition laws, the Panel necessarily excluded regulations, executive orders, and most case law from the study. However, the most significant effects imposed by the time constraint may have come when the Panel chose to recommend a law's retention or to exclude it from more detailed consideration, either because the evidence for change was ambiguous or because it was impossible to obtain additional data without the expenditure of far greater resources than the Panel had at its disposal. The Panel is, therefore, recommending the retention of more laws than might otherwise have been identified for amendment or repeal. It is important to note that these recommendations are made on the basis of the "best evidence" available to the Panel at the time of its decision.

The second constraint reflects a general concern about the numbers of laws considered during this review, as well as their placement within the U.S. Code. Many of the statutes affecting defense procurement arise from titles of the Code beyond Title 10, often reflecting the divergent interests and agendas of many different congressional committees and subcommittees. The organization of the Code also reflects multiple functions which may apply in different ways to different agencies of the Government. The recognition of those realities affected one of the Panel's original goals, which was to "prepare a proposed code of relevant acquisition laws." Early in its deliberations, the

Panel decided that this goal did not imply the creation of a "model code" for DOD procurement to be located at a single point within the body of Title 10 -- primarily because the administrative tidiness of such a compilation would be less helpful than the jurisdictional questions that would inevitably be raised. Equally important was the need to assemble and review the array of procurement laws before creating a "model code" in Title 10 or anywhere else. Consequently, though it has recommended the consolidation of certain laws and chapters in several of the areas noted above, the statutes which the Panel has assembled, reviewed, and presented in the following pages represent its best judgments on the core functions of the defense procurement process. Should those recommendations be enacted, therefore, a new code of relevant acquisition laws will have been created.

There can be no doubt, however, that the task of codification will require a great deal of leadership and teamwork in the new Congress. A recent study by the Business Executives for National Security, for example, is merely the latest to note that no fewer than 107 congressional committees and subcommittees exercise some degree of Pentagon oversight: "The result is massive jurisdictional confusion."<sup>32</sup> But without better coordination, defense procurement law will remain complex, confused, and often chaotic. The evidence accumulated during this review also suggests that an ancillary result of jurisdictional confusion is the proliferation of laws which can impose burdensome and often conflicting requirements. While the Panel is particularly appreciative of the strong congressional support for its efforts, it respectfully suggests that the enactment of the reforms recommended here will not achieve a lasting effect unless Congress also gives continued attention to its responsibility for maintaining a disciplined and coherent legal structure.

The final point of this introduction may not be so much a constraint as a caveat. The work of this Panel represents its best efforts to provide a common baseline for those who seek to improve defense acquisition laws as well as the policies which implement them. In each of the areas they reviewed, however, the Panel members were struck by the magnitude of the task which future reformers will face in making comprehensive legislative changes. There is also no question that these recommendations are best thought of as a "first cut" at a large problem, and certainly not as an ideal solution to it. Moreover, the Panel recognizes the importance of seeking Government-wide consistency in procurement matters and hopes that its recommendations can serve as the baseline for parallel changes in the legislative underpinnings of civilian agency acquisition. While these findings do not fully achieve the Packard Commission's ultimate goal of providing a "single, consistent, and greatly simplified procurement statute,"<sup>33</sup> they clearly carry out the will of Congress by translating those general principles into a "pragmatic, workable set of recommended changes to the acquisition laws."<sup>34</sup> It is therefore our sincere hope that the changes charted in the following pages will make a substantial and lasting contribution to

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<sup>32</sup>Business Executives for National Security, Washington, DC, *Report of the Commission on Fundamental Defense Management Reform*, 36 (1992).

<sup>33</sup>See note 6, *supra*.

<sup>34</sup>See note 11, *supra*.

the development of a more efficient defense procurement system, one that is capable of meeting any future challenge to American national security.

**Chapter 1**  
**Contract Formation**

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**STREAMLINING**  
**DEFENSE**  
**ACQUISITION LAWS**

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**Report**  
**of the**  
**Acquisition Law Advisory Panel**

**to the**  
**United States Congress**



**January**  
**1993**

**DISTRIBUTION STATEMENT A**  
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1. CONTRACT FORMATION.....	1
1.0. Introduction.....	1
1.0.1. Competition as a National Policy.....	1
1.0.2. Objectives.....	3
1.0.3. Acquisition of Commercial Products and Services.....	3
1.0.4. Panel Recommendations.....	4
1.1. Chapter 137, Congressional Policy, Definitions, and Applicability.....	9
1.1.0. Introduction.....	9
1.1.1. 10 U.S.C. § 2301.....	11
1.1.2. 10 U.S.C. § 2302.....	21
1.1.3. 10 U.S.C. § 2303.....	29
1.2. Competitive Statutes.....	31
1.2.0. Introduction.....	31
1.2.1. 10 U.S.C. § 2304.....	39
1.2.2. 10 U.S.C. § 2305.....	65
1.2.3. 10 U.S.C. § 2306.....	77
1.2.4. 10 U.S.C. § 2317.....	89
1.2.5. 10 U.S.C. § 2318.....	91
1.2.6. 10 U.S.C. § 2319.....	95
1.2.7. 10 U.S.C. § 2325.....	97
1.2.8. 40 U.S.C. §§ 541 - 544.....	103
1.2.9. 41 U.S.C. § 416.....	107
1.2.10. 41 U.S.C. § 418.....	117
1.2.11. 41 U.S.C. § 419.....	121
1.3. Truth In Negotiations Act.....	123
1.3.0. Introduction.....	123
1.3.1. 10 U.S.C. § 2306a.....	131
1.4. Research And Development.....	149
1.4.0. Introduction.....	149
1.4.1. 10 U.S.C. § 2351.....	153
1.4.2. 10 U.S.C. § 2352.....	155
1.4.3. 10 U.S.C. § 2353.....	157
1.4.4. 10 U.S.C. § 2354.....	161
1.4.5. 10 U.S.C. § 2356.....	163
1.4.6. 10 U.S.C. § 2358.....	167
1.4.7. 10 U.S.C. § 2360.....	173
1.4.8. 10 U.S.C. § 2361.....	175

1.4.9. 10 U.S.C. § 2364.....	179
1.4.10. 10 U.S.C. § 2367.....	183
1.4.11. 10 U.S.C. § 2368.....	185
1.4.12. 10 U.S.C. § 2370.....	187
1.4.13. 10 U.S.C. § 2371.....	189
1.4.14. 10 U.S.C. § 2372.....	193
1.4.15. 10 U.S.C. § 4503.....	195
1.4.16. 10 U.S.C. § 7303.....	197
1.4.17. 10 U.S.C. § 7522.....	199
1.4.18. 10 U.S.C. § 9503.....	201
<b>1.5. Procurement Protests.....</b>	<b>203</b>
1.5.0. Introduction .....	203
1.5.1. 5 U.S.C. §§ 701 - 706 .....	219
1.5.2. 31 U.S.C. § 3551.....	225
1.5.3. 31 U.S.C. § 3552.....	227
1.5.4. 31 U.S.C. § 3553.....	229
1.5.5. 31 U.S.C. § 3554.....	239
1.5.6. 31 U.S.C. § 3555.....	251
1.5.7. 31 U.S.C. § 3556.....	255
1.5.8. 28 U.S.C. § 1491.....	257
1.5.9. 40 U.S.C. § 759 .....	269
<b>1.6. Other Related Statutes.....</b>	<b>285</b>
1.6.0. Introduction .....	285
1.6.1. 10 U.S.C. §§ 2308 and 2311 .....	287
1.6.2. 10 U.S.C. § 2310.....	293
1.6.3. 10 U.S.C. § 2316.....	301
1.6.4. 10 U.S.C. § 2326.....	303
1.6.5. 10 U.S.C. § 2329.....	309
1.6.6. 10 U.S.C. § 2331.....	313
1.6.7. 10 U.S.C. § 2381.....	319
1.6.8. 10 U.S.C. § 2384.....	323
1.6.9. 10 U.S.C. § 2410a.....	327
1.6.10. 41 U.S.C. § 12 .....	329
1.6.11. 41 U.S.C. § 413 .....	331
1.6.12. Public Law Number 101-189 § 821 .....	333
1.6.13. Public Law Number 101-189 § 822 .....	335

# 1. CONTRACT FORMATION

## 1.0. Introduction

This chapter sets forth the Panel's analyses and recommendations on procurement policy and on the implementation of the most fundamental of these policies -- full and open competition. The laws which are addressed here apply primarily to matters arising before award of a DOD contract. The Panel divided the laws under this chapter into the following major categories:

- Congressional procurement policy, definitions, and applicability
- Competitive statutes
- Truth in Negotiations Act
- Research and development
- Procurement protests
- Other related statutes.

Congress directed the Panel to determine if the DOD acquisition process could be streamlined by changing or eliminating acquisition laws. The Panel was asked to recommend the repeal or amendment of laws which are "unnecessary for the establishment and administration of the buyer and seller relationships in procurement," while at the same time ensuring "the continuing financial and ethical integrity of defense procurement programs."<sup>1</sup> The Panel was also to consider "the best interests" of DOD.<sup>2</sup>

The Panel examined 80 contract formation laws and found, with few exceptions, that these laws were necessary for the establishment of the buyer-seller relationship. Accordingly, the Panel has recommended the retention of the vast majority of these laws, including those laws which implement the full and open competition mandates of the Competition in Contracting Act of 1984 (CICA).<sup>3</sup> At the same time, the Panel has recommended numerous amendments which it believes will improve and strengthen these laws.<sup>4</sup>

### **1.0.1. Competition as a National Policy**

Competition has been the foundation for the buyer-seller relationship in Government contract laws from the earliest days of the United States. In 1809, for example, Congress enacted

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

<sup>2</sup>*Id.*

<sup>3</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, Title VIII, 98 Stat. 1175.

<sup>4</sup>The Panel has recommended amending 43% of the laws addressed in this chapter.

a law to provide that "all purchases and contracts for supplies and services shall be made by open purchase or by previously advertising for proposals."<sup>5</sup> This policy was reinforced and strengthened by numerous other laws in the ensuing years.<sup>6</sup>

The role of competition in the buyer-seller relationship was recognized by the Supreme Court in 1925 in *United States v. Purcell Envelope*.<sup>7</sup> In *Purcell*, the Court addressed a sealed bid procurement, the primary method for obtaining competition at that time, and observed that "the procedure for advertising for bids "gives the Government --

. . . the benefit of the competition and each bidder is given the chance of a bargain. It is a provision therefore in the interest of both Government and bidder necessarily giving rights to both and placing obligations on both."<sup>8</sup>

More recently, in response to concerns that competition had become the exception and not the rule in Government contracts, the Congress established full and open competition as the guiding principle for all Government acquisitions. The Conference Report on the Competition in Contracting Act of 1984 explained this principle as follows:

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids and proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government.<sup>9</sup>

The Report of the House Government Operations Committee on CICA provided further support for competition stating:

The Committee has long held the belief that any effort to reform Government procurement practices must start with a firm commitment to increase the use of competition in the Federal marketplace. Competition not only provides substantially reduced costs, but also ensures that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to sell to the Federal Government.<sup>10</sup>

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<sup>5</sup>2 Stat. 536.

<sup>6</sup>See generally John Cibinic, Jr. and Ralph C. Nash, Jr., *FORMATION OF GOVERNMENT CONTRACTS* 216 (2d ed. 1986).

<sup>7</sup>249 U.S. 313 (1919).

<sup>8</sup>*Id.* at 318-319.

<sup>9</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1442 (1984).

<sup>10</sup>H.R. REP. NO. 1157, 98th Cong., 2d Sess. 11 (1984).



The competition policy underlies all of the Panel's recommendations on contract formation. The Panel believes that its recommendations will improve and strengthen the competition process and enable DOD to gain a fuller measure of the benefits of competition.

### **1.0.2. Objectives**

The following objectives established by the Panel are of primary importance in this Contract Formation Chapter:

- Acquisition laws should identify the broad policy objectives and the fundamental requirements to be achieved. Detailed implementing methodology should be reserved to the acquisition regulations.
- Acquisition laws should establish a balance between an efficient process and
  - full and open access to the procurement system; and
  - socioeconomic policies.
- Acquisition laws should, without requiring contractors to incur additional costs, facilitate the purchase by DOD or its contractors of commercial or modified-commercial products and services at or based on commercial market prices.
- Acquisition laws should provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.
- Acquisition laws should encourage the exercise of sound judgment on the part of acquisition personnel.

### **1.0.3. Acquisition of Commercial Products and Services**

In 1986, Congress established a preference for nondevelopmental items, including "any item of supply that is available in the commercial marketplace."<sup>11</sup> The Panel believes this preference has increased in importance because of the reduction in available funding for DOD programs. When Congress established this preference, it did not amend many of the basic competition statutes. After review of these statutes and DOD's efforts to implement this preference, the Panel believes that significant changes should be made to DOD contract formation laws. Accordingly, many of the Panel's recommendations in this and other chapters are directed to removing barriers to the competitive acquisition of commercial products and services.

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<sup>11</sup> 10 U.S.C. § 2325(d)(1), added by the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986) (*identical legislation omitted*).

## **1.0.4. Panel Recommendations**

The Panel's recommendations on specific areas of contract formation are briefly summarized as follows:

### **1.0.4.1. Congressional Procurement Policy, Definitions, and Applicability**

In its proposed changes, the Panel has sought to provide a clear recognition in the Statement of Congressional Policy of the need for an optimum balance between efficiency, full and open access to the procurement system, and sound implementation of socioeconomic policies. It also has recommended clear policies on preferences for commercial and nondevelopmental items, appropriate allocation of risk, and fair and expeditious resolution of protests and disputes through uniform interpretation of laws and regulations. The Panel has also recommended a new definition of "commercial item" and refinement of the definition of "nondevelopmental item."

### **1.0.4.2. Competitive Statutes**

There are 14 statutes, codified in Titles 10, 40, and 41, which, together with the procurement protest system, provide the fundamental framework for the system of competitive procurement in DOD.

Four of the competitive statutes are on the critical path of every procurement. They are: (1) 10 U.S.C. § 2304, "Contracts: competition requirements;" (2) 10 U.S.C. § 2305, "Competition: planning, solicitation, evaluation, and award procedures;" (3) 10 U.S.C. § 2306, "Kinds of contracts;" and (4) 41 U.S.C. § 416, "Procurement notice." Taken together, these four statutes tell when to compete, how to compete, and what kinds of contracts may be used. The fundamental conclusion of the Panel is that these four statutes, including the fundamental requirement for full and open competition, continue to provide a sound framework for conducting the DOD procurement process in an open, fair, and ethical manner, while meeting mission requirements.

The Panel's major substantive recommendation for amendment of 10 U.S.C. § 2304 is to delete the authority and rule structure for master agreements for advisory and assistance services, section 2304(j), and substitute a completely new authority. This new authority would set forth in the law the recognition of the legitimate need for contracts that do not procure or specify a firm quantity of supplies or services, the legitimate use of proper delivery or task orders under such contracts, and the criteria that such contracts must meet in order for the delivery or task orders issued under them to be exempt from the notice requirements of 41 U.S.C. § 416 (synopsis or posting requirements) and from separate competition or approval of a justification under 10 U.S.C. § 2304(f).

Three of the Panel's four recommended amendments to 10 U.S.C. § 2305 are an integral part of implementing the Panel's recommended improvements to the protest process. The first of these is to amend section 2305 to require regulations which address the debriefing of unsuccessful offerors. The fundamental purpose for this recommended change is to eliminate needless protests.

The Panel believes a timely and meaningful debriefing to an offeror which is not awarded the contract might well provide the unsuccessful offeror with sufficient information to conclude that a protest should not be filed. The proposed amendment would require regulations to accomplish three things. First, the regulations would establish the criteria for determining whether a debriefing is required. Second, the regulations must provide that any required debriefing be conducted to the maximum extent practicable within 15 calendar days after award. Third, the regulations must provide that the debriefing address the strengths and weaknesses of the unsuccessful proposal. A second recommended amendment to section 2305 should also help eliminate needless protests. The Panel has recommended requiring contracting activities to establish, and provide access to, a protest file. Such a file may prevent unnecessary multiple protests on the same proposed contract award since all bidders would have access to the same information that the protester receives. The Panel has also recommended that the agency head be granted the authority to pay bid and proposal costs or attorney fees associated with a protest which the agency believes has merit. Such an explicit grant of authority will encourage more settlements at the agency level of meritorious protests.

The Panel's major recommendation for amendment of 10 U.S.C. § 2306 is to delete the requirement that the head of the agency approve the use of a cost-reimbursement or incentive contract. This determination is often a superfluous justification of a contract type which has already been completely evaluated by the acquisition strategy panel, through approval of the acquisition plan by the Senior Procurement Executive, or by the Under Secretary of Defense (Acquisition) review. Moreover, this determination will be unnecessary if regulations properly implement the Panel's recommended statement of defense procurement policy which, among other things, provides for the appropriate allocation of risk between the Government and the contractor.

Of the five recommended amendments to 41 U.S.C. § 416, two are of particular significance. The Panel concluded the statutory minimum time periods that offerors have to prepare their bids or proposals after notice is published in the Commerce Business Daily may be excessive when the product sought is a commercial item. The proposed amendment exempts commercial items from the existing time periods and directs the Administrator for Federal Procurement Policy to issue rules published in the FAR which prescribe the appropriate time periods.

The Panel has also recommended amendments to section 416 that seek to improve the use of automated means of providing notice for purchases under the Panel's recommended "simplified acquisition threshold" of \$100,000. The Administrator for Federal Procurement Policy would be required to issue rules to accomplish notice through automated means and to take the costs and availability of automated means to offerors, including small businesses, into account. In addition, agencies would be permitted to fulfill or supplement posting requirements through automated means, subject to the Administrator's rules.

#### **1.0.4.3. Truth In Negotiations Act**

The Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, is an important statute that clearly impacts the critical path of many large-dollar contracts awarded without price competition

and the critical path of many significant contractual modifications. Because of TINA's impacts on the accounting, auditing, and negotiation processes, the Panel solicited comments from a wide range of Government and private sector entities on possible amendments to TINA.

After consideration of comments, analysis of the law, and full consideration of the many related presentations concerning this law, as well as the overall subject of procurement of commercial items, the Panel concluded that the threshold for application of the statute should be stabilized at \$500,000, that the statute should be amended to facilitate acquisition of commercial items and leading edge technology, and that certain conforming language changes should be made for internal consistency and consistency with Panel recommendations elsewhere in this Report.

#### **1.0.4.4. Research and Development**

There are 19 statutes, assigned by the Panel to the Contract Formation Working Group, that provide the general statutory framework for research and development. The Panel concluded that most of these statutes are necessary, are serving their intended purposes, and are not causing significant problems in the acquisition of research and development.

The Panel's most important recommendation on these research and development statutes is to amend 10 U.S.C. § 2358, "Research projects," to clarify that advanced, as well as basic and applied, research and development should be included in the scope of authority granted in the statute and that these authorities should be clearly provided to both the Secretary of Defense and the Secretaries of the military departments. Implementation of this recommendation will make 10 U.S.C. § 2358 the fundamental statute providing authority for performing research and development projects.

#### **1.0.4.5. Procurement Protests**

The Panel recognizes the important role of bid protests in assuring full and open competition and has therefore made recommendations to increase the efficiency and effectiveness of the existing protest remedies. The Panel's recommendations propose specific changes to the current bid protest system, which reinforce the continuing congressional support for GAO and GSBCA resolution of protests and make the current process more efficient.

The Panel believes that the 1982 creation of the U.S. Claims Court, now the Court of Federal Claims, with its grant of bid protest jurisdiction and the interpretation of this jurisdiction by various Federal courts of appeals, has created confusion and unnecessarily impeded the fast, expeditious, and efficient resolution of judicial bid protests. There continue to be significant differences in judicial interpretation of the pre-award bid protest jurisdiction of the Federal district courts and the U.S. Court of Federal Claims. In addition, this pre-award protest jurisdiction of the Court of Federal Claims has been narrowly interpreted. Accordingly, the Panel recommends that Congress consolidate the current bid protest jurisdiction of the Court of Federal Claims and the Federal district courts into a single forum, the U.S. Court of Federal Claims. In conjunction, the Panel also recommends that the jurisdiction of the U.S. Court of Federal Claims be expanded

to include all pre-award and post-award protests that can now be considered by the GAO and GSBICA.

The Panel also proposes that Congress consider whether protests need to be decided by four different forums in three different branches of the Government. The Panel, therefore, recommends that Congress further consider and study whether competition policy might be better served through resolution of protests by a single independent agency located within the executive branch, with powers comparable to those exercised by the existing four forums. With proper authority, this single forum might provide more uniform and cost effective treatment of protests. This agency could provide two different procedures for consideration of protests. The first procedure would be similar to the relatively inexpensive and expeditious procedure now provided by the GAO. The second procedure would be similar to the adjudicatory procedure provided by the GSBICA. The GSBICA-type procedure would be available for all types of procurements over \$100,000, if elected by the protester.

#### **1.0.4.6. Other Related Statutes**

The Panel analyzed 12 codified sections and two uncodified sections of public law which are related to contract formation but which do not readily fit within the theme or subject of the five other subdivisions of this chapter. Three of the more significant Panel recommendations are summarized below.

First, the Panel has recommended repealing 10 U.S.C. § 2308, "Assignment and delegations of procurement functions and responsibilities," and incorporating its substance into 10 U.S.C. § 2311, "Delegation." While both sections address delegations, the former is primarily focused on delegating functions and assigning responsibilities to facilitate joint procurement between two or more agencies, whereas the latter sets out general delegation authority.

Second, the Panel has recommended amending 10 U.S.C. § 2310, "Determinations and decisions," to more clearly distinguish the allowable class justifications and approvals for less than full and open competition made under 10 U.S.C. § 2304 from the prohibited class determinations and decisions made under that section. The Panel has also recommended deleting subsection (b) from section 2310 since the requirements of this subsection are adequately covered in other laws and are properly implemented in the regulations.

Third, the Panel has also proposed making two changes to 10 U.S.C. § 2326, "Unfinalized contractual actions." The first would remove limitations prior to finalization that are stated in terms of expenditures and rely instead on limitations stated in terms of obligations. This recognizes that the Government does not have immediate visibility and control of contractor expenditures, but does control expenditures by limiting the Government's liability to the amount obligated. The second recommended change would allow the head of the agency to waive the percentage limitations on obligations if waiver is necessary in support of a statutorily defined contingency operation or is otherwise in the best interests of the United States. The Panel believes contractors should not unreasonably be discouraged from contracting to meet such an

urgent requirement solely because the time to award a definitive contract that complies with applicable laws and regulations may exceed the time to physically deliver or perform.

## **1.1. Chapter 137, Congressional Policy, Definitions, and Applicability**

### **1.1.0. Introduction**

In this subchapter, the Panel presents its analyses and recommendations on the first three sections of Title 10, Chapter 137, that provide a foundation of congressional defense procurement policy, define terms with broad application in the Chapter, and state the agencies to which the Chapter applies.

As set forth in the analysis of section 2301, "Congressional defense procurement policy," the Panel has devoted substantial time and effort to developing objectives for use in analyzing acquisition laws. The Panel has incorporated some of these objectives, as appropriate, in policy form, melding them with the existing statements of congressional policy in a manner that it believes preserves congressional intent and priorities.

In its proposed changes, the Panel has sought to provide a clear recognition of the need for an optimum balance between efficiency, full and open access to the procurement system, and sound implementation of socioeconomic policies. It also has recommended clear policies on preferences for commercial and nondevelopmental items, appropriate allocation of risk, and fair and expeditious resolution of protests and disputes through uniform interpretation of laws and regulations.

In section 2302, "Definitions," the Panel has recommended a new definition of "commercial item" and the relocation and refinement of the definition of "nondevelopmental item" from section 2325(d). Greater reliance on, and consistency with, 41 U.S.C. § 403 has been recommended, and an increase in the authority to procure outside the United States in support of contingency operations, as defined in section 101(47) of Title 10, has been proposed.

More detailed analyses and recommendations for these three sections are contained within this subchapter.

## 1.1.1. 10 U.S.C. § 2301

### Congressional defense procurement policy

#### 1.1.1.1. Summary of the Law

The statute states congressional policy for defense procurement.<sup>1</sup> With respect to DOD procurement, it is congressional policy that DOD: (1) obtain property and services through the use of full and open competitive procedures; (2) use any type of contract except cost-plus-a-percentage-of-cost contracts that will promote the interests of the Government; (3) use incentives that will improve contractor productivity, capital investment, and advanced technology; (4) acquire economic lot quantities whenever feasible; (5) use advance procurement planning and market research and prepare contract specifications in a manner that will obtain full and open competition; (6) develop a procurement career management program; and, (7) in sealed bid acquisition procedures, preclude evaluation of option prices unless there is a reasonable likelihood that the options will be exercised.<sup>2</sup>

In addition, the statute stipulates that the procurement policies and procedures of DOD, the National Aeronautics and Space Administration (NASA), and the Coast Guard shall (1) promote full and open competition; (2) support agency requirements during wartime, national emergency, and peacetime; (3) promote procurement system responsiveness; (4) maintain an essential defense industrial base; (5) provide incentives to contractors in ways that will reduce Government procurement costs; (6) promote the acquisition of commercial products whenever practicable; and (7) require that agency requirements be stated as functional or performance requirements whenever feasible.<sup>3</sup> The statute also stipulates that a fair proportion of contracts be placed with small business concerns.<sup>4</sup>

#### 1.1.1.2. Background of the Law

The Armed Services Procurement Act of 1947 had a limited declared policy. Specifically, it was that "a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns."<sup>5</sup> The general 1956 Armed Services codification reaffirmed this policy.<sup>6</sup>

This policy was first expanded upon in 1981 in the defense authorization act for 1992. That act listed three goals: to ensure national defense preparedness, to conserve fiscal resources,

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<sup>1</sup>10 U.S.C. § 2301(a).

<sup>2</sup>*Id.* 41 U.S.C. § 253f imposes a requirement on executive agencies other than those covered by this statute to procure supplies in economic order quantities.

<sup>3</sup>10 U.S.C. § 2301(b).

<sup>4</sup>10 U.S.C. § 2301(c). 41 U.S.C. § 252(b) makes a similar policy statement applicable to executive agencies other than those covered by this statute.

<sup>5</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, ch. 65, § 2(b), 62 Stat. 21 (1948).

<sup>6</sup>Pub. L. No. 84-1028, ch. 1041, 70A Stat. 127 (1956).



and to enhance defense production capability. To further these goals, Congress found that it was in the best interests of DOD to acquire property and services in the most timely, economic, and efficient manner.<sup>7</sup> Based upon these goals, Congress made three policy declarations. The first was that DOD can use any kind of contract (including multiyear), other than cost-plus-percentage-of-cost; second, contracts should, when practicable, provide for purchase of property in times and quantities which result in reduced Government costs and provide incentives for improving productivity through investments in capital facilities, equipment, and advanced technologies; finally, purchases for weapons systems support should be made in a manner to achieve economic lot purchases and efficient production rates.<sup>8</sup> The provision regarding small business concerns was retained.

The 1984 advent of the Competition in Contracting Act (CICA)<sup>9</sup> provided the last major revision to this section. The basic pre-CICA text was retained, but reorganized. In addition, the amendments added congressional policy statements on use of full and open competition, use of advance procurement planning and market research, and the development and maintenance of a procurement career management program.<sup>10</sup> Finally, guidance on affected agencies' regulations in this area were listed.<sup>11</sup> The small business provisions, although moved to a new subsection (c), remained unchanged.

The legislative history accompanying CICA clearly states that the provisions of the Armed Services Procurement Act are identical to those of the Federal Property and Administrative Services Act (41 U.S.C. § 251 *et seq.*). The conceptual objective was to establish an "absolute preference for competition and, practically, to provide more flexibility in contracting." This preference for competition dates back to 1809.<sup>12</sup>

The last amendment was in 1986. It added a new subsection (a)(7) dealing with the evaluation of options in sealed bid procedures.<sup>13</sup>

### 1.1.1.3. Law in Practice

This statute encompasses broad policy statements. For a discussion as to how those policies are being carried out, refer to the analyses of the following statutes:

10 U.S.C. § 2304, Contracts: competition requirements;<sup>14</sup>

10 U.S.C. § 2305, Contracts: planning, solicitation, evaluation and award procedures;<sup>15</sup>

10 U.S.C. § 2306, Kinds of contracts;<sup>16</sup>

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<sup>7</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 909, 95 Stat. 1118 (1981).

<sup>8</sup>*Id.*

<sup>9</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 2721-2726, 98 Stat. 494, 1185-95.

<sup>10</sup>*Id.* These are subsection (a)(1), (5) and (6), respectively.

<sup>11</sup>*Id.* See subsections (b)(1)-(7).

<sup>12</sup>S. REP. NO. 22, 98th Cong., 1st Sess. 4-7 (1983). There is a good but short discussion of this history at pp. 4-7 of the report.

<sup>13</sup>Act of Oct. 18, 1986, Pub. L. No. 99-500, § 925, 100 Stat. 1783, 1783-153.

<sup>14</sup>See Chapter 1.2.1 of this Report.

<sup>15</sup>See Chapter 1.2.2 of this Report.

- 10 U.S.C. § 2317, Encouragement of competition and cost savings;<sup>17</sup>  
10 U.S.C. § 2318, Advocates for competition;<sup>18</sup> and  
10 U.S.C. § 2319, Encouragement of new competitors.<sup>19</sup>

#### **1.1.1.4. Recommendations and Justification**

The Panel sought comments from the private sector and Government entities on this section as part of its work on competitive statutes related to or amended by the Competition in Contracting Act (CICA); however, the Panel's recommended amendments to section 2301 are mainly a result of the Panel's own extensive discussions in seeking a consensus on a set of objectives to serve as a framework for the Panel's review of acquisition laws. Presentations received, and other factors influencing the Panel's development of its 10 objectives that acquisition laws should meet, are discussed in the introduction to the Panel's Report.

Once those 10 objectives were set, the analysis of section 2301 by the Contract Formation Working Group revealed that the statement of congressional defense procurement policy in this section represents the optimum means of conveying those objectives to the degree appropriate in broad policy form. The Panel's analysis of many statutes, congressional reports, and other available information, including the policy statements already included in section 2301, caused the Panel to conclude that there is, at least at the broad policy level, congruence between the Panel's objectives and those of the Congress. Accordingly, the Panel makes the following recommendation:

**Amend section 2301 to incorporate in policy form appropriate objectives developed by the Panel and integrate them with existing congressional defense procurement policy.**

In the congressional findings as stated in subsection (a), the term "enhance defense production capability" has been deleted. In its place, a more comprehensive phrase has been substituted. This phrase, ". . . enhance science and technology, research and development and production capability; provide for continued development and preservation of an efficient and responsive defense industrial base; and ensure the financial and ethical integrity of defense procurement programs," emphasizes the many goals that defense procurement must pursue as it moves into the next century. That there are significant and important restraints upon this is recognized by the declaration that DOD acquisition be done "consistent with achieving an optimum balance among efficient processes, full and open access to the procurement system and sound implementation of socioeconomic policies." The Panel believes that it is both accurate and useful to recognize in congressional policy that there are trade-offs and compromises required between worthwhile objectives.

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<sup>16</sup>See Chapter 1.2.3 of this Report.

<sup>17</sup>See Chapter 1.2.4 of this Report.

<sup>18</sup>See Chapter 1.2.5 of this Report.

<sup>19</sup>See Chapter 1.2.6 of this Report.

Subsections (a)(2) and (a)(3) are recommended to be added as clear statements of what the Panel believes to be current congressional policy on preference for commercial and nondevelopmental items. The order, as well as the specific wording of paragraph (3), makes the priority between commercial items and other nondevelopmental items clear.

Subsection (a)(4) (renumbered from (a)(2)) adds an important statement regarding risk allocation. The concept of risk allocation has grown in importance as the complexity of the weapons systems acquisition process has increased. Both Government and industry need to work together to ensure appropriate risk allocation between the Government and the contractor, whether it be through contract type, indemnification provisions, or other contractual terms.

Subsection (a)(5) (renumbered from (a)(3)) expands the language to include investment in "flexible manufacturing processes" and "dual-use" technologies. These are important for the future health of the defense industrial base.

Subsection (a)(7) (added) recognizes that the fair and expeditious processing of protests and disputes is essential to the health of the acquisition system, and the ability to rely on precedent and uniform interpretation of laws and regulations is essential to the process. The Panel believes this is a concern of the Congress and is a proper subject for a clear policy statement.

Subsection (a)(8) (renumbered from (a)(5)) retains the intent of the previous policy, but substitutes "state contract requirements" for "prepare contract specifications." The Panel believes that the word "specification" connotes a detailed or "how to" approach, whereas the intent of the Congress expressed, for example in section 2325, is to state requirements in terms of functions to be performed, performance required, or essential physical characteristics. Subparagraphs (B), (C), and (D) are added to embed in the statement of requirements the broad policies previously discussed.

Subsection (a)(9) (renumbered from subsection (a)(6)) reflects the addition of the Defense Acquisition Workforce Improvement Act and its broader application to all acquisition professionals.

The existent subsection (a)(7) was deleted. This subsection is more directive and procedural in nature, as opposed to broad policy. As such, this provision was included in a proposed amendment to 10 U.S.C. § 2305.<sup>20</sup>

Subsection (b) provides congressional policies for agency regulations.<sup>21</sup> It also expands the coverage to include all of Title 10 as opposed to chapter 137 as is in the current version. A significant change is the inclusion of references to Title 41 sections 401, 418b, and 421. The concept of complying with the promotion of "full and open competition" has been expanded upon by reference to the need to "promote and implement" all of the congressional policies contained in

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<sup>20</sup>See Recommendation and Justification No. IV in Chapter 1.2.2 of this Report.

<sup>21</sup>In this instance it is those agencies listed in 10 U.S.C. § 2303.

41 U.S.C. § 401.<sup>22</sup> To recognize the applicable statutory requirements, specific mention was made of the requirement to comply with 41 U.S.C. §§ 418b and 421 dealing with publication of proposed regulations and the Federal Acquisition Regulation.

Subsection (b)(3) has been renumbered (b)(4) and reorganized to include language reflecting the need to provide incentives to contractors to lower costs of property and services to be acquired. A previous subsection (b)(5) reflecting this concept has been deleted. While this is an important concept, the Panel believes that it more easily fits within this subsection as opposed to being "stand-alone."

A prior subsection (b)(4) was deleted. This was not out of any shrinking of importance; rather, this concept received tremendous emphasis in subsection (a) and is embodied in subsection (b)(2).

Subsections (b)(5) (added) and (b)(6) (renumbered from (b)(7)) discuss commercial and nondevelopmental items. Specific guidance is given regarding encouraging contracting officer discretion to exercise sound judgment in purchasing commercial items without requiring contractors to incur additional costs, avoiding arbitrary tests for purchase of commercial items, and re-emphasizing the need to describe requirements in terms of function or performance.

Subsection (c), dealing with the placement of contracts with small business concerns, is left unchanged.

Note: The latest defense authorization act amended section 2301 by adding subsection (d).<sup>23</sup> This addition does not alter the Panel's above recommendation to incorporate the goals and objectives of Congressional procurement policy within section 2301. Although this addition was not codified as of the date this Report went to press, the Panel has incorporated the change in its proposed statute as if it already had been codified as section 2301(d).

#### **1.1.1.5. Relationship to Objectives**

In general, the Panel believes that these recommendations significantly clarify policies and emphasize concerns which will continue to be the driving factors in DOD acquisition into the next century. They will provide an important policy basis for many of the Panel's specific recommendations on other statutes.

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<sup>22</sup>This is known as the Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. No. 98-191, 97 Stat. 1325.

<sup>23</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 808(a), 106 Stat. 2315, 2249 (1992).

### 1.1.1.6. Proposed Statute

#### 10 U.S.C. § 2301. Congressional defense procurement policy

(a) The Congress finds that in order to ensure national defense preparedness; conserve fiscal resources; ~~and enhance defense production capability~~ enhance science and technology, research and development and production capability; provide for continued development and preservation of an efficient and responsive defense industrial base; and ensure the financial and ethical integrity of defense procurement programs. it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner consistent with achieving an optimum balance among efficient processes, full and open access to the procurement system and sound implementation of socioeconomic policies. It is therefore the policy of Congress that--

(1) full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter;

(2) to the maximum extent practicable, the Department of Defense shall acquire commercial items to meet its needs and shall require prime contractors and subcontractors, at all levels, which furnish other than commercial items, to incorporate to the maximum extent practicable commercial items as components of items being supplied to the Department;

(3) when commercial items and components are not available, practicable or cost effective, the Department shall acquire, and shall require prime contractors and subcontractors to incorporate, other nondevelopmental items and components to the maximum extent practicable;

(2)(4) services and property (including weapon systems and associated items) property and services for the Department of Defense may be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States and will provide for appropriate allocation of risk between the Government and the contractor with due regard to the nature of the property or services to be acquired;

(3)(5) contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, flexible manufacturing processes, and advanced and dual-use technology;

~~(4)~~(6) contracts for advance procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if ~~feasible and practicable~~, be entered into in a manner to achieve economic-lot purchases and more efficient production rates;

(7) procurement protests and disputes be fairly and expeditiously resolved through uniform interpretation of relevant laws and regulations;

~~(5)~~(8) the head of an agency shall use advance procurement planning and market research and prepare state contract specifications requirements in such a manner as is necessary to

(A) obtain full and open competition with due regard to the nature of the property or services to be acquired;

(B) facilitate the acquisition by the agency and its contractors of commercial items at or based on commercial market prices;

(C) facilitate the acquisition by the agency and its contractors of nondevelopmental items in accordance with the requirements of this chapter; and

(D) facilitate agency access to commercial technologies and the skills available in the commercial market place to develop new technologies; and

~~(6)~~(9) the head of an agency ~~encourage the~~ shall development and maintenance of a ~~procurement~~ maintain an acquisition career management program to ensure a professional ~~procurement acquisition~~ work force in accordance with the requirements of Chapter 87; and

~~(7) the head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, not include in such solicitation a clause providing for the evaluation of prices under the contract for options to purchase additional supplies or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.~~

(b) Further, it is the policy of Congress that procurement policies and procedures for the agencies named in section 2303 of this title shall in accordance with the requirements of this title chapter--

(1) promote full and open competition be issued in accordance with and conform to the requirements of 41 U.S.C. §§ 418b and 421;

(2) promote and implement the Congressional policies in subsection (a) of this section and 41 U.S.C. § 401;

~~(2)(3)~~ be implemented to support the requirements of such agencies in time of war or national emergency as well as in peacetime;

~~(3)(4)~~ promote responsiveness of the procurement system to agency needs by -- ~~simplifying and streamlining procurement processes;~~

(i) simplifying and streamlining procurement processes; and

(ii) providing incentives to encourage contractors to take actions and make recommendations that would reduce the costs of property or services to be acquired;

~~(4) promote the attainment and maintenance of essential capability in the defense industrial base and the capability of the United States for industrial mobilization;~~

~~(5) provide incentives to encourage contractors to take actions and make recommendations that would reduce the costs to the United States relating to the purchase or use of property or services to be acquired under contracts;~~

~~(6) promote the use of commercial products whenever practicable; and~~

(5) promote the acquisition and use of commercial items and of other nondevelopmental items both as end items and as components by --

(i) encouraging contracting officers to exercise sound judgment in purchasing and facilitating the purchase by contractors of commercial items at or based on commercial market prices, without requiring contractors to incur additional costs;

(ii) avoiding the imposition of arbitrary restrictions or tests not required by law on the purchase or pricing of commercial items; and

~~(7)(6)~~ promote the acquisition and use of commercial items and of other nondevelopmental items by require requiring descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.

(c) Further, it is the policy of Congress that a fair proportion of the purchases and contracts entered into under this chapter be placed with small business concerns.

(d) It is also the policy of Congress that qualified nonprofit agencies for the blind or severely handicapped (as defined in section 2410(b) of this title) shall be afforded the maximum practicable opportunity to provide approved commodities and services (as defined in such section) as subcontractors and suppliers under contracts awarded by the Department of Defense.



## 1.1.2. 10 U.S.C. § 2302

### Definitions

#### 1.1.2.1. Summary of the Law

The statute provides definitions of terms applicable to procurement by DOD, the National Aeronautics and Space Administration (NASA), and the Coast Guard. It defines the following terms: head of an agency, competitive procedures, full and open competition, responsible source, technical data, major system, Federal Acquisition Regulation and small purchase threshold.<sup>1</sup>

#### 1.1.2.2. Background of the Law

The Competition in Contracting Act of 1984 (CICA) effectively replaced the text of this statute.<sup>2</sup> Prior to the enactment of CICA, the statute defined the terms "head of an agency," "negotiate" and "formal advertising."<sup>3</sup> CICA made minor changes in the first definition, deleted the latter two definitions and added definitions for the terms "competitive procedures," "full and open competition," and "responsible source."

Before CICA, an agency required specific authority to enter into a contract using negotiated rather than formal advertising procedures. Prior legislation did not recognize that negotiated procurements could also ensure competition in the acquisition of property and services. However, the majority of Government procurement funds were expended through negotiated procurements. Congress found that in many cases the authority for using negotiated procurements was abused to justify inappropriate sole-source acquisitions.<sup>4</sup>

Through CICA, Congress attempted to curtail inappropriate sole-source acquisitions and to provide agencies broader discretion in the use of legitimate negotiated procurements as a means for obtaining competition in the acquisition of property and services. The emphasis was to shift the statutory framework from justifying the use of negotiation to justifying the use of noncompetitive negotiations.<sup>5</sup> Consequently, it amended this statute to delete the terms "negotiate" and "formal advertising" and substitute definitions for the terms "competitive procedures," "full and open competition," and "responsible source."<sup>6</sup>

After passage of CICA, Congress added the terms "technical data," "major system," "Federal Acquisition Regulation," and "small purchase threshold" to the list of definitions.<sup>7</sup>

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<sup>1</sup>10 U.S.C. § 2302.

<sup>2</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2722, 98 Stat. 1175, 1186-87 (1984).

<sup>3</sup>S. REP. NO. 98th Cong., 1st Sess. 52, 53 (1983).

<sup>4</sup>*Id.* at 9-12.

<sup>5</sup>*Id.* See also the analysis for 10 U.S.C. § 2304 at Chapter 1.2.1 of this Report.

<sup>6</sup>H.R. REP. NO. 861, 98th Cong., 2d Sess. 1432 (1984).

<sup>7</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1211, 98 Stat. 2492, 2589 (1984); See also H.R. CONF. REP. NO. 1080, 98th Cong., 2d Sess. 317 (1984). National Defense Authorization Act for Fiscal

### 1.1.2.3. Law in Practice

The FAR incorporates these definitions in FAR Parts 1, 2, 6, 13, 27, and 34.

### 1.1.2.4. Recommendations and Justification

The Panel sought comments from industry and Government agencies concerning the statute and determined that it still fulfills a valid need. The Panel considers it useful to have a single location for definitions with broad applicability throughout Title 10. The Panel does recommend that the section be restructured and certain new definitions be added.

#### I

**Delete definitions at sections 2302(4) and (5) and move terms to section 2302(3); add other terms to section 2302(3).**

Restructuring is recommended to maximize uniformity between the definitions in this section and those in 41 U.S.C. § 403. Presently, "full and open competition" and "responsible source" are defined by reference to 41 U.S.C. § 403. To that list would be added "technical data" and "major system," both currently defined separately in 10 U.S.C. § 2302, but having the same definition in 41 U.S.C. § 403. Also, the Panel recommends that the terms "procurement," "procurement system," and "standards," which are defined at 41 U.S.C. § 403, be added to the list.

#### II

**Delete section 2302(7) and relocate to section 2302(4). Change "small purchase threshold," to "simplified acquisition threshold," reference 41 U.S.C. § 403(11) at section 2302(4) and add language concerning "contingency operation."**

A subparagraph concerning "simplified acquisition threshold" was added to indicate that the term has the meaning given that term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(11)).<sup>8</sup> Also, the Panel recommends including an amended alternate threshold for contracts awarded and performed or purchases to be made outside the United States in support of a "contingency operation" from the present level of \$100,000 to two times the "simplified acquisition threshold." An amendment to section 101(47) by the National Defense Authorization Act for Fiscal Years 1992 and 1993, defines "contingency operation" as a military operation that:

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in

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Years 1990 and 1991, Pub. L. No. 101-189, § 853(b)(1), 103 Stat. 1352, 1518 (1989). Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 701(d), 105 Stat. 75, 113.  
<sup>8</sup>See the analysis at Chapter 4.1 of this Report.

military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 672(a), 673, 673b, 673c, 688, 3500, or 8500 of this title, chapter 15 of this title, or any other provision of law during a national emergency declared by the President or Congress.<sup>9</sup>

The Panel recognized that the level of purchases to be permitted in support of contingency operations using simplified acquisition procedures is a matter for judgment by the Congress, based upon perceived needs. The Panel noted that in its previous action, the Congress authorized \$100,000, an amount four times the current small purchase threshold. The Panel's judgment was that the amount should be stated in terms of a multiple of the simplified acquisition threshold to be set forth in 41 U.S.C. § 403(11) and that if the Congress enacts the Panel's recommended threshold of \$100,000, some latitude above that should be provided for overseas procurements in support of contingency operations. The Panel's consensus was that two times the recommended threshold, which would be \$200,000 at enactment, represents a reasonable threshold.

### III

#### **Add definition of "commercial items" to section 2302(5).**

The Panel recommends including within this section its proposed definition of commercial items. As discussed in detail in Chapter 8 of this Report, the Panel spent a large amount of its time and effort developing and refining this definition. The Panel discussed this definition, as it was being developed, at many of its meetings and received many oral and written comments and suggestions. The Panel believes this definition will support the objectives of the Congress, as well as the Panel, to facilitate the efficient and economical procurement of commercial items, while helping to ensure that only those items to which commercial market forces and methods actually apply are included in the definition.

Placement of this new definition in section 2302(5) gives it prominence in the statute and permits appropriate reference throughout Title 10 to reduce redundancy and avoid the insertion in other sections of varying definitions or undefined terms.

### IV

**Amend section 2302(6) by incorporating the definition of "nondevelopmental item" currently at section 2325(d) and amend the definition for clarity and simplicity.**

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<sup>9</sup>Pub. L. No. 102-190 § 631, 105 Stat. 1290, 1380 (1991).

The Panel recommends including the definition of nondevelopmental item in this section because it should be given prominence in this title, will be easier to refer to in other sections, and should be collocated with the definition of commercial item.

## V

### **Retain the term "full and open competition."**

The Panel considered amending this statute and 10 U.S.C. § 2304 to provide a definition for the term "adequate and effective competition" and the conditions under which such competition could be used. The Panel perceived situations in which the responses received to a solicitation did not warrant the expense the Government incurred in preparing, reproducing, and distributing solicitation documents. However, the Panel concluded after extensive discussion that retreat from the "full and open competition" standard was neither warranted nor wise.

The Panel was particularly mindful of concerns expressed by Congress when it enacted CICA. When Congressman Brooks introduced CICA before the House of Representatives in 1984, he expressed the following opinion:

Rather than address [the problems of increased costs resulting from limited competition], DOD has consistently attempted to expand the definition of competition to include procurements which severely limit competition or which eliminate it completely. In this regard, DOD asserts that sufficient competition exists as long as just two vendors are involved in the procurement. However, as long as a single qualified vendor is prohibited from competing, the Department will not be getting its money's worth.<sup>10</sup>

The Senate version of CICA used "effective" competition as the standard for awarding federal contracts. The House and Senate conference committee, however, substituted the "full and open" competition standard, stating,

In Government contracting, **effective competition** is a marketplace condition which results when two or more contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure Government business. . . . The conference substitute uses **"full and open" competition** as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which

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<sup>10</sup>130 Cong. Rec. H6011 (daily ed. Mar. 20, 1984) (remarks of Rep. Brooks).

contractor responsibility is determined by the agency after offers are received.<sup>11</sup>

In commenting on a policy letter issued by the Office of Federal Procurement Policy (OFPP) in 1984, Congress also said,

. . . [T]his regulation fails to define competition. In fact the regulations do not even refer to the term "full and open competition" even though OFPP's authorization legislation establishes this as national policy.

The FAR states that **sufficient competition** is achieved as long as offers are received from at least two independent sources that are capable of satisfying the requirements of the agencies. Thus, the standard for competition is not whether an agency has opened up a procurement to all qualified sources, but whether it received at least two bids. In the Committee's view, an acquisition is hardly competitive when it is limited to just two independent sources, since additional bidders are often available to meet a government requirement. Using the traditional view, an agency may select two of its vendors and then assert that a "**reasonable degree of competition**" has been achieved. The Committee believes that full and open competition exists only when all qualified vendors are allowed to compete in an agency acquisition.<sup>12</sup>

In addition to consideration of the congressional concerns, clearly expressed above, the Panel concluded, based upon its own knowledge and experience, that there would be great difficulties involved in precisely defining "adequate and effective competition," as well as significant possible unintended consequences of the adoption of that standard. The Panel also noted that as the technology of electronic data interchange (EDI) permits greater use of electronic commerce, the costs of preparing and publicizing solicitations are likely to decrease.

#### **1.1.2.5. Relationship to Objectives**

These recommendations support several of the Panel's goals and objectives, including the goal to streamline the body of defense acquisition laws and the objectives to encourage the exercise of sound judgment on the part of acquisition personnel, to facilitate the purchase by DOD or its contractors of commercial or modified commercial products and services at or based on commercial market prices, and promote development and preservation of the defense industrial base.

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<sup>11</sup>H.R. REP. NO. 861, 98th Cong., 2d Sess. 1422 (1984) (emphasis added).

<sup>12</sup>H.R. REP. NO. 1157, 98th Cong., 2d Sess. 16 (1984) (emphasis added).

### 1.1.2.6. Proposed Statute

#### 10 U.S.C. § 2302. Definitions

In this chapter:

(1) The term "head of an agency" means the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration.

(2) The term "competitive procedures" means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes--

(A) procurement of architectural or engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.);

(B) the competitive selection for award of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals;

(C) the procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if--

(i) participation in the program has been open to all responsible sources;  
and

(ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States;

(D) procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for such procurement are permitted to compete; and

(E) a competitive selection of research proposals resulting from a general solicitation and peer review or scientific review (as appropriate) solicited pursuant to section 9 of the Small Business Act (15 U.S.C. 638).

(3) The terms "procurement," "procurement system," "standards," "full and open competition," ~~and~~ "responsible source," "technical data," and "major system" have the same meanings provided such terms in 41 U.S.C. § 403 (Office of the Federal Procurement Policy Act), section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

(4) The term "simplified acquisition threshold" has the meaning provided that term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(11)) except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the

United States in support of a contingency operation, as defined in section 101(47) of this title, the term means an amount equal to two times the amount specified in 41 U.S.C. § 403(11).

(5) The term "commercial item" means --

(A) property, other than real property, which --

(i) is sold or licensed to the general public for other than government purposes;

(ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than government purposes; or

(iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;

(B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the government and commercial services are or will be provided by the same workforce, plant, or equipment;

(C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B) if unmodified will be deemed to be a commercial item when modified for sale to the government if the modifications required to meet government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C), need not be deemed other than "commercial" merely because sales of such item to the general public for other than governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.

(6) The term "nondevelopmental item" means --

(A) any commercial item; any item of supply that is available in the commercial marketplace;

(B) any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(C) any item of supply described in subparagraph (A) or (B) that requires only minor modification in order to meet the requirements of the procuring agency; or

(D) any item of supply that is currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item -

(i) is not yet in use; or

(ii) is not yet available in the commercial marketplace.

~~(4) The term "technical data" means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.~~

~~(5) The term "major system" means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property. A system shall be considered a major system if (A) the Department of Defense is responsible for the system and the total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than \$300,000,000 (based on fiscal year 1980 constant dollars); (B) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a "major system" established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled "Major Systems Acquisitions," whichever is greater; or (C) the system is designated a "major system" by the head of the agency responsible for the system.~~

~~(6)(7) The term "Federal Acquisition Regulation" means the Federal Acquisition Regulation issued pursuant to section 25(c)(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(c)(1)).~~

~~(7) The term "small purchase threshold" has the meaning given that term in section 4(11) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(11)), except that, in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation, the term means \$100,000.~~



### **1.1.3. 10 U.S.C. § 2303**

#### **Applicability of chapter**

##### **1.1.3.1. Summary of the Law**

This statute identifies the agencies and types of procurements to which Chapter 137 of Title 10 applies.<sup>1</sup> Chapter 137 applies to the appropriated fund procurement of all services and property, except land, by DOD, the military departments, the Coast Guard, and the National Aeronautics and Space Administration (NASA).<sup>2</sup>

##### **1.1.3.2. Background of the Law**

This statute originated in sections 2(a) and 9 of the Armed Services Procurement Act of 1947.<sup>3</sup> Subsequent amendments have clarified the agencies named therein<sup>4</sup> and deleted the original section 9 provision which specified that the term "supplies" meant all property except land, but did include buildings.<sup>5</sup>

##### **1.1.3.3. Law in Practice**

The provisions of Chapter 137 are implemented throughout various parts of the FAR and DFARS.

##### **1.1.3.4. Recommendation and Justification**

#### **Retain**

The Panel recommends retaining this statute as presently written. The Panel sought comments from industry and Government agencies concerning the statute and determined that it still fulfills a valid need. No issues were identified warranting amendment.

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<sup>1</sup>10 U.S.C. § 2301 *et seq.*

<sup>2</sup>41 U.S.C. § 252 prescribes procurement laws applicable to executive agencies other than those named by this section.

<sup>3</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, §§ 2(a), (9), 62 Stat. 20, 24 (1948). This statute was initially codified at 41 U.S.C. §§ 151 and 158 and subsequently recodified at 10 U.S.C. § 2303 by Pub. L. No. 85-1028, ch. 1041, 70A Stat. 128 (1956).

<sup>4</sup>National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 301, 72 Stat. 432; Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2722(b), 98 Stat. 1187.

<sup>5</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2722(b), 98 Stat. 1187.

### **1.1.3.5. Relationship to Objectives**

This statute, which defines the applicability of other procurement laws, provides a streamlining function and is essential to an understandable and coherent statutory procurement scheme.

## **1.2. Competitive Statutes**

### **1.2.0. Introduction**

There are 14 statutes, codified in Titles 10, 40, or 41, presented and analyzed in this subchapter. These statutes, together with the procurement protest system, presented in detail separately in Chapter 1.5, provide the fundamental framework for the system of competitive procurement in DOD. When applied in conjunction with the Truth in Negotiations Act (TINA) at 10 U.S.C. § 2306a, these statutes also provide the fundamental framework for sole-source or limited-source negotiations under exceptions to the general requirement for full and open competition, including the methods for selection and award of architect-engineering services.

Four of these statutes are on the critical path of every procurement. Section 2304 of Title 10, "Contracts: competition requirements," provides the fundamental requirement for full and open competition, as well as the exceptions and the methods for justifying these exceptions. It also provides the statutory basis for inclusion in the regulations of simplified procedures for small purchases. Section 416 of Title 41, "Procurement notice," prescribes the public notice requirements for procurements to ensure prospective offerors are aware of solicitations to be issued and awards made. Section 2305 of Title 10, "Competition: planning, solicitation, evaluation, and award procedures," prescribes these processes, both for sealed bids and competitive proposals. Section 2306 of Title 10, "Kinds of contracts," provides broad latitude for the kinds of contracts that may be used, prescribes requirements for use of multiyear contracts, places limitations on fees in cost type contracts, and prohibits cost-plus-a-percentage-of-costs contracts. Taken together then, these four statutes tell when to compete, how to compete, and what kinds of contracts may be used.

The Contract Formation Working Group solicited comments on these and other competition related statutes in February 1992<sup>1</sup> and again in June 1992.<sup>2</sup> After analyzing the responses and the supporting rationale, the Panel concluded that a series of specific recommended amendments would improve clarity, facilitate processes, and implement broader recommendations of the Panel presented elsewhere in this Report; however, the fundamental conclusion of the Panel is that these four statutes, including the fundamental requirement for full and open competition,<sup>3</sup> continue to provide a sound framework for conducting the DOD procurement process in an open, fair, and ethical manner, while meeting mission requirements.

The most important recommendations on these four statutes are summarized here. This summary will be followed by discussions of selected recommendations on the other competitive statutes included in this subchapter.

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<sup>1</sup>Memorandum from Contract Formation Working Group signed by Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College to Distribution (Industry and Government) (Feb. 11, 1992).

<sup>2</sup>Memorandum from Contract Formation Working Group signed by Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College to Distribution (Industry and Government) (June 8, 1992).

<sup>3</sup>See Chapter 1.2.1 of this Report for analysis of 10 U.S.C. § 2304.

The Panel has made recommendations for 10 amendments to section 2304, "Contracts: competition requirements." All but one of these are procedural or are necessary to implement in section 2304 other recommendations of the Panel. These include amendment of section 2304(g) to provide for simplified procedures in the Federal Acquisition Regulation (FAR) for purchases of property or services with a value not in excess of the new "simplified acquisition threshold," initially \$100,000, recommended by the Panel in Chapter 4.1.

The Panel's major substantive recommendation for amendment of section 2304 is to delete the authority and rule structure for master agreements for advisory and assistance services, currently at section 2304(j), and substitute a completely new section 2304(j). This new section would set forth in law the recognition of the legitimate need for contracts that do not procure or specify a firm quantity of supplies or services, the legitimate use of proper delivery or task orders under such contracts, and the criteria that such contracts must meet in order for the delivery or task orders issued under them to be exempt from the notice requirements of 41 U.S.C. § 416 (synopsis or posting requirements) and from separate competition or approval of a justification under section 2304(f).

The Panel requested and received comments on the current provision for master agreements in subsection (j). Several commenters cited the limited utility of the master agreements as presently prescribed in section 2304(j). While the Panel was considering these and other comments and considering possible amendments to section 2304(j), the Panel was contacted by the Director of Defense Procurement (DDP), who expressed her concern about the abuse of indefinite quantity and task order contracts, including those for other supplies and services, as well as those for advisory and assistance services. She cited repeated audit and IG criticism of the award and administration of such contracts, as well as identification of specific problems by the OSD procurement staff. She requested that the Panel consider and make appropriate legislative recommendations in its deliberations, but did not recommend specific proposals.

Problems cited by the DDP are also known to some of the Panel members, both Government and private sector. In the Panel's several discussions of these issues, the Panel generally considered that properly awarded indefinite quantity contracts, and other contracts involving delivery or task orders, are within the competition requirements of section 2304, if the various requirements of Chapter 137 of Title 10 and 41 U.S.C. § 416 are complied with.

The Panel believes that it is important that DOD continue to be permitted by law and regulation to award contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value cannot be reasonably known when the basic contract is awarded. Without such ability, many legitimate requirements and tasks would be unnecessarily delayed or result in attempts by requirements personnel and contracting officers to justify sole-source contracting actions, including inappropriate use of undefinitized contractual actions.

Since the master agreement authority of section 2304(j) is limited to advisory and assistance services and includes many restrictions on award, duration, and competition of individual task orders, the Panel does not believe that it represents an effective solution to the overall problem. The Panel is aware that this authority was requested by DOD, and believes that

it was a sincere, but not entirely successful, attempt to address one very important portion of a larger problem. Therefore, the Panel recommends amendment of section 2304(j) by deletion of the current master agreement authority, as amended by section 2331(c) and the National Defense Authorization Act for Fiscal Year 1993, and substitution of an entirely new subsection (j).

The recommended section 2304(j)(1) provides the basic recognition and description of the contracts involved, including those awarded using competitive procedures and those awarded using less than full and open competition after approval of a justification under an exception. The recommended section 2304(j)(2) exempts from the notice (synopsis) requirements of the relevant laws, and from the requirement to compete or obtain an approved justification under subsection (f), only delivery or task orders under contracts that comply with the statutory and regulatory requirements that follow in paragraphs (3), (4), and (5) of subsection (j).

The recommended section 2304(j)(3) provides for appropriate standards for notice (synopsis); a definite contract period and a maximum value; reasonable description of the general scope, nature, complexity, and purposes of the supplies or services; meaningful evaluation criteria, properly applied; and, if more than one contract is awarded, a clear method of competing or allocating delivery or task orders among contracts.

The recommended section 2304(j)(4) squarely addresses the issue by prohibiting in law the expansion of the contract scope or period by delivery or task order. It also clearly requires any modification to the basic contract that significantly expands the scope, contract period, or maximum value of the contract to be competed or justified under section 2304. The providing of notice (synopsis) helps ensure that potential competitors will be aware of such proposed expansion and have the opportunity to object. Section 2304(j)(5) requires the Secretary of Defense to issue implementing regulations and provide for audit and oversight.

The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing, and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not. Adoption of this recommendation will help to ensure the continuing financial and ethical integrity of defense procurement, help to establish a balance between efficient processes and full and open access to the procurement system, and permit the exercise of sound judgment by acquisition personnel within appropriate statutory limits.

The Panel has recommended four amendments to section 2305, "Competition: planning, solicitation, evaluation, and award procedures." One of these is a relocation of procedural material from section 2301(a)(7). The others are an integral part of implementing the Panel's recommended improvements in the protest process, discussed more fully in Chapter 1.5. The first of these is to amend section 2305(b)(4)(B) to require regulations which address the debriefing of unsuccessful offerors.

The fundamental purpose for this recommended change is to eliminate needless protests. As this Report explains more fully in the analysis of 31 U.S.C. § 3553, it is a commonly accepted belief that a number of protests would not have been filed if a meaningful debriefing had been provided in a timely manner to the protesters. A timely and meaningful debriefing to an offeror which is not awarded the contract award might well provide the unsuccessful offeror with sufficient information to conclude that a protest should not be filed. The statute as presently written requires an agency to promptly notify unsuccessful offerors of the rejection of their proposals but does not require a debriefing. FAR 15.1003 does require debriefings. The Panel believes timely and meaningful debriefings should be a statutory requirement, but the detailed requirements of a debriefing should be left to the regulations.<sup>4</sup>

The proposed amendment would require the regulations to accomplish three things. First, the regulations would establish the criteria for determining whether a debriefing is required. Not all procurement actions should entitle unsuccessful offerors to a debriefing, particularly those below the simplified acquisition threshold and those actions which do not involve significant judgments about factors other than price. Second, the regulations must provide that any required debriefing be conducted to the maximum extent practicable within 15 calendar days after award. The sooner a debriefing is conducted, the more likely it is to prevent an unnecessary protest. Finally, the regulations must provide that the debriefing address the strengths and weaknesses of the unsuccessful proposal. A debriefing which contains such information, in contrast to a debriefing which focuses exclusively on how a bidder might improve its next proposal, will more likely avoid unnecessary protests.

The second recommendation is to amend section 2305(b) to require contracting activities to establish, and provide access to, a protest file. Closely related to the preceding recommendation, the purpose of this recommended statutory addition is to prevent unnecessary multiple protests on the same proposed contract award. In the pre-award situation, bidders not filing a protest may believe they are at a disadvantage if they do not receive the same information that the protester receives. Therefore, they may feel compelled to intervene in the original protest by filing their own protest, since the delay in waiting to obtain the information through a Freedom of Information Act request might prejudice their interests. Requiring such a file to be established once one protest is lodged would not unduly burden a contracting activity since the information which the file would contain would necessarily be collected to respond to the protest.

The third recommendation is to amend section 2305(b) by granting to the agency head the same authority the Comptroller General has when the agency determines a solicitation, proposed award, or award does not comply with a statute or regulation. Currently, it is not clear that an agency can pay bid and proposal costs or attorneys fees associated with a protest which the agency believes has merit. The Panel believes that such an explicit grant of authority will encourage more agency settlements of protests.

The Panel has recommended four amendments to section 2306, "Kinds of contracts." Three of these are procedural or needed to implement other Panel recommendations. The major

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<sup>4</sup>See Chapter 1.2.2 of this Report for analysis of 10 U.S.C. § 2305.

recommendation is to amend section 2306 by deleting subsection (c). Section 2306(c) requires approval by the head of an agency before use of a cost-reimbursement or incentive contract is allowed. However, Congress has for the last four years raised the approval level to the Under Secretary of Defense for Acquisition for fixed-price contracts in excess of \$10 million for the development of a major system or subsystem.

The agency head determination required by section 2306(c), which is delegable pursuant to section 2311, often becomes a superfluous justification of a contract type which has already been completely evaluated by the acquisition strategy panel, through approval of the acquisition plan by the Senior Procurement Executive, or by the Under Secretary of Defense (Acquisition) review. Moreover, the section 2306(c) determination and approval restrictions in the appropriations acts will be unnecessary if the Panel's recommended statement of defense procurement policy is properly implemented by regulations. The recommended policy, which is expressed at section 2301(a)(4), states that property and services for DOD may be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States and will provide for appropriate allocation of risk between the Government and the contractor with due regard to the nature of the property or services to be acquired.

This policy seeks to ensure agencies select the appropriate type of contract by requiring them to focus on the nature of property or services to be acquired and the proper allocation of risk between parties. The methodology for implementing this policy, including the prescription of approval requirements by the milestone decision authority, or other officials, should be left entirely to the regulations. The Panel considers selection of contract type to be an integral part of the acquisition strategy and planning process.

The Panel has recommended five amendments to 41 U.S.C. § 416, "Procurement notice," and provided one recommendation for future consideration by the Congress. One recommendation is to harmonize the dollar threshold for posting notices at the contracting office at \$10,000 for both DOD and the civilian agencies. Another is to increase flexibility when setting deadlines for submission of offers for commercial products.

Section 416(a)(3) establishes minimum time periods that offerors have to prepare their bids or proposals after notice is published in the Commerce Business Daily. The Panel believes the time periods may be excessive when the product sought is a commercial item. For example, a supplier may already have an existing catalog which describes the item and shows the market price of a commercial item when the notice is published, and therefore does not need the usual 30 days to submit a bid. The rigidity of the present law precludes setting a shorter time for the submission of bids and proposals and thus builds unnecessary delay and attendant costs into the acquisition process. The proposed section 416(a)(4) exempts commercial items from the statutory time constraints described above and directs the Administrator for Federal Procurement Policy to issue rules published in the FAR which prescribe the appropriate time periods.

The Panel has recommended amendments that seek to improve the use of automated means of providing notice for purchases under the Panel's recommended "simplified acquisition

threshold" of \$100,000. A new section 416(e) would be added to require the Administrator for Federal Procurement Policy to issue rules to accomplish notice through automated means and to take the costs and availability of automated means to offerors, including small businesses, into account. An amendment to section 416(a)(1)(B) would permit agencies to fulfill or supplement posting requirements through automated means, subject to the Administrator's rules.

Because of the Panel's recommendation in Chapter 4.1 of this Report to raise the simplified acquisition threshold (currently termed "small purchase threshold") to \$100,000 from \$25,000, fewer procurement actions will require publication in the Commerce Business Daily. To prevent any potential adverse impact on competition from such decreased notice, section 416(e) requires the Administrator for Federal Procurement Policy to issue regulations which will ensure there is adequate notification of actions below the threshold.

The use of automated systems is a rapidly changing technology which can and does facilitate the rapid, widespread, and efficient dissemination of information. This technology should, therefore, be used to the maximum extent practicable to satisfy the notice requirement of this statute. However, the Panel does not at this time advocate use of automated systems in lieu of publication in the Commerce Business Daily for actions over the simplified acquisition threshold because the Commerce Business Daily is at present the only standardized, uniform repository of such procurement information. As the technology evolves and experience is gained, the Panel recommends that Congress consider alternative publication methods above the simplified acquisition threshold and, when appropriate, authorize the issuance of new uniform and Government-wide regulations.

The Panel has recommended retention of both 41 U.S.C. § 418 and 10 U.S.C. § 2318, both entitled, "Advocates for Competition," but with obsolete material in section 2318(c) to be repealed.

The Panel solicited comments on section 418. The possibility of combining sections 2318 and 418 was considered, but commenters varied in their responses and the Panel concluded that no clear improvement would result. One comment received recommended that the entire area of the need for single issue advocates be examined, questioning whether they have served their purpose and their affordability, including their staffs, in a declining budget environment.

The Panel considered in its discussions whether competition is sufficiently institutionalized in DOD to permit the elimination of competition advocates. The Panel concluded that in an environment of decreasing budgets, fewer new programs, and greater reliance on upgrade and modifications of existing systems, it may be very difficult to maintain current levels of competition or improve them further. For that reason, and in light of their expanded role as advocates for commercial and nondevelopmental items, the Panel concluded that both the competition advocates and sections 2318 and 418 should be retained.

The Panel has recommended moving the definition of nondevelopmental items from 10 U.S.C. § 2325(d) to 10 U.S.C. § 2302(6). Other proposed amendments to section 2325 focus



this statute on product descriptions to promote the use of both commercial and nondevelopmental items.

Section 2317 of Title 10, "Encouragement of Competition and Cost Saving," requires the Secretary of Defense to establish procedures to ensure that personnel appraisal systems of DOD give appropriate recognition to efforts to increase competition and achieve cost savings in areas related to contracts. The Air Force stated that the Competition Advocate General of the Air Force does not believe this requirement is necessary to ensure a successful competition program, and recommended repeal. Another commenter stated, "There is a question as to the need for this provision in light of the passage of the Defense Workforce Improvement Act subsequent to CICA, and the creation of the acquisition corps."

The Panel recognizes that efforts to increase competition and achieve cost savings are important in the work of many DOD personnel. There are many laws, regulations, processes, and reviews which support competition and cost savings. This section does not add meaningful or unique requirements to the inherent responsibilities of agency heads to provide appropriate systems of performance appraisal for agency personnel. Therefore, the Panel considers section 2317 to be an unnecessary congressional requirement placed on a traditional management prerogative and has recommended repeal of this section.

The Panel has recommended amendment of 40 U.S.C. § 541(3)(C) to delete the word "may" as a possible means of resolving ongoing disagreements about how the regulators are to interpret the definition of architectural and engineering services. A detailed analysis and rationale are included in this subchapter.

More detailed analyses of the recommendations summarized above, as well as analyses of the other competitive statutes, are included in this subchapter.

## 1.2.1. 10 U.S.C. § 2304

### Contracts: competition requirements

#### 1.2.1.1. Summary of the Law

This statute requires, with certain exceptions, the head of an agency to obtain full and open competition using competitive procedures when conducting a procurement for property or services. The agency head is to use the competitive procedure, or combination of competitive procedures, best suited to the circumstances.<sup>1</sup>

The statute provides that agencies may either solicit sealed bids or competitive proposals. Sealed bidding procedures must be used if: (1) there is adequate time for soliciting, submitting, and evaluating bids; (2) award will be only on the basis of price or price-related factors; (3) discussions with offerors concerning their bids will not be necessary; and (4) there is a reasonable expectation that more than one bid will be received.<sup>2</sup>

The statute permits the head of an agency to use competitive procedures, but to exclude a particular source in order to establish or maintain an alternate source(s), after determining that doing so: (1) would increase or maintain competition and result in lower overall costs for current or future procurements; (2) would be in the interests of national defense in having a facility or source available in case of national emergency or industrial mobilization; or (3) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability of an educational or other nonprofit institution or a federally funded research and development center (FFRDC).<sup>3</sup>

Agencies may also use competitive procedures that exclude sources other than small business concerns under 15 U.S.C. §§ 638 or 644 or exclude concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 1207 of the National Defense Authorization Act of 1987. Justification and approval is not required under section 2304(f)(1) for such procurements.<sup>4</sup>

Although the statute mandates the use of competitive procedures, an agency may use other than competitive procedures only when the procurement falls within any of the following seven exceptions:<sup>5</sup>

(1) the property or services are available from only one source or a limited number of sources;<sup>6</sup>

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<sup>1</sup> 10 U.S.C. § 2304(a)(1).

<sup>2</sup> *Id.*

<sup>3</sup> 10 U.S.C. § 2304(b).

<sup>4</sup> *Id.*

<sup>5</sup> 10 U.S.C. § 2304(c).

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(2) there is an unusual and compelling urgency in which the Government would be seriously injured unless the number of sources were limited;<sup>7</sup>

(3) it is necessary to award the contract to a particular source(s) to establish or maintain a facility or supplier in the event of national emergency or industrial mobilization or an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a FFRDC;

(4) an international agreement between the U.S. and a foreign government or international organization requires the use of noncompetitive procedures, or it is required by written directions of a foreign government paying for the procurement;

(5) a statute authorizes or requires procurement from a specific source or the acquisition is for a brand name commercial item for resale;

(6) disclosure of agency needs would compromise national security unless the number of sources were limited;<sup>8</sup> or

(7) the agency head determines that the use of other than competitive procedures is in the public interest.<sup>9</sup>

An agency may not award a contract under exceptions (1), (2), (3), or (6) above using other than competitive procedures unless the appropriate officials justify and approve the use of such procedures.<sup>10</sup> However, the justification and approval for a procurement under the unusual

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<sup>6</sup>An unsolicited research proposal offering a unique or innovative capability that is not the subject of a pending procurement is considered as a procurement available from only one source. In addition, a follow-on contract for continued development or production of a major system or highly specialized equipment or services may be considered as available from only one source. See 10 U.S.C. § 2304(d)(1).

<sup>7</sup>Under this exception, the agency must request offers from as many sources as practicable. 10 U.S.C. § 2304(c).

<sup>8</sup>Under this exception, the agency must request offers from as many sources as practicable. 10 U.S.C. § 2304(c).

<sup>9</sup>The agency head may not delegate this authority. 10 U.S.C. § 2304(d)(2). Under this exception the agency head must notify Congress in writing at least 30 days before the award of the contract. 10 U.S.C. § 2304(c)(7)(B).

<sup>10</sup>10 U.S.C. § 2304(f)(1). The contracting officer prepares the justification. The approval authority depends on the contemplated dollar amount of the contract as follows:

For amounts exceeding	Up to	The approval authority is
\$100,000	\$1 million	The procuring activity's competition advocate.
\$1 million	\$10 million	The head of the procuring activity or delegate.
\$10 million	\$50 million	The agency's senior procurement executive or delegate pursuant to 10 U.S.C. § 2304(f)(6)(B).
\$50 million		The agency's senior procurement executive.

and compelling urgency exception may be made after the contract is awarded.<sup>11</sup> An agency may not contract using other than competitive procedures because it failed to conduct advance planning for the procurement or because of concerns related to funds availability.<sup>12</sup> The statute describes the minimum information required in any justification for the use of other than competitive procedures.<sup>13</sup> It also requires that any notice required by 41 U.S.C. § 416 (synopsis in the Commerce Business Daily or posting requirement) has been published and all responses considered.<sup>14</sup>

The statute also specifies the grade levels of officials to whom the authorities of the head of the contracting activity, senior procurement executive, or the Under Secretary of Defense for Acquisition may delegate authority to approve justifications. To promote efficiency and economy, the statute permits regulations to provide for special simplified procedures for purchases of property and services below the small purchase threshold.<sup>15</sup>

The statute requires the Secretary of Defense to prescribe regulations governing price negotiations for supplies to be acquired using other than competitive procedures.<sup>16</sup> The regulations must specify the incurred overhead a contractor can allocate to the contract and require the contractor to identify supplies it did not manufacture or to which it did not contribute significant value.<sup>17</sup> The regulations do not apply to an item for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.<sup>18</sup>

The statute also authorizes the Secretary of Defense to enter into master agreements under which task orders may be issued for specific advisory or assistance services.<sup>19</sup> A master agreement may not exceed a two-year period.<sup>20</sup> Any such agreement must be with at least three sources that submitted offers for the master agreement under competitive procurement procedures.<sup>21</sup> The total value of task orders issued under master agreements by a contracting activity during a fiscal year may not exceed 30% of the value of all contracts for advisory and assistance services awarded by the contracting activity in fiscal year 1989.<sup>22</sup>

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In the case of a DOD procurement exceeding \$50 million, the Under Secretary of Defense for Acquisition, acting as the senior DOD procurement executive, may delegate approval authority pursuant to 10 U.S.C. § 2304(f)(5)(C).

<sup>11</sup> 10 U.S.C. § 2304(f)(2).

<sup>12</sup> 10 U.S.C. § 2304(f)(5).

<sup>13</sup> 10 U.S.C. § 2304(f)(3).

<sup>14</sup> 10 U.S.C. § 2304(f)(1)(C).

<sup>15</sup> 10 U.S.C. § 2304(g).

<sup>16</sup> 10 U.S.C. § 2304(i).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 10 U.S.C. § 2304(j).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at (j)(4). However, as noted in Chapter 1.6.6 of this Report, 10 U.S.C. § 2331(c) allows the Secretary of Defense to raise the 30% limitation to 50%. Such waiver becomes effective 60 days after notice of the waiver is published in the Federal Register.

### 1.2.1.2. Background of the Law

The original law regarding the method of soliciting offers was passed in 1861 and required the use of advertising.<sup>23</sup> After many exceptions to the statutory requirement for advertising were passed, the Armed Services Procurement Act of 1947 (ASPA)<sup>24</sup> was enacted to "make uniform all the laws and rules covering purchase procedures for the armed services and [repeal] many obsolete and diverse laws."<sup>25</sup> The ASPA included, among other things, a statutory preference for the use of formal advertising rather than negotiation procedures.<sup>26</sup> Contracts could only be negotiated if the requirements for one of 17 exceptions were satisfied.

The Competition in Contracting Act of 1984 (CICA) replaced the text of section 2304.<sup>27</sup> CICA mandates the use of competitive procurement procedures unless an exception applies. Congress intended this law to help ensure the Government obtains the advantages of competitive procurement: lower procurement costs, reduced cost growth on major system acquisitions, technical innovation, enhanced mobilization capability and industry responsiveness, and assurance that contracts are awarded based on merit rather than favoritism.<sup>28</sup>

In enacting CICA, Congress also wanted to correct problems it perceived in the Government procurement process. Congress believed the existing laws were inadequate because they neither recognized negotiation as a legitimate procurement procedure nor adequately restricted the use of noncompetitive negotiation.<sup>29</sup> Congress also wanted to curtail poor agency procurement practices: inappropriate sole-source contract awards, the use of noncompetitive procedures in order to obligate appropriations before the end of the fiscal year, the use of overly restrictive specifications limiting opportunities for legitimate competition, and agency bias toward only certain sources. In addition, Congress wanted to instill greater discipline in the procurement process by requiring advance procurement planning and market research.<sup>30</sup>

CICA incorporated the terms "sealed bid" and "competitive proposal" into the statute in lieu of the pre-CICA terminology, "formal advertising" and "negotiation." Changing this terminology was done to eliminate the competitive and noncompetitive connotations associated, respectively, with the former terms.<sup>31</sup> As originally proposed, CICA would have provided only the first six exceptions to the requirement for using competitive procedures. The conference

<sup>23</sup>S. REP. NO. 571, 80th Cong., 1st Sess. 1 (1947), *citing* R. S. 3709 (1861).

<sup>24</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 20 (1948).

<sup>25</sup>S. REP. NO. 571, 80th Cong., 1st Sess. 1 (1947).

<sup>26</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, §§ 2(b), (c), (e), 7(d), 8, 62 Stat. 20, 21, 22, 24 (1948). These sections were initially codified at 41 U.S.C. §§ 151, 156, and 157 and eventually recodified at 10 U.S.C. § 2304 by Pub. L. No. 85-1028, ch. 1041, 70A Stat. 128 (1956).

<sup>27</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2723, 98 Stat. 1175, 1185, 1187-91. CICA also mandated the use of competitive procedures by civilian executive agencies. *See* 41 U.S.C. § 253, Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2711, 98 Stat. 1175-78.

<sup>28</sup>S. REP. NO. 50, 98th Cong., 1st Sess. 3 (1983).

<sup>29</sup>*See* analysis for 10 U.S.C. § 2302 at Chapter 1.1.2 of this Report.

<sup>30</sup>S. REP. NO. 50, 98th Cong., 1st Sess. 9-16 (1983).

<sup>31</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1422, 1432 (1984). *See also* the analysis for 10 U.S.C. § 2302 at Chapter 1.1.2 of this Report.

committee added the seventh exception to allow the head of an agency, on a non-delegable basis, to determine when the public interest required the use of other than competitive procedures.<sup>32</sup>

In 1984 and in 1989, Congress made clarifying amendments to subsection (b)(2) of the statute concerning the restriction of solicitations in order to further promote small business concerns and small, disadvantaged business concerns.<sup>33</sup>

In 1986, Congress revised subsection (d)(1) concerning unsolicited proposals and follow-on contracts to its present text.<sup>34</sup> The purpose was to clarify the test for awarding a contract for an unsolicited proposal on a noncompetitive basis and to ensure follow-on contracts for services were dealt with in the same manner as follow-on contracts for products.<sup>35</sup>

Congress twice amended subsections (f)(1) and (f)(6) of the statute to revise and clarify who can approve the use of other than competitive procedures and to whom such authority can be delegated. The 1988 amendments clarified the approval authorities for agencies within DOD other than the military departments.<sup>36</sup> The following year, Congress changed the approval levels and delegation authorities to those presently depicted in the statute in order to promote administrative efficiency.<sup>37</sup>

Congress also amended subsection (f)(2) on two occasions to clarify when a justification and approval for the use of other than competitive procedures is not required. It first amended the subsection in 1985 to reflect that a justification and approval is not required for the acquisition of a brand name commercial item for authorized resale, such as items acquired for sale in commissaries.<sup>38</sup> The 1989 amendments added a subsection (f)(2)(E) to reduce the paperwork burden on acquisition managers when the procurement is directed by a foreign source.<sup>39</sup>

In 1990, subsection (g) was amended by substituting the term "small purchase threshold" for the dollar amount of \$25,000 that had previously been specified to govern the application of simplified procedures for small purchases.<sup>40</sup>

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<sup>32</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1425, 1432 (1984).

<sup>33</sup>Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, § 504(b)(2), 98 Stat. 3086; National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 853(d), 103 Stat. 1352, 1519 (1989).

<sup>34</sup>National Defense Authorization Act for Fiscal Year 1987; Pub. L. No. 99-661, § 923, 100 Stat. 3816, 3932 (1986) (*identical legislation omitted*).

<sup>35</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 266 (1986).

<sup>36</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 803, 102 Stat. 2008 (1988); H.R. REP. NO. 753, 100th Cong., 2d Sess. 422, 423 (1988).

<sup>37</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 818, 101 Stat. 1502 (1989); S. REP. NO. 81, 101st Cong., 1st Sess. 199, 200 (1989). *See also* note 10, *supra*.

<sup>38</sup>Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 961(a)(1), 99 Stat. 703 (1985); H.R. REP. NO. 235, 99th Cong., 1st Sess. 464 (1985).

<sup>39</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 817, 101 Stat. 1352, 1501-02 (1989); S. REP. NO. 81, 101st Cong., 1st Sess. 200, 203 (1989).

<sup>40</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 806(b), 104 Stat. 1405, 1592 (1990). Congress also made conforming amendments to subsection (j)(3)(A) in 1991. Persian Gulf Conflict

Congress added subsection (i) in 1986.<sup>41</sup> This subsection, which requires the Secretary of Defense to prescribe regulations governing price negotiations for supplies to be acquired using other than competitive procedures, was added to curb what Congress perceived were outrageous overhead costs that were passed to DOD on such common items of supply as hammers. It was also intended to identify opportunities for breakout purchases by DOD of supplies manufactured by subcontractors but sold through prime contractors. Congress provided that the regulations do not apply to an item for which the price is based upon the established catalog or market price of commercial items sold in substantial quantities to the general public because the marketplace determines the price of such an item.<sup>42</sup>

Congress added subsection (j), which concerns the use of master agreements, in 1989.<sup>43</sup> DOD requested the authority to enter into such agreements in order to facilitate its acquisition of needed study, advisory and assistance services on a timely basis.<sup>44</sup> Congress agreed that streamlined procedures were desirable but also was adamant that any new procedures should ensure adequate competition and prevent conflicts of interests by firms that provide consulting services to the Government. Consequently, the authority to use master agreements was granted only on a test basis to last three years once appropriate regulations were promulgated.<sup>45</sup> Nevertheless, Congress viewed this test program "as an important step in the development of improved policies and procedures in the acquisition of advisory and assistance services, including professional and technical services."<sup>46</sup> The recent extension of the test program through the end of fiscal year 1994<sup>47</sup> was made after DOD advised Congress that the test program had facilitated the acquisition of advisory and assistance services using competitive procurement procedures.<sup>48</sup>

Congress has also included in recent defense appropriations acts a recurring provision which has impacted this statute but which has not been codified.<sup>49</sup> For the last several years, Congress has precluded agencies from entering into a contract for studies, analyses, or consulting services on the basis of an unsolicited proposal if there has been no competition, unless the head of the activity responsible for the procurement determines that: (1) only one source is qualified; (2) the purpose of the contract is to explore an unsolicited proposal which offers significant

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Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 701(d)(2), 105 Stat. 75, 114 (1991).

<sup>41</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 927(a), 100 Stat. 3876, 3932 (1986) (*identical legislation omitted*).

<sup>42</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 264 (1986).

<sup>43</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 812, 103 Stat. 1352, 1493, 1494 (1989).

<sup>44</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 201 (1989).

<sup>45</sup>*Id.*

<sup>46</sup>H.R. CONF. REP. NO. 331, 101st Cong., 1st Sess. 603 (1989).

<sup>47</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 816, 106 Stat. 2315, 2454 (1992).

<sup>48</sup>S. REP. NO. 352, 102d Cong., 2d Sess. 238 (1992).

<sup>49</sup>*E.g.*, Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9050, 106 Stat. 1914 (1992); Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8052, 105 Stat. 1183 (1991); Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8059, 104 Stat. 1888 (1990); Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165 § 9078, 103 Stat. 1146-47 (1989); (*none codified*).

scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source; or (3) the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to ensure that a new product or idea of a specific concern is given financial support. In addition, this restriction does not apply to contracts of less than \$25,000, to contracts related to improvements of equipment that is in development or production, or to contracts determined by a qualifying official to be in the interest of the national defense.

#### **1.2.1.3. Law in Practice**

FAR Part 6, as supplemented by DFARS Part 206, implements the statute's requirements for full and open competition and the authorized exceptions thereto. FAR Part 13, as supplemented by DFARS Part 213, implements the provisions concerning small purchases. FAR Subparts 15.8 and 15.9 and corresponding DFARS subparts prescribe regulations for the price negotiation of other than competitive procurements. DFARS 237.270 implements provisions concerning DOD master agreements.

FAR Subpart 15.5, which addresses unsolicited proposals, implements the requirements of the uncodified appropriations act provisions described in the Background of the Law section above. The FAR restrictions on the acceptance of unsolicited proposals are more sweeping than those in the statute since they apply to all types of contracts, not just to those for studies, analyses, or consulting services. Because the regulations adequately implement the statutory provisions and have been published for quite some time, the Panel believes the continued insertion of the referenced provision in future appropriations acts is unnecessary.

#### **1.2.1.4. Recommendations and Justification**

The Panel requested comments on section 2304, as well as other CICA-related sections by letter in February 1992. Based upon discussions and its own analysis, the Contract Formation Working Group raised a variety of potential issues to stimulate comment, but stated it was equally interested in other issues commenters might wish to raise.<sup>50</sup> After analyzing the responses, including the reasoning and support for positions taken, the Working Group concluded that section 2304, while lengthy and complex, is a fundamentally sound statute that requires full and open competition, but also provides appropriate exceptions that adequately cover the range of legitimate needs to procure using less than full and open competition. The Panel considered recommending a change to "adequate and effective competition" and definition of that term in section 2302, but for reasons set forth in detail in Chapter 1.1, the Panel concluded that such a change would create great difficulties in precise definition, could result in adverse unintended consequences, and would not be acceptable to the Congress.

In a second request for comments, the Working Group conveyed the Panel's intent to recommend only modest amendments concerning approving authorities and again requested

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<sup>50</sup>Letter from Maj Gen John D. Slinkard, USAF and Thomas J. Madden to Distribution (industry and Government) (Feb. 11, 1992).



comments on master agreements.<sup>51</sup> As reflected in the recommendations that follow, most proposed amendments are either procedural or are needed to conform to the Panel's recommendations on other statutes. The major exception is the recommended amendment of section 2304(j) by repeal of the existing language and substitution of new language of general applicability to the award and administration of contracts under which delivery or task orders will be issued.

## I

**Amend section 2304(a)(1)(A) by deleting "modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984 (41 U.S.C. 403 note)" and substituting "the Federal Acquisition Regulation."**

The amendments required by section 2752 of CICA are in the Federal Acquisition Regulation. It is well known and understood by that name, and its issuance and maintenance are controlled by 41 U.S.C. § 421.

## II

**Amend section 2304(b) and (d) by adding new paragraphs which specifically prohibit the agency head from making the required determinations for a class of purchases or contracts.**

The addition of these two paragraphs is necessary to conform to the Panel's recommendation in Chapter 1.6.2 of this Report to clarify which determinations may, and may not be, made for a class of purchases or contracts. Chapter 1.6.2 explains the rationale for this recommendation and the corresponding amendment to 10 U.S.C. § 2310(a).

## III

**Amend section 2304(f)(1)(A) by deleting the words "for the contract."**

While the contracting officer justifying the use of other than competitive procedures would normally be the contracting officer "for the contract," there are some circumstances, including a class justification and approval, in which it may not be the same individual.

## IV

**Amend section 2304(f)(1)(B)(i) by adding after "(without further delegation)" the words "or by an official described in clauses (ii) through (iv) below."**

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<sup>51</sup>Letter from Maj Gen John D. Slinkard, USAF and Thomas J. Madden to Distribution (Industry and Government) (June 8, 1992).

This change would recognize that it may be appropriate in some circumstances for a higher-level official that already has authority to approve actions over \$1,000,000 to approve an action between \$100,000 and \$1 million. For example, in a highly classified special access program, one would not clear and access the procuring activity competition advocate solely for the purpose of approving the justification.

## V

**Amend section 2304(f)(1)(B)(ii) and (f)(6)(A) to delete "head of the [a] procuring activity" and substitute "head of the [a] contracting activity."**

The Panel has recommended this change for consistency, both here and elsewhere, to reflect current usage and to be consistent with the FAR.

## VI

**Amend section 2304(g)(1) by deleting "the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 (41 U.S.C. § 403 note)" and substituting "the Federal Acquisition Regulation" and by deleting the word "small" before "purchases of property and services" and adding thereafter "with a value not in excess of the simplified acquisition threshold."**

This recommendation deletes words no longer current, as in recommendation I above, and specifies the FAR as the source of simplified procedures for purchases of supplies and services below the new simplified acquisition threshold recommended by the Panel in Chapter 4.1. This recommendation assumes that the Panel's recommended change to 41 U.S.C. § 403(11) will be enacted and will apply throughout the Government. If the threshold applied only in DOD, the recommended wording would be as follows:

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Secretary of Defense shall provide through the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 (41 U.S.C. 403 note) shall provide for special simplified procedures for small purchases of property and services with a value not in excess of the simplified acquisition threshold.

## VII

**Amend section 2304(g) by deleting paragraph (2), renumbering paragraphs (3) and (4), and changing therein "small purchase threshold" to "simplified acquisition threshold" and small purchase procedures to "simplified procedures."**

This recommendation is for consistency.

## VIII

**Amend section 2304(h) by deleting subsection (h)(1) and (2) and by incorporating the words in subsection (h)(2) within the basic subsection (h).**

This is consistent with the Panel's recommendation in Chapter 4.2 on the "Walsh-Healey Act" (41 U.S.C. §§ 35-45).

## IX

**Amend subsection (i)(3) by deleting the current wording and substituting "(3) Such regulations shall not apply to a commercial item, as defined in section 2302(5) of this title or to another item included in a contract or subcontract for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public."**

Commercial items as defined in the Panel's definition recommended for inclusion in section 2302(5) can and should be totally exempted from the requirements of paragraph (2)(A) and (B). DOD should not prescribe the allocation of overhead in a commercial entity's accounting system, nor should there be a need to examine the value added by the contractor, since commercial market forces would limit inappropriate markups. The second portion of the wording preserves the original intent of the Congress and recognizes that there may be some items that are not within the definition for which the price is based on catalog or market prices of commercial items.

## X

**Amend subsection (j) by deleting the entire subsection, including language currently included in section 2331(c), and substituting an entirely new subsection (j) that prescribes requirements for contracts that do not procure or specify a firm quantity of supplies or services and provide for obtaining supplies or services by issuance of delivery orders or task orders.**

The panel requested and received comments on the current provision for master agreements in subsection (j). The requests for comments focused on whether the test period for master agreements should be extended and whether master agreements, now limited in duration to two years, should be extended and be required to be competed every three years.<sup>52</sup> Most commenters mildly supported extending the test period and more strongly supported the need to permit master agreements to last up to five years.<sup>53</sup> Several commenters cited the limited utility of the master agreements as presently prescribed in section 2304(j).

The Air Force commenter stated:

We see no reason to extend the test period for master agreements. The Air Force has not been able to determine an effective use of this provision nor any suitable acquisition candidates. Further, we are not convinced master agreements are necessary, since pre-existing authority already permits contracting techniques similar to master agreements.<sup>54</sup>

The Army commenter stated:

I believe that Sec. 2304(j) should be rewritten. It is unnecessarily complex, and therefore buying activities have not made as good a use of master agreements as had been hoped.<sup>55</sup>

The Council of Defense and Space Industry Associations (CODSIA) stated in part:

These agreements are very time-consuming and expensive to negotiate. Under the current law, with only two years between contracts, advisory and assistance services contractors often find themselves in perpetual contract negotiations. As an additional consideration, if a decision to enter into a master agreement with fewer than three sources is made, it must be supported with a written determination which stipulates that no other qualified sources for the required services are available.

The requirement to have at least three contractors sign a master agreement should be deleted. It is no less an efficient method of procuring the needed services when there are only one or two

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<sup>52</sup>*Id.*

<sup>53</sup>See Matrix of CICA comments, Working Group 2, Acquisition Law task Force, Defense Systems Management College.

<sup>54</sup>Memorandum from SAF/AQC signed by Ira L. Kemp, Associate Deputy Assistant to Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Working Group 2, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (July 15, 1992).

<sup>55</sup>Memorandum from Department of the Army signed by Joseph Varaday Jr., Dir. of Procurement Policy, to Maj Gen John D. Slinkard, USAF, and Thomas J. Madden, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (Feb. 27, 1992).

contractors available to perform the service. There is no logical reason to restrict the availability of this type of agreement to only situations where at least three suitable contractors can be found.

Revise the last phrase in (j)(2) deleting the words in brackets to read "considering only [cost or price and other] the factors included in the request for offers." This will eliminate any confusion arising from the use of the word "only" before a combination of factors to be considered.<sup>56</sup>

While the Panel was considering these and other comments and considering possible amendments to section 2304(j), the Panel was contacted by the Director of Defense Procurement (DDP), who expressed her concern about the abuse of indefinite quantity and task order contracts, including those for other supplies and services, as well as those for advisory and assistance services. She cited repeated audit and IG criticism of the award and administration of such contracts,<sup>57</sup> as well as identification of specific problems by the OSD procurement staff. She requested that the Panel consider any appropriate legislative recommendations in its deliberations, but did not recommend specific proposals.

Problems cited by the DDP are also known to some of the Panel members, both Government and private sector. In the Panel's several discussions of the issues, the Panel generally considered that properly awarded indefinite quantity and other contracts involving delivery orders or task orders are within the competition requirements of section 2304 if the various requirements of Chapter 137 of Title 10 and 41 U.S.C. § 416 are complied with.<sup>58</sup>

The Panel generally considers that the problems, and valid criticism, stem from the difficulty in writing an adequate statement of work for the basic contract, failure to adequately evaluate proposals using valid criteria, or most often and most importantly, issuance of delivery or task orders beyond the originally contemplated scope and value of the contract without recompetition or approval of the required justification under section 2304(f). The Panel is aware that in some instances, the ultimate value of delivery or task orders greatly exceeded the estimated amount of work originally competed, or included work not fairly included in the work competed.

The Panel believes that it is important that DOD continue to be permitted by law and regulation to award contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value cannot be reasonably be known when the basic contract is awarded. Without such ability, many legitimate requirements and tasks would be unnecessarily

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<sup>56</sup>Letter from CODSIA signed by Don Fuqua, President, AIA, John J. Stocker, President, Shipbuilders Council of America, James R. Hogg, President, NSIA, and Dan C. Heinemeier, Vice President, EIA, to Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (Mar. 12, 1992).

<sup>57</sup>See e.g., DODIG Report No. 91-041, February 1, 1991, *Contract Advisory and Assistance Service Contracts*, and DODIG Report No. 93-023, November 13, 1992, *Time-and-Materials Billings on Air Force Contract F33600-86-D-0295*.

<sup>58</sup>See generally *Astronautics Corp. of America*, Comp. Gen. B-242782, 91-1 CPD ¶ 531; and *Stanford Telecommunications, Inc.*, Comp. Gen. B-241449, 90-2 CPD ¶ 475.

delayed or result in attempts by requirements personnel and contracting officers to justify sole-source contracting actions, including inappropriate use of undefinitized contractual actions.<sup>59</sup>

Since the master agreement authority of section 2304(j) is limited to advisory and assistance services and includes many restrictions on award, duration, and competition of individual task orders, the Panel does not believe that it represents an effective solution to the overall problem. The Panel is aware that this authority was requested by DOD, and believes that it was a sincere, but not entirely successful, attempt to address one very important portion of a larger problem. Therefore, the Panel recommends amendment of section 2304(j) by deletion of the current master agreement authority, as amended by section 2331(c) and the National Defense Authorization Act for Fiscal Year 1993.<sup>60</sup>

The Panel recommends a new section 2304(j) set forth in full in the proposed amended statute included in this analysis, which would set forth in law the recognition of the legitimate need for contracts that do not procure or specify a firm quantity of supplies or services, the legitimate use of proper delivery orders or task orders under such contracts, and the criteria that such contracts must meet in order for the delivery or task orders issued under them to be exempt from the notice requirements of 41 U.S.C. § 416 and from separate competition or approval of a justification under section 2304(f).

The recommended section 2304(j)(1) is set forth in full below. It provides the basic recognition and description of the contracts involved, including those awarded using competitive procedures and those awarded using less than full and open competition after approval of a justification under an exception.

(j)(1) When a contract is awarded using competitive procedures as defined in section 2302(2) of this title, or under an exception

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<sup>59</sup>The Panel's view that such contracts should be permitted to continue is echoed by a comment received. The corporate counsel for Science Applications International Corporation (SAIC) stated:

Finally, noncompeting delivery orders, [which comply with the law described above], are not only permissible but practical. It is recognized by everyone that competing delivery orders on an indefinite quantity contract, when not required to do so, are clearly duplicative and render the original competition meaningless. In trying to ascertain how much delay could reasonably be anticipated by competing delivery orders, we quite naturally looked in-house at our own experience and discovered that we, in fact, have one indefinite contract that does compete delivery orders and that it takes a minimum of five months to compete each delivery order. Our experience in similar contracts where delivery orders are not competed shows that the average lead-time is two weeks for issuance of delivery orders. We doubt that such a time gap is fully responsive to the DOD's needs in most instances.

Letter from SAIC signed by Barry Shillito to Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (Nov. 2, 1992).

<sup>60</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 816, 106 Stat. 2315, 2454 (1992).

permitted by subsection (c) of this section, properly approved in compliance with subsection (f) of this section, but does not procure or specify a firm quantity of supplies or services (other than any minimum or maximum quantity), such contract for supplies or services may provide for the issuance of delivery orders or task orders during the specified term of the contract.

The recommended section 2304(j)(2) is set forth in full below. It exempts from the notice (synopsis) requirements of the relevant laws and from the requirement to compete or obtain an approved justification under subsection (f) *only* delivery orders or task orders under contracts that comply with the statutory and regulatory requirements that follow in paragraphs (3), (4), and (5).

(2) Provided that a contract described in paragraph (1) complies with the requirements of paragraphs (3) and (4) and with regulations issued pursuant to paragraph(5), the delivery orders or task orders issued under such contract shall not --

(A) require separate notice under section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416) and section 8(e) of the Small Business Act (15 U.S.C. § 637(e)); or

(B) require separate competition or justification under this section.

The recommended section 2304(j)(3) is set forth in full below. It provides for appropriate standards for notice (synopsis); a definite contract period and a maximum value; reasonable description of the general scope, nature, complexity, and purposes of the supplies or services; meaningful evaluation criteria, properly applied; and, if more than one contract is awarded, a clear method of competing or allocating delivery or task orders among contracts.

(3) Contracts to which the provisions of paragraph (2) apply shall --

(A) be awarded as a result of a solicitation for which the notice required by sections 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416) and 8(e) of the Small Business Act (15 U.S.C. § 637(e)) reasonably and fairly describes the general scope, magnitude, and duration of the proposed contract in a manner that would reasonably permit a potential offeror to decide whether to request the solicitation and consider submitting an offer;

(B) specify in the solicitation and contract the period of the contract, including the number and period of any options.

and the maximum quantity or dollar value of supplies or services to be procured under the contract;

(C) both in the solicitation and contract, reasonably describe in the statement of work, specifications, or other description, the general scope, nature, complexity, and purposes of the supplies or services to be procured under the contract;

(D) be awarded as a result of a solicitation which specifies, and an evaluation of proposals that properly applies, evaluation criteria which include estimated or firm costs, prices, or rates and other evaluation criteria directly relating to the offeror's ability to provide the supplies or services at the level of quality required; and,

(E) if the contract is one of multiple contracts awarded from the same competitive solicitation for the same or similar supplies or services, specify, both in the solicitation and contract, the manner in which individual delivery orders or task orders will be negotiated and either competed among or allocated among the multiple contracts.

The recommended section 2304(j)(4) is set forth in full below. It squarely addresses the issue by prohibiting in law the expansion of the contract scope or period by delivery or task order. It also clearly requires any modification to the basic contract that significantly expands the scope, contract period or maximum value of the contract to be competed or justified under section 2304. The providing of notice (synopsis) helps ensure that potential competitors will be aware of such proposed expansion and have the opportunity to object.

(4) Significant increases in the scope, period, or maximum value of the contracts described in paragraph (3) shall be made only by modification to the basic contract or contracts, and not by delivery orders or task orders, and shall be accomplished by competitive procedures or properly justified as exceptions under this section, including the providing of notice under 41 U.S.C. § 416 and 15 U.S.C. § 637(e).

Section 2304(j)(5) requires the Secretary of Defense to issue implementing regulations and provide for audit and oversight.

The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing, and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not.



### 1.2.1.5. Relationship to Objectives

Recommendations I through IX will help to simplify and clarify acquisition laws and implement other Panel recommendations in this complex, but fundamentally sound statute. Adoption of recommendation X will help to ensure the continuing financial and ethical integrity of defense procurement, help to establish a balance between efficient processes and full and open access to the procurement system, and permit the exercise of sound judgment by acquisition personnel within appropriate statutory limits.

### 1.2.1.6. Proposed Statute

#### 10 U.S.C. § 2304. Contracts: competition requirements

(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services--

(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation ~~modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984 (41 U.S.C. 403 note); and~~

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency--

(A) shall solicit sealed bids if--

- (i) time permits the solicitation, submission, and evaluation of sealed bids;
  - (ii) the award will be made on the basis of price and other price-related factors;
  - (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
  - (iv) there is a reasonable expectation of receiving more than one sealed bid;
- and

(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

(b)(1) The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service if the head of the agency determines that to do so--

(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

(2) The determination required of an agency head in paragraph (1) shall not be made for a class of purchases or contracts.

~~(2)(3) The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 2323 of this title, 1207 of the National Defense Authorization Act for Fiscal Year 1987 (10 U.S.C. 2301 note).<sup>61</sup>~~

~~(3)(4) A contract awarded pursuant to the competitive procedures referred to in paragraphs (1) and (2) shall not be subject to the justification and approval required by subsection (f)(1).~~

(c) The head of an agency may use procedures other than competitive procedures only when--

(1) the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency;

(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish

<sup>61</sup>The indicated section (1207) has been codified by the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 801, 106 Stat. 2315, 2442 (1992).

or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

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

(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

(7) the head of the agency--

(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

(d)(1) For the purposes of applying subsection (c)(1)--

(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a concept--

(i) that is unique and innovative or, in the case of a service, for which the source demonstrates a unique capability of the source to provide the service; and

(ii) the substance of which is not otherwise available to the United States, and does not resemble the substance of a pending competitive procurement; and

(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment, or the continued provision of highly specialized services, such property or services may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures when it is likely that award to a source other than the original source would result in--

(i) substantial duplication of cost to the United States which is not expected to be recovered through competition; or

(ii) unacceptable delays in fulfilling the agency's needs.

(2) The authority of the head of an agency under subsection (c)(7) may not be delegated.

(3) The determination required of an agency head in subsection (c)(7) shall not be made for a class of purchases or contracts.

(e) The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

(f)(1) Except as provided in paragraph (2), the head of an agency may not award a contract using procedures other than competitive procedures unless--

(A) the contracting officer ~~for the contract~~ justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

(B) the justification is approved--

(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation) or by an official described in clauses (ii) through (iv) below;

(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the ~~procuring contracting~~ activity (or the head of the ~~procuring contracting~~ activity's delegate designated pursuant to paragraph (6)(A));

(iii) in the case of a contract for an amount exceeding \$10,000,000 (but equal to or less than \$50,000,000), by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) or the senior procurement executive's delegate designated pursuant to paragraph (6)(B), or in the case of the Under Secretary of Defense for Acquisition, acting in his capacity as the senior procurement executive for the Department of Defense, the Under Secretary's delegate designated pursuant to paragraph (6)(C); or

(iv) in the case of a contract for an amount exceeding \$50,000,000, by the senior procurement executive of the agency designated pursuant to section 15(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation) or in the case of the Under Secretary of Defense for Acquisition, acting in his capacity as the senior procurement executive for the Department of Defense, the Under Secretary's delegate designated pursuant to paragraph (6)(C); and

(C) any required notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) and all bids or proposals received in response to that notice have been considered by the head of the agency.

(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required--

(A) when a statute expressly requires that the procurement be made from a specified source;

(B) when the agency's need is for a brand-name commercial item for authorized resale;

(C) in the case of a procurement permitted by subsection (c)(7);

(D) in the case of a procurement conducted under (i) the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act, or (ii) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(E) in the case of a procurement permitted by subsection (c)(4), but only if the head of the contracting activity prepares a document in connection with such procurement that describes the terms of an agreement or treaty, or the written directions, referred to in that subsection that have the effect of requiring the use of procedures other than competitive procedures and such document is approved by the competition advocate for the procuring activity.

(3) The justification required by paragraph (1)(A) shall include--

(A) a description of the agency's needs;

(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

(C) a determination that the anticipated cost will be fair and reasonable;

(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

(F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

(4) The justification required by paragraph (1)(A) and any related information, and any document prepared pursuant to paragraph (2)(E), shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

(5) In no case may the head of an agency--

(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

(B) procure property or services from another agency unless such other agency complies fully with the requirements of this chapter in its procurement of such property or services.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

(6)(A) The authority of the head of a procuring contracting activity under paragraph (1)(B)(ii) may be delegated only to an officer or employee who--

(i) if a member of the armed forces, is a general or flag officer; or

(ii) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of brigadier general or rear admiral (lower half).

(B) The authority of the senior procurement executive under paragraph (1)(B)(iii) may be delegated only to an officer or employee within the senior procurement executive's organization who--

(i) if a member of the armed forces, is a general or flag officer; or

(ii) if a civilian, is serving in a position in grade GS-16 or above (or in a comparable or higher position under any other schedule for civilian officers or employees).

(C) The authority of the Under Secretary of Defense for Acquisition under paragraph (1)(B)(iv) may be delegated only to--

(i) an Assistant Secretary of Defense; or

(ii) with respect to the element of the Department of Defense (as specified in section 111(b) of this title), other than a military department, carrying out the procurement action concerned, an officer or employee serving in or assigned or detailed to that element who--

(I) if a member of the armed forces, is serving in a grade above brigadier general or rear admiral (lower half); or

(II) if a civilian, is serving in a position with a grade under the General Schedule (or any other schedule for civilian officers or employees) that is comparable to or higher than the grade of major general or rear admiral.

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 (41 U.S.C. 403 note) shall provide for special simplified procedures for small purchases of property and services with a value not in excess of the simplified acquisition threshold.

~~(2) For the purposes of this subsection, a small purchase is a purchase or contract for an amount which does not exceed the small purchase threshold.~~

~~(3)(2) A proposed purchase or contract for an amount above the small purchase simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase simplified procedures required by paragraph (1).~~

~~(4)(3) In using small purchase simplified procedures, the head of an agency shall promote competition to the maximum extent practicable.~~

(h) For the purposes of ~~the following laws~~ the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly referred to as the "Davis-Bacon Act") (40 U.S.C. 276a-276a-5), purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

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

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

(i)(1) The Secretary of Defense shall prescribe by regulation the manner in which the Department of Defense negotiates prices for supplies to be obtained through the use of procedures other than competitive procedures, as defined in section 2302(2) of this title.

(2) The regulations required by paragraph (1) shall--

(A) specify the incurred overhead a contractor may appropriately allocate to supplies referred to in that paragraph; and

(B) require the contractor to identify those supplies which it did not manufacture or to which it did not contribute significant value.

~~(3) Such regulations shall not apply to an item of supply included in a contract or subcontract for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.~~

(3) Such regulations shall not apply to a commercial item, as defined in section 2302(5) of this title, or to an item other than a commercial item included in a contract or subcontract for which the price is based on established catalogue or market prices of commercial items sold in substantial quantities to the general public.

(j)(1) When a contract is awarded using competitive procedures as defined in section 2302(2) of this title or under an exception permitted by subsection (c) of this section, properly approved in compliance with subsection (f) of this section, but does not procure or specify a firm quantity of supplies or services (other than any minimum or maximum quantity), such contract for supplies or services may provide for the issuance of delivery orders or task orders during the specified term of the contract.

(2) Provided that a contract described in paragraph (1) complies with the requirements of paragraphs (3) and (4) and with regulations issued pursuant to paragraph (5), the delivery orders or task orders issued under such contract shall not - -

(A) require separate notice under section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416) and section 8(e) of the Small Business Act (15 U.S.C. § 637(e)); or

(B) require separate competition or justification under this section.

(3) Contracts to which the provisions of paragraph (2) apply shall - -

(A) be awarded as a result of a solicitation for which the notice required by sections 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416) and 8(e) of the Small Business Act (15 U.S.C. § 637(e)) reasonably and fairly describes the general scope, magnitude, and duration of the proposed contract in a manner that would reasonably permit a potential offeror to decide whether to request the solicitation and consider submitting an offer;

(B) specify in the solicitation and contract the period of the contract, including the number and period of any options, and the maximum quantity or dollar value of supplies or services to be procured under the contract;

(C) both in the solicitation and contract, reasonably describe in the statement of work, specifications, or other description, the general scope, nature, complexity, and purposes of the supplies or services to be procured under the contract;



(D) be awarded as a result of a solicitation which specifies, and an evaluation of proposals that properly applies, evaluation criteria which include estimated or firm costs, prices, or rates and other evaluation criteria directly relating to the offeror's ability to provide the supplies or services at the level of quality required; and,

(E) if the contract is one of multiple contracts awarded from the same competitive solicitation for the same or similar supplies or services, specify, both in the solicitation and contract, the manner in which individual delivery orders or task orders will be negotiated and either competed among or allocated among the multiple contracts.

(4) Significant increases in the scope, period, or maximum value of the contracts described in paragraph (3) shall be made only by modification to the basic contract or contracts, and not by delivery orders or task orders, and shall be accomplished by competitive procedures or properly justified as exceptions under this section, including the providing of notice under 41 U.S.C. § 416 and 15 U.S.C. § 637(e).

(5) The Secretary of Defense shall issue regulations to implement this paragraph (i) and provide for appropriate audit and oversight.

~~(j)(1) The Secretary of Defense may enter into agreements (known as "master agreements") with responsible sources under which the Secretary may issue orders for the performance of specific advisory and assistance services. Any such agreement shall specify terms and conditions for the subsequent procurement of advisory and assistance services from the sources. The period covered by any such agreement may not exceed two years. Any such agreement may only be entered into using procedures that, in the case of the award of a contract, would be competitive procedures. Any such agreement shall be entered into with at least three of the sources that submit offers for the master agreement.~~

~~(2) Following the establishment of sources for advisory and assistance services through the use of a master agreement described in paragraph (1), the Secretary of Defense (A) may request offers from all sources with master agreements for the services for which offers are being requested if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two sources, and (B) may issue orders (known as "task orders") pursuant to the request for offers to such sources for the performance of specific advisory and assistance services, subject to the requirements of this subsection. Any such request for offers shall contain a statement of work clearly specifying all tasks to be performed under the order. Upon evaluation of an offer or offers resulting from a request, the task order shall be issued to the source submitting the offer that the Secretary of Defense determines to be the most advantageous to the United States, considering only cost or price and other factors included in the request for offers.~~

~~(3)(A) The requirements for the giving of notice of certain solicitations that are prescribed in section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) and section 8(e) of the Small Business Act (15 U.S.C. 637(e)) shall apply to solicitations for offers for a master agreement under this subsection in the same manner and to the same extent as those requirements~~

apply to solicitations for proposals for a contract for services for a price expected to exceed the small purchase threshold.

~~(B) Such requirements for the giving of notice shall not apply to the issuance of orders under a master agreement entered into pursuant to the procedures established under this section, except that the Secretary of Defense shall furnish for publication by the Secretary of Commerce a notice announcing the order.~~

~~(4) The total value of task orders issued under master agreements by any contracting activity in a fiscal year may not exceed the amount equal to 30 percent of the value of all contracts for advisory and assistance services awarded by that contracting activity during fiscal year 1989.~~

~~(5) The authority provided by this subsection to enter into master agreements shall terminate at the end of the three-year period beginning on the date on which final regulations prescribed to carry out this subsection take effect.~~

## 1.2.2. 10 U.S.C. § 2305

### Competition: planning, solicitation, evaluation and award procedures

#### 1.2.2.1. Summary of the Law

This statute requires agencies to conduct advance procurement planning and market research, and to develop contract specifications which are not unnecessarily restrictive, in order to obtain full and open competition.<sup>1</sup> It requires solicitations for sealed bids and competitive proposals to state the evaluation factors for contract award and the relative weights of those factors.<sup>2</sup> Offers, whether sealed bids or competitive proposals, may be evaluated only against the stated factors.<sup>3</sup>

Solicitations for sealed bids must state the time and place of bid opening and that bids will be evaluated without discussions with the bidders.<sup>4</sup> Solicitations for competitive proposals must state the time and place for proposal submission and whether the agency intends to hold discussions with offerors as part of the proposal evaluation process.<sup>5</sup> If discussions are held, they must be held with all responsible offerors within the competitive range.<sup>6</sup>

An agency must award a contract with reasonable promptness after the evaluation of sealed bids or competitive proposals to that responsible offeror whose bid or proposal is most advantageous to the Government consistent with the evaluation factors for award.<sup>7</sup> However, an agency may reject all bids or proposals received in response to a solicitation if the head of the agency determines that such action is in the public interest.<sup>8</sup> Unsuccessful offerors must be promptly notified after their proposals are rejected.<sup>9</sup>

Before entering contracts for supplies, DOD agencies must review the existing DOD supply system and standard Government supply contracts for item availability and cost when determining the most advantageous source.<sup>10</sup> DOD agencies must also review the procurement history of the item and ensure there is an adequate description of the item to be procured.<sup>11</sup>

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<sup>1</sup>10 U.S.C. § 2305(a)(1).

<sup>2</sup>10 U.S.C. § 2305(a)(2), (3).

<sup>3</sup>10 U.S.C. § 2305(b)(1).

<sup>4</sup>10 U.S.C. § 2305(a)(2).

<sup>5</sup>*Id.*

<sup>6</sup>10 U.S.C. § 2305(b)(4)(A)(i).

<sup>7</sup>10 U.S.C. § 2305(b)(3), (4)(B).

<sup>8</sup>10 U.S.C. § 2305(b)(2).

<sup>9</sup>10 U.S.C. § 2305(b)(4)(B).

<sup>10</sup>10 U.S.C. § 2305(c).

<sup>11</sup>*Id.*

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The statute imposes special requirements concerning the development and production of major systems by DOD. With respect to the development of a major system, a DOD agency must consider including in the solicitation a requirement that offerors: (1) propose subsystems and components that are currently available in the Government's supply system or commercially available from more than one source, or (2) propose subsystems and components that the Government will be able to acquire competitively in the future.<sup>12</sup>

With respect to the production of a major system, a DOD agency must consider including in the solicitation a requirement that offerors: (1) propose Government acquisition of technical data rights enabling future competitive reprourement of subsystems and components and the cost of such acquisition, or (2) propose qualifying or developing multiple sources of supply for subsystems or components.<sup>13</sup>

A DOD agency may not require an offeror to provide a proposal which would enable the Government to later acquire competitively a subsystem or component developed exclusively at private expense unless the head of the agency determines that: (1) the original supplier will be unable to meet delivery requirements, or (2) the original supplier is unable to satisfy mobilization requirements.<sup>14</sup>

### 1.2.2.2. Background of the Law

This statute originated in the Armed Services Procurement Act of 1947.<sup>15</sup> After two minor amendments,<sup>16</sup> the Competition in Contracting Act of 1984 (CICA) contained provisions which rewrote the entire text of this statute.<sup>17</sup> Through this statute, Congress attempted to address two of the problems that were the genesis of CICA: overly restrictive specifications limiting competition and the lack of acquisition planning and market research.<sup>18</sup> The evaluation and award procedures for sealed bids and competitive proposals are almost the same as those that had been required for formal advertising and negotiation prior to CICA. However, CICA clarified that agencies evaluate sealed bids and competitive proposals solely on factors specified in the solicitation.<sup>19</sup>

Subsections (c) and (d) of this statute, which concern review of existing inventories and contracts and preparation of solicitations for development and production of major systems,

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<sup>12</sup>10 U.S.C. § 2305(d)(1).

<sup>13</sup>10 U.S.C. § 2305(d)(2).

<sup>14</sup>10 U.S.C. § 2305(d)(4)(A).

<sup>15</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, § 2(d), 3, 62 Stat. 20, 22 (1948). It was initially codified at 41 U.S.C. §§ 151(d) and 152 and subsequently recodified at 10 U.S.C. § 2305 by Pub. L. No. 84-1028, ch. 1041, § 1, 70A Stat. 130 (1956).

<sup>16</sup>Act of Sept. 20, 1958, Pub. L. No. 85-861, § 1(44), 72 Stat. 1457; Act of Mar. 16, 1968, Pub. L. No. 90-268, § 3, 82 Stat. 49.

<sup>17</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2723, 98 Stat. 1175, 1191-92. CICA also imposed the same requirements on executive agencies other than those covered by this statute. See 41 U.S.C. §§ 253a, 253b; Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2711, 98 Stat. 1175, 1178-81.

<sup>18</sup>See the analysis of 10 U.S.C. § 2304 in Chapter 1.2.1 of this Report.

<sup>19</sup>H.R. REP. NO. 861, 98th Cong., 2d Sess. 1429, 1432 (1984).

respectively, did not stem from CICA. Instead, Congress added subsections (c) and (d)(1)-(3) through the Defense Procurement Reform Act of 1984 to impose better asset accountability practices on DOD and to control the cost to the Government of spare parts for major systems.<sup>20</sup> Subsequently in 1988, Congress added subsection (d)(4) regarding the future competition of items developed at private expense. This addition was aimed at ensuring that DOD balanced the need for the future cost-effective acquisition of spares against industry's incentive to undertake private development.<sup>21</sup>

In 1986, Congress amended the requirement for written notice of contract award in subsection (b)(4) to eliminate the requirement when a procurement is for perishable subsistence items.<sup>22</sup> In the same law, Congress added subsection (a)(3), which requires in a solicitation for competitive proposals, disclosure of the relative weight assigned to evaluation factors, including an offeror's capabilities and past performance.<sup>23</sup> The rationale for this amendment was to ensure that quality of service was appropriately evaluated in relation to cost and price factors in the acquisition of sophisticated professional and technical services.<sup>24</sup>

Congress amended subsections (a)(2) and (b)(4) in 1990 to reflect their present text concerning contract award without discussions after seeking competitive proposals.<sup>25</sup> CICA, as interpreted by the GAO, required an award without discussions to be made to the offeror proposing the lowest overall cost despite the technical superiority of another offeror.<sup>26</sup> However, there are significant reasons for permitting award without discussion to an offeror proposing other than lowest overall cost: technical capability, reduced acquisition lead time, reduced risk of wrongful disclosure of source selection information, improved pricing of initial proposals and reduced bid and proposal costs.<sup>27</sup> Consequently, Congress wanted to enable DOD to make such awards when doing so would be in the best interest of the Government considering overall cost, technical capability and risk.<sup>28</sup>

### 1.2.2.3. Law in Practice

FAR Part 14 prescribes regulations for contracting by sealed bid procedures, including the solicitation and evaluation of bids, the award of contracts in response thereto, and notification to unsuccessful offerors. The FAR is supplemented by DFARS 214.404-1 and 214.406-3, which

<sup>20</sup>National Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1213, 98 Stat. 2492, 2591 (1984); H.R. CONF. REP. NO. 1080, 98th Cong., 2d Sess. 317-18 (1984).

<sup>21</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 806, 102 Stat. 2010 (1988); S. REP. NO. 326, 100th Cong., 2d Sess. 105 (1988).

<sup>22</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 313(b), 100 Stat. 3816, 3853 (1986) (*identical legislation omitted*).

<sup>23</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 924, 100 Stat. 3816, 3932-33 (1986) (*identical legislation omitted*).

<sup>24</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 266-67 (1986).

<sup>25</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 802, 104 Stat. 1485, 1588 (1990).

<sup>26</sup>H.R. REP. NO. 665, 101st Cong., 2d Sess. 299, 300 (1990).

<sup>27</sup>*Id.* at 301-02.

<sup>28</sup>*Id.* at 301. *See also* S. REP. NO. 384, 101st Cong., 2d Sess. 191-92 (1990). Other minor amendments made by the above cited public laws are not addressed in this summary.

address cancellation of invitations after opening and mistakes in bids, respectively. Regulations for contracting by negotiation are contained in FAR Part 15. These regulations cover the solicitation and evaluation of proposals, the award of contracts in response thereto, and notification and debriefing of unsuccessful offerors. DFARS supplementation is at Subparts 215.4, 215.6 and 215.10.

FAR Subpart 7.1, as supplemented by DFARS Subpart 207.1, implements the statutory requirements for acquisition planning. The requirement in section 2305(d)(4)(A) that the agency head make a determination before requiring a proposal which would enable the Government to later acquire competitively a subsystem or component developed exclusively at private expense is implemented at DFARS 227.403-71(b)(3).

#### **1.2.2.4. Recommendations and Justification**

### **I**

#### **Amend section 2305(b)(4)(B) to require regulations which address the debriefing of unsuccessful offerors.**

The fundamental purpose for this recommended change is to eliminate needless protests. As this Report explains more fully in the analysis of 31 U.S.C. § 3553, it is a commonly accepted belief that a number of protests would not have been filed if a meaningful debriefing had been provided in a timely manner to the protesters. A timely and meaningful debriefing to an offeror which is not awarded the contract might well provide the unsuccessful offeror with sufficient information to conclude that a protest should not be filed.

The statute as presently written requires an agency to promptly notify unsuccessful offerors of the rejection of their proposals but does not require a debriefing. FAR 15.1003 does require debriefings. The Panel believes timely and meaningful debriefings should be a requirement. The Section of Public Contract Law of the American Bar Association concurs.<sup>29</sup> The DOD Inspector General suggested that rules on notifying and debriefing unsuccessful offerors should be addressed in the FAR rather than in legislation.<sup>30</sup> The Panel believes that the detailed requirements of a debriefing should be left to the regulations,<sup>31</sup> but that the statute should articulate the broad policy objective to be attained.

The proposed amendment would require the regulations to accomplish three things. First, the regulations would establish the criteria for determining whether a debriefing is required. Not all procurement actions should entitle unsuccessful offerors to a debriefing, particularly those

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<sup>29</sup>Section of Public Contract Law, ABA, comments on S. 1958, Federal Property and Administrative Services Act of 1992, before the Committee on Governmental Affairs, United States Senate (June 11, 1992).

<sup>30</sup>Letter from DOD Inspector General to Stuart A. Hazlett, DSMC (July 14, 1992).

<sup>31</sup>The Panel believes the amount of detail which would have been statutorily required in a debriefing, had a recent bill passed, is excessive. See H.R. 3161, 102d Cong., 1st Sess. § 403 (1991).

below the simplified acquisition threshold<sup>32</sup> and those actions which do not involve significant judgments about factors other than price. Second, the regulations must provide that any required debriefing be conducted to the maximum extent practicable within 15 calendar days after award. The sooner a debriefing is conducted, the more likely it is to prevent an unnecessary protest. Finally, the regulations must provide that the debriefing address the strengths and weaknesses of the unsuccessful proposal. A debriefing which contains such information, in contrast to a debriefing which focuses exclusively on how a bidder might improve its next proposal, will more likely avoid unnecessary protests.

## II

**Amend section 2305(b) to require contracting activities to establish, and provide access to, a protest file.**

Closely related to the preceding recommendation, the purpose of this recommended statutory addition is to prevent unnecessary multiple protests on the same proposed contract award. In the pre-award situation, bidders not filing a protest may believe they are at a disadvantage if they do not receive the same information that the protester receives. Therefore, they may feel compelled to intervene in the original protest by filing their own protest, since the delay in waiting to obtain the information through a Freedom of Information Act request might prejudice their interests. Requiring such a file to be established once one protest is lodged would not unduly burden a contracting activity since the information which the file would contain would necessarily be collected to respond to the protest.

## III

**Amend section 2305(b) by granting to the head of an agency the authority to take certain remedial action if an award or proposed award does not comply with a statute or regulation.**

As stated in Chapter 1.5.0 of this Report, one impediment to the early resolution and settlement of protests is the perceived inability of a contracting agency to completely resolve and settle a protest by the payment of bid and proposal costs and legal fees. This recommended amendment will remove this impediment by clearly granting to the agency head the authority to pay such expenses for meritorious protests. Early settlement of protests at the agency level will avoid unnecessary administrative and legal expenses.

## IV

**Amend section 2305(a)(2) by replacing "small purchases" with "purchases below the simplified acquisition threshold."**

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<sup>32</sup>The Panel has recommended in Chapter 4.1 of this Report that the term, "small purchase threshold," be changed to "simplified acquisition threshold" and the corresponding dollar amount be raised to \$100,000.

This amendment is necessary to conform to the Panel's recommendation made elsewhere in this Report.<sup>33</sup>

V

**Amend section 2305(a) to incorporate the provision currently found at section 2301(a)(7).**

The provision currently located at section 2301(a)(7) is more of a procedural directive than a policy statement of general applicability. This provision, like the existing provisions of section 2305(a), is concerned with what should properly be included in a solicitation. Therefore, the Panel recommends moving this provision to section 2305(a).

**1.2.2.5. Relationship to Objectives**

The recommended amendments will streamline the acquisition process by preventing a number of unnecessary protests and by encouraging the settlement of protests at the agency level. Such amendments will enhance the expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations. The proposed changes identify the fundamental objectives to be achieved while at the same time specifically leave the detailed implementation to the regulations.

**1.2.2.6. Proposed Statute**

**10 U.S.C. § 2305. Contracts: planning, solicitation, evaluation, and award procedures**

(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall--

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which--

(i) consistent with the provisions of this chapter, permit full and open competition; and

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

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<sup>33</sup>*Id.*



(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of--

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

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

(iii) design requirements.

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for ~~small~~ purchases below the simplified acquisition threshold) shall at a minimum include--

(A) a statement of--

(i) all significant factors (and significant subfactors) which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost- or price-related factors, and noncost- or nonprice-related factors); and

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

(B)(i) in the case of sealed bids--

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

(II) the time and place for the opening of the sealed bids; or

(ii) in the case of competitive proposals--

(I) a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), unless discussions are determined to be necessary; and

(II) the time and place for submission of proposals.

(3) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, shall not include in such solicitation a clause providing for the evaluation of prices under the contract for options to purchase additional supplies or services under the contract

unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(3)(4) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, and prior experience of the offeror).

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

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

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids in accordance with paragraph (1) without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(4)(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract--

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(B) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals. The regulations implementing this chapter shall- -

(i) establish the criteria for determining whether an unsuccessful offeror is entitled to a debriefing;

(ii) provide that any required debriefing shall be conducted to the maximum extent practicable within 15 calendar days after the date of award; and

(iii) provide that any required debriefing contain information on the strengths and weaknesses of that offeror's proposal.

(C) Subparagraph (B) does not apply with respect to the award of a contract for the acquisition of perishable subsistence items.

(5) Where a protest is filed pursuant to the procedures in 31 U.S.C. § 3551 et seq. and where an actual or prospective offeror so requests, a file of the protest shall be established by the contracting activity and reasonable access shall be provided to actual or prospective offerors. This file should contain such information as would ordinarily be releasable under the Freedom of Information Act.

(6) If a protest is filed and if the head of the agency determines that a solicitation, proposed award, or award does not comply with a statute or regulation, the head of the agency may take any action which the agency is authorized to take under 31 U.S.C. § 3554 (b)(1)(A)-(F).

~~(5)~~(7) If the head of an agency considers that a bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General or appropriate action.

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

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

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

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

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

(d)(1)(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a development contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology

necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a production contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded. Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.

(4)(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if

the item was developed exclusively at private expense unless the head of the agency determines that--

(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

(B) In considering offers in response to a solicitation requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

## **1.2.3. 10 U.S.C. § 2306**

### **Kinds of contracts**

#### **1.2.3.1. Summary of the Law**

This statute prohibits the use of cost-plus-a-percentage-of-cost contracts but authorizes an agency to use any other kind of contract that will promote the best interests of the Government when using other than sealed bid procedures.<sup>1</sup> Cost reimbursement and incentive contracts must be approved by the head of the agency.<sup>2</sup> With limited exceptions, all contracts issued under other than sealed bid procedures must contain a contractor warranty against the payment of any fee contingent on the securing of contract award.<sup>3</sup>

This law also establishes fee limitations for cost-plus-a-fixed-fee contracts.<sup>4</sup> The fee for such a contract for experimental, developmental or research work may not exceed 15% of the estimated cost of the contract, exclusive of the fee. The fee, plus costs, on such a contract for architectural or engineering services for a public work or utility, together may not exceed 6% of the estimated cost (exclusive of fees) of the public work or utility contract. On any other cost-plus-a-fixed-fee contract, the fee may not exceed 10% of the estimated contract cost exclusive of fee.

Cost and cost-plus-a-fixed-fee contracts must require the contractor to notify the agency before the contractor enters into any cost-plus-a-fixed-fee subcontract, or fixed-price subcontract or purchase order which exceeds the small purchase threshold or 5% of the estimated cost of the prime contract.<sup>5</sup>

Two subsections of this statute address multiyear contracting. First, the head of an agency is authorized to enter into contracts not exceeding five years for the operation, maintenance and support of facilities, the maintenance or modification of highly complex military equipment, specialized training and base services. For each such contract, the agency head must determine, among other things, that the contract will encourage effective competition and promote economies of scale. A cancellation or termination fee must be paid if funds are not available to continue such a contract into a subsequent fiscal year.<sup>6</sup>

Second, this law contains extensive provisions relating to the use of multiyear contracts not exceeding five program years for the procurement of property, including weapon systems and items and services associated with weapon systems.<sup>7</sup> The head of an agency other than the Coast

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<sup>1</sup>10 U.S.C. § 2306(a).

<sup>2</sup>10 U.S.C. § 2306(c).

<sup>3</sup>10 U.S.C. § 2306(b).

<sup>4</sup>10 U.S.C. § 2306(d).

<sup>5</sup>10 U.S.C. § 2306(e).

<sup>6</sup>10 U.S.C. § 2306(g).

<sup>7</sup>10 U.S.C. § 2306(h).

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Guard or NASA may use such a contract if he finds that certain statutory criteria are met. Again, a cancellation or termination fee must be paid if funds are not available to continue such a contract into a subsequent fiscal year. The agency head must notify Congress before entering into such a contract if the termination or cancellation clause sets forth a ceiling in excess of \$100 million. The Secretary of Defense is required to prescribe regulations which will promote the efficient use of multiyear contracting, broaden the defense industrial base, and not curtail possible competition for items to be delivered under such a contract.

Finally, additional provisions apply to the use of such multiyear contracts if Congress has specifically authorized the use of multiyear contracting authority for a defense acquisition program. Agencies may not use the authority of section 2306(h) to enter such multiyear contracts when Congress has so acted unless program support costs are fully funded and production will be at not less than economic rates. Second, if Congress specifically authorizes the use of multiyear contracting for a defense procurement program but grants such authority contingent upon the achievement of cost savings, and the cost savings cannot be met, the President may request relief from the specified cost savings.<sup>8</sup>

### 1.2.3.2. Background of the Law

This statute originated in section 4 of the Armed Service Procurement Act of 1947.<sup>9</sup> It was first amended in 1962 by the Truth in Negotiations Act which established the requirement for certified cost or pricing data.<sup>10</sup> Those provisions of the statute pertaining to cost or pricing data were recodified at 10 U.S.C. § 2306a in 1986.<sup>11</sup>

Other than amendments pertaining to cost or pricing data, almost all revisions to the statute have involved multiyear contracting. In 1968, Congress added subsection (g) to the statute concerning certain contracts exceeding one year.<sup>12</sup> The subsection was added to authorize DOD to take advantage of economies of scale possible with longer term contracts, but it limited such authority to contracts outside the 48 contiguous states and the District of Columbia.<sup>13</sup> At that time, DOD did not convincingly demonstrate to Congress that greater benefits would accrue to the Government than could be obtained on a year-to-year competitive basis within the boundary of the 48 contiguous states.<sup>14</sup>

Congress reassessed its position regarding multiyear contracts in 1981. In that year, it removed the geographical limitation in subsection (g) and added paragraphs (h)(1)-(8).<sup>15</sup>

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<sup>8</sup>*Id.*

<sup>9</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, § 4 62 Stat. 20, 22, 23 (1948). The statute was initially codified at 41 U.S.C. § 153 and subsequently recodified at 10 U.S.C. § 2306 by Pub. L. No. 84-1028, ch. 1041, 70A Stat. 130 (1956).

<sup>10</sup>Act of Sept. 10, 1962, Pub. L. No. 87-653, 76 Stat. 528 (1962).

<sup>11</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3816, 3945 (1986) (*identical legislation omitted*).

<sup>12</sup>Act of July 5, 1968, Pub. L. No. 90-378, § 1, 82 Stat. 289.

<sup>13</sup>H.R. REP. NO. 1315, 90th Cong., 2d Sess. 1 (1968).

<sup>14</sup>*Id.* at 2.

<sup>15</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 909(b), 95 Stat. 1099, 1118-20 (1981).

Although recognizing that multiyear contracts pose certain disadvantages, Congress authorized DOD to enter such contracts on a selective basis in an attempt to control weapon system costs and to provide defense contractors an incentive to invest in new technology, facilities and equipment.<sup>16</sup>

In 1989, Congress added paragraphs (h)(9), (h)(10) and (h)(11) to codify conditions and limitations for multiyear contracting that had been imposed previously on an annual basis.<sup>17</sup> One such condition required a multiyear contract to achieve a 10% cost savings. In 1990, Congress eliminated the percentage savings requirement because it was too rigid.<sup>18</sup>

Congress has also included in recent defense appropriations acts two recurring sections which have impacted this statute, but which have not been codified. For the last four years, one section has raised the approval level for the use of certain contract types. Congress has precluded DOD from using a fixed price contract in excess of \$10 million for the development of a major system or subsystem unless approved by the Under Secretary of Defense for Acquisition.<sup>19</sup>

The other section, also included for at least the past four years, places additional restrictions on the use of multiyear contracts. Congress must be notified before: (1) the award of any multiyear contract that provides for economic order quantity purchases in excess of \$20 million in any year; (2) the award of a contract for advance procurement leading to a multiyear contract that provides for economic order quantity purchases in excess of \$20 million in any year; (3) the award of a multiyear contract that includes an unfunded contingent liability in excess of \$20 million; and (4) the termination of a multiyear contract. Additionally, a multiyear contract may not be entered into if it exceeds \$500 million for any system or component thereof, unless specifically provided for in a DOD appropriation act, or without conducting a present value analysis.<sup>20</sup>

### 1.2.3.3. Law in Practice

FAR Part 16 and DFARS Part 216 implement statutory requirements concerning types of contracts. FAR Subpart 3.4 and DFARS Subpart 203.4 prescribe regulations concerning contingent fees. FAR Subpart 15.9 and DFARS Subpart 215.9 prescribe fee limitations for

<sup>16</sup>H.R. REP. NO. 71, Pt. III, 97th Cong., 1st Sess. 19-22 (1981).

<sup>17</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 805(a), 103 Stat. 1352, 1488 (1989). H.R. REP. NO. 331, 101st Cong., 1st Sess. 450, 451 (1989).

<sup>18</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 808, 104 Stat. 1485, 1593 (1990). H.R. REP. NO. 923, 101st Cong., 2d Sess. 623 (1990).

<sup>19</sup>Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9037, 106 Stat. 1876 (1992); Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8037, 105 Stat. 1150, 1179-80 (1991); Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8038, 104 Stat. 1856, 1882-83 (1990); Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9048, 103 Stat. 1139 (1989) (*none codified*).

<sup>20</sup>Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 9013, 106 Stat. 1876 (1992); Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8013, 105 Stat. 1150 (1991); Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8014, 104 Stat. 1856 (1990); Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9021, 103 Stat. 1112 (1989) (*none codified*).



certain kinds of contracts specified in the statute. FAR 44.201-2 implements the statutory requirement that prime contractors under cost reimbursement contracts notify the procuring agency before entering into cost reimbursement and certain fixed price subcontracts. FAR Subpart 17.1 and DFARS Subpart 217.1 address multiyear contracting.

#### 1.2.3.4. Recommendations and Justification

### I

#### Delete section 2306(c).

Section 2306(c) requires approval by the head of an agency before use of a cost reimbursement or incentive contract is allowed. However, as discussed above, Congress has for the last four years raised the approval level to the Under Secretary of Defense for Acquisition for fixed price contracts in excess of \$10 million for the development of a major system or subsystem.

One Government comment recommended repealing section 2306(c)<sup>21</sup> but another thought the statute should remain unchanged.<sup>22</sup> An industry comment opined that the section could be repealed, but only if all of the authorization and appropriation limitations on fixed price development contracts were consolidated into one section.<sup>23</sup> The latter comment also stated the additional limitations in the appropriations acts should remain a part of defense acquisition law.

The Panel recommends that section 2306(c) be repealed and that the recent approval restrictions in the appropriations acts not remain a part of defense acquisition law. The agency head determination required by section 2306(c), which is delegable pursuant to section 2311, often becomes a superfluous justification of a contract type which has already been completely evaluated by the acquisition strategy panel, through approval of the acquisition plan by the Senior Procurement Executive, or by an Under Secretary of Defense (Acquisition) review. Moreover, the section 2306(c) determination and the approval restrictions in the appropriations acts will be unnecessary if the Panel's recommended statement of defense procurement policy is properly implemented by regulations. The recommended policy, which is expressed at section 2301(a)(4), states that:

Property and services for the Department may be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States and will provide for appropriate allocation of risk between the Government and the contractor with due regard to the nature of the property or services to be acquired.<sup>24</sup>

<sup>21</sup>Letter from SAF/AQC to Maj Gen J. D. Slinkard and T. J. Madden (July 15, 1992).

<sup>22</sup>Letter from DOD Inspector General to Stuart A. Hazlett (July 1, 1992).

<sup>23</sup>Letter from D. Fuqua, J. R. Hogg, D. C. Heinemeier, and J. J. Stocker to Maj Gen J. D. Slinkard and T. J. Madden (July 10, 1992) (commenting on CICA issues).

<sup>24</sup>Emphasis added.

This policy seeks to ensure agencies select the appropriate type of contract by requiring them to focus on the nature of property or services to be acquired and the proper allocation of risk between the parties. The methodology for implementing this policy, including the prescription of approval requirements by the milestone decision authority, or other officials, should be left entirely to the regulations. The Panel considers selection of contract type to be an integral part of the acquisition strategy and planning process.

## II

**Amend section 2306(d) to delete 6% fee limit.**

This amendment should be made to parallel the Panel's recommended repeal of 10 U.S.C. §§ 4540, 7212, and 9540, which would delete the fee limits for architectural and engineering services.<sup>25</sup>

## III

**Amend section 2306(e)(2) by replacing "small purchase threshold" with "simplified acquisition threshold."**

This amendment is necessary to conform to the Panel's recommended change to 41 U.S.C. § 403(11), which would establish a simplified acquisition threshold of \$100,000.

## IV

**Delete section 2306(f).**

The Panel believes it is no longer necessary to signal where the Truth in Negotiations Act is codified.

## V

**Retain section 2306(g) and (h), which concern multiyear contracting.**

The Panel twice solicited comments on this statute, but received no substantive comments regarding the multiyear contracting provisions. The Panel recognizes that in the present environment, which is marked by uncertainties regarding the threats to national defense, future defense budgets, and the status of weapons systems acquisition, the utility of multiyear contracting is reduced. Nevertheless, the Panel believes the provisions now codified represent a reasonable framework for multiyear contracting. Consequently, these two subsections should be retained.

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<sup>25</sup>See Chapter 3.3.11 of this Report for analysis of 10 U.S.C. §§ 4540, 9540, and 7212 and the rationale for deleting the fee provisions.

### 1.2.3.5. Relationship to Objectives

The Panel believes adoption of the proposed changes will serve the best interests of the DOD, further streamline the acquisition process, and encourage the exercise of sound judgment by acquisition personnel. Also, the law, as amended, would identify broad policy objectives and the fundamental requirements to be achieved, while leaving the detailed implementing methodology to the acquisition regulations.

### 1.2.3.6. Proposed Statute

#### 10 U.S.C. § 2306. Kinds of contracts

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States.

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

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

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

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

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

(2) a fixed-price subcontract or purchase order involving more than the greater of (A) the ~~small purchase simplified acquisition~~ threshold, or (B) 5 percent of the estimated cost of the prime contract.

~~(f) So-called "truth-in-negotiations" provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title.~~

~~(g)~~(e)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated--

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

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

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

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

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

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

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

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

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

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

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

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

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

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(h)(1) To the extent that funds are otherwise available for obligation, the head of an agency may make multiyear contracts for the purchase of property, including weapon systems and items and services associated with weapon systems (or the logistics support thereof), whenever he finds--

(A) that the use of such a contract will promote the national security of the United States and will result in substantial savings of the total anticipated costs of carrying out the program through annual contracts;

(B) that the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(C) that there is a reasonable expectation that throughout the contemplated contract period the Department of Defense will request funding for the contract at the level required to avoid contract cancellation;

(D) that there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive; and

(E) that the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

**(2)(A)** The Secretary of Defense shall prescribe defense acquisition regulations to promote the use of multiyear contracting as authorized by paragraph (1) in a manner that will allow the most efficient use of multiyear contracting.

**(B)** Such regulations may provide for cancellation provisions in such multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. Such cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with the production of the items to be delivered under the contract.

**(C)** In order to broaden the defense industrial base, such regulations shall provide that, to the extent practicable--

**(i)** multiyear contracting under paragraph (1) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

**(ii)** upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

**(D)** Such regulations shall also provide that, to the extent practicable, the administration of this subsection, and of the regulations prescribed under this subsection, shall not be carried out in a manner to preclude or curtail the existing ability of agencies in the Department of Defense to--

**(i)** provide for competition in the production of items to be delivered under such a contract; or

**(ii)** provide for termination of a prime contract the performance of which is deficient with respect to cost, quality, or schedule.

**(3)** Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling in excess of \$100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

**(4)** Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic-lot purchases and more efficient production rates.

(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from--

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

(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(6) This subsection does not apply to contracts for the purchase of property to which section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) applies.

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

(8) For the purposes of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

(9) A multiyear contract may not be entered into for any fiscal year under this subsection for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority unless each of the following conditions is satisfied:

(A) The Secretary of Defense certifies to Congress that the current five-year defense program fully funds the support costs associated with the multiyear program.

(B) The proposed multiyear contract provides for production at not less than minimum economic rates given the existing tooling and facilities.

(10) The Secretary of Defense may instruct the Secretary of the military department concerned to incorporate into a proposed multiyear contract negotiated priced options for varying the quantities of end items to be procured over the period of the contract.

(11) If for any fiscal year a multiyear contract to be entered into under this subsection is authorized by law for a particular procurement program and that authorization is subject to certain conditions established by law (including a condition as to cost savings to be achieved under the multiyear contract in comparison to specified other contracts) and if it appears (after negotiations with contractors) that such savings cannot be achieved, but that substantial savings could nevertheless be achieved through the use of a multiyear contract rather than specified other

contracts, the President may submit to Congress a request for relief from the specified cost savings that must be achieved through multiyear contracting for that program. Any such request by the President shall include details about the request for a multiyear contract, including details about the negotiated contract terms and conditions.



## **1.2.4. 10 U.S.C. § 2317**

### **Encouragement of competition and cost savings**

#### **1.2.4.1. Summary of the Law**

This section requires the Secretary of Defense to establish procedures to ensure that personnel appraisal systems of DOD give appropriate recognition to efforts to increase competition and achieve cost savings in areas related to contracts.

#### **1.2.4.2. Background of the Law**

This statute was enacted in 1984 by Pub. L. No. 98-525,<sup>1</sup> and has not been amended.

#### **1.2.4.3. Law in Practice**

The Panel was unable to identify specific policy or regulatory implementation of section 2317 at the OSD level. In response to the Panel's request for information on whether appropriate procedures have been implemented, the Air Force stated that it complied with this statute after passage in 1984 and reiterated the requirement as a mandatory appraisal factor in model performance standards issued in 1987.<sup>2</sup>

#### **1.2.4.4. Recommendation and Justification**

##### **Repeal**

The Panel requested comments on section 2317, as well as other statutes related to the Competition in Contracting Act (CICA). In addition to the Air Force comment cited above, the Air Force stated that the Competition Advocate General of the Air Force does not believe this factor is necessary to ensure a successful competition program, and recommended repeal.<sup>3</sup> Another commenter stated, "There is a question as to the need for this provision in light of the passage of the Defense Workforce Improvement Act subsequent to CICA, and the creation of the acquisition corps."<sup>4</sup>

The Panel recognizes that efforts to increase competition and achieve cost savings are important in the work of many DOD personnel. There are many laws, regulations, processes, and

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<sup>1</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1215, 98 Stat. 2492, 2592 (1984).

<sup>2</sup>Memorandum from SAF/AQC signed by Ira L. Kemp, Associate Deputy, to Working Group 2, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (July 15, 1992).

<sup>3</sup>*Id.*

<sup>4</sup>Letter from Council of Defense and Space Industry Associations (CODSIA) signed by Don Fuqua, President, AIA, Dan C. Heinemeier, Vice President, EIA, James R. Hogg, President, NSIA, and John J. Stocker, President, Shipbuilders Council of America, to Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Law (July 10, 1992).

reviews which support competition and cost savings. This section does not add meaningful or unique requirements to the inherent responsibilities of agency heads to provide appropriate systems of performance appraisal for agency personnel. Therefore, the Panel considers section 2317 to be an unnecessary Congressional requirement placed on a traditional management prerogative.

#### **1.2.4.5. Relationship to Objectives**

Repeal would support the Panel's goal of streamlining acquisition laws and its objective of encouraging the exercise of sound judgment on the part of acquisition personnel.

## **1.2.5. 10 U.S.C. § 2318**

### **Advocates for competition**

#### **1.2.5.1. Summary of the Law**

This section requires the Secretary of Defense to designate a competition advocate for the Defense Logistics Agency, with the same responsibilities and functions as those designated pursuant to 41 U.S.C. § 418. In addition, it specifies that competition advocates of the agencies named in section 2303(a)<sup>1</sup> shall be a general or flag officer, or a GS-16 or above. Advocates are designated to serve for a minimum of two years.

Advocates for competition of DOD agencies must transmit to the Secretary of Defense, for inclusion in the Secretary's report to Congress required by section 23 of the Office of Federal Procurement Policy Act (41 U.S.C. § 419), an annual report describing their activities. This report is to be included in the form in which it was submitted to the Secretary.

#### **1.2.5.2. Background of the Law**

This statute was added by Pub. L. No. 98-525 in 1984<sup>2</sup> and was amended in 1987<sup>3</sup> and 1991.<sup>4</sup> The legislative history indicates that the general/flag officer level was a compromise, and originally the Senate wanted a major general or rear admiral. Section 2318(c) specifies reporting requirements to Congress based upon 41 U.S.C. § 419, which expired in 1990.<sup>5</sup>

#### **1.2.5.3. Law in Practice**

The requirement to designate agency and procuring activity competition advocates, as well as their duties and responsibilities under 41 U.S.C. § 418, is implemented in FAR Subpart 6.5. This subpart is not supplemented by the DFARS; however, the duties and responsibilities are the same under section 2318. By memorandum, the Deputy Secretary of Defense recently directed that competition advocates within DOD, designated under section 2318 or 41 U.S.C. § 418, shall also perform similar duties and responsibilities for commercial and non-developmental item advocacy.<sup>6</sup>

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<sup>1</sup>See Chapter 1.1.3 of this Report for analysis of 10 U.S.C. § 2303.

<sup>2</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1216(a), 98 Stat. 2492, 2593 (1984).

<sup>3</sup>Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(d)(4), 101 Stat. 273, 281.

<sup>4</sup>Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 701(f)(1), 105 Stat. 75, 115 (1991).

<sup>5</sup>See Chapter 1.2.11 of this Report for analysis of 41 U.S.C. § 419.

<sup>6</sup>Memorandum from Honorable Donald J. Atwood Jr., Deputy Secretary of Defense to DOD agencies (April 24, 1992).

#### **1.2.5.4. Recommendations and Justification**

##### **I**

#### **Retain section 2318(a) and (b).**

The Panel solicited comments on combining section 2318 with 41 U.S.C. § 418. Comments were divided, but the Defense Logistics Agency expressed concern that its ability to designate a competition advocate at other than a flag level or equivalent would need to be preserved.<sup>7</sup> The Panel believes that the designation of military or civilian grade requirements for agency competition advocates within DOD should remain in a DOD specific statute under the purview of the committees on Armed Services.

##### **II**

#### **Amend section 2318 by repealing subsection 2318(c).**

The Panel believes the requirement for each competition advocate of a DOD agency to report to Congress, as part of an annual report by the Secretary of Defense, has clearly served its purpose, and the Panel has recommended deletion of 41 U.S.C. § 419, since its requirements expired in 1990.<sup>8</sup> The requirements for reporting to the agency senior procurement executive, included in 41 U.S.C. § 418(b)(3) and (4) and implemented in FAR Subpart 6.5, provide both the duty to report to an appropriate executive level and ample opportunity to bring barriers or problems to the attention of senior management.

#### **1.2.5.5. Relationship to Objectives**

Recommendation II supports the Panel's goal of simplifying and streamlining the body of acquisition law.

#### **1.2.5.6. Proposed Statute**

##### **10 U.S.C. § 2318. Advocates for competition**

(a)(1) In addition to the advocates for competition established or designated pursuant to section 20(a) of the Office of Federal Procurement Policy Act (41 U.S.C. § 418(a)), the Secretary of Defense shall designate an officer or employee of the Defense Logistics Agency to serve as the advocate for competition of the agency.

(2) The advocate for competition of the Defense Logistics Agency shall carry out the responsibilities and functions provided for in sections 20(b) and 20(c) of the Office of Federal Procurement Policy Act (41 U.S.C. § 418(b), (c)).

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<sup>7</sup>Memorandum from DLA signed by Jill E. Pettibone, Acting Chief, Plans, Policies, and Systems Division, Contract Management to Stuart A. Hazlett, Defense Systems Management College (July 2, 1992).

<sup>8</sup>See Chapter 1.2.11 of this Report for analysis of 41 U.S.C. § 419.

(b) Each advocate for competition of an agency named in section 2303(a) of this title shall be a general or flag officer if a member of the armed forces or a grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule), if a civilian employee and shall be designated to serve for a minimum of two years.

~~(e) Each advocate for competition of an agency of the Department of Defense shall transmit to the Secretary of Defense a report describing his activities during the preceding year. The report of each advocate for competition shall be included in the annual report of the Secretary of Defense required by section 23 of the Office of Federal Procurement Policy Act (41 U.S.C. 419), in the form in which it was submitted to the Secretary.~~

## 1.2.6. 10 U.S.C. § 2319

### Encouragement of new competitors

#### 1.2.6.1. Summary of the Law

This statute seeks to encourage competition by placing certain restrictions on an agency's ability to impose qualification requirements.<sup>1</sup> A "qualification requirement" is a "requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract."<sup>2</sup> The statute requires agencies to justify in writing any qualification requirements and to estimate the costs of satisfying those requirements. Agencies must provide written notice of precontract qualification requirements to potential offerors upon request and provide them, upon request and on a reimbursable basis, an opportunity to demonstrate their abilities to meet the standards specified for qualification. Agencies must promptly notify potential offerors seeking qualification whether qualification is attained and, if not, explain why it was not attained.<sup>3</sup> These requirements also apply before any qualified products list, bidders list, or manufacturers list may be enforced.<sup>4</sup>

The requirements for notice to, and demonstration by, potential offerors may be waived for two years provided it is unreasonable for the agency to specify qualification standards a potential offeror must demonstrate, and provided the agency competition advocate has reviewed a determination to that effect. Such waiver authority does not apply to qualified product lists.<sup>5</sup>

An offeror normally may not be denied the opportunity to compete if it can demonstrate it meets the standards for qualification before the date of contract award.<sup>6</sup> However, an agency is not required to delay a procurement to allow a potential offeror to demonstrate its ability to meet qualification standards.<sup>7</sup>

An agency is required to solicit additional sources to qualify for anticipated future requirements if there are less than two qualified sources.<sup>8</sup> An agency must also re-evaluate and revalidate the need for a qualification requirement within seven years after its establishment.<sup>9</sup>

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<sup>1</sup>41 U.S.C. § 253c imposes the same requirements as 10 U.S.C. § 2319 on executive agencies other than those covered by this statute.

<sup>2</sup>10 U.S.C. § 2319(a).

<sup>3</sup>10 U.S.C. § 2319(b).

<sup>4</sup>10 U.S.C. § 2319(c)(6).

<sup>5</sup>10 U.S.C. § 2319(c)(2).

<sup>6</sup>10 U.S.C. § 2319(c)(3).

<sup>7</sup>10 U.S.C. § 2319(c)(5).

<sup>8</sup>10 U.S.C. § 2319(d).

<sup>9</sup>10 U.S.C. § 2319(e).

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### **1.2.6.2. Background of the Law**

Congress added this statute in 1984 because it believed qualification requirements, particularly those which required a demonstration prior to award, were sometimes being used inappropriately to restrict competition. In drafting this law, Congress attempted to balance its desire for greater competition for Government contracts with legitimate concerns for product quality, reliability, and maintainability.<sup>10</sup> In 1987, minor technical changes were made to this law.<sup>11</sup>

### **1.2.6.3. Law in Practice**

FAR Subpart 9.2 and DFARS § 209.202 implement this statute.

### **1.2.6.4. Recommendation and Justification**

#### **Retain**

The Panel recommends retaining this statute as presently written. The Panel believes that it still fulfills a valid need. The Panel sought comments from industry and Government agencies and identified no issues warranting amendment.<sup>12</sup>

### **1.2.6.5. Relationship to Objectives**

This statute encourages full and open access to the procurement system without unduly burdening the process. It also outlines broad policy objectives while leaving detailed implementing methodology to the acquisition regulations.

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<sup>10</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1216(a), 98 Stat. 2492, 2593 (1984). H.R. CONF. REP. NO. 1080, 98th Cong., 2d Sess. 319 (1984).

<sup>11</sup>Defense Technical Corrections Act of 1987, Pub. L. No. 100-26, § 7(d)(5), (l)(4), (k)(3), 101 Stat. 273, 281, 282, 284 (1987).

<sup>12</sup>Letter from SAF/AQC to Working Group 2 (July 15, 1992) (recommended allowing competition advocates to exempt particular procurements from this statute to alleviate administrative burdens of the qualification process).

## 1.2.7. 10 U.S.C. § 2325

### Preference for nondevelopmental items

#### 1.2.7.1. Summary of the Law

This law establishes a preference for nondevelopmental items (NDIs) in DOD. The law requires the Secretary of Defense to ensure that DOD defines and fulfills its requirements for the procurement of supplies through NDIs to the maximum extent practicable. This means a new item should only be developed if no acceptable item is already available in the marketplace. To ensure this preference, requirements must be stated in terms of performance, functional, or essential physical characteristics rather than in detailed design terms. In addition, market research is required prior to developing new specifications to determine whether agency needs can be met with existing or modified NDIs.

The statute defines a nondevelopmental item as any item of supply: (1) available in the commercial marketplace; (2) previously developed that is in use by a department or agency of the United States, a state or local Government or a foreign Government with which the United States has a mutual defense cooperation agreement; (3) described in (1) or (2) above which requires only minor modification to meet the procuring agency's requirements; or (4) currently being produced that does not meet the above requirements solely because it is not yet in use, or is not yet available in the commercial marketplace.

#### 1.2.7.2. Background of the Law

Congress enacted this law in 1986<sup>1</sup> in response to the Packard Commission Report, *A Formula for Action*, which recommended that DOD make greater use of components, systems, and services available in the marketplace.<sup>2</sup> Congress intended this provision to reverse the long standing bias to use detailed military specifications by establishing a preference for the procurement of nondevelopmental items.<sup>3</sup> As recently stated by the Comptroller General,

The fundamental purpose of the statutory NDI preference is to preclude the unnecessary development of unique military specifications and the anticipated higher cost of acquiring from private industry items manufactured to those specifications rather than items the private sector otherwise could provide. In other words, if DOD can satisfy its needs with commercially available

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3917 (1986) (*identical legislation omitted*).

<sup>2</sup>S. REP. NO. 331, 99th Cong. 2d Sess. 265 (1986). There had been previous reports which also advocated more Government reliance on commercial products, such as the 1972 Report of the Commission on Government Procurement and the 1982 report issued by the Office of Management and Budget, *Proposal for a Uniform Federal Procurement System*.

<sup>3</sup>S. REP. NO. 331, 99th Cong. 2d Sess. 265 (1986).



items or with such items with only minor modification to them, DOD is to acquire such products instead of products manufactured to its unique requirements.<sup>4</sup>

Congress intended the definition of NDIs to be broader than the term "off-the-shelf" in that NDIs include "commercial products and products in use by other federal agencies that may require minor modification to meet the identified need."<sup>5</sup> By including in the definition items currently being produced but not yet in use or not yet available in the commercial marketplace, Congress intended to ensure that "newly developed products would be able to compete on an equal basis with products already in the marketplace."<sup>6</sup>

The law also required the Secretary of Defense to submit a report to Congress within one year of the statute's enactment (1) identifying actions taken, including training and regulatory changes, to implement the statute, (2) identifying impediments to NDI acquisition, and (3) recommending any further legislation to promote acquisition of NDIs.<sup>7</sup> Furthermore, the law directed the GAO to conduct an independent evaluation. DOD submitted its report in 1987<sup>8</sup> and the GAO submitted its report in 1989.<sup>9</sup> The GAO report discusses nine impediments to the acquisition of NDIs and commercial items.

In 1989, Congress passed another provision which impacted the acquisition of NDIs and commercial items, but did not amend section 2325.<sup>10</sup> Concerned by testimony presented by the GAO and DOD Inspector General that DOD had been "unacceptably slow" in eliminating barriers to the increased use of NDIs,<sup>11</sup> Congress directed the Secretary of Defense to take several actions. The Secretary was directed to issue regulations which would address impediments to the acquisition of commercial items. These would include: (1) developing a simplified uniform contract for the acquisition of commercial items which would eliminate or modify burdensome and unnecessary clauses; (2) limiting the clauses required for inclusion in subcontracts under such contracts, (3) developing a streamlined inspection clause that would take advantage of alternative approaches to quality assurance, such as greater reliance on commercial warranties and awarding to contractors with proven records of quality performance; and (4) revising the regulations which require certified cost or pricing data to ensure such data is required for commercial items only when necessary.

The Secretary was also directed to (1) enhance the training for acquisition personnel in the acquisition of NDIs and commercial items, (2) study the impediments to the acquisition of NDIs and develop a plan to address such impediments, and (3) establish a 3-year demonstration

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<sup>4</sup>Motorola, Inc., Comp. Gen. B-247913.2, Oct. 13, 1992.

<sup>5</sup>S. REP. NO. 331, 99th Cong. 2d Sess. 265 (1986).

<sup>6</sup>H.R. CONF. REP. NO. 1001, 99th Cong. 2d Sess. 496 (1986).

<sup>7</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3917 (1986) (*not codified*).

<sup>8</sup>NDI Acquisition, Progress, and Impediments (Dec. 1987).

<sup>9</sup>U.S. GAO, *Nondevelopmental Items*, GAO/NSIAD-89-51 (1989).

<sup>10</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824, 103 Stat. 1352, 1504 (1989) (*not codified*).

<sup>11</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 194 (1989); H.R. CONF. REP. NO. 331, 101st Cong., 1st Sess. 612 (1989).

program for the procurement of items of clothing using solicitation techniques similar to those used in the commercial sector.

The following year, the Senate considered a Defense Department proposal to waive virtually all statutes governing the acquisition process for commercial items. Although the Senate was unwilling to grant "unbridled discretion to waive all current laws" before the 1989 amendments had been fully implemented, it did approve a bill which would codify certain portions of the 1989 amendments, require DOD to prescribe streamlined procedures for the acquisition of commercial products, and would establish test programs for the use of commercial bidders lists and the award of contracts for commercial products without discussions.<sup>12</sup>

The House agreed with the Senate that the 1989 reforms should be implemented before embarking on major new legislative initiatives and, in keeping with that philosophy, would not agree to the proposed Senate bill.<sup>13</sup> The resulting compromise amended the statute in 1990 by simply adding paragraph (4) to section 2325(a).<sup>14</sup> This provision requires market research prior to the development of new specifications in order to determine whether NDIs are available or could be modified.

### 1.2.7.3. Law in Practice

DFARS 210.001 reiterates the statutory definition of NDIs and, through a brief policy statement, DFARS 210.002-70 paraphrases the statute's objective of fulfilling requirements for supply items through the procurement of NDIs to the maximum extent practicable. DFARS 207.105(b)(6) requires that written acquisition plans for systems entering development include a description of the market research efforts planned or undertaken to identify NDIs. DFARS Subpart 211.70, titled "Contracting for Commercial Items," implements the requirements levied by Congress in 1989 upon the Secretary of Defense.

The Comptroller General has issued several decisions which interpret this statute. Among the decisions, one states that, for purposes of the definition, an item is "available" so long as it is available by the date of award rather than at some earlier date.<sup>15</sup> Another states that the statutory preference is only a preference and does not require any particular procurement to be for NDIs,<sup>16</sup> and a third condones a procurement limited to NDIs only.<sup>17</sup>

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<sup>12</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 188-89 (1990), to accompany S. 2884.

<sup>13</sup>H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 624 (1990)

<sup>14</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1595 (1990).

<sup>15</sup>*Motorola, Inc.*, Comp. Gen. B-247913.2, Oct. 13, 1992.

<sup>16</sup>*See Harris Corp.*, Comp. Gen. B-235126, 89-2 CPD ¶ 113.

<sup>17</sup>*See Astron*, Comp. Gen. B-236922.2, 90-1 CPD ¶ 441.

#### **1.2.7.4. Recommendations and Justification**

##### **I**

**Amend section 2325 to ensure product descriptions promote the use of both commercial and nondevelopmental items.**

The Panel's recommended change to section 2301 states that it is Congressional policy that DOD shall, to the maximum extent practicable, (1) acquire commercial items, and require prime contractors and subcontractors to maximize the use of commercial items as components when the end item is not a commercial item, and (2) acquire, and require prime contractors and subcontractors to incorporate, nondevelopmental items and components when commercial items are not available, practicable or cost effective. These clearly stated preferences for commercial and nondevelopmental items in section 2301 mean that the word "preference" may be deleted from this section's title and from section 2325(a) as unnecessary redundancies, and that this statute should be focused on product descriptions.

The Panel also recommends amending subsection (a) by clarifying that requirements should be defined in terms that permit fulfillment by the purchase of commercial items, as well as nondevelopmental items. The addition of "commercial items" to this subsection, along with the deletion of the word "preference," necessitates a change to the title of this section to reflect that the amended section addresses product descriptions.

##### **II**

**Delete section 2325(b) and (c).**

Subsection (b) should be deleted because the Secretary of Defense should have the discretion as to how best to carry out this section. Subsection (c) should be deleted because the Secretary of Defense already has sufficient authority to prescribe necessary regulations.

##### **III**

**Delete section 2325(d) and move the definition to section 2302.**

The term "nondevelopmental item" is used not only in section 2325 but in other sections of this title as well. Therefore, the definition of the term should be moved to section 2302, which is the section for definitions of general applicability.

#### **1.2.7.5. Relationship to Objectives**

The amendments to the title and subsection (a), as well as the relocation of subsection (d) to section 2302, help to make the law more simple and understandable as well as to encourage Government access to commercial items. The deletion of subsections (b) and (c) ensure that section 2325 contains only the broad policy objectives and fundamental requirements to be

achieved and leaves the implementing methodology to the regulations prescribed by the Secretary of Defense.

#### 1.2.7.6. Proposed Statute

10 U.S.C. § 2325. ~~Preference for~~ Commercial and nondevelopmental items; product descriptions

~~(a) Preference.~~ The Secretary of Defense shall ensure that, to the maximum extent practicable --

(1) requirements of the Department of Defense with respect to a procurement of supplies are stated in terms of --

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that commercial or nondevelopmental items may be procured to fulfill such requirements;

(3) such requirements are fulfilled through the procurement of commercial or nondevelopmental items; and

(4) prior to developing new specifications, the Department conducts market research to determine whether commercial or nondevelopmental items are available or could be modified to meet agency needs.

~~(b) Implementation.~~ ~~The Secretary of Defense shall carry out this section through the Under Secretary of Defense for Acquisition, who shall have responsibility for its effective implementation.~~

~~(c) Regulations.~~ ~~The Secretary of Defense shall prescribe regulations to carry out this section.~~

~~(d) Definition.~~ ~~In this section, the term "nondevelopmental item" means--~~

~~(1) any item of supply that is available in the commercial marketplace;~~

~~(2) any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;~~

~~(3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency; or~~

~~(4) any item of supply that is currently being produced that does not meet the requirements of paragraph (1), (2), or (3) solely because the item~~  
~~(A) is not yet in use; or~~  
~~(B) is not yet available in the commercial marketplace.~~

## **1.2.8. 40 U.S.C. §§ 541 - 544**

### **Brooks Architect-Engineers Act**

#### **1.2.8.1. Summary of the Law**

The Brooks Architect-Engineers Act, more commonly called the Brooks Act, sets the statutory framework for the procurement of architectural and engineering services by the Government.<sup>1</sup> The Act requires the agency head to conduct discussions with architectural and engineering firms regarding a project and then select, in order of preference, no less than three of the firms deemed to be the "most highly qualified" to provide the required services. The Act then requires the agency head to negotiate a contract for such services with the firm deemed most qualified at a compensation rate that is "fair and reasonable" to the Government. If accord cannot be reached with the most qualified firm, negotiations commence with the second most qualified firm. If accord again cannot be reached, additional firms are selected in order of their qualifications for negotiations and negotiations continue independently and in series until a contract is consummated.

#### **1.2.8.2. Background of the Law**

The Brooks Act amended the Federal Property and Administrative Services Act of 1949 (FPASA). The Brooks Act, passed in 1972, provides for the selection of Federal architectural and engineering services under a specified, qualifications-based source selection procedure. The purpose of the Act was to cast in statutory form the system Government agencies had used for more than 30 years to procure architectural and engineering services. It also responded to a request from the Comptroller General that Congress clarify by legislation the procedure for securing such services.<sup>2</sup>

In 1988, Congress again amended the FPASA by changing the definition of architectural and engineering services.<sup>3</sup> For purposes of the Brooks Act, the term includes research, planning, development, design, construction, alteration, or repair of real property, and other services justifiably performed, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

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<sup>1</sup> Act of Oct. 27, 1972, Pub. L. No. 92-582, 86 Stat. 1278.

<sup>2</sup> S. REP. No. 1219, 92d Cong., 2d Sess. 6 (1972).

<sup>3</sup> Public Buildings Amendments of 1988, Pub. L. No. 100-679, § 8, 102 Stat. 4049, 4068; Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 742, 102 Stat. 3853, 3897.

### 1.2.8.3. Law in Practice

The Brooks Act procedures apply to civilian and military agencies of the Government. FAR Subpart 36.6 and DFARS Subpart 236.6 prescribe policies and procedures applicable to the acquisition of architect-engineer services.

### 1.2.8.4. Recommendation and Justification

#### Amend section 541(3)(C) by striking the word "may."

The Panel received comments from three sources. One set of comments suggested combining sections 541, 543, and 544 of Title 40 into one section since they all deal with architectural and engineering contracts, and further pointed out that a DOD audit found that discussions with three firms were not always performed and doubted whether current annual statements of qualifications and performance data were evaluated.<sup>4</sup> Both of the other comments indicated there was some confusion over the existing definition of architectural and engineering services, particularly whether environmental restoration services were included in the definition.<sup>5</sup>

In addition to these comments, the Defense Acquisition Regulatory (DAR) Council currently has an open case.<sup>6</sup> All but one issue appear to be of strictly regulatory concern. However, one issue involves the interpretation of the statutory definition of architectural and engineering services. In implementing the 1988 change to the statutory definition of architectural and engineering services, FAR 36.601-4(a)(3) was promulgated to provide guidance on the application of the statutory definition. The FAR provision states that contracting officers should consider services subject to Brooks Act procedures when the services are "of an architectural or engineering nature or services incidental thereto . . . that logically or justifiably require performance by registered architects or engineers or their employees." (Emphasis added.) In contrast to this guidance, the pertinent language in the statutory definition states that services are subject to Brooks Act procedures when the services are "of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform . . . ." (Emphasis added.)

The issue at the DAR Council seems to be over the meaning of the word "may" in the statutory definition. Apparently, some in DOD believe that the word "may" injects ambiguity into the definition such that it might be construed more broadly than Congress intended. DOD is concerned that some might construe the words "may logically or justifiably perform" as sweeping in almost any services that architectural and engineering firms become interested in performing, even though other entities which are not registered architectural or engineering firms could perform the services. Such a broad interpretation would reduce competition and cause more services to fall under Brooks Act procedures. DOD believes the proper reading is that the definition lists a number of services usually performed by registered architects and engineers and

<sup>4</sup>Letter from the DOD Inspector General to Stuart A. Hazlett (Oct. 6, 1992).

<sup>5</sup>Letter from the U.S. Army Corps of Engineers General Counsel to Stuart A. Hazlett (Oct. 8, 1992); Letter from HQ USAF/AQC to Stuart A. Hazlett (Oct. 8, 1992).

<sup>6</sup>DAR Case No. 91-73, A-E Services, Technical Clarifications.

that therefore the definition should have more clearly said something like, ". . . other professional services of an architectural or engineering nature, or incidental services, which . . . [A/Es] would normally or typically perform, including . . ."

An industry group submitted a letter to the Office of Federal Procurement Policy stating that the FAR language departs from the Congressional intent: whereas the statutory definition is broad, the regulatory guidance is narrow. OFPP agrees with the industry group and recommends that the FAR guidance be changed to mirror the statutory definition. OFPP is not convinced that the existing statutory definition is ambiguous; therefore, it does not agree with the position of the Director of Defense Procurement that the existing definition might lead to the use of Brooks Act procedures for "any and all acquisitions which could logically or justifiably be performed by members of the architectural and engineering profession." Furthermore, OFPP believes the guidance in FAR 36.601-4(a)(3), which restricts Brooks Act applicability to those services which "require" performance by registered architects or engineers, contravenes the intent of the 1988 amendments.<sup>7</sup>

As the DAR Case points out, the legislative history and several Comptroller General decisions are inconclusive on this issue. However, the legislative history and Comptroller General decisions do establish certain facts. The statutory language "may logically or justifiably perform," was included in the 1972 amendments and was not changed by the 1988 amendments. The 1988 amendments were merely to clarify the 1972 definition and were not intended to narrow or expand its scope.<sup>8</sup> The Senate and House reports accompanying the 1972 amendments state that "[t]he purpose of this definition is to encompass all of the services which architects and engineers might logically or justifiably perform."<sup>9</sup> The Comptroller General decisions reveal no evidence of anyone asserting the very broad interpretation of the definition feared by DOD.

Based on the preceding evidence, it appears the guidance in FAR 36.601-4(a)(3), which restricts application of Brooks Act procedures to services which logically or justifiably "require" performance by registered architects or engineers or their employees, is more restrictive than contemplated by the statute. However, because this regulatory "fix" is too restrictive does not mean some sort of "fix" is not needed. Although the broad definitional interpretation feared by DOD has not yet been the subject of a Comptroller General decision, the DAR Case record contains comments from industry groups which urge an expansive interpretation of the definition.<sup>10</sup> The recommended amendment to the existing definition could prevent an unintended expansion of the scope of the Brooks Act.

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<sup>7</sup>*Id.*

<sup>8</sup>H.R. REP. NO. 911, 100th Cong., 2d Sess. 24 (1988) ("changing technology and applications, as well as several decisions of the Comptroller General which might have been interpreted as narrowing the applicability of this law, have made clear the need to clarify" the definition); S. REP. NO. 394, 100th Cong., 2d Sess. 89 (1988) ("This section clarifies the definition. . . [and] seeks to recognize the realities of current professional practices"); 134 Cong. Rec. H10613 (daily ed. Oct. 20, 1988) (remarks of Rep. Brooks) ("The definition . . . is not an expansion of previous law, but a clarification of the definition").

<sup>9</sup>S. REP. NO. 1219, 92d Cong., 2d Sess. 7 (1972); H.R. REP. NO. 1188, 92d Cong., 2d Sess. 9 (1972).

<sup>10</sup>See e.g., DAR Case No. 91-73, comments 89-25-185 and 89-25-187.



### **1.2.8.5. Relationship to Objectives**

This legislation identifies the broad policy objectives and the fundamental requirements to be achieved, but leaves the detailed implementing methodology to the acquisition regulations. The recommended change will clarify the intended scope of the Brooks Act, thereby precluding restricted competition for services which can be obtained from non-registered architectural and engineering firms.

### **1.2.8.6. Proposed Statute**

#### **40 U.S.C. § 541. Definitions**

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" means --

(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

## **1.2.9. 41 U.S.C. § 416**

### **Procurement Notice**

#### **1.2.9.1. Summary of the Law**

This statute sets forth the requirements for executive agencies to publish notice of their intent to solicit bids or proposals and to publish notice of contract awards.<sup>1</sup> When agencies intend to solicit bids or proposals or to place orders for a price expected to exceed the small purchase threshold, they must publish a notice in the Commerce Business Daily. The notice must precede the solicitation by at least 15 days. In addition, it must not set a deadline for the submission of most bids and proposals that is less than 30 days after the solicitation is issued. The deadline for research and development bids and proposals must not be less than 45 days and the deadline for orders must not be less than 30 days after the notice is published.

The statute mandates what provisions the notice must contain, chief of which are an accurate description of the property or services needed that is complete enough to assist a prospective contractor to make an informed business decision as to whether to seek a copy of the solicitation, and, second, the name, business address, and telephone number of the contracting officer. The notice must also state where any technical data necessary to respond to the solicitation may be obtained, whether there are any qualification requirements, that the agency will consider all offers or quotations from responsible sources, and the justification for using other than competitive procedures (if appropriate) and the identity of the intended source.

Notification in the Commerce Business Daily generally is not required if the procurement falls within any one of five of the seven exceptions to full and open competition described at 10 U.S.C. § 2304(c) or if the agency head, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, determines notice is inappropriate. In contrast, notification generally is required even if only one or a limited number of sources are available and 10 U.S.C. § 2304(c)(1) is cited. Notification is also required when 10 U.S.C. § 2304(c)(6) is cited, provided notification does not compromise the national security.

If the expected price of the bid or proposal or order to be placed is less than the small purchase threshold, agencies are not required to publish notice in the Commerce Business Daily. However, whenever the expected price is between \$5000 and the small purchase threshold for a defense agency procurement, and, whenever the expected price is between \$10,000 and the small purchase threshold for a civilian agency threshold, notice of the intent to solicit bids or proposals must be posted in a public place at the contract office for not less than ten days. This requirement does not apply to the placement of orders. The constraints on imposing deadlines for the submission of bids and proposals and the necessary contents of the notice are the same for both

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<sup>1</sup>The provisions of this statute are duplicated at 15 U.S.C. § 637(e). The Panel recommends the same amendments be made to both statutes.

posted notices and published notices. Exemptions from the requirement to post a notice are far fewer than for published notices.

Where a contract award or placement of order exceeds the small purchase threshold and is likely to generate a subcontract, agencies must publish notice of such action in the Commerce Business Daily. The statute does not specify how soon after award or placement of the order that the notice must be published.

### 1.2.9.2. Background of the Law

This provision was added as part of the Competition in Contracting Act of 1984.<sup>2</sup> Senator William Cohen, a cosponsor of this legislation, wrote that procurement notice is an integral part of the affirmative effort required of all agencies to obtain effective competition. The notice requirement was intended to remedy two problems identified by Senator Carl Levin. These were that contract descriptions in the Commerce Business Daily were frequently insufficient for businesses to adequately prepare a response, and, second, the period of time for competitive responses was too short. These problems often precluded small companies from competing for Government contracts.<sup>3</sup>

The Senator also explained that the notice provision would act as a double-check for potential competition before a sole-source award is made. "The objective is to alert contractors, who may be capable of meeting the agency's needs but would have otherwise not known of the contract, to submit offers. In this manner, the legislation further safeguards against sole-source contracts when competition is available."<sup>4</sup>

In 1986, two amendments were made to this law. The notice thresholds were raised from \$10,000 to \$25,000 and the provision which requires posting of the notice at the contracting office issuing the solicitation was added.<sup>5</sup> Furthermore, a new notice requirement was added: when the price was expected to exceed \$10,000 and there was not a reasonable expectation that at least two offers would be received from responsive and responsible offerors, a notice was required to be published in the Commerce Business Daily.<sup>6</sup> The notice threshold was raised in order to save administrative lead time, since 98 percent of all contract actions in DOD were small purchases; the posting requirement was added to incorporate the existing FAR and DFARS provisions.<sup>7</sup>

The most recent amendments were made in 1990.<sup>8</sup> The notice thresholds were changed from the specific dollar amount of \$25,000 to the term, "small purchase threshold." In addition,

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<sup>2</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2732(a), 98 Stat. 1175, 1195-97.

<sup>3</sup>Cohen, *The Competition in Contracting Act*, 14 Pub. Cont. L.J. 1 (Oct. 1983).

<sup>4</sup>98 Cong. Rec. S1287 (daily ed. Feb. 1, 1983).

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3931 (1986) (*identical legislation omitted*).

<sup>6</sup>*Id.*

<sup>7</sup>H.R. CONF. REP. NO. 1001, 99th Cong. 2d Sess. 501-02 (1986).

<sup>8</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 806(d), 104 Stat. 1485, 1592-93 (1990).

Congress repealed the 1986 notice requirement for actions where the price was expected to exceed \$10,000 and there was no reasonable expectation of receiving two offers.

### **1.2.9.3. Law in Practice**

This statute is implemented at FAR Part 5 and DFARS Subparts 205.2 and 205.3. Although the statute does not require a posted notice at the contracting office prior to placing an order under a basic agreement, basic ordering agreement, or similar arrangement, FAR 5.101 does impose this requirement to the same extent posting is required for bid and proposal solicitations.

### **1.2.9.4. Recommendations and Justification**

#### **I**

**Amend section 416 by replacing "small purchase threshold" with "simplified acquisition threshold."**

This amendment is necessary to conform to the Panel's recommended change to 41 U.S.C. § 403(11), which would establish a simplified acquisition threshold of \$100,000.

#### **II**

**Amend section 416(a)(1)(B) to harmonize DOD and civilian agency thresholds.**

Section 416(a)(1)(B) currently treats defense agencies differently than it treats civilian agencies. The former are required to post a notice at the contracting office when the expected price is between \$5,000 and the small purchase threshold. In contrast, the latter are required to post a notice at the contracting office when the expected price is between \$10,000 and the small purchase threshold. This amendment reconciles the two thresholds at \$10,000. The Panel perceives no reason to continue the present disparity and believes a uniform threshold will simplify the process for all those involved.

#### **III**

**The Panel recommends that Congress consider alternative publication methods for actions above the simplified acquisition threshold.**

The use of automated systems is a rapidly changing technology which can and does facilitate the rapid, widespread, and efficient dissemination of information. This technology should therefore be used to the maximum extent practicable to satisfy the notice requirements of this statute. However, the Panel does not at this time advocate the use of automated systems in lieu of publication in the Commerce Business Daily for actions over the simplified acquisition threshold because the Commerce Business Daily is at present the only standardized, uniform

repository of such procurement information. As the technology evolves and experience is gained under recommendation IV below, the Panel recommends that Congress consider alternative publication methods above the simplified acquisition threshold and, when appropriate, authorize the issuance of new uniform and Government-wide regulations.

#### IV

**Allow the use of automated systems for actions under the simplified acquisition threshold: add section 416(e) and amend section 416(a)(1)(B).**

Because of the Panel's recommendation elsewhere<sup>9</sup> to raise the simplified acquisition threshold (currently termed "small purchase threshold") to \$100,000 from \$25,000, fewer procurement actions will require publication in the Commerce Business Daily. To prevent any potential adverse impact on competition from such decreased notice,<sup>10</sup> section 416(e) requires the Administrator for Federal Procurement Policy to issue regulations which will ensure there is adequate notification of actions below the threshold.

The Panel believes such notification is best achieved through automated means, which, as stated in the preceding recommendation, facilitate the rapid, widespread, and efficient dissemination of information. In developing the regulations, the Administrator must take into account the costs and availability of automated means to offerors, with appropriate consideration of small businesses. Such consideration addresses a present deficiency in using automated means described in the preceding recommendation. This new provision gives the Administrator the flexibility to adapt the rules as the technology and business environment change.

Section 416(e)(1)(A), together with the proposed addition to section 416(a)(1)(B), address the use of automated means for satisfying or supplementing the requirement to post an intention to solicit a bid or proposal at the contracting office. Section 416(e)(1)(B) corrects a gap in the existing statute. Presently, the law does not require the posting of an intent to place an order; however, FAR 5.101 does impose this requirement for certain orders. Although section 416(e)(1)(B) does not require physical posting of an intent to place an order, it does require the regulations to ensure sufficient notice is given and allows such notice to be given solely through automated means if the Administrator determines doing so is appropriate.

#### V

**Add section 416(a)(1)(D) to generally require automated means for transmitting solicitation and award notices for publication in the Commerce Business Daily.**

Some procurement offices currently use automated means to transmit the statutorily required notices for publication in the Commerce Business Daily. Transmission by such means

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<sup>9</sup>See Chapter 4.1 of this Report.

<sup>10</sup>See S. REP. NO. 523, 98th Cong., 2d Sess. 34-36 (1984).

reduces costs and the number of days needed in the contract award process. The Panel recommends requiring the agencies to use such transmission means to the maximum extent practicable in order to achieve savings in cost and time.

## VI

### **Add section 416(a)(4) to increase flexibility when setting deadlines for submission of offers for commercial items.**

Section 416(a)(3) establishes minimum time periods that offerors have to prepare their bids or proposals after notice is published in the Commerce Business Daily. The Panel believes the time periods may be excessive when the product sought is a commercial item. For example, a supplier may already have an existing catalog which describes the item and shows the market price of a commercial item when the notice is published, and therefore does not need the usual 30 days to submit a bid. The rigidity of the present law precludes setting a shorter time for the submission of bids and proposals and thus builds unnecessary delay and attendant costs into the acquisition process. The proposed section 416(a)(4) exempts commercial items from the statutory time constraints described above and directs the Administrator for Federal Procurement Policy to issue rules published in the FAR which prescribe the appropriate time periods.

#### **1.2.9.5. Relationship to Objectives**

The Panel recommends six changes to this law. Collectively, the amendments simplify the acquisition process, leave detailed implementing methodology to the regulations, which can adapt to meet expected changes in technology and the business environment, encourage faster and more widespread dissemination of information and thereby promote greater access to the procurement system, save time and money, and facilitate Government access to commercial items.

#### **1.2.9.6. Proposed Statute**

##### **41 U.S.C. § 416. Procurement notice**

(a)(1) Except as provided in subsection (c) --

(A) an executive agency intending to --

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed the ~~small-purchase~~ simplified acquisition threshold; or

(ii) place an order, expected to exceed the ~~small-purchase~~ simplified acquisition threshold, under a basic agreement, basic ordering agreement, or similar arrangement, shall furnish for publication by the Secretary of Commerce a notice described in subsection (b);

(B) an executive agency intending to solicit bids or proposals for a contract for property or services with an estimated price of \$10,000 or more but not exceeding the simplified acquisition threshold --

(i) shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection ~~(f)~~ (b);

(ii) may fulfill or supplement the requirement in (i) through the use of automated systems, such as systems that provide remote access to such information through the use of electronic data interchange, to the extent permitted by regulations published in the Federal Acquisition Regulation under the authority of the Administrator for Federal Procurement Policy set forth in subsection (e).

~~(i) in the case of an executive agency other than the Department of Defense, if a contract is for a price expected to exceed \$10,000, but not to exceed the small purchase threshold; and~~

~~(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed the small purchase threshold; and~~

(C) an executive agency awarding a contract for property or services for a price exceeding the ~~small purchase~~ simplified acquisition threshold, or placing an order referred to in clause (A)(ii) exceeding the ~~small purchase~~ simplified acquisition threshold, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order; and

(D) executive agencies shall, to the maximum extent practicable, transmit the notices required by subparagraphs (A) and (C) for publication in the Commerce Business Daily through automated means.

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

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

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that --

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(4) The requirements of paragraph (3)(B) do not apply to contracts for the purchase of commercial items made in accordance with section XXXX of this title. For such contracts, the Administrator for Federal Procurement Policy shall issue rules published in the Federal Acquisition Regulation which prescribe appropriate limits on any deadline established for the submission of all bids or proposals in response to the notice required by paragraph (a)(1).

(b) Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include --

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that --

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency; and

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

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



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

(B) the proposed procurement would result from acceptance of --

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 9 of the Small Business Act;

(C) the procurement is made against an order placed under a requirements contract;

(D) the procurement is made for perishable subsistence supplies; or

(E) the procurement is for utility services, other than telecommunication services, and only one source is available.

(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of title 10, United States Code.

(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice under subsection (a). An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(e)(1) The Administrator for Federal Procurement Policy shall issue such rules as may be required

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(A) to accomplish notice requirements through the use of automated means (e.g., electronic data interchange, bulletin boards) in lieu of, or in addition to, the requirements set forth in paragraph (a)(1)(B); and

(B) to ensure that an executive agency provides sufficient notice whenever the agency intends to place an order, expected to exceed \$10,000 but not expected to exceed the

simplified acquisition threshold, under a basic agreement, basic ordering agreement, or similar agreement.

(2) Such rules shall take into account the costs and availability of automated means to offerors, including small businesses. Such rules shall be published for public comment in accordance with the requirements of section 22 of this title.

## **1.2.10. 41 U.S.C. § 418**

### **Advocates for competition**

#### **1.2.10.1. Summary of the Law**

Section 418(a)(1) establishes the position of competition advocate, a senior level position, in each executive agency. This requires competition advocates for the Army, Navy, and Air Force. Section 2318(a) of Title 10 requires a competition advocate for the Defense Logistics Agency.<sup>1</sup>

Section 418(a)(2) directs the head of each agency to appoint an advocate for competition for the executive agency and for each procuring activity within the agency. The competition advocate must be someone different from the person holding the position of senior procurement executive. The competition advocate may not be assigned duties inconsistent with the advocate position and must be provided the staff or assistance necessary to perform those duties and responsibilities (e.g., access to persons experienced in contract administration, engineering, technical operations, financial management, etc.).

The agency competition advocate's responsibilities under section 418(b) are:

- challenging barriers to full and open competition in the procurement of property or services by the agency;
- reviewing the procurement activities of the executive agency;
- reporting to the senior procurement executive regarding opportunities and barriers to full and open competition and any condition that unnecessarily restricts competition;
- annual reporting to senior procurement executive on the advocate's actions under this section, new initiatives required to increase competition, and remaining barriers to full and open competition;
- making recommendations to the senior procurement executive as to plans for increasing competition on a fiscal year basis;
- making recommendations to the senior procurement executive as to a system of personal and organizational accountability for competition, such as incentives to program managers, contracting officers, and others to promote competition in contracting; and

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<sup>1</sup>See Chapter 1.2.5 of this Report for analysis of 10 U.S.C. § 2318.

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- describing other ways in which the executive agency has emphasized competition in programs for procurement training and research.

Section 418(c) charges the competition advocate for each procuring activity with responsibility for challenging barriers to, and promoting, full and open competition in the procuring activity, such as unnecessarily detailed specifications and restrictive statements of need.

#### **1.2.10.2. Background of the Law**

Section 418 of Title 41 was added to the Office of Federal Procurement Policy Act in 1984 by the Competition in Contracting Act of 1984 (CICA).<sup>2</sup>

Senator William Cohen, supported by the Senate Armed Services Committee, strongly recommended the adoption of a provision establishing an advocate for competition in the procuring agencies. Writing in the *Public Contract Law Journal*,<sup>3</sup> the Senator stated that, without an advocate for competition, there was no clear responsibility and accountability for competition in Government contracting. To support his position, Senator Cohen relied upon a GAO finding that contracting officers often acquiesce to the sole-source procurement requests of headquarters, technical personnel, and end-users. The advocate was needed to ensure proper implementation of CICA, which requires that agencies make an affirmative effort to obtain competition. The original proposal to establish an advocate for competition was made in 1981 by Senator David Pryor. The Senate version would have established a single advocate for competition in each agency. The conference substitute, and the statute as enacted, required the establishment of an additional advocate for competition in each procuring activity.

#### **1.2.10.3. Law in Practice**

This statute is implemented by FAR Subpart 6.5. Under this regulatory guidance, the services and the Defense Logistics Agency have developed competition advocate programs. Due to the success of these programs in challenging the barriers to competition, a recent bill proposed that the advocate for competition for each procuring activity also become the advocate for nondevelopmental items.<sup>4</sup> The Deputy Secretary of Defense has directed the Secretaries of the military departments, the Director of Defense Logistics Agency, and other appropriate components to ensure that advocates for competition in DOD perform a similar role for commercial and nondevelopmental items.<sup>5</sup>

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<sup>2</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2731, 98 Stat. 494, 1195.

<sup>3</sup>Cohen, *The Competition in Contracting Act*, 14 Pub. Cont. L.J. 1 (Oct. 1983).

<sup>4</sup>H.R. 3161, 102d Cong., 1st Sess. § 113 (1991).

<sup>5</sup>Memorandum from Honorable Donald J. Atwood Jr., Deputy Secretary of Defense to DOD agencies (Apr. 24, 1992).

#### **1.2.10.4. Recommendation and Justification**

##### **Retain**

The Panel solicited comments on section 418, as well as other CICA-related statutes. The possibility of combining 10 U.S.C. § 2318 with section 418 was considered, but commenters varied in their responses and the Panel concluded that no clear improvement would result.<sup>6</sup>

One comment recommended that the entire area of the need for single-issue advocates be examined, questioning whether such advocates have served their purpose and whether they and their staffs are affordable in a declining budget environment.<sup>7</sup>

The Panel considered in its discussions whether competition is sufficiently institutionalized in DOD to permit the elimination of competition advocates. The Panel concluded that in an environment of decreasing budgets, fewer new programs, and greater reliance on upgrades and modifications of existing systems, it may be very difficult to maintain current levels of competition or improve them further. For that reason, and in light of their expanded role as advocates for commercial and nondevelopmental items, the Panel concluded that both the competition advocate position and section 418 should be retained.

#### **1.2.10.5. Relationship to Objectives**

This statute establishes and identifies the broad policy objectives and the fundamental requirements to be achieved by the advocate for competition. It also supports the Panel's objective to establish a balance between efficient processes, full and open access to the procurement system, and sound implementation of socioeconomic policies.

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<sup>6</sup>See Chapter 1.2.5 of this Report for analysis of 10 U.S.C. § 2318.

<sup>7</sup>Letter from Council of Defense and Space Industry Associations (CODSIA) signed by Don Fuqua, President, AIA, Dan C. Heinomeier, Vice President, EIA, James R. Hogg, President, NSIA, and John J. Stocker, President, Shipbuilders Council of America, to Maj Gen John D. Slinkard, USAF and Thomas J. Madden, Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Law (July 10, 1992).

## **1.2.11. 41 U.S.C. § 419**

### **Annual report on competition**

#### **1.2.11.1. Summary of the Law**

This law requires that the head of each executive agency issue an annual report to Congress on the agency's use of competition in contracting. The report includes the following:

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

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

(b) reduce the number and dollar value of noncompetitive contracts entered into by the executive agency; and

(2) a summary of the activities and accomplishments of the advocate for competition of the executive agency during the preceding fiscal year.

#### **1.2.11.2. Background of the Law**

This statute was added to the Office of Federal Procurement Policy Act in 1984 by the Competition in Contracting Act of 1984 (CICA).<sup>1</sup>

#### **1.2.11.3. Law in Practice**

The reports due to Congress under this statute were required for a five-year period beginning in 1986 and ending in 1990.

#### **1.2.11.4. Recommendation and Justification**

##### **Delete**

This statute should be deleted from Title 41 because its provisions expired in 1990 and the requirements of this section are covered in 41 U.S.C. § 418. Specifically, section 418 provides that the competition advocate must make an annual report to the senior procurement executive on new initiatives to increase competition and to remove remaining barriers to full and open competition. The section also provides that the competition advocate must make plans for increasing competition on a fiscal year basis.

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<sup>1</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2732(a), 98 Stat. 484, 1197.

#### **1.2.11.5. Relationship to Objectives**

The requirements of this statute are covered elsewhere in the U.S. Code. Therefore, deletion would streamline the body of defense related acquisition laws.

## **1.3. Truth In Negotiations Act**

### **1.3.0. Introduction**

Section 2306a, "Cost or pricing data: truth in negotiations," often referred to as "TINA," is considered by the Panel to be an important statute that clearly impacts the critical path of many large-dollar contracts awarded without price competition and the critical path of many significant contractual modifications. The Panel had expected TINA to be a statute on which it would receive substantial and controversial recommendations for amendment. This expectation was based on the law's long history since enactment in 1962; its significant impacts on accounting, auditing, and negotiation processes; its central role in regulatory guidance for submission and support of contractor proposals;<sup>1</sup> the special emphasis on tracking, resolution, and disposition of defective pricing cases by audit and contracting activities;<sup>2</sup> the rights conferred on the Government for price reductions, including interest and, in certain cases, penalties for defective data;<sup>3</sup> and the collective experience of the Panel which indicated that TINA has been a subject of continuing discussion and controversy over many years.

Because of this expectation, the Contract Formation Working Group focused on TINA first, solicited in writing comments from a wide range of Government and private sector entities, and it conducted a public meeting in December 1991. In its formal request for comments issued in late December 1991,<sup>4</sup> the working group identified twelve issues on the basis of its own analyses and informal comments it had received. These issues ranged from the possible need to revisit the definition of "cost or pricing data," through such issues as greater specificity on what constitutes proper submission or identification of such data, to whether the requirement for certification of such data should be retained. Commentators were also invited to comment on any other TINA issues.

Most private sector commenters, including the American Bar Association Section of Public Contract Law<sup>5</sup> and the Council of Defense and Space Industry Associations (CODSIA)<sup>6</sup> advocated very limited changes to address specific issues or recommended against any attempt to change the TINA statute at this time. Both private sector and Government commenters, in general, believed most of the issues either did not require change or that needed changes could be handled by regulation. For example, the Department of Defense Inspector General (DODIG)

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<sup>1</sup>48 C.F.R. § 15.804.

<sup>2</sup>Letter from DODIG to Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition) (Jan. 14, 1992) states, "Over the last five years, the DCAA has performed 12,118 defective pricing audits and in 4,463 found defective pricing totaling about \$4.5 billion. For defective pricing audits settled during the last 5 years, the Government has recouped over \$700 million."

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Air Force Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition) to Distribution (Industry and Government) (Dec. 22, 1991).

<sup>5</sup>Letter from ABA Section of Public Contract Law signed by John S. Pachter, Chair, to DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College (Re: Recommended Changes to the Truth in Negotiations Act) (Apr. 8, 1992).

<sup>6</sup>Letter from CODSIA signed by D. Fuqua, J.R. Iverson, K. McLennan, D.C. Heinemeier, J.R. Hogg, and J.J. Stocker to Stuart A. Hazlett (Jan. 16, 1992).



stated, "We do not believe additional changes are needed to the TINA."<sup>7</sup> Exceptions to this general pattern were comments from the Defense Contract Audit Agency<sup>8</sup> and the Air Force Contract Law Center.<sup>9</sup> These commenters raised various issues concerning definitions, timing of submissions, burden of proof, defenses, etc., but the consensus of most other commenters and the judgment of the Panel was that the need for such amendments was not clearly established and that the resulting risks of unintended consequences and new controversy were not warranted.

As set forth in the detailed analysis and recommendations included in this subchapter, there was a focus by several public and private sector commenters on the need to amend TINA, or its regulatory implementation, in order to better facilitate the procurement of commercial items and make it easier for the Government to buy from commercial entities. Commercial company accounting systems do not normally produce the detailed cost and pricing data required under TINA and do not segregate or record costs according to Government cost principles. These issues were expanded upon and discussed in detail during Panel meetings, including several presentations by CODSIA representatives and other interested parties.

As the Panel evolved its concepts of recommending a statutory definition of "commercial item" for inclusion in 10 U.S.C. § 2302(5) and of a separate subchapter of Title 10 covering procurement of commercial items, including end items and components, it frequently revisited proposed changes to TINA in order to ensure appropriate interaction and consistency. The Panel's effort to define, and improve opportunities to procure, commercial items, set forth in detail in Chapter 8 of this Report, represented the single area to which the Panel devoted the most time and effort. After consideration of comments, analysis of the law, and full consideration of the many related presentations concerning TINA and the overall subject of procurement of commercial items, the Panel concluded that the threshold for application of the statute should be stabilized at \$500,000.<sup>10</sup> Furthermore, the Panel concluded that the statute should be amended to facilitate acquisition of commercial items,<sup>11</sup> and that certain conforming language changes should be made for internal consistency and consistency with Panel recommendations elsewhere in its Report.<sup>12</sup>

The three most significant of the Panel's six recommended amendments to the statute are summarized here (recommendations I, III, and IV):

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<sup>7</sup>See note 2, *supra*.

<sup>8</sup>Memorandum from DCAA signed by Roy C. Heldemann, Assistant Director for Operations to Maj Gen John D. Slinkard, USAF, Deputy Assistant Secretary (contracting), Assistant Secretary (Acquisition) (Jan. 10, 1992).

<sup>9</sup>Memorandum from HQ Air Force Contract Law Center to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (Dec. 10, 1991).

<sup>10</sup>See Recommendation and Justification No. I in Chapter 1.3.1 of this Report.

<sup>11</sup>*Id.* at No. III and IV.

<sup>12</sup>*Id.* at No. II, V, and VI.

## I

**Maintain the dollar threshold for application of the statute constant at \$500,000 by eliminating all words in the statute that refer to the threshold reverting to \$100,000 after December 31, 1995, and repeal section 803 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. No. 101-510), as amended.**

Over the past decade, the threshold for applying TINA to DOD, NASA, and Coast Guard contracts has fluctuated between \$100,000 and \$500,000. This recommendation would provide consistency. It also takes into account inflation since the passage of TINA in 1962. To stabilize the threshold at \$500,000 would maintain the threshold at the general level that applied when the statute was originally passed. Based on inflation, the \$100,000 figure in 1962 equates to \$520,000 in 1992 dollars, and \$100,000 in 1992 equates to \$19,162 in 1962 dollars.<sup>13</sup> Stability will assist in containing costs to the Government because both Government and industry will know the threshold and plan their surveillance or accounting systems accordingly.

Although there may be cases of defective pricing on contracts below \$500,000, the recommended increased threshold will appropriately balance the risk to the Government of defective pricing against the administrative costs of auditing and pursuing alleged defective pricing cases on such contracts. In addition, the Government will still have the discretion to require submission of cost or pricing data below the recommended threshold when it has reason to believe such action is necessary to protect its interests.

The Panel recognizes the continuing need for appropriate review by the DODIG of the effectiveness of TINA, as implemented in the regulations and in practice. However, the Panel believes that the specific requirements of Pub. L. No. 101-510, as amended, which calls for a review and report on the threshold change, would be inconsistent with the Panel's recommendation for stability and predictability in the threshold.

## III

**Add a specific exception in subsection (b)(2) for modifications to contracts or subcontracts for commercial items or services when the modification exceeds the threshold, but does not change the commercial item or service to a non-commercial item or service or the modification is issued solely to purchase a commercial item or service.**

In the course of its extensive discussions of the differences between the accounting systems used by Government contractors and those used by commercial companies, and of changes which would promote greater use of commercial items or services, the Panel concluded

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<sup>13</sup>See FY92 President's Budget, Part 7, Historical Tables, at 17 (composite deflator: 5.2).

that there is a legitimate concern by commercial companies about the application of TINA to modifications. If a commercial company, whose accounting system will not produce the cost or pricing data required by TINA, wins a large contract for a commercial item or service under adequate price competition, it may become subject to submission of certified cost or pricing data if a modification in excess of the threshold is needed, but the price of the modification, itself, is not based on adequate price competition.

The Panel recognized that a broad exemption for all modifications to contracts and subcontracts for commercial items or services could be subject to abuse. Therefore, the Panel sought to limit the recommended exemption to only those circumstances under which the contracting officer should be able to determine the reasonableness of the price of the modification by price analysis and comparison to the price(s) under the basic contract. The Panel used the term "need not be applied," to provide appropriate latitude for judgment in applying the exception by the regulators and contracting officers.

#### IV

**Expand and clarify the exception for adequate price competition as stated in subsection (b) by adding a new subsection (b)(3).**

This amendment would remove unnecessary impediments to the use of commercial items and leading edge technology. Congress has noted that the exceptions to the requirement for cost or pricing data have not enabled DOD greater access to commercial items.<sup>14</sup>

Concern over the effect on commercial items emanates in part from Congress' stated preference for the use of such items and its repeated guidance to remove regulatory impediments.<sup>15</sup> Besides Congress, other Government agencies have expressed concern about the ability of DOD to acquire commercial items efficiently.<sup>16</sup>

Government sentiment is also shared by the private sector. Although the Council of Defense and Space Industry Associations (CODSIA), in general, opposed changing the statute, it said:

It is unlikely DOD will be able to achieve the objective of increasing its acquisition of commercial products until such time as it treats

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<sup>14</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 196 (1989).

<sup>15</sup>See 10 U.S.C. § 2301(b)(6); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824, 103 Stat. 1352, 1504-07 (1989).

<sup>16</sup>Memorandum from Dept. of the Navy, Office of the Assistant Secretary (Research, Development, and Acquisition) signed by E.G. Cammack, Director of Procurement Policy to Department of the Air Force Deputy Assistant Secretary (Contracting) (Subj.: Request for Comment on the Truth in Negotiation Act (TINA), 10 U.S.C. § 2306A) (Jan. 14, 1992).

such acquisitions as exempt from the requirements for cost or pricing data.<sup>17</sup>

The American Bar Association, Section of Public Contract Law, also considered that changes to TINA should be limited to those absolutely necessary to effectuate pressing priorities and that such changes should be spare, simple, and easily understood. However, the Section also stated:

While acquisition of commercial products could be substantially encouraged by appropriate changes to the procurement regulations without changes to the statute, it is our view that these changes will not be made unless they are encouraged or, in some cases, mandated by the statute.<sup>18</sup>

The language in subsection (b)(3) of the proposed statute will enhance the Government's access to items and technology developed in commercial markets by clarifying and expanding the exemption for adequate price competition. Specifically, by permitting the contracting officer to consider the same or similar items produced under the same or similar production processes as the contractor's commercial items, proper consideration will be given to the actual operation of market forces in the determination of a fair and reasonable price. The same rationale (i.e., the actual operation of market forces) is the basis for the established catalog or market price exception.

The proposed amendment links the adequate price competition exemption more directly to the use of market research techniques. Market research can be used by the Government for the acquisition of commercial items, including items that must be modified to meet the Government's needs, as well as the prices of such items and the terms and conditions under which commercial sales are made for these items.

Where the Government can be assured that it will receive a fair and reasonable price for an item, a procurement can be exempted from TINA.<sup>19</sup> The proposed amendment specifically provides that a procurement can be exempted from TINA under the adequate price competition exemption if: (1) the price is fair and reasonable, and (2) the item is to be purchased from a company or business unit that produces the same or similar item for the commercial market using the same or similar commercial production processes as those used to produce the offered item for the Government.

By use of the term "same or similar item," the proposed amendment recognizes the dynamics of the marketplace where commercial items are frequently undergoing changes: (1) to

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<sup>17</sup>Letter from CODSIA signed by D. Fuqua, J.R. Iverson, K. McLennan, D.C. Heinemeier, J.R. Hogg, and J.J. Stocker to Stuart A. Hazlett (commenting on TINA issues) (Jan. 16, 1992).

<sup>18</sup>Memorandum from ABA Section of Public Contract Law signed by John S. Pachter, Chair, to DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College (Re: Recommended Changes to the Truth in Negotiations Act) (Apr. 8, 1992).

<sup>19</sup>See e.g., National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 803, 104 Stat. 1485, 1589 (1990), as amended by Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 704(a)(4), 105 Stat. 75, 118-20.

meet customer-specific needs; (2) to use new technologies; and (3) to incorporate so-called planned product improvements. The concept of exempting procurements from TINA based on an offer of a fair and reasonable price for "similar" items was first introduced in the National Defense Authorization Act for Fiscal Year 1991, section 803, as amended by Pub. L. No. 102-25, § 704(a)(4). In that Act, the exemption was limited to procurements under \$500,000. This proposal differs from current regulatory implementation. Current law has been interpreted to limit the adequate price competition exemption to those procurements where there is actual price competition or there is price analysis comparing prices for "the same or substantially the same items."<sup>20</sup>

As proposed, similar items may, in appropriate circumstances, include: (1) items within a defined family of products or a product line where the products share essential functional characteristics or incorporate preplanned product improvements;<sup>21</sup> (2) products that require modifications "in order to meet the requirements of the procuring agency;"<sup>22</sup> and (3) items in current production but "not yet available in the commercial market."<sup>23</sup>

The proposed amendment provides for the consideration of several different factors in determining if an item meets the proposed criteria for the adequate price competition exemption and is offered at a fair and reasonable price. Under the proposed amendment, consideration may be given to the prices of alternate items that perform the same or similar functions. This would allow the Government to compare, for example, the prices of items manufactured with new technologies or processes to items manufactured with older technologies or processes. Consideration may also be given to the prices at which the offeror has previously sold the same or similar items. Consideration may also be given to the existing commercial practices of contractors and subcontractors. Under this last consideration, where a subcontract price is established through the use of existing vendor business relationships and pricing methodologies regularly used for commercial production, this factor may support a determination of a fair and reasonable price.

Although there may be some potential for abuse of the discretion afforded the Government by this recommendation, the increased ability to attract commercial suppliers to the defense industrial base and to benefit from the efficiencies of the commercial marketplace, outweigh what the Panel believes to be an acceptable risk. Proper management of this risk will require better training of contracting and requirements personnel in market research and price analysis techniques, as well as meaningful, thoughtful, and innovative regulatory implementation.

The Panel believes that amendment of section 2306a to implement the three recommendations just highlighted, as well as the three additional recommendations also discussed in the attached analysis, will support several of the Panel's objectives. These include: facilitating the purchase by DOD or its contractors of commercial or modified commercial items and services at or based on commercial market prices; enabling companies (contractors and subcontractors) to

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<sup>20</sup>48 C.F.R. § 15.803-3(b).

<sup>21</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 824, 104 Stat. 1485, 1603-04 (1990).

<sup>22</sup>10 U.S.C. § 2325 (definition of nondevelopmental item).

<sup>23</sup>*Id.*

integrate the production of both commercial and defense-peculiar products in a single business unit without altering their accounting or management procedures; and facilitating Government access to commercial technologies and skills available in the commercial marketplace to develop new technologies.

### **1.3.1. 10 U.S.C. § 2306a**

#### **Cost or pricing data: truth in negotiations**

##### **1.3.1.1. Summary of the Law**

The Truth in Negotiations Act (TINA) applies to negotiated contracts awarded by the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the Coast Guard. It requires prime contractors to submit cost or pricing data to the Government before the award of any negotiated contract or the pricing of any contract modification expected to exceed \$500,000. Subcontractors must submit cost or pricing data to the prime contractor before the award of a subcontract or subcontract modification expected to exceed \$500,000. The Government may require the submission of cost or pricing data for contracts, subcontracts, and modifications below the \$500,000 threshold if it believes the data is necessary to determine price reasonableness. The statute stipulates that the current \$500,000 threshold will be reduced to \$100,000 for contracts or subcontracts awarded, or modifications made, after December 31, 1995.

Contractors and subcontractors must certify that the data submitted is current, accurate, and complete. The statute defines cost or pricing data as all facts that, as of the date of agreement on price, a prudent buyer or seller would reasonably expect to significantly affect price negotiations. Such data does not include information that is judgmental, but does include facts from which a judgment was derived.

There are four exceptions to the requirement for the submission of cost or pricing data. A contractor or subcontractor is not required to submit such data if the price agreed upon is based on: (1) adequate price competition; (2) established catalog or market prices of commercial items sold in substantial quantities to the general public; (3) prices set by law or regulation; or (4) in an exceptional case, when a determination and justification is made by the head of the agency.

"Defective cost or pricing data" is defined as data that was inaccurate, incomplete, or noncurrent as of the date of agreement on price or other date mutually agreed to by the parties. The statute requires applicable contracts to include a provision for the adjustment of the contract price that excludes any significant amount by which the price was increased because the contractor or subcontractor submitted defective cost or pricing data. The statute also sets forth detailed criteria for contractor defenses against price adjustments and when offsets are permitted against such adjustments.

##### **1.3.1.2. Background of the Law**

Congress enacted the statute in 1962 to place Government negotiators on an equal footing with contractors by requiring contractors to submit current, accurate, and complete cost or

pricing data on negotiated acquisitions prior to contract award.<sup>1</sup> As stated at FAR 15.804-1, cost or pricing data "ultimately enable the Government and the contractor to negotiate fair and reasonable prices."

The House Armed Services Committee (HASC) initiated the legislation in 1960 when it proposed a bill imposing a truth-telling obligation on contractors under incentive-priced contracts with DOD. The HASC and the General Accounting Office maintained that contractors had received windfall profits on such contracts.<sup>2</sup> Subsequently, the Senate Armed Services Committee generalized the application of the proposed legislation to all negotiated contracts exceeding \$100,000 to avoid excessive profits due to a lack of current, accurate, and complete cost data.<sup>3</sup>

The original \$100,000 threshold was based on an Armed Services Procurement Regulation (ASPR).<sup>4</sup> In 1981, Congress raised the threshold to \$500,000 to provide administrative relief to the procurement process and realize cost savings.<sup>5</sup> However, in 1984 Congress reduced it to \$100,000 to maintain consistency with the threshold used by civilian agencies and because of abuses in the pricing of spare parts.<sup>6</sup> In December 1990, Congress again raised the threshold to \$500,000 because of DOD and industry testimony that cost or pricing data requirements discouraged small and mid-sized firms from participating in defense procurement.<sup>7</sup> Because of evidence of defective pricing on contracts between \$100,000 and \$500,000, Congress directed the DOD Inspector General (DODIG) to review the effect of the increased threshold after three years and report its findings to Congress.<sup>8</sup> In addition, Congress stipulated that the threshold revert to \$100,000 at the end of 1995.<sup>9</sup>

Originally, the statute did not define the term "cost or pricing data." In 1986, Congress provided a statutory definition in an attempt to settle arguments concerning the extent of data to

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<sup>1</sup>See H. Roback, *Truth in Negotiating: The Legislative Background* 1, 10 (presented to the American Bar Association, Section of Public Contract Law, Aug. 8, 1967; available in the George Washington University Government Contract Law Library).

<sup>2</sup>H.R. REP. NO. 1797, 86th Cong., 2d Sess. 5-7 (1960); H.R. REP. NO. 1638, 87th Cong., 2d Sess. 5-7 (1962) (discussing H.R. 5532, 87th Cong. 1st Sess. § (g) (1961)). See also C.A. Preston, *The Truth in Negotiations Act: Is a New Definition of "Cost or Pricing Data" Necessary?*, 34 Fed. B. News & J. 448 (1987).

<sup>3</sup>S. REP. NO. 1884, 87th Cong., 2d Sess. 3 (1962). See also C.A. Preston, *The Truth in Negotiations Act: Is a New Definition of "Cost or Pricing Data" Necessary?*, 34 Fed. B. News & J. 448 (1987).

<sup>4</sup>See H.R. REP. NO. 1638, 87th Cong., 2d Sess. 4 (1962). See also C.A. Preston, *The Truth in Negotiations Act: Is a New Definition of "Cost or Pricing Data" Necessary?*, 34 Fed. B. News & J. 522-25 (1987). The ASPR was the predecessor to the FAR and DOD FAR Supplement (DFARS).

<sup>5</sup>S. REP. NO. 58, 97th Cong., 1st Sess. 122-23 (1981).

<sup>6</sup>H.R. REP. NO. 861, 98th Cong., 2d Sess. 1429, 1430 (Conference Report to the Deficit Reduction Act of 1984, Competition in Contracting Act of 1984). See also S. REP. NO. 50, 98th Cong., 1st Sess. 24, 25 (Senate Report on the Competition in Contracting Act of 1983 accompanying S. 338).

<sup>7</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 192-93 (1990).

<sup>8</sup>See H.R. REP. NO. 923, 101st Cong., 2d Sess. 622 (1990); H.R. REP. NO. 665, 101st Cong., 2d Sess. 303, 304 (1990).

<sup>9</sup>*Id.*



be disclosed.<sup>10</sup> The statutory definition was similar to that in the FAR.<sup>11</sup> In 1987, Congress revised the definition to its present form to more closely parallel the regulatory definition and to clarify the distinction between factual and judgmental information.<sup>12</sup>

In 1986, Congress granted to contractors a statutory right to offset against an amount that the Government is entitled to recover for the submission of defective cost or pricing data.<sup>13</sup> Prior to this statutory recognition, a contractor's right of offset was grounded only in case law.<sup>14</sup> The legislative history emphasizes that the statutory provision corrected the manner in which courts had applied the offset principle. Congress wanted to ensure that an offset could only be taken when the contractor understated factual data (versus judgmental data) and the understatement was not intentional.<sup>15</sup>

### 1.3.1.3. Law in Practice

The statute is implemented at FAR Subpart 15.8 and the corresponding DFARS Subpart. FAR § 15.801 defines cost or pricing data consistently with the statutory definition and includes a number of examples that comprise such data. FAR § 15.804-8 implements the statutory requirement that applicable contracts include a provision for the adjustment of the contract price to exclude any significant amount by which the price was increased because the contractor or subcontractor submitted defective cost or pricing data.<sup>16</sup> FAR § 15.804-3 implements the four exemptions from the requirement for cost or pricing data.

With respect to the exemptions, FAR 15.804-3 defines the terms "adequate price competition," "established catalog or market prices," and "prices set by law or regulation." It also defines "commercial item" to include supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations. DFARS 215.804-3(b) further clarifies "adequate price competition." According to FAR 15.804-3(b), the contracting officer determines if adequate price competition exists to grant an exemption to the cost or pricing data requirement.

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<sup>10</sup>10 U.S.C. § 2306a(g); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3816, 3945 (1986) (*identical legislation omitted*). See also C.A. Preston, *The Truth in Negotiations Act: Is a New Definition of "Cost or Pricing Data" Necessary?*, 34 Fed. B. News & J. 448 (1987).

<sup>11</sup>48 C.F.R. § 15.801.

<sup>12</sup>National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 804, 101 Stat. 1019, 1125 (1987); H.R. CONF. REP. NO. 446, 100th Cong., 1st Sess. 636, 657 (1987); See also, C.A. Preston, *The Truth in Negotiations Act: Is a New Definition of "Cost or Pricing Data" Necessary?*, 34 Fed. B. News & J. 450, 451 (1987).

<sup>13</sup>10 U.S.C. § 2306a(d)(4); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 952, 100 Stat. 3816, 3945 (1986) (*identical legislation omitted*).

<sup>14</sup>The seminal case is *Cutler-Hammer, Inc., v. United States*, 416 F.2d 1306, 189 Ct. Cl. 76 (1969).

<sup>15</sup>S. REP. NO. 23, 99th Cong., 2d Sess. 267 (1986) (correcting the misapplication of the principle in *United States v. Rogerson Aircraft Controls*, 785 F.2d 296 (1986)).

<sup>16</sup>48 C.F.R. § 15.804-8. The FAR prescribes six different clauses: FAR § 52.215-22, Price Reduction for Defective Cost or Pricing Data; FAR § 52.215-23, Price Reduction for Defective Cost or Pricing Data - Modifications; FAR § 52.215-24, Subcontractor Cost or Pricing Data; FAR § 52.215-25, Subcontractor Cost or Pricing Data - Modifications; FAR § 52.215-27, Termination of Defined Benefit Pension Plans; and FAR § 52.215-39, Reversion or Adjustment of Plans for Post retirement Benefits Other than Pensions.

FAR 15.804-3(f) provides that a contractor which requests an exemption based on established catalog or market prices must substantiate its entitlement to the exemption. It does so by submitting a Standard Form (SF) 1412, "Claim for Exemption from Submission of Certified Cost or Pricing Data," to the contracting officer. The SF 1412 lists three categories of sales related to the established catalog price of a commercial item: (1) sales to the Government or to contractors for Government use; (2) sales at catalog price to the general public; and (3) sales to the general public at other than catalog price. As a guideline, the FAR specifies that the latter two categories combined should exceed 35 percent of a contractor's total sales for a contractor to be considered for the exemption. In addition, the FAR states that the second category should be at least 55 percent of sales comprising both the second and third categories of contractor sales for the exemption to apply.

FAR 15.804-7 implements the statutory provisions dealing with defective pricing and offsets. It also implements the statutory provisions for interest and penalties on certain Government overpayments.

#### **1.3.1.4. Recommendations and Justification**

The Panel sought and received comments concerning TINA early in its deliberations. In general, respondents expressed no desire to amend it significantly.<sup>17</sup> In addition, the Contract Formation Working Group of the Panel conducted a public meeting on December 5, 1991 to receive the views of both private sector and Government personnel, and both the Working Group and the Panel interacted frequently with interested parties during formal Panel meetings and in less formal contacts. As the Panel evolved its concepts of a statutory definition of "commercial item" recommended by the Panel for inclusion in 10 U.S.C. § 2302(5) and of a separate subchapter covering procurement of commercial items, it was necessary to revisit proposed changes to TINA in order to ensure appropriate interaction and consistency. After consideration of comments, analysis of the law, and full consideration of the many presentations and discussions concerning TINA, the Panel concluded that the threshold for application of the statute should be stabilized, that the statute should be amended to facilitate the acquisition of commercial items, and that certain conforming language changes should be made.

#### **I**

**Maintain the dollar threshold for application of the statute constant at \$500,000 by eliminating all words in the statute that refer to the threshold reverting to \$100,000 after December 31, 1995, and repeal section 803 of the National Defense Authorization Act for Fiscal Year 1991 (Pub. L. 101-510), as amended.**

Over the past decade, the threshold for applying TINA to DOD, NASA, and Coast Guard contracts has fluctuated between \$100,000 and \$500,000.<sup>18</sup> This recommendation would provide

<sup>17</sup>See e.g., notes 25-28, *infra*.

<sup>18</sup>See text at notes 4-9, *supra*.

consistency. It also takes into account inflation since the passage of TINA in 1962. To stabilize the threshold at \$500,000 would maintain the threshold at the general level that applied when the statute was originally passed. Based on inflation, the \$100,000 figure in 1962 equates to \$520,000 in 1992 dollars, and \$100,000 in 1992 equates to \$19,162 in 1962 dollars.<sup>19</sup> Stability will assist in containing costs to the Government because both Government and industry will know the threshold and plan their surveillance or accounting systems accordingly.

Although there may be cases of defective pricing on contracts below \$500,000, the recommended increased threshold will appropriately balance the risk to the Government of defective pricing against the administrative costs of auditing and pursuing alleged defective pricing cases on such contracts. In addition, the Government will still have the discretion to require submission of cost or pricing data below the recommended threshold when it has reason to believe such action is necessary to protect its interests.

The Panel recognizes the continuing need for appropriate review by the DODIG of the effectiveness of TINA, as implemented in the regulations and in practice. However, the Panel believes that the specific requirements of Pub. L. No. 101-510, as amended, which calls for a review and report on the threshold change, would be inconsistent with the Panel's recommendation for stability and predictability in the threshold. The requirements of paragraph (c) for the issuance of regulations for below threshold procurements have been accomplished.<sup>20</sup> Such regulations should be maintained or revised on the basis of experience as a continuing inherent responsibility of the FAR Council.

## II

**Amend subsection (b)(1)(A)(ii) by adding the phrase, "or of services regularly used for other than Government purposes" after the words "established catalog or market prices of commercial items."**

The Panel has recommended that a statutory definition of "commercial item" applicable throughout Title 10 be added to 10 U.S.C. § 2302(5). The Panel devoted extensive time and effort to crafting this definition, taking into account its recommended use in a separate subchapter on commercial items recommended in Chapter 8 of this Report and its impact on socioeconomic provisions and other statutory requirements.

In developing its definition, the Panel carefully considered the degree to which commercial services should be included in the commercial item definition, and conducted extensive discussions both within the Panel and with private sector companies and associations. The Panel concluded that a relatively narrow scope of services should be included in the definition of commercial item, but recognized that there may be other services which, for pricing purposes, are substantially the same as those provided to the general public by commercial business entities.

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<sup>19</sup>See FY92 President's Budget, Part 7, Historical Tables, at 17 (composite deflator: 5.2).

<sup>20</sup>Federal Acquisition Circular No. 90-10 (Dec. 30, 1991).

In the absence of a statutory definition of the term "commercial item," FAR 15.804-3(c)(3) has used the term and included within its meaning supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations. The Panel has recommended that a definition of "commercial item" be added to section 2302 of this title.<sup>21</sup> Because the proposed statutory definition does not encompass all of the services included within the term as used in the FAR, the proposed definition, standing alone, might be interpreted as narrowing the exception in section 2306a(b)(1)(B) by excluding some services for which the exception is now available. The recommended change to subsection (b)(1)(B)<sup>22</sup> will retain the current application of the exception and avoid any unintended consequence of the recommended statutory commercial item definition.

### III

**Add a specific exception in subsection (b)(2) for modifications to contracts or subcontracts for commercial items or services when the modification exceeds the threshold, but does not change the commercial item or service to a non-commercial item or service or the modification is issued solely to purchase a commercial item or service.**

In the course of its extensive discussions of the differences between the accounting systems used by Government contractors and those used by commercial companies, and of changes which would promote greater use of commercial items or services, the Panel concluded that there is a legitimate concern by commercial companies about the application of TINA to modifications. If a commercial company, whose accounting system will not produce the cost or pricing data required by TINA, wins a large contract for a commercial item or service under adequate price competition, it may become subject to submission of certified cost or pricing data if a modification in excess of the threshold is needed, but the price of the modification, itself, is not based on adequate price competition.

The Panel recognized that a broad exemption for all modifications to contracts and subcontracts for commercial items or services could be subject to abuse. Therefore, the Panel sought to limit the recommended exemption to only those circumstances under which the contracting officer should be able to determine the reasonableness of the price of the modification by price analysis and comparison to the price(s) under the basic contract. The Panel used the term "need not be applied," rather than "shall not" both for consistency with the wording of the basic exemptions in subsection (b)(1) and to provide appropriate latitude for judgment in applying the exception by the regulators and contracting officers.

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<sup>21</sup>See Chapter 1.1.2 of this Report.

<sup>22</sup>The recommended change appears at subsection (b)(1)(A)(ii) of the proposed statute due to the renumbering caused by Panel recommendation III.

#### IV

**Expand and clarify the exception for adequate price competition as stated in subsection (b) by adding a new subsection (b)(3).**

This amendment would remove unnecessary impediments to the use of commercial items and leading edge technology. Congress has noted that the exceptions to the requirement for cost or pricing data have not enabled DOD greater access to commercial items. For example, the Senate Armed Services Committee stated in its report on the National Defense Authorization Act for FY90 and 91:

The Truth in Negotiations Act provides that a contractor need not provide the Government certified cost or pricing data where the contract price is based upon established catalog or market prices of commercial items sold in substantial quantities to the general public. However, the committee understands that the regulations interpreting this exception create a rigid test for commerciality which in many cases creates an impediment to the purchase of commercial products.

In particular, existing regulations establish percentage tests for sale to the general public and sales at catalog prices that many commercial products cannot meet. In addition, substantial questions have been raised about the applicability of the regulations to new commercial products, old commercial products, modified commercial products, and spare parts for commercial products.<sup>23</sup>

Concern over the effect on commercial items emanates in part from Congress' stated preference for the use of such items and its repeated guidance to remove regulatory impediments.<sup>24</sup> Besides Congress, other Government agencies have expressed concern about the ability of DOD to acquire commercial items efficiently. The Department of the Navy stated:

While the Act provides for an exemption of established catalog or market prices of commercial items sold in substantial quantities to the general public, it permits no other commercial item exemptions. If the Government wants to benefit from commercial prices it must accept commercial risks. There are circumstances, such as new commercial products, that would be likely candidates for an exemption.<sup>25</sup>

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<sup>23</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 196 (1989).

<sup>24</sup>See 10 U.S.C. § 2301(b)(6); National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824, 103 Stat. 1352, 1504-07 (1989).

<sup>25</sup>Memorandum from Dept. of the Navy, Office of the Assistant Secretary (Research, Development, and Acquisition) signed by E.G. Cammack, Director of Procurement to Department of the Air Force Deputy Assistant

Government sentiment is also shared by the private sector. Although the Council of Defense and Space Industry Associations (CODSIA), in general, opposed changing the statute, it said:

It is unlikely DOD will be able to achieve the objective of increasing its acquisition of commercial products until such time as it treats such acquisitions as exempt from the requirements for cost or pricing data.<sup>26</sup>

The Integrated Dual-Use Commercial Companies added:

The accounting man hours needed to provide cost or pricing data ... goes (sic) far beyond that which is necessary to do business in the commercial world market.<sup>27</sup>

The American Bar Association, Section of Public Contract Law, also considered that changes to TINA should be limited to those absolutely necessary to effectuate pressing priorities and that such changes should be spare, simple, and easily understood. However, the Section also stated:

While acquisition of commercial products could be substantially encouraged by appropriate changes to the procurement regulations without changes to the statute, it is our view that these changes will not be made unless they are encouraged or, in some cases, mandated by the statute.<sup>28</sup>

The language in subsection (b) of the proposed statute will enhance the Government's access to items and technology developed in commercial markets by clarifying and expanding the exemption for adequate price competition. Specifically, by permitting the contracting officer to consider the same or similar items produced under the same or similar production processes as the contractor's commercial items, proper consideration will be given to the actual operation of market forces in the determination of a fair and reasonable price. The same rationale (i.e., the actual operation of market forces) is the basis for the established catalog or market price exception.

The proposed amendment links the adequate price competition exemption more directly to the use of market research techniques. Market research can be used by the Government for the acquisition of commercial items, including items that must be modified to meet the Government's

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Secretary (Contracting) (Subj.): Request for Comment on the Truth in Negotiation Act (TINA), 10 U.S.C. § 2306A) (Jan. 14, 1992).

<sup>26</sup>Letter from CODSIA signed by D. Fuqua, J.R. Iverson, K. McLennan, D.C. Heinemeier, J.R. Hogg, and J.J. Stocker to Stuart A. Hazlett (commenting on TINA issues) (Jan. 16, 1992).

<sup>27</sup>Letter from IDCC signed by G.B. Barthold and R.G. Spreng to Maj Gen John D. Slinkard, USAF (discussing differences in commercial and government procurement systems) (Feb. 13, 1992).

<sup>28</sup>Memorandum from ABA Section of Public Contract Law signed by John S. Pachter, Chair, to DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College (Re: Recommended Changes to the Truth in Negotiations Act) (Apr. 8, 1992).

needs, as well as the prices of such items and the terms and conditions under which commercial sales are made for these items.

Where the Government can be assured that it will receive a fair and reasonable price for an item, a procurement can be exempted from TINA.<sup>29</sup> The proposed amendment specifically provides that a procurement can be exempted from TINA under the adequate price competition exemption if: (1) the price is fair and reasonable, and (2) the item is to be purchased from a company or business unit that produces the same or similar item for the commercial market using the same or similar commercial production processes used to produce the offered item for the Government.

By use of the term "same or similar item," the proposed amendment recognizes the dynamics of the marketplace where commercial items are frequently undergoing changes: (1) to meet customer-specific needs; (2) to use new technologies; and (3) to incorporate so-called planned product improvements. The concept of exempting procurements from TINA based on an offer of a fair and reasonable price for "similar" items was first introduced in the National Defense Authorization Act for Fiscal Year 1991, section 803, as amended by Pub. L. No. 102-25, § 704(a)(4). In that Act, the exemption was limited to procurements under \$500,000. This proposal differs from current regulatory implementation. Current law has been interpreted to limit the adequate price competition exemption to those procurements where there is actual price competition or there is price analysis comparing prices for "the same or substantially the same items."<sup>30</sup>

As proposed, similar items may, in appropriate circumstances, include: (1) items within a defined family of products or a product line where the products share essential functional characteristics or incorporate preplanned product improvements;<sup>31</sup> (2) products that require modifications "in order to meet the requirements of the procuring agency;"<sup>32</sup> and (3) items in current production but "not yet available in the commercial market."<sup>33</sup>

The proposed amendment provides for the consideration of several different factors in determining if an item that meets the proposed criteria for the adequate price competition exemption is offered at a fair and reasonable price. Under the proposed amendment, consideration may be given to the prices of alternate items that perform the same or similar functions. This would allow the Government to compare, for example, the prices of items manufactured with new technologies or processes to items manufactured with older technologies or processes. Consideration may also be given to the prices at which the offeror has previously sold the same or similar items. This consideration could have several facets. It could allow consideration of prices of previous sales even if the previous sales: (1) were insubstantial; (2)

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<sup>29</sup>See e.g., National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 803, 104 Stat. 1485, 1589 (1990), as amended by the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25 § 704(a)(4), 105 Stat. 75, 118-20.

<sup>30</sup>48 C.F.R. § 15.803-3(b).

<sup>31</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 824, 104 Stat. 1485, 1603-04 (1990).

<sup>32</sup>10 U.S.C. § 2325 (definition of nondevelopmental item).

<sup>33</sup>*Id.*

were not based on established catalog or market prices; (3) were only for similar items; or (4) were for commercial items that are no longer sold to the public. Consideration may also be given to the existing commercial practices of contractors and subcontractors. Under this last consideration, where a subcontract price is established through the use of existing vendor business relationships and pricing methodologies regularly used for commercial production, this factor may support a determination of a fair and reasonable price.

Although there may be some potential for abuse of the discretion afforded the Government by this recommendation, the increased ability to attract commercial suppliers to the defense industrial base and to benefit from the efficiencies of the commercial marketplace, outweigh what the Panel believes to be an acceptable risk. Proper management of this risk will require better training of contracting and requirements personnel in market research and price analysis techniques, as well as meaningful, thoughtful, and innovative regulatory implementation.

## V

**Insert the words "or another date agreed upon between the parties pursuant to subsection (d)(1)(B)," within subsections (d)(4)(A)(ii), (d)(4)(B)(ii), and (g).**

Language referring to timeliness elsewhere in the statute (i.e., (d)(4)(A)(ii), (d)(4)(B)(ii) and (g)) is not consistent with the definition of defective data in subsection (d)(1)(B). The proposed change provides clarity and consistency throughout the entire statute.

## VI

**Amend subsection (f) to delete detailed prescription of the right to examine contractor records under this section and to provide appropriate reference to a consolidated audit section 10 U.S.C. § 2313.**

As described in detail in Chapter 2.3 of this Report, the Panel has recommended consolidation of all audit and access to records provisions in an amended 10 U.S.C. § 2313. This recommendation provides an appropriate conforming amendment to subsection (g) of this section to eliminate redundancy, while providing appropriate clear reference to section 2313.

### **1.3.1.5. Relationship to Objectives**

These recommendations support several of the Panel's objectives. These include: facilitating the purchase by DOD or its contractors of commercial or modified commercial items and services at or based on commercial market prices; enabling companies (contractors and subcontractors) to integrate the production of both commercial and defense-peculiar products in a single business unit without altering their accounting or management procedures; and facilitating Government access to commercial technologies and skills available in the commercial marketplace to develop new technologies.



### **1.3.1.6. Proposed Statute**

#### **10 U.S.C. § 2306a. Cost or pricing data: truth in negotiations**

##### **(a) Required Cost or Pricing Data and Certification.**

(1) The head of an agency shall require offerors, contractors, and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of a contract if:

(i) in the case of a prime contract entered into after December 5, 1990, the price of the contract to the United States is expected to exceed \$500,000; and

(ii) in the case of a prime contract entered into on or before December 5, 1990, and ~~before January 1, 1996~~, the price of the contract to the United States is expected to exceed \$100,000.

(B) The contractor for a prime contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if:

(i) in the case of a change or modification made to a prime contract referred to in subparagraph (A)(i), the price adjustment is expected to exceed \$500,000;

(ii) in the case of a change or modification made after December 5, 1991, to a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price adjustment is expected to exceed \$500,000; and

(iii) in the case of a change or modification not covered by clause (i) or (ii), the price adjustment is expected to exceed \$100,000.

(C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section and

(i) in the case of a subcontract under a prime contract referred to in subparagraph (A)(i), the price of the subcontract is expected to exceed \$500,000;

(ii) in the case of a subcontract entered into after December 5, 1991, under a prime contract that was entered into on or before December 5, 1990, and that has been modified pursuant to paragraph (6), the price of the subcontract is expected to exceed \$500,000; and

(iii) in the case of a subcontract not covered by clause (i) or (ii), the price of the subcontract is expected to exceed \$100,000.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if:

(i) in the case of a change or modification to a subcontract referred to in subparagraph (C)(i) or (C)(ii), the price adjustment is expected to exceed \$500,000; and

(ii) in the case of a change or modification to a subcontract referred to in subparagraph (C)(iii), the price adjustment is expected to exceed \$100,000.

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of the agency concerned to submit such data under subsection (c)) shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) (or under subsection (c)), and a certification required to be submitted under paragraph (2), shall be submitted:

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) in the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) For purposes of paragraph (1)(C), a contractor or subcontractor granted a waiver under subsection (b)(2) shall be considered as having been required to make available cost or pricing data under this section.

(6)(A) Upon the request of a contractor that was required to submit cost or pricing data under paragraph (1) in connection with a prime contract entered into on or before December 5, 1990, the head of the agency that entered into such contract shall modify the contract to reflect subparagraphs (B)(ii) and (C)(ii) of paragraph (1). All such modifications shall be made without requiring consideration.

(B) The head of an agency is not required to modify a contract under subparagraph (A) if that head of an agency determines that the submission of cost or pricing data with respect to that contract should be required under subsection (c).

(b) Exceptions. (1) This section need not be applied to a contract or subcontract --

~~(1)(A)~~ for which the price agreed upon is based on-

~~(A)(i)~~ adequate price competition;

~~(B)(ii)~~ established catalog or market prices of commercial items, or of services regularly used for other than Government purposes, sold in substantial quantities to the general public; or

~~(C)(iii)~~ prices set by law or regulation; or

~~(2)(B)~~ in an exceptional case when the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.

(2) This section need not be applied to a modification - -

(A) to a contract or subcontract which is exempt from this section based upon paragraph (1)(A)(i) or (1)(A)(ii) provided that the contract or subcontract being modified is for a commercial item or service and the modification does not change the commercial item or service to a non-commercial item or service; or

(B) if the sole purpose of the modification is to purchase a commercial item or service.

(3) In determining the applicability of the exception in paragraph (1)(A)(i) above, to a contract or subcontract, the price for an item may be considered as based on adequate price competition if the item is purchased from a company or business unit which produces the same or similar items for the commercial market using the same or similar production processes and the price is fair and reasonable. In this case, a determination of fair and reasonable price may take into consideration (A) the price(s) of alternative items that perform the same or similar function(s), (B) the prices at which the offeror has previously sold the same or similar items or (C) in the case of a subcontract, if the prime contractor or higher tier subcontractor consistently applies established subcontractor or vendor business relationships and pricing methodologies regularly used for its commercial production.

(c) Authority To Require Cost or Pricing Data. When cost or pricing data are not required to be submitted by subsection (a), such data may nevertheless be required to be submitted by the head of the agency if the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract. In any case in which the head of the agency requires such data to be submitted under this subsection, the head of the agency shall document in writing the reasons for such requirement.

(d) Price Reductions for Defective Cost or Pricing Data. (1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that-

(A) the price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor-

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contracting officer;

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2).

(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if-

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) (or another date agreed upon between the parties pursuant to paragraph (1)(B)) and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if-

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification) (or another date agreed upon between the parties pursuant to paragraph (1)(B)), the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(e) Interest and Penalties for Certain Overpayments. (1) If the United States makes an overpayment to a contractor under a contract with the Department of Defense subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States-

(A) for interest on the amount of such overpayment, to be computed-

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1986; and

(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Any liability under this subsection of a contractor that submits cost or pricing data but refuses to submit the certification required by subsection (a)(2) with respect to the cost or pricing data shall not be affected by the refusal to submit such certification.

(f) Right of United States To Examine Contractor Records. For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section, the head of the agency shall have the audit rights provided by subsection (a)(2) of section

~~2313 of this title. (1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to~~

~~(A) the proposal for the contract or subcontract;~~

~~(B) the discussions conducted on the proposal;~~

~~(C) pricing of the contract or subcontract; or~~

~~(D) performance of the contract or subcontract.~~

~~(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.~~

~~(3) In this subsection, the term "records" includes books, documents, and other data.~~

(g) Cost or Pricing Data Defined. In this section, the term "cost or pricing data" means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or another date agreed upon between the parties pursuant to subsection (d) (1) (B), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such terms does not include information that is judgmental, but does include the factual information from which a judgment was derived.

~~Section 803 of the National Defense Authorization Act for Fiscal Year 1991 (P.L. 101-510; 104 Stat. 1589), as amended by sec. 704(a)(4) of P.L. 102-25 and by section 804(e)(2) of P.L. 102-190, provides:~~

#### ~~SEC. 803. CERTIFIED COST OR PRICING DATA THRESHOLD~~

~~(a) Increase in Threshold for Certified Cost or Pricing Data. (1) [amended section 2306a(a)(1)]~~

~~(b) Review by Inspector General of the Department of Defense. (1) After the increase in the threshold for submission of cost or pricing data under section 2306a(a) of title 10, United States Code (as amended by subsection (a)) has been in effect for three years, the Inspector General of the Department of Defense shall conduct a review of the effects of the increase in the threshold.~~

~~(2) The review shall address whether increasing the threshold has improved the acquisition process in terms of reduced paperwork, financial or other savings to the government, an increase in the number of contractors participating in the defense contracting process, and the adequacy of information available to contracting officers in cases in which certified cost or pricing data are not required under section 2306a.~~

~~(3) The Inspector General of the Department of Defense shall submit to the Secretary of Defense a report on the review conducted under paragraph (1). The Secretary of Defense shall submit such report to Congress, along with such comments as the Secretary considers appropriate, upon completion of the report (and comments) but not later than the date on which the President submits the budget to Congress pursuant to section 1105 of title 31, United States Code, for fiscal year 1996.~~

~~(e) Regulations for Below-Threshold Procurements. (1) The Secretary of Defense shall prescribe regulations identifying the type of procurements for which contracting officers should consider requiring the submission of certified cost or pricing data under section 2306a(e) of title 10, United States Code.~~

~~(2) The Secretary also shall prescribe regulations concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under section 2306a of such title because the price of the procurement to the United States is not expected to exceed \$500,000. Such information, at a minimum, shall include appropriate information on the prices at which such offeror has previously sold the same or similar products.~~

~~(3) The regulations required under this subsection shall be prescribed not later than six months after [November 5, 1990].~~

~~(d) Documentation of Submissions Under Section 2306a(e). [amends section 2306a(e)].~~

## **1.4. Research And Development**

### **1.4.0. Introduction**

The nineteen statutes analyzed in this subchapter provide the general statutory framework for research and development. All but four service-specific statutes, sections 4503 (Army), 9503 (Air Force), 7303 (Navy), and 7522 (Navy) are currently included in Chapter 139 of Title 10, Research and Development. Certain sections of Chapter 139 were considered to be more closely related to the responsibilities of other working groups and are included in other chapters of this Report.<sup>1</sup> There are clearly many other statutes in Title 10, such as those in Chapter 144, Major Defense Acquisition Programs, as well as statutes of general applicability to all procurements that impact the research and development process. These are analyzed and reported by the Panel under their appropriate chapter headings.

The Panel solicited in writing comments from a wide array of Government and private sector entities, conducted its own analyses, and discussed specific issues with appropriate research and development management and contracting personnel. In general, the Panel concluded that most of these statutes are necessary, are serving their intended purposes, and are not causing significant problems in the acquisition of research and development. However, the Panel did identify opportunities to improve consistency and clarity within and between statutes, and recommended for repeal two statutes that are specific to individual services. Another service-specific statute should be refocused in its remaining purpose, the international exchange of scientific personnel, and amended to apply throughout DOD.<sup>2</sup>

The Panel's most important recommendation on these research and development statutes is to significantly amend section 2358, "Research projects," to clarify that advanced, as well as basic and applied, research and development should be included in the scope of authority granted in the statute and that these authorities should be clearly provided to both the Secretary of Defense and the Secretaries of the military departments. Implementation of this recommendation will make section 2358 the fundamental statute providing authority for performing research and development projects. Implementation will also permit the Panel's recommended repeal of sections 4503 and 9503, both titled "Research and development programs," which are service-specific statutes that grant broad authority to the secretaries of the Army and Air Force, respectively. As part of this overall recommendation to clarify and consolidate, the Panel has recommended rewording section 2358(b) to ensure that the public works responsibilities of the Army Corps of Engineers are included within the statute's requirement that a research project or study have a potential relationship to a military function or operation.

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<sup>1</sup>See Chapter 3.2 of this Report, Testing (Streamlined statute & Individual amendments), for sections 2362 and 2366 concerning testing of wheeled or tracked armored vehicles and survivability and lethality testing; and Chapter 2.1, Contract Payment, for section 2355 on vouchering; and Chapter 3.9 of this Report, Miscellaneous, for section 2369 on product evaluation.

<sup>2</sup>See Chapter 3.3 of this Report for analysis and recommendations to amend and redesignate section 7203, "Scientific investigations and research."



The Panel has made a closely related recommendation to amend section 2371, "Advanced research projects: cooperative agreements and other transactions," to delete "advanced research projects" from the title and delete subsection (a), which provides authority to the Secretary of Defense (to be exercised through DARPA) and to the Secretaries of the military departments. This authority would be redundant with section 2358 when amended as recommended by the Panel. The net effect is to amend section 2371 to focus its necessary and very useful provisions more clearly on the use of cooperative agreements and other transactions for research and development.

The Panel recommends making two amendments to section 2356, "Contracts and delegations." First, the Secretary of a military department would be permitted to delegate the authorities in that section to a Deputy Assistant Secretary, in addition to the officials already listed. Second, subsection (b) would be deleted since it is redundant with general authorities in Chapter 137, including authorities to delegate.

As part of its recommendations to simplify and clarify, the Panel also recommends changing section 2364, "Coordination and communication of defense research activities," to delete specific references to, and definitions of, acquisition program milestones. Such deletion will not alter one of the section's purposes: namely, ensuring that the latest technology position papers and assessments are considered in acquisition program decisions.

The Panel recommends retention of two research and development statutes that Congress has recently amended. Section 2352, "Contracts: notice to Congress required for contracts performed over a period exceeding ten years," was changed in 1991 and, in the view of the Panel, provides an appropriate balance between the potential need for long-term contracts and Congressional oversight to prevent abuse. Section 2372, "Independent research and development and bid and proposal costs: payments to contractors," was fundamentally changed in 1991 to provide for full allowability of independent research and development (IR&D)/bid and proposal (B&P) costs, after a three-year transition period, provided those costs are allocable and reasonable and not otherwise unallowable by law or regulation. The Panel believes that this statute, now being implemented in its transition period, represents a reasoned and enlightened balance between the need of the Government to control costs and its need to support new technology and the industrial base.

When the Panel initially analyzed section 2365, "Competitive prototype strategy requirement: major defense programs," the section was no longer in effect because its sunset date of September 30, 1991, had passed. The Panel's clear consensus was that it should be deleted from the code and not reinstated, even though the Panel was aware that Congress was considering reinstating or amending the statute. The Panel reasoned that the specific requirement for competitive prototyping, with exceptions requiring written Congressional notification, was redundant with normal Congressional oversight and constituted a requirement for a single preferred approach outside the planning context of the overall acquisition strategy of a major weapons system program. The Panel believed, and still believes, that in an environment of reduced budgets, fewer new start programs, and greater reliance on modifications and upgrades

of existing systems, it is unlikely that competitive prototyping will be affordable as the legislated norm.

During the Panel's deliberations, the 1993 defense authorization act was passed,<sup>3</sup> in which section 2365 was repealed and replaced by section 2438, "Major programs: competitive prototyping." Because of the change in location and its close relationship to section 2439, "Major programs: competitive alternative sources," the Panel's analyses and recommendations to repeal the new section 2438 are presented in Chapter 3.1, Major Systems.

The Panel recommends retaining or making minor amendments to the balance of the statutes under research and development except in two cases. For these two laws, the Panel recommends "no action" because they are not primarily about the acquisition process. A separate analysis of each of these sections, along with detailed analyses of those sections specifically discussed in the narrative above, is included in this subchapter.

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<sup>3</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 821, 106 Stat. 2315, 2459-60 (1992).

## **1.4.1. 10 U.S.C. § 2351**

### **Availability of appropriations**

#### **1.4.1.1. Summary of the Law**

This law provides that funds appropriated to DOD for research and development (R&D) are available for obligation for a period of two consecutive years. The law also delineates purposes for which R&D funds may be available. These are for (1) acquisition or construction by, or furnishing to, a contractor of research, developmental, or test facilities and equipment determined to be necessary for the performance of the contract, and (2) purposes related to R&D for which Congress has made specific appropriations for DOD.

#### **1.4.1.2. Background of the Law**

This provision was originally enacted in 1982 and codified at 10 U.S.C. § 2361.<sup>1</sup> It was redesignated 10 U.S.C. § 2351 in 1988 when the provisions found at 10 U.S.C. § 2351(b) were added.<sup>2</sup> A previous 10 U.S.C. § 2351, entitled "Policy, plans and coordination," establishing the responsibilities of the Secretary of Defense in the R&D area, had been repealed in 1958.<sup>3</sup> There does not appear to be a specific reason that two years was chosen for the length of this appropriation.

#### **1.4.1.3. Law in Practice**

The law provides that money appropriated for R&D during one fiscal year is available for obligation during that fiscal year and the following fiscal year. Money appropriated for R&D in FY92, for example, is available for obligation during both FY92 and FY93 and may be obligated against requirements that arise in either FY92 or FY93.

The effect of the two-year life of the money is that longer term R&D efforts may be funded with an appropriation over a two-year period incrementally. Under current statutes, R&D funds continue in an expired status for five years after their availability for obligation ends.<sup>4</sup>

#### **1.4.1.4. Recommendation and Justification**

##### **Retain**

Requests for comments produced two suggestions. The first was that although the two-year period for obligation is reasonable, the period for expenditure of these funds should be

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<sup>1</sup> Act of Sept. 13, 1982, Pub. L. No. 97-258, § 2(b)(3)(B), 96 Stat. 877, 1052.

<sup>2</sup> Codification of Military Laws Act of 1988, Pub. L. No. 100-370, § 1(g)(1), 102 Stat. 840, 846.

<sup>3</sup> Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3(d), 72 Stat. 514, 516.

<sup>4</sup> 31 U.S.C. § 1552(a).

increased to ten years after the obligation authority ceases. Currently, the expenditure period is limited by 31 U.S.C. § 1552a to five years after the availability for obligation ends. The belief was that such a time frame would more easily accommodate close-out of R&D contracts, which may run for up to 10 years.<sup>5</sup>

While an extended period for expenditure of properly obligated funds is a suggestion with merit, there is no compelling justification to rewrite this statute to achieve that goal. Instead, the overall funds availability issue needs to be addressed. The Panel has done so in Chapter 3.8.16 of this Report.

The second suggestion focused on making R&D funds available for obligation for three years, so as to be consistent with the availability for obligation of production funds.<sup>6</sup> The Panel believes the differences between incremental funding for R&D contracting and full funding for production are sufficient to warrant the existing difference in obligation periods.

#### **1.4.1.5. Relationship to Objectives**

The statute is consistent with the Panel's objectives of promoting financial integrity in ways that are simple and understandable, and in identifying fundamental requirements without including detailed implementing methodology.

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<sup>5</sup>Letter from Headquarters Air Force Systems Command, signed by Anthony J. Perfilio, Command Counsel, to Stuart A. Hazlett, Defense Systems Management College (May 27, 1992).

<sup>6</sup>Memorandum from Department of the Army, signed by Joseph Varady, Director for Procurement Policy, and Anthony H. Gamboa, Deputy General Counsel (Acquisition), to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (June 25, 1992).

## **1.4.2. 10 U.S.C. § 2352**

### **Contracts: notice to Congress required for contracts performed over period exceeding ten years**

#### **1.4.2.1. Summary of the Law**

This statute establishes a requirement for the military department concerned to notify Congress whenever a research and development (R&D) contract is expected, at the time of award, or as the result of a modification, to be performed over a period exceeding ten years from the date of initial contract award, or performance of the contract exceeds ten years and no notice has been previously provided to Congress. To meet the notice requirement, the military department must identify the contract, state the date of initial award, and state the period of time over which performance is expected. Notice is required to be submitted not later than 30 days after award or modification of a contract for which period of performance is expected to exceed ten years, or the date upon which contract performance exceeds ten years for all other contracts.

#### **1.4.2.2. Background of the Law**

In 1991, the text of the prior 10 U.S.C. § 2352 was completely replaced by the current language.<sup>1</sup> Under the prior section 2352, military departments were authorized to enter into five-year R&D contracts with provision for an extension of up to five years.<sup>2</sup> This legislation came about as a result of a recognition that R&D contracting was a long term activity, and the ability to enter into longer term agreements was advantageous to both the Government and the contractor. The current change came about as the Administration sought relief from Congress as two Air Force R&D contracts, for the B-2 and C-17 aircraft, approached the 10-year limit.<sup>3</sup> Coupled with this was the apparent acceptance that adherence to the prior statutory scheme would not only defeat the purposes of long term R&D contracting but could also increase costs through termination expenses. A further concern was the difficulty associated with the transfer of complex R&D efforts from an expiring contract to a new contract late in the performance period.

#### **1.4.2.3. Law in Practice**

As the current text of this section is new,<sup>4</sup> there is no empirical data to judge its impact or effectiveness. By eliminating a maximum time period for R&D contracting, appropriate discretion is provided officials to take advantage of opportunities for complex R&D efforts. This discretion

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<sup>1</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 803, 105 Stat. 1290, 1415 (1991).

<sup>2</sup>Act of July 16, 1952, Pub. L. No. 82-557 § 3, 66 Stat. 687, 723 (1952). Codified by Act of Aug. 10, 1956, Pub. L. No. 84-1028, § 1, 70A Stat. 134, 725.

<sup>3</sup>56 Fed. Cont. Rep. 321 (1991).

<sup>4</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 803, was effective Oct. 31, 1991.

is not unfettered, however, as the notification provision, authorization and appropriation process, and regulatory restraints will combine to provide oversight to prevent abuse.

#### **1.4.2.4. Recommendation and Justification**

##### **Retain**

One recommendation was received. That recommendation would permit modifications which "consist solely of new procurement," supported by J&As, not to trigger the notification requirement unless the performance period of the new work exceeds ten years.<sup>5</sup> The Panel believes a modification involving significant new work which could be characterized as "new procurement" should normally be a separate procurement and not a modification. Even where a modification is appropriate, the Panel believes there is no compelling reason not to make the required notification.

#### **1.4.2.5. Relationship to Objectives**

Retention of the current statute is appropriate because it identifies the fundamental requirements to be achieved and does not include detailed implementing requirements.

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<sup>5</sup>Letter from Headquarters Air Force Systems Command, signed by Anthony J. Perfilio, Command Counsel, to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (May 27, 1992).

### **1.4.3. 10 U.S.C. § 2353**

#### **Contracts: acquisition, construction, or furnishing of test facilities and equipment**

##### **1.4.3.1. Summary of the Law**

This statute permits a contract for research and development to include provisions for either the construction by, or furnishing to, the contractor of research, developmental, or test facilities and equipment determined to be necessary for the performance of the contract. Such facilities, equipment, and housing may be lent or leased to the contractor (with or without reimbursement) or sold to the contractor at fair market value. This provision does not authorize new construction or improvements having general utility.<sup>1</sup>

The provision precludes installation or construction of facilities, not readily removable or separable without unreasonable expense or loss of value, on property not owned by the United States unless one of three conditions is met. These conditions are that the contract contain: (1) a provision for reimbursing the United States for fair market value of the facility at the time of contract completion or termination, or reasonably thereafter; (2) a provision stating that the United States has an option to acquire the underlying land; or (3) alternative provisions determined to be adequate by the Secretary concerned to protect the interests of the United States.<sup>2</sup>

Except as otherwise provided by law with respect to property acquired by the contractor, proceeds from sales or reimbursements under this section will be deposited into the Treasury as miscellaneous receipts.<sup>3</sup>

##### **1.4.3.2. Background of the Law**

This section originated in 1952.<sup>4</sup> The basis for the statute was wartime experience which indicated that contractors often required special facilities for contract performance. Options were to either have the contractors build the facility and include the costs in the contract, or to have the Government acquire or build a facility and retain rights to it after contract completion. The latter was chosen.<sup>5</sup>

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<sup>1</sup>10 U.S.C. § 2353(a).

<sup>2</sup>10 U.S.C. § 2353(b).

<sup>3</sup>10 U.S.C. § 2353(c).

<sup>4</sup>Act of July 16, 1952, Pub. L. No. 82-557, 66 Stat. 687.

<sup>5</sup>S. REP. NO. 936, 82d Cong., 1st Sess. 3, 4 (1951).

The section was recodified at its current location without substantive change in 1956.<sup>6</sup> A note to this section permitted appropriations for research and development to be used for the purposes of this section.<sup>7</sup> That was repealed and the authority restated in 10 U.S.C. § 2351(b).<sup>8</sup>

#### **1.4.3.3. Law in Practice**

FAR Part 36 deals with construction contracts. FAR 45.309 appears to implement this statute insofar as utilization of Government property is concerned. There is no required clause nor any reference to the lease or sale provisions of this statute in the FAR. The DFARS does not contain supplemental coverage.

Implementation of this statute permits that which might otherwise be military construction, and funded as such, to be accomplished using research and development funds. This authority carries with it the proviso that the facility in question must be in direct support of a research and development program and is not a general utility facility. This provides great leeway in the construction of R&D facilities. Congressional notification is required.<sup>9</sup>

#### **1.4.3.4. Recommendation and Justification**

##### **Retain**

Three responses were received on this provision, all of which addressed the issue of where the proceeds from sales or reimbursements should go. One suggested that they be credited to the appropriation of the year originally charged.<sup>10</sup> A second suggested that such monies be used to further similar research,<sup>11</sup> and the third suggested no change.<sup>12</sup>

The first suggestion was not adopted for two reasons. First, with limited access to funds for either obligation or expenditure,<sup>13</sup> it is unlikely that the funds could be used as the suggestion intended. Second, it would be hard, if not impossible, to track funds to specific contractual efforts, some of which may be closed at the time of the sale or reimbursement. The second suggestion, for further research, may have merit but is beyond the scope of the Panel's effort.

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<sup>6</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 134. This was a general reorganization and codification of laws pertaining to the Armed Services (placed in Title 10) and the National Guard (placed in Title 32).

<sup>7</sup>Further Continuing Appropriations, 1985, Pub. L. No. 99-190, § 8015, 99 Stat. 1185, 1205.

<sup>8</sup>Codification of Military Laws Act of 1988, Pub. L. No. 100-370, § 1(g)(1)(B), (2), 102 Stat. 840, 846.

<sup>9</sup>For example, *see* AFR 80-22 which deals with policies and responsibilities for use of research, development, test and evaluation funds.

<sup>10</sup>Letter from Headquarters Air Force Systems Command signed by Anthony J. Perfilio, Command Counsel, to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (May 27, 1992).

<sup>11</sup>Letter from Council on Governmental Relations signed by Milton Goldberg to Stuart A. Hazlett, DOD Advisory Panel on Streamlining and Codifying Acquisition Laws, Defense Systems Management College (June 1, 1992).

<sup>12</sup>Memorandum from Systems and Logistics Contracting, Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition) signed by Lt Col Moxon, USAF, to Stuart A. Hazlett, Defense Systems Management College (May 29, 1992).

<sup>13</sup>*See* 31 U.S.C. § 1552(a).



Others may wish to consider the sponsorship of legislation to create a special account for research whose funds could come from these activities.

#### **1.4.3.5. Relationship to Objectives**

This statute supports the Panel's objectives associated with promoting financial integrity and identifying broad policy objectives, while reserving the implementing methodology to the regulations.

#### 1.4.4. 10 U.S.C. § 2354

### **Contracts: indemnification provisions**

#### 1.4.4.1. Summary of the Law

This statute provides that the Secretary of a military department may approve in contracts for research or development, or both, provisions to indemnify contractors for claims by third parties, or loss and damage to contractor property, that arise out of direct contract performance and which are not compensated by insurance or otherwise. For the purpose of the statute, the claims involved are those for death, bodily injury, or loss or damage to property from a risk the contract has defined as unusually hazardous. Similarly, any loss or damage to contractor property must also result from a risk which the contract has defined as unusually hazardous.

The statute requires that contracts which contain indemnification provisions must provide for notice to the United States and that the United States have control or assistance in defense of any suit or claim (at the Government's election). Payment cannot be made unless the Secretary or a designee certifies the amount as just and reasonable. Such payments may be made from one of three sources: funds obligated for the contract's performance, otherwise unobligated research and development funds, or funds specifically appropriated for the payments.

#### 1.4.4.2. Background of the Law

This section originated in 1952.<sup>1</sup> The basis for the statute was a belief that contractors would be reluctant to undertake research or development contracts involving extremely hazardous new developments without securing adequate protection in the event of liability claims. There was, and continues to be, no capacity to include a reserve in the contract price. Additionally, there was the perception that the cost of insurance would be prohibitive. As a result, indemnification was developed as the solution.<sup>2</sup> The section was recodified at its current location without substantive change in 1956.<sup>3</sup>

This statute preceded 50 U.S.C. § 1431, *et seq.*<sup>4</sup> and its implementing Executive Order No. 10789.<sup>5</sup>

#### 1.4.4.3. Law in Practice

DFARS 235.070 provides regulatory implementation of 10 U.S.C. § 2354. These provisions account for situations where indemnification is predicated upon either 10 U.S.C. §

<sup>1</sup>Act of July 16, 1952, Pub. L. No. 82-557, § 5, 66 Stat. 687, 726.

<sup>2</sup>S. REP. No. 936, 82d Cong., 1st Sess. 4 (1951).

<sup>3</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, 70A Stat. 134.

<sup>4</sup>Act of Aug. 28, 1958, Pub. L. No. 85-804, § 1, 72 Stat. 972. See Chapter 2.7 of this Report for analysis of indemnification under 50 U.S.C. § 1431, *et seq.*

<sup>5</sup>Exec. Order No. 10789, as amended on Nov. 14, 1958.

2354 alone or in combination with indemnification under Pub. L. No. 85-804 (50 U.S.C. § 1431 *et seq.*).<sup>6</sup> There are two separate clauses for use in instances where indemnification provisions are appropriate. DFARS 252.235-7000 is applicable to fixed price contracts, while 252.235-7001 applies to cost reimbursement contracts.<sup>7</sup>

The clauses are identical except as follows. The fixed price clause has a provision requiring the contractor to purchase insurance, and, in the event the cost of such insurance is higher than the cost of the insurance the contractor had in effect on the date of the contract, the Government will reimburse the difference.<sup>8</sup> The cost reimbursement clause contains one provision making the Limitation of Funds clause inapplicable to these obligations<sup>9</sup> and another provision specifying that claim, loss, or damage must have occurred during the period of contract performance or be the result of contract performance.<sup>10</sup>

#### **1.4.4.4. Recommendation and Justification**

##### **Retain**

The Panel received no comments suggesting a revision to this statute. The Panel believes the purpose of the statute remains valid, that the statute is working as intended, and therefore recommends no change.

Any changes to this statute which reduced the Government's ability to indemnify contractors would likely increase costs of R&D, as contractors would be forced to either seek out insurers willing to cover the risks, or become self-insurers with large reserves. Either of these would cause R&D, particularly in the areas of propellants and nuclear research, to become prohibitively expensive or impossible to accomplish.

#### **1.4.2.5. Relationship to Objectives**

This statute meets the Panel's objectives of promoting development of the industrial base, encouraging the exercise of sound judgment by acquisition personnel, and promoting balance between an efficient process and full and open access to the procurement system.

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<sup>6</sup>DFARS 235.070-2

<sup>7</sup>DFARS 235.070-3.

<sup>8</sup>DFARS 252.235-7000(d). This is contingent upon the cost being properly allocable and not included in the original contract price.

<sup>9</sup>DFARS 252.235-7001(g).

<sup>10</sup>DFARS 252.235-7001(h).

## 1.4.5. 10 U.S.C. § 2356

### Contracts: delegations

#### 1.4.5.1. Summary of the Law

This statute provides specific authority for the Secretary of a military department to delegate authority under 10 U.S.C. §§ 1584, "Employment of non-citizens," 2353, "Contracts: acquisition, construction, or furnishing of test facilities and equipment," 2354, "Contracts: indemnification provisions," or 2355, "Contracts: vouchering procedures," to the Under Secretary, Assistant Secretary, or the chief and one assistant to the chief of any technical service, bureau, or office within his department. This authority does not extend to the delegation of approval authority for alternative provisions under 10 U.S.C. § 2353(b)(3). The statute permits further delegations of the authority to negotiate and administer R&D contracts. Negotiation is defined as "make without a solicitation for sealed bids" as used in Title 10, Chapter 137.<sup>1</sup>

#### 1.4.5.2. Background of the Law

This section was enacted as part of an omnibus R&D statute entitled, "Army, Navy and Air Force Departments--Research and Development."<sup>2</sup> Delegation authority previously existed, including specific delegation authority in the areas of extending R&D contracting and creating advisory committees and panels.<sup>3</sup> It was thought that such delegations were normal and considered essential to achieving necessary facility and flexibility of operation.<sup>4</sup>

The statute is substantially the same as the original. However, the current language in subsection (b) dealing with "solicitation for sealed bids" brings prior language into conformity with Title 10, Chapter 137.<sup>5</sup> In addition, although the original statute did not define "negotiate" as does the current version, such a definition had its origins in the 1956 codification.<sup>6</sup>

#### 1.4.5.3. Law in Practice

Delegation of authority is addressed elsewhere in Title 10. Specifically, 10 U.S.C. § 2311 provides for delegation from the head of an agency to another officer or official any power under "this chapter" (10 U.S.C. § 2301 *et seq.*).<sup>7</sup>

These authorities do not overlap. The delegation authority in 10 U.S.C. § 2356(a) deals with policy matters, such as to whom authority to permit indemnification provisions may be

<sup>1</sup>Chapter 137 is "Procurement Generally."

<sup>2</sup>Act of July, 16, 1952, Pub. L. No. 82-557, ch. 882, § 7, 1952 U.S.C.C.A.N. (66 Stat.) 687, 688.

<sup>3</sup>The authority regarding facilities was somewhat narrower than current.

<sup>4</sup>S. REP. NO. 936, 82d Cong., 1st Sess. 5 (1951).

<sup>5</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2727(d), 98 Stat. 1175, 1195.

<sup>6</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1058, 70A Stat. 134, 135.

<sup>7</sup>Reference is to chapter 137 of Title 10. The authority under 10 U.S.C. § 2304(c)(7) is not delegable.

delegated. This contrasts with the general delegation authority in 10 U.S.C. § 2311, which permits delegation of appropriate authority for formation of contracts, including those for R&D.<sup>8</sup>

#### **1.4.5.4. Recommendations and Justification**

##### **I**

**Amend subsection (a) to permit the Secretary of the military department to delegate the authorities in this section to a Deputy Assistant Secretary of the department.**

This recommendation would expand the number of positions to which these powers may be delegated. This would expand the authority of the Deputy Assistant Secretaries and thus provide for decision making at a lower level, contributing to streamlining and efficiency.

##### **II**

**Delete reference to 10 U.S.C. § 2355 in subsection (a).**

This provides conformity with the Panel's recommendation at Chapter 2.1.2 of this Report to delete that section of Title 10.

##### **III**

**Delete subsection (b).**

Subsection (b) of the statute does not appear to provide additional, useful authority, and is confusing. The specific authority to administer and negotiate contracts conveys upon a group of people authority which they would otherwise have inherent in their position (vis-a-vis administration) or is not necessary (vis-a-vis "negotiate"). The "power" identified in subsection (b) has been superseded by the Competition in Contracting Act (CICA).<sup>9</sup> The reference to the power to negotiate contracts is unnecessary and confusing because it is a carryover from the pre-CICA situation, where contracts were to be awarded using formal advertising procedures unless negotiation could be justified.

#### **1.4.5.5. Relationship to Objectives**

These changes increase authority at lower levels and eliminate unnecessary and duplicative authorities, thereby increasing efficiency and streamlining.

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<sup>8</sup>The FAR and DFARS cover various delegations; for example, full and open competition is covered in FAR Part 6 and DFARS Part 206. See Chapter 1.6.1 of this Report for analysis of section 2311.

<sup>9</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2723, 98 Stat. 1175.

#### 1.4.5.6. Proposed Statute

##### 10 U.S.C. § 2356. Contracts: delegations

(a) The Secretary of a military department may delegate any authority under section 1584, 2353, ~~or 2354, or 2355~~ of this title to-

~~(1)(a)~~ the Under Secretary of his department;

~~(2)(b)~~ an Assistant Secretary of his department; or

~~(3)(c)~~ a Deputy Assistant Secretary of his department; or

(d) the chief, and one assistant to the chief, of any technical service, bureau, or office.

However, the authority of the Secretary under section 2353(b)(3) of this title may not be delegated to a person described in clause ~~(3)~~ (d) of this subsection.

~~(b) Subject to other provisions of law, the power to negotiate and administer contracts for research or development, or both, may be further delegated. In this section, the term "negotiate" means make without a solicitation for sealed bids under chapter 137 of this title.~~

## 1.4.6. 10 U.S.C. § 2358

### Research projects

#### 1.4.6.1. Summary of the Law

This section permits the Secretary of Defense, subject to the approval of the President, to engage in basic and applied research projects necessary to DOD responsibilities in the field of basic and applied research and development and which relate to weapon systems and other military needs. Such projects may be through contracts or grants to: educational or research institutions, private businesses, other United States agencies, one or more of the military departments, or DOD employees or consultants. No funds appropriated to DOD may be used to fund a research project or study unless that project has a "potential relationship to a military function or operation."

#### 1.4.6.2. Background of the Law

This section, minus the grant authority and funding limitation, was originally included in the DOD Reorganization Act of 1958.<sup>1</sup> The Supplemental Military Construction Act of 1958 provided for a limited grant authority.<sup>2</sup> The legislative history makes reference to this provision and expands upon the authority in the interest of giving the Secretary of Defense "as great freedom as possible in this area."

Because the Federal Grant and Cooperative Agreement Act of 1977<sup>3</sup> repealed the broad grant authority provided in 42 U.S.C. § 1891, doubt was generated as to the extent to which DOD could use grants for basic and applied research.<sup>4</sup> To dispel this doubt, Congress decided to specifically authorize use of grants and did so in 1981.<sup>5</sup> According to the committee report,

[t]he committee view[ed] grants as an important means of funding research activities with educational or research institutions, private businesses [sic] and individual researchers and believe[d] that this authority should be clearly available to the Department of Defense. . . . [T]his section would authorize the use of grants in addition to contracts, thereby providing clear statutory authorization for grants.<sup>6</sup>

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<sup>1</sup>Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 9(a), 72 Stat. 514. See H.R. REP. NO. 1765, 85th Cong., 2d Sess. 20 (1958). This section was recodified as 10 U.S.C. § 2358 in 1962. Act of Sep. 7, 1962, Pub. L. No. 87-651, § 208(a), 76 Stat. 506, 523.

<sup>2</sup>Pub. L. No. 85-325, § 7, 72 Stat. 11.

<sup>3</sup>Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (1978).

<sup>4</sup>H.R. REP. NO. 71 (III), 97th Cong., 1st Sess. 14 (1981).

<sup>5</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 910, 95 Stat. 1084, 1120 (1981).

<sup>6</sup>See note 4, *supra*.

The funding restriction contained in subsection (b) was added in 1988.<sup>7</sup>

#### **1.4.6.3. Law in Practice**

Research and development contracts are covered under FAR Part 35. Basic and applied research are defined in the FAR, as is development. The concept of "advanced research" is not statutorily defined.<sup>8</sup> The FAR recognizes that R&D contracts are directed toward work or methods which cannot be precisely defined in advance. A goal of contracting in this area is to provide an environment where work can be done with flexibility and minimum administrative burden.<sup>9</sup> Contracts should be used when the end product is of direct benefit to the Federal Government; grants should be used when the transaction is to support or stimulate R&D for another public purpose.<sup>10</sup> A series of DOD Directives governs the formation and administration of grants.<sup>11</sup>

#### **1.4.6.4. Recommendations and Justification**

##### **I**

**Amend subsection (a) to include authority to engage in advanced research.**

##### **II**

**Amend subsection (a) to eliminate the language, "subject to approval by the President."**

##### **III**

**Amend subsection (a)(1) to include the ability to use cooperative agreements or other transactions for research and development projects.**

##### **IV**

**Amend the section to give specific statutory authority to the Secretaries of the military departments to engage in research and development projects.**

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<sup>7</sup>Codification of Military Laws Act of 1988, Pub. L. No. 100-370, § 1(g)(3), 102 Stat. 840, 847. This superseded Pub. L. No. 91-441, § 204, 84 Stat. 905, 908 (1970), which contained similar provisions and appeared as a note to this section. This provision of Pub. L. No. 91-441 was repealed by Pub. L. No. 101-510, § 624(b), 104 Stat. 1485, 1604 (1990).

<sup>8</sup>The reference in 10 U.S.C. § 2371 is without further definition. DFARS Part 235.001 discusses advanced development.

<sup>9</sup>48 C.F.R. § 35.002.

<sup>10</sup>*Id.* at section 35.003.

<sup>11</sup>See generally DOD Directives 3210.1, .2, and .6.



One comment pointed out that advanced research was covered by another statute, 10 U.S.C. § 2371; that this statute did not specifically authorize use of contracts and grants; and that cooperative agreements were not authorized under 10 U.S.C. § 2358, but were authorized under 10 U.S.C. § 2371.<sup>12</sup> Another comment indicated concern over the limitation on delegation authority through the statute's language, "subject to the approval of the President."<sup>13</sup> Both of these comments are meritorious and the Panel recommends revisions to the statute accordingly.

Adoption of the first comment would expand the ability to accomplish advanced research by clearly providing authority for use of contracts and grants as vehicles to obtain advanced research. Additionally, it would permit the use of cooperative agreements and other transactions as vehicles for basic, advanced, and applied research. The authority for cooperative agreements and other transactions is presently found in 10 U.S.C. § 2371.<sup>14</sup> The cooperative agreements referenced are those in 31 U.S.C. § 6305. The term "other transactions" is not defined in section 2371. However, it appears to permit certain consortium type agreements, which do not have a specific statutory authority elsewhere.

The Army was concerned with the words "subject to the approval of the President" in section 2358(a). These words invoke the limitation in 3 U.S.C. § 301 on delegation authority. Thus, these words limit delegation of function to those officials whose appointments are subject to the "advice and consent" of the Senate. The Army stated this limitation places an inordinate burden on what is really a rather pedestrian authority to conduct research.<sup>15</sup> Deleting this language would expand the ability of the Secretary of Defense to delegate authority, thus further meeting the goals of streamlining and improving efficiency.

While elimination of the language, "subject to the approval of the President," would maximize efficiency, the granting of specific concurrent authority to the Secretaries of the military departments would eliminate any issue regarding their authority in this area. Further, such a specific grant would clearly eliminate the need for the present service-specific research and development statutes.<sup>16</sup>

The Panel also recommends deleting the word "assigned" in subsection (a). This language, without definition, is not meaningful. The provisions of 10 U.S.C. § 2364, "Coordination and communication of defense research," would ensure minimal duplication of efforts between the services.

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<sup>12</sup>Letter from HQ Air Force Systems Command/JA signed by Anthony J. Perfilio, Command Counsel, to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (May 29, 1992).

<sup>13</sup>Memorandum from Department of the Army signed by Joseph Varady, Director for Procurement Policy and Anthony H. Gamboa, Deputy General Counsel (Acquisition) to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (June 25, 1992).

<sup>14</sup>In Chapter 1.4.13 of this Report, the Panel is recommending that 10 U.S.C. § 2371 become a "process only" statute. That is, it will not provide authority to conduct research, but solely deal with the processes involved in the utilization of cooperative agreements and other transactions.

<sup>15</sup>See note 13, *supra*.

<sup>16</sup>These are 10 U.S.C. § 4503 (Army), 10 U.S.C. § 7203 (Navy), and 10 U.S.C. § 9503 (Air Force).

**Amend subsection (b) to expand the range of research and development projects available to include those which are of "potential interest to the Department of Defense or to the military department concerned."**

When the Panel initially considered repealing 10 U.S.C. § 4503 because it appeared duplicative of section 2358, it invited comment. In response, a memorandum from the Army Corps of Engineers Chief Counsel indicated there was difference between the two sections. The memorandum stated that the authority in section 2358 to engage in research projects is limited to those that relate to weapons and other military needs, whereas section 4503 permits the Corps to conduct R&D in support of public works efforts, which are part of the mission of the Army, but which relate to neither weapons nor military needs. Because repeal of section 4503 might be construed as removing the Corps' authority to continue civil works R&D, the memorandum recommended providing for such authority in section 2358 if section 4503 were repealed.<sup>17</sup>

The Corps' authority to carry out its public works responsibilities may be gleaned from language in 10 U.S.C. § 4503 permitting research and development "relating to the Army." While there is no clearly comparable language in the current 10 U.S.C. § 2358, the latter does not prohibit such efforts and would seem to be broad enough to cover such actions. Nevertheless, because the Panel is recommending repeal of section 4503,<sup>18</sup> it also recommends amending section 2358 to ensure that the Corps of Engineers may continue to perform research and development programs associated with its public works responsibilities. The recommended amendment to section 2358, which would permit research and development which is of "potential interest to [DOD] or to the military department concerned," is specifically intended to ensure that the Corps' capabilities in this area are not diminished.

#### **1.4.6.5. Relationship to Objectives**

The Panel's recommendations will streamline and consolidate authority for advanced research and clarify and permit appropriate judgment on methods for accomplishing R&D activities. This will result in increased efficiencies and provide policies and fundamental requirements, but leave detailed implementing methodology to the regulations.

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<sup>17</sup>Memorandum from Department of the Army Corps of Engineers signed by Kathryn Kurke, Assistant Chief Counsel for Research and Development to Lt Col James S. Cohen, USAF, Acquisition Law Task Force, Defense Systems Management College (Aug. 12, 1992).

<sup>18</sup>See Chapter 1.4.15 of this Report for analysis of section 4503. See also Chapter 1.4.18 of this Report, where the Panel is recommending repeal of 10 U.S.C. § 9503.

#### 1.4.6.6. Proposed Statute

#### 10 U.S.C. § 2358. Research projects

(a) In general, ~~Subject to approval by the President, †The Secretary of Defense, and the Secretaries of the military departments~~ may engage in basic, advanced, and applied research and development projects that are necessary to the responsibilities of the Department of Defense or the military department concerned in the field of basic, advanced, and applied research and development and that relate to weapons systems and other military needs or are of potential interest to the Department of Defense or the military department concerned. ~~Subject to approval by the President, †The Secretary concerned~~ may perform assigned research and development projects

(1) by contract ~~with~~, cooperative agreement, or other transaction with, or by grant to, educational or research institutions, private businesses, or other agencies of the United States;

(2) through one or more of the military departments; or

(3) by using employees and consultants of the Department of Defense.

(b) Requirement of Potential Military Relationship Interest.--Funds appropriated to the Department of Defense and to the military departments may not be used to finance any research project or study unless the project or study has is, in the opinion of the Secretary of Defense or the Secretary of the military department concerned, ~~a potential relationship to a military function or operation~~ of potential interest to the Department of Defense or to the military department concerned.

## 1.4.7. 10 U.S.C. § 2360

### Research and development laboratories: contracts for services of university students

#### 1.4.7.1. Summary of the Law

The statute permits the Secretary of Defense to hire students to provide technical support at defense research and development laboratories. Such contracts may be directly with the students or with nonprofit organizations employing such students. Students are considered employees for the purposes of compensation for work injuries (5 U.S.C. § 8101 *et seq.*) and tort claims (28 U.S.C. § 2671 *et seq.*). DOD was required to formulate regulations defining specific terms.

#### 1.4.7.2. Background of the Law

The statute was part of the 1982 DOD Authorization Act.<sup>1</sup> The legislative history indicates a recognition of the "cost effectiveness of allowing college level students to provide short term technical support to Government research and development laboratories."<sup>2</sup> The history also indicates that such contracts are only for technical services and are to be used only when it can be demonstrated to be cost effective.<sup>3</sup> Because students are not counted against civilian end-strength ceilings, the provision was passed with the understanding that such student service contract arrangements would not be used to circumvent these ceilings or increase the civilian workforce.<sup>4</sup>

#### 1.4.7.3. Law in Practice

DFARS subpart 237.73 implements this statute. It defines "institution of higher learning," "nonprofit organization," "students," and "technical support."<sup>5</sup> It cites this statute and 10 U.S.C. § 2304(a)(i) (*s/c*) as authority for these contracts.<sup>6</sup>

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<sup>1</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 603, 95 Stat. 1099, 1110 (1981).

<sup>2</sup>H.R. REP. NO. 71 (III), 97th Cong., 1st Sess. 12 (1981).

<sup>3</sup>H.R. CONF. REP. NO. 311, 97th Cong., 1st Sess. 116 (1981).

<sup>4</sup>*Id.*

<sup>5</sup>DFARS 237.7301(a)-(d). The statute required that the regulations include the first three of these terms but did not specify the last.

<sup>6</sup>DFARS 237.7302. This was originally set forth in DAC 84-10. It is intended to reflect that less than full and open competition is appropriate. The reference should read "(a)(1)" rather than "(a)(i)."

#### **1.4.7.4. Recommendation and Justification**

##### **Retain**

One comment was received. It suggested that this authority, currently with the Secretary of Defense, might be given directly to the military departments.<sup>7</sup> The Panel declined to adopt this suggestion because the program is apparently working as intended.

#### **1.4.7.5. Relationship to Objectives**

The statute as written contributes to DOD efficiency and effectiveness. It permits utilization of students for important research that increases the cost effectiveness of certain types of research, while at the same time providing opportunities for students. The statute identifies the fundamental requirements to be achieved while leaving the detailed implementing methodology to the regulations.

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<sup>7</sup>Memorandum from Systems and Logistics Contracting, Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), signed by Lt Col Moxon, USAF to Stuart A. Hazlett, Defense Systems Management College (May 29, 1992).

## **1.4.8. 10 U.S.C. § 2361**

### **Award of grants and contracts to colleges and universities: requirement of competition**

#### **1.4.8.1. Summary of the Law**

This statute prohibits the Secretary of Defense from awarding grants and contracts to colleges and universities for research and development, or for the construction of any research or other facility, unless competitive procedures are used. Specifically, contracts must be awarded in accordance with 10 U.S.C. § 2304, excluding that statute's subsection (c)(5). If those conditions are not met, grants and contracts may be awarded only if the Secretary has notified Congress of intent to award and has waited 180 days. The statute requires an annual report to Congress on the use of competitive procedures for the award of research and development contracts, and the award of construction contracts, to colleges and universities.

This statute contains a rule of construction. Another law may not be construed as modifying or superseding section 2361 unless the other statute specifically refers to section 2361, states that it is intended to modify section 2361 and states that the grant to the named college or university is being awarded in contravention of section 2361.

#### **1.4.8.2. Background of the Law**

This statute was enacted in 1988.<sup>1</sup> The statute was a response to a strong congressional belief that "ear-marking" of research funds for particular colleges and universities was not an acceptable practice because it was considered as having an adverse effect on research. Congress determined that competition in the award process would lead to geographical diversity and promote creative, energetic basic research.<sup>2</sup> As enacted, the statutory mandate to award such grants or contracts using competitive procedures was absolute -- an award could not be made pursuant to one of the seven exceptions to full and open competition provided for in 10 U.S.C. § 2304(c).

The statute was substantially amended in 1989.<sup>3</sup> Congress added the provisions which (1) allow grants or contracts to be awarded using one of the exceptions in section 2304(c) (except for the exception at subsection (c)(5) of that section); (2) require identification of the college or university involved if one of the exceptions to full and open competition is invoked; and (3) require notice and waiting if other than competitive procedures are contemplated. Congress decided to allow grants or contracts to be awarded using one of the exceptions in section 2304(c) because it recognized that circumstances might exist where doing so was in the best interests of

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<sup>1</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 220(a), 102 Stat. 1941 (1988).

<sup>2</sup>H.R. CONF. REP. NO. 989, 100th Cong., 2d Sess. 217 (1988).

<sup>3</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 252, 103 Stat. 1352, 1404 (1989).

the Government.<sup>4</sup> An additional amendment in 1990 changed the frequency of the reports to Congress from a semiannual to annual basis.<sup>5</sup>

#### **1.4.8.3. Law in Practice**

The law may create administrative burdens; however, there is no indication that any additional administrative requirements are overly burdensome or that the purpose of the law is contrary to the best interests of the DOD acquisition system.

Often, competition in this area is achieved through use of Broad Agency Announcements.<sup>6</sup> These general announcements detail the agency's research interests, specify criteria for selection of proposals, and solicit offerors.

The 1993 Defense Appropriations Act provides an example of this law in practice. In that act, Congress stated that the funds appropriated elsewhere in the act for contracts or grants to specific colleges and universities were made available without regard to, and, to the extent necessary, in contravention of, 10 U.S.C. § 2361.<sup>7</sup>

#### **1.4.8.4. Recommendation and Justification**

**Retain, but delete subsection (c) when it expires.**

One comment recommended repealing this statute.<sup>8</sup> The stated basis for this recommendation was that the law arbitrarily discriminates against colleges and universities as a category of nonprofit/not-for-profit entities, in terms of their access to DOD contracts and grants for R&D, and that the statute puts an undue burden on DOD to enforce congressional legislative discipline. There was further concern that the law conflicts with CICA. Specifically, it was felt that 10 U.S.C. § 2304(c) permits awards to universities and nonprofit entities, and that the term "competitive procedures," while defined for contracts with reference to CICA, is not so defined regarding grants.

The law protects DOD from external pressures to provide research and development contracts to specific colleges and universities. As such, it is an important tool in the integrity of the R&D contracting process insofar as colleges and universities are involved.

The Panel believes this law is not creating difficulties for colleges and universities or the Government. Retention or repeal of the statute would be a function of weighing the potential

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<sup>4</sup>H.R. CONF. REP. NO. 331, 101st Cong., 1st Sess. 532 (1989).

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1311, 104 Stat. 1485, 1669 (1990).

<sup>6</sup>48 C.F.R. §§ 6.102(d)(2), 35.001.

<sup>7</sup>Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, § 401, 106 Stat. 1876, 1895 (1992).

<sup>8</sup>Memorandum from Department of the Army signed by Joseph Varady, Director for Procurement Policy and Anthony H. Gamboa, Deputy General Counsel (Acquisition) to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (June 25, 1992).

administrative burden and the corresponding effects of its elimination against clear congressional intent in this area. On balance, there is no compelling reason to amend or repeal this statute.

The report required under subsection (c) has a sunset provision.<sup>9</sup> Unless data gathered through the current reporting cycles indicates the existence of a problem in sole-source awards to specific colleges and universities, this provision should be deleted upon its expiration.

The Panel recommends no other changes.

#### **1.4.8.5. Relationship to Objectives**

The statute, as written, protects the integrity of the DOD acquisition process and should be retained. Deletion of the reporting requirement upon expiration will streamline this section.

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<sup>9</sup>No report has to be filed for any period beginning after Dec. 31, 1993.



## **1.4.9. 10 U.S.C. § 2364**

### **Coordination and communication of defense research activities**

#### **1.4.9.1. Summary of the Law**

This section provides that the Secretary of Defense will "promote, monitor, and evaluate" programs for communication and exchange of technical data among and between DOD activities. It requires that defense research facilities be assigned broad mission requirements; appropriate personnel be utilized as consultants on system standardization; facility managers be given broad latitude to choose R&D projects; technology position papers prepared by these facilities be available to combatant commands and contractors who submit bids and proposals for DOD contracts; and that any position paper prepared on a technological issue relating to a major weapon system, as well as technological assessments made regarding a component, be part of the record considered when milestone 0, I, and II decisions are made. The statute defines the following terms: "defense research facility," "milestone 0 decision," "milestone I decision," and "milestone II decision."

#### **1.4.9.2. Background of the Law**

This law was enacted in 1986<sup>1</sup> in order to strengthen coordination among DOD research facilities and other DOD organizations.<sup>2</sup> There were specific statutory findings indicating that centralized coordination and dissemination of technological data were necessary. Two reasons were given: ensuring all DOD personnel were informed about emerging technologies, and avoiding cost duplication of research staffs and projects.<sup>3</sup>

#### **1.4.9.3. Law in Practice**

This statute is not directly related to Government contracting. It establishes a data point of reference for use by decision makers at various milestones that directly relate to contract formation.

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 234(c), 100 Stat. 3816, 3848 (1986).

<sup>2</sup>*Id.* at section 234(a).

<sup>3</sup>*Id.* at section 234(b).

#### **1.4.9.4. Recommendations and Justification**

**Amend by deleting specific references to, and definitions of, Milestones 0, I, and II from the statute.**

The statute provides that data be part of the record prior to decisions at milestones 0, I, and II, and it defines these points. There is no doubt that decision makers should have access to critical information regarding technologies at all phases of the acquisition cycle. However, over time, terms such as milestones 0, I, and II, with specific definitions, can lose effectiveness due to changes in the acquisition process, particularly when decision points are changed either as to time or event. Continuation of this terminology may result in the anomalous situation where data is not provided at the necessary time due to alterations in the acquisition processes. Currently, DOD Directives provide definitions of milestones 0, I, and II that are not the same as those in the statute.

The Panel recommends retaining this important concept, but changing the language to ensure that the information is provided in a timely manner, whatever the critical phase points are called. This would be accomplished by replacing the references to, and definitions of, the milestones 0, I, and II decisions with "acquisition program decisions."

A recommendation was received to expressly authorize laboratories to enter into R&D agreements with other Government laboratories.<sup>4</sup> This recommendation is not necessary, as the authority to enter into such agreements already exists.<sup>5</sup>

#### **1.4.9.5. Relationship to Objectives**

The proposed change would further the Panel's objective of ensuring that acquisition laws provide the broad policy framework but leave the specific implementing methodologies to the regulations.

#### **1.4.9.6. Proposed Statute**

##### **10 U.S.C. § 2364: Coordination and communication of defense research activities**

(a) Coordination of Department of Defense Technological Data. The Secretary of Defense shall promote, monitor, and evaluate programs for the communication and exchange of technological data --

(1) among the Defense research facilities, combatant commands, and other organizations that are involved in developing for the Department of Defense the technological requirements for new items for use by combat forces; and

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<sup>4</sup>Letter from HQ Air Force Systems Command/JA signed by Anthony J. Perfilio, Command Counsel, to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (May 29, 1992).

<sup>5</sup>10 U.S.C. § 2358 authorizes the research projects to be done "through one or more" military departments. Section 2358 is analyzed at Chapter 1.4.6 of this Report.

(2) among Defense research facilities and other offices, agencies, and bureaus in the Department that are engaged in related technological matters.

(b) Functions of Defense Research Facilities. The Secretary of Defense shall ensure, to the maximum extent practicable --

(1) that Defense research facilities are assigned broad mission requirements rather than specific hardware needs;

(2) that appropriate personnel of such facilities are assigned to serve as consultants on component and support system standardization;

(3) that the managers of such facilities have broad latitude to choose research and development projects;

(4) that technology position papers prepared by Defense research facilities are readily available to all combatant commands and to contractors who submit bids or proposals for Department of Defense contracts; and

(5) that, in order to promote increased consideration of technological issues early in the development process, any position paper prepared by a Defense research facility on a technological issue relating to a major weapon system, and any technological assessment made by such facility in the case of such component, is made a part of the records considered for the purpose of making ~~milestone 0, milestone I, and milestone II~~ acquisition program decisions.

(c) Definitions. In this section:

(1) The term "Defense research facility" means a Department of Defense facility which performs or contracts for the performance of--

(A) basic research; or

(B) applied research known as exploratory development.

~~—— (2) The term "milestone 0 decision" means the decision made within the Department of Defense that there is a mission need for a new major weapons system and that research and development is to begin to meet such need.~~

~~—— (3) The term "milestone I decision" means the decision by an appropriate official of the Department of Defense selecting a new major weapon system concept and a program for demonstration and validation of such concept.~~

~~—— (4) The term "milestone II decision" means the decision by an appropriate official of the Department of Defense approving the full-scale development of a new major weapon system.~~

(2) The term "acquisition program decisions" has the meaning given to it by the regulations promulgated by the Secretary of Defense.

## **1.4.10. 10 U.S.C. § 2367**

### **Use of federally funded research and development centers**

#### **1.4.10.1. Summary of the Law**

This statute establishes parameters for DOD utilization of federally funded research and development centers (FFRDC). With the exception of "applied scientific research," no work may be placed in an FFRDC unless such work is within the general scope of effort as established in its sponsoring agreement with DOD. In an effort to limit the creation of new FFRDCs, Congress specified that no money may be obligated or expended from DOD appropriated funds for any FFRDC not in existence prior to June 2, 1986, without first filing a report with Congress as to the FFRDC's "purpose, mission, and general scope" and then waiting 60 days. The Secretary of Defense is required to submit, as part of the annual budget submission, the amount of man-years of effort proposed to be funded for each FFRDC. Finally, a report is required to be filed with Congress not later than January 1st of the next fiscal year detailing actual obligations and man-years of effort expended at each FFRDC during the previous year.

#### **1.4.10.2. Background of the Law**

FFRDCs have been a part of the Government since the end of the Second World War. However, this section was not enacted until recently.<sup>1</sup> Congress placed these statutory restrictions on FFRDCs because it was concerned that agencies had tasked FFRDCs to do work that was not within the scope of the FFRDCs' mission and that could have been performed by various private sector sources. Moreover, Congress was concerned about the lack of oversight, given the growth in the amount of work performed by the FFRDCs.<sup>2</sup>

#### **1.4.10.3. Law in Practice**

Since their inception, FFRDCs have engendered considerable controversy regarding potentially unfair competition with industry sources capable of doing the same, or similar, work. FAR 5.017 describes the special relationship FFRDCs have with the Government. The 1992 DOD Appropriations Act reduced FFRDC funding by 4% from FY91 and imposed certain prohibitions on expenditure of funds where members of FFRDC Boards of Directors or Trustees are also members of the Boards of Directors or Trustees of a profit making company that has contracts with DOD. Exceptions to this are for the Software Engineering Institute and certain classified activities by the Institute for Defense Analyses.<sup>3</sup>

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 912(a), 100 Stat. 3816, 3925 (1096) (*identical legislation omitted*).

<sup>2</sup>S. REP. NO. 718, 99th Cong., 2d Sess. 267 (1986).

<sup>3</sup>Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8107, 105 Stat. 1150, 1199 (1991).

#### **1.4.10.4. Recommendation and Justification**

##### **No Action**

The Panel recommends no action on this statute, since it is primarily about the creation and management of FFRDCs, rather than acquisition *per se*.

#### **1.4.10.5. Relationship to Objectives**

The Panel considers that action on this statute would not specifically promote its objectives.

## **1.4.11. 10 U.S.C. § 2368**

### **Critical technologies research**

#### **1.4.11.1. Summary of the Law**

This section provided that the Secretary of Defense could contract with three specific entities for studies in fields of R&D essential to development of critical technologies. Such agreements could be entered into only after consultation with the Director, Office of Science and Technology Policy. There was an annual statutory ceiling of \$500,000 for studies conducted under this section.

#### **1.4.11.2. Background of the Law**

As enacted in 1988, this section called for development of a critical technology plan. The plan was required to contain, among other things, lists of critical technologies, milestone goals, and comparisons with the Soviet Union and other countries.<sup>1</sup> The text of the section was completely replaced the following year.<sup>2</sup> The substituted provision authorized the Secretary of Defense to enter into agreements in furtherance of the technologies outlined in the Report of the Critical Technologies Panel in accordance with the National Science and Technology Policy, Organization and Priorities Act of 1976 (42 U.S.C. § 6683).

This section was repealed by section 821 of the 1992-93 Defense Authorization Act. That Act provided in section 821 for cooperative arrangements with non-profit organizations to establish offices overseas to monitor and assess foreign critical technology, in section 822 for the President to develop a critical technology strategy, and in section 823 for the establishment of a Federally funded Critical Technologies Institute.<sup>3</sup>

#### **1.4.11.3. Law in Practice**

The section has been repealed.

#### **1.4.11.4. Recommendation and Justification**

##### **No Action**

Because this section was repealed after inception of this Panel, no action is required.

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<sup>1</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 823, 102 Stat. 1918, 2018 (1988).

<sup>2</sup>National Defense Authorization Acts for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 841(c)(1), 103 Stat. 1352, 1514 (1989).

<sup>3</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 821(c)(1), 105 Stat. 1290, 1431 (1991).

**1.4.11.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.



## 1.4.12. 10 U.S.C. § 2370

### Biological Defense Research Program

#### 1.4.12.1. Summary of the Law

This statute mandates that the Secretary of Defense submit an annual report, in both classified and unclassified versions, on all research, development, test, and evaluation (RDT&E) conducted by DOD during the preceding fiscal year for purposes of biological defense. This report, to be submitted in conjunction with the annual budget, is required to include a description of agents or toxins used for the purposes of biological defense research during the covered fiscal year, in addition to biological agents and toxins not previously listed in Center for Disease Control publications. The list should include a description of biological properties of each agent, location of and amount spent at each facility, statement of biosafety level at each facility, and a statement of coordination with local health, fire, and police officials for provisions of emergency support services. The terms "biosafety level" and "biological defense research facility" are defined by the statute.

#### 1.4.12.2. Background of the Law

The statute, enacted in 1990,<sup>1</sup> stems from concerns over the amount of information available to local public health and safety officials in the event of the accidental release of biological agents.<sup>2</sup> The required report assures disclosure through notification (10 U.S.C. § 2370(b)(5)).<sup>3</sup> A Senate amendment, based upon a proposed Army regulation, to delete the notification requirement was withdrawn, as conferees were concerned that coordination with local officials be formalized as expeditiously as possible.<sup>4</sup>

#### 1.4.12.3. Law in Practice

The Army is responsible for preparing this report. Originally, there was concern with security considerations stemming from the ability of foreign governments to glean intelligence data from the unclassified version. The world situation has lessened this concern.

#### 1.4.12.4. Recommendation and Justification

##### No Action

The Panel believes this statute is not directly related to acquisition and it therefore makes no recommendations concerning this statute.

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 241(a), 104 Stat. 1485, 1516 (1990).

<sup>2</sup>H.R. REP. NO. 665, 101st Cong., 2d Sess. 1 (1990).

<sup>3</sup>*Id.* See also H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 561 (1990).

<sup>4</sup>H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 561 (1990).

**1.4.12.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

## 1.4.13. 10 U.S.C. § 2371

### **Advanced research projects: cooperative agreements and other transactions**

#### 1.4.13.1. Summary of the Law

This statute currently provides the vehicle for doing advanced research, both through the Defense Advanced Research Projects Agency (DARPA)<sup>1</sup> and the military departments, using cooperative agreements and other transactions. The statute consists of provisions establishing the authority of DOD to receive payments under this statute, utilization of funds received under this statute, and reporting requirements. The statute also requires the Secretary of Defense to ensure that (1) to the maximum extent practicable, the research conducted pursuant to a cooperative agreement or other transaction under this section does not duplicate other research being conducted by DOD; (2) to the extent practicable, the funds provided by the Government under this section do not exceed the total amount provided by other parties to the cooperative agreement or other transaction; and (3) this section is used only when the use of standard contracts or grants is not feasible or appropriate.

#### 1.4.13.2. Background of the Law

This statute was enacted as part of the National Defense Authorization Act for Fiscal Years 1990 and 1991.<sup>2</sup> The reason for adding this provision is explained in the Senate committee report as follows:

The committee recognizes that maturation of many technologies funded by [DARPA] have significant commercial application. The committee applauds the efforts of DARPA in this area and supports a broadening of this effort. Current law does not authorize DARPA to enter into "cooperative agreements" or "other transactions" as distinct from "grants" or "contracts." Additionally, current law does not allow for any proceeds of such arrangements to be applied to a fund for the development of other advanced technologies. Accordingly, [this] [sic] section clearly establishes the legal authority of DARPA to enter into cooperative agreements and other transactions. In granting the authority to enter into "other transactions," the committee enjoins the Department to utilize this unique authority only in those instances in which traditional authorities are clearly not appropriate. The legislation would also permit DARPA to recoup the fruits of such arrangements when there is a "dual use" potential for commercial application, for

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<sup>1</sup>DARPA "is [DOD's] corporate research organization, chartered with pursuing imaginative and innovative ideas leading to systems with significant military utility." S. REP. NO. 81, 101st Cong., 1st Sess. 126 (1989).

<sup>2</sup>Pub. L. No. 101-189, § 251(a)(1), 103 Stat. 1352, 1403 (1989).

reinvestment in the development of other technologies with the potential for military utility.<sup>3</sup>

Although the Senate version would have established the authority contained in this section on a one-year trial basis, the law as passed extended the trial period to two years.<sup>4</sup> Recently, the authority in this statute was made permanent.<sup>5</sup>

The 1992 Appropriations Act restricted agreements under the statute during FY92 to only those made by DARPA.<sup>6</sup>

#### **1.4.13.3. Law in Practice**

Although not specifically defined in this section, the term "cooperative agreement" has a similar meaning to that in 31 U.S.C. § 6305.<sup>7</sup> That statute articulates that a cooperative agreement "is to transfer a thing of value to the state, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government."

The FAR does not apply to cooperative agreements.<sup>8</sup>

#### **1.4.13.4. Recommendation and Justification**

**Amend section 2371 so that it contains only statutory provisions dealing with the utilization of cooperative agreements and other transactions.**

This amendment would specify the requirements of cooperative agreements and other transactions in this section. It would delete the limitation of authority for using these cooperative agreements and other transactions only for advanced research projects. Authority for advanced research, currently found in 10 U.S.C. § 2371, has been recommended for transfer to 10 U.S.C. § 2358.<sup>9</sup> The result would be that cooperative agreements and other transactions would now be available for use in basic, advanced, and applied research and development. The proposed amendment would separate the authority for performing research and development from the mechanics of how research and development would be accomplished.

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<sup>3</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 126, 127 (1989).

<sup>4</sup>H.R. CONF. REP. NO. 331, 101st Cong., 2d Sess. 531 (1989).

<sup>5</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 826(c), 105 Stat. 1290, 1432 (1991).

<sup>6</sup>Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, § 8113, 105 Stat. 1150, 1202 (1991) (*not codified*).

<sup>7</sup>Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877. These are different from CRDAs under 15 U.S.C. § 3710a.

<sup>8</sup>48 C.F.R. § 1.103. See the definition of "acquisition" in FAR 2.101, which references the term "contract."

<sup>9</sup>See Chapter 1.4.6 of this Report for analysis for section 2358.

#### 1.4.13.5. Relationship to Objectives

This amendment would streamline acquisition of all phases of research and development by clearly differentiating authorities. It would also support the Panel's objectives of facilitating Government access to commercial technologies and skills, as well as facilitating commercial market access to Government developed technologies.

#### 1.4.13.6. Proposed Statute

10 U.S.C. § 2371. ~~Advanced research projects;~~ Cooperative agreements and other transactions

~~(a) The Secretary of Defense, in carrying out advanced research projects through the Defense Advanced Research Projects Agency, and the Secretary of each military department, in carrying out advanced research projects, may enter into cooperative agreements and other transactions with any person, any agency or instrumentality of the United States, any unit of State or local government, any educational institution, and any other entity.~~

~~— (b)(a)(1)~~ Cooperative agreements and other transactions entered into under ~~subsection (a) section 2358 of this title~~ may include a clause that requires a person or other entity to make payments to the Department of Defense (or any other department or agency of the Federal Government) as a condition for receiving support under the agreement or other transaction.

(2) The amount of any payment received by the Federal Government pursuant to a requirement imposed under paragraph (1) may be credited, to the extent authorized by the Secretary of Defense, to the appropriate account established under ~~subsection (e) (d)~~. Amounts so credited shall be merged with other funds in the account and shall be available for the same purposes and the same period for which other funds in such account are available.

~~(e)(b)~~ The authority provided under subsection (a) may be exercised without regard to section 3324 of title 31.

~~(d)(c)~~ The Secretary of Defense shall ensure that--

(1) to the maximum extent practicable, a cooperative agreement or other transaction under this section does not provide for research and development that duplicates research and development being conducted under existing programs carried out by the Department of Defense;

(2) to the extent the Secretary determines practicable, the funds provided by the Government under the cooperative agreement or other transaction do not exceed the total amount provided by other parties to the cooperative agreement or other transaction; and

(3) the authority under this section is used only when the use of standard contracts or grants is not feasible or appropriate.

~~(e)~~ (d) There is hereby established on the books of the Treasury separate accounts for each of the military departments and the Defense Advanced Research Projects Agency for support of ~~advanced-research and development~~ projects provided for in cooperative agreements and other transactions entered into under section 2358 of title 10. Funds in those accounts shall be available for the payment of such support.

~~(f)~~ (e) Not later than 60 days after the end of each fiscal year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report on all cooperative agreements and other transactions (other than contracts and grants) entered into under this section during such fiscal year. The report shall contain, with respect to each such cooperative agreement and transaction, the following:

(1) A general description of the cooperative agreement or other transaction (as the case may be), including the technologies for which ~~advanced-research and development~~ is ~~are~~ provided for under such agreement or transaction.

(2) The potential military and, if any, commercial utility of such technologies.

(3) The reasons for not using a contract or grant to provide support for such ~~advanced research and development~~.

(4) The amount of the payments, if any, referred to in subsection ~~(b)~~ (a) that were received by the Federal Government in connection with such cooperative agreement or other transaction during the fiscal year covered by the report.

(5) The amount of the payments reported under paragraph (4), if any, that were credited to each account established under subsection ~~(e)~~ (d).

## **1.4.14. 10 U.S.C. § 2372**

### **Independent research and development and bid and proposal costs: payments to contractors**

#### **1.4.14.1. Summary of the Law**

This section requires the Secretary of Defense to prescribe regulations governing the payment of independent research and development (IR&D) and bid and proposal (B&P) expenses incurred by contractors. Such IR&D/B&P costs are allowable on covered contracts to the extent that they are allocable, reasonable, and not otherwise unallowable by law or FAR. Among specific controls the statute imposes are ones that restrict allowability to IR&D/B&P costs of "potential interest" to DOD and a limitation on the amount which may be paid annually for FYs 93-95 to major contractors.

#### **1.4.14.2. Background of the Law**

This section was originally enacted in 1990.<sup>1</sup> With the passage of this section, Congress instituted an expansion of the types of research and development that a company could consider for recovery under IR&D as being of "potential interest" to the Department of Defense. Congress did so because it was concerned that the anticipated reduction in defense procurement spending in the coming years might well have an adverse impact on the defense industry's IR&D program.<sup>2</sup>

Soon thereafter, the section was amended.<sup>3</sup> Differences between the original enactment and the amended version include the use of the terms "major contractor," "covered contract," and "covered contractor;" the inclusion of a specific formula by which the maximum reimbursable amount may be determined; elimination of advance agreements; and encouragement of enabling superior weapon systems performance and reducing acquisition and life cycle costs.

The legislative history accompanying the amendments notes that numerous industrial associations provided Congress with information addressing industry concerns about the IR&D program. Those concerns included efficiency and degree of independence, as well as the future of the program itself in light of a declining defense budget. The legislative history also indicates that Congress intended to enhance the IR&D program through simplification, including eliminating reviews and gradings by Government officials and removing arbitrary ceilings for R&D recovery. This would allow the degree of reasonableness to prevail in contract negotiations for recovery of both IR&D and bid and proposal costs.<sup>4</sup>

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 824, 104 Stat. 1485, 1603 (1990), repealing The Military Procurement Act of 1971, Pub. L. No. 91-441, § 203, 84 Stat. 905, 906-08 (1970).

<sup>2</sup>H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 627 (1990).

<sup>3</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 802(a)(1), (e), 105 Stat. 1290, 1412, 1414 (1991).

<sup>4</sup>H.R. REP. NO. 60, 102d Cong., 1st Sess. 181, 182 (1991).

The utilization of ceilings for FYs 93-95 was representative of a concern over potential increased expenditures in the defense arena. Provisions were included to prescribe the maximum reimbursement limitation for major contractors during this period. Such contractors are allowed to recover up to 105% of the preceding year's allowable costs. Additionally, provisions were included which would allow for greater reimbursement in specified situations.<sup>5</sup>

#### **1.4.14.3. Law in Practice**

This section has been implemented at FAR 31.205-18 and 42.102 and DFARS 225.7303-2, 231.205-18, 242.302, 242.771, and 242.10.

#### **1.4.14.4. Recommendation and Justification**

##### **Retain**

Only one recommendation was received on this statute. It recommended eliminating the detailed procedures from the statutory scheme.<sup>6</sup> While the detailed procedures present in this statute should be the exception, rather than the rule, this recommendation appears to be premature. The Panel believes this statute addresses significant and previously controversial issues in the area of IR&D/B&P costs, and represents a reasoned and enlightened balance between the Government's need to control costs and the need to support new technology and the industrial base.

#### **1.4.14.5. Relationship to Objectives**

This section helps streamline the acquisition process and recognizes costs essential to support of the defense industrial base.

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<sup>5</sup>H.R. CONF. REP. NO. 311, 102d Cong., 1st Sess. 568 (1991).

<sup>6</sup>Memorandum from DCAA signed by Michael J. Thibault, Assistant Director for Policy and Plans, to Contract Formation Working Group, Advisory Panel on Streamlining and Codifying Acquisition Law, Defense Systems Management College (June 1, 1992).



## **1.4.15. 10 U.S.C. § 4503**

### **Research and development programs**

#### **1.4.15.1. Summary of the Law**

This section gives the Secretary of the Army authority to conduct and participate in research and development programs. There is a prohibition on using the authority in this section for the development of prototype aircraft intended primarily for civilian use.

#### **1.4.15.2. Background of the Law**

This section had its origins in the Army and Air Force Authorization Act of 1949. The Secretary of the Army was specifically authorized to "conduct, engage, and participate in research and development programs related to Army activities." Further, the Secretary was authorized to procure or contract for facilities, equipment, services and supplies as needed.<sup>1</sup> The restriction on using funds for prototype aircraft intended primarily for commercial use was DOD-wide.<sup>2</sup> These provisions were codified in their present form by the 1956 reorganization amendments.<sup>3</sup>

#### **1.4.15.3. Law in Practice**

Acquisition of research and development is implemented in FAR Part 35 and DFARS Part 235.

#### **1.4.15.4. Recommendation and Justification**

##### **Repeal**

When the Panel initially considered repealing 10 U.S.C. § 4503 because it appeared duplicative of section 2358, it invited comment. In response, a memorandum from the Army Corps of Engineers Chief Counsel indicated there was difference between the two sections. The memorandum stated that the authority in section 2358 to engage in research projects is limited to those that relate to weapons and other military needs, whereas section 4503 permits the Corps to conduct R&D in support of public works efforts, which are part of the mission of the Army but which neither relate to weapons nor to military needs. Because repeal of section 4503 might be construed as removing the Corps' authority to continue civil works R&D, the memorandum recommended providing for such authority in section 2358 if section 4503 were repealed.<sup>4</sup>

<sup>1</sup>Army and Air Force Authorization Act of 1949, Pub. L. No. 81-604, § 104, 1950 U.S.C.C.A.N. (64 Stat.) 325, 327-28.

<sup>2</sup>*Id.* at § 304.

<sup>3</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 134.

<sup>4</sup>Memorandum from Department of the Army Corps of Engineers signed by Kathryn Kurke, Assistant Chief Counsel for Research and Development, to Lt Col James S. Cohen, USAF, Acquisition Law Task Force, Defense Systems Management College (Aug. 12, 1992).

The Corps' authority to carry out its public works responsibilities may be gleaned from language in 10 U.S.C. § 4503 permitting research and development "relating to the Army." While there is no clearly comparable language in the current 10 U.S.C. § 2358, the latter does not prohibit such efforts and would seem to be broad enough to cover such actions. Nevertheless, because the Panel is recommending repeal of section 4503, it also recommends amending section 2358 to ensure that the Corps of Engineers may continue to perform research and development programs associated with its public works responsibilities. The recommended amendment to section 2358, which would permit research and development which is of "potential interest to [DOD] or to the military department concerned," is specifically intended to ensure that the Corps' capabilities in this area are not diminished.<sup>5</sup>

#### **1.4.14.5. Relationship to Objectives**

Repeal would streamline the acquisition process by elimination of a duplicative statute.

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<sup>5</sup>See Chapter 1.4.6 of this Report for analysis of section 2358. See also Chapter 1.4.18 of this Report, where the Panel is recommending repeal of 10 U.S.C. § 9503.

## **1.4.16. 10 U.S.C. § 7303**

### **Model Basin; investigation of hull designs**

#### **1.4.16.1. Summary of the Law**

This statute provides that the Department of Navy, through an unspecified office or agency, shall conduct tests at the David W. Taylor Model Basin (DTMB) regarding shapes and forms of vessels and aircraft, and other investigations associated with design problems. The statute also provides for experiments to be conducted for private persons. Data from such experiments is required to be kept confidential. Government use of data is permitted consistent with United States patent laws.

#### **1.4.16.2. Background of the Law**

The present statute traces its origins to a 1936 authorization for construction of a model basin.<sup>1</sup> The major provisions of the current statute were included in the original. The present version represents a 1956 recodification<sup>2</sup> with a 1966 amendment which increased discretion within the Department of Navy as to which organization the facility would fall under.<sup>3</sup>

#### **1.4.16.3. Law in Practice**

The statute is the authority for operations at DTMB. Discussion with DTMB's General Counsel indicated the statute is essential for operations.

#### **1.4.16.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention. The statute is currently an effective tool in the operation of the facility. Repeal of the statute would require a new statutory scheme to ensure operations could continue.

#### **1.4.16.5. Relationship to Objectives**

Retention of this statute meets the Panel's objectives by identifying the broad policy objectives and the fundamental requirements to be achieved under the law, but leaves detailed implementing methodology to the acquisition regulations.

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<sup>1</sup>Act of May 6, 1936, ch. 333, 49 Stat. 1263.

<sup>2</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, 70A Stat. 451.

<sup>3</sup>Act of Nov. 2, 1966, Pub. L. No. 89-718, § 41, 80 Stat. 1115, 1120.

## **1.4.17. 10 U.S.C. § 7522**

### **Contracts for research**

#### **1.4.17.1. Summary of the Law**

This law permits the Secretary of the Navy or the Secretary's delegates, in particular the Chief of Naval Research and the chiefs of the bureaus, to make, without advertising, contracts, amendments, or modifications of contracts for services and materials necessary to conduct research or make or secure reports, tests, models, or apparatus. These types of contracts are not subject to the requirements of 31 U.S.C. § 3324 relating to advance, partial, progress, or other payments, and no bond is necessary. This law also specifically prohibits the use of the cost-plus-a-percentage-of-cost type contracting for research contracts.

#### **1.4.17.2. Background of the Law**

This statute was originally passed in 1946.<sup>1</sup> During World War II, the War Powers Act enabled the Navy to relax the peacetime constraints on research contracts it had previously followed. This statute provided for, in peacetime, the Naval Research Laboratory and Naval Research Development Board, which had been established during the war.<sup>2</sup> These two bodies performed so effectively during the war that Congress decided to continue their operations during peacetime through the newly created Office of Naval Research.<sup>3</sup> This statute was codified in 1956,<sup>4</sup> and subsequent amendments have been technical without any substantive alterations.

#### **1.4.17.3. Law in Practice**

The subject of Research and Development contracting is addressed at FAR Subpart 35 and DFARS Subpart 235, both entitled "Research and Development Contracting."

#### **1.4.17.4. Recommendation and Justification**

**Repeal subsection (b) of 10 U.S.C. § 7522 and merge into 10 U.S.C. § 2307 as a subsection.**

As stated in Chapter 2.1.1 of this Report, the Panel is recommending that all statutes within Title 10 relating to contract payment and financing should be consolidated within a single comprehensive statute. The Panel recommends that subsection (b) of section 7522 dealing with payments of research and development contracts be repealed and merged into the revised version of 10 U.S.C. § 2307, "Contract financing," as a subsection. This single statute will centralize all

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<sup>1</sup>Act of Aug. 1, 1946, ch. 727, § 6, 60 Stat. 779, 780.

<sup>2</sup>S. REP. NO. 1628, 79th Cong., 2d Sess. 3 (1946).

<sup>3</sup>*Id.*

<sup>4</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, 70A Stat. 464.

pertinent requirements regarding Title 10 contract financing, while eliminating duplication within the U.S. Code. The Panel recommends that the remaining two subsections of 10 U.S.C. § 7522 be retained in their current form and location.<sup>5</sup>

#### **1.4.17.5. Relationship to Objectives**

This recommendation satisfies the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It eliminates the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law.

#### **1.4.17.6. Proposed Statute**

##### **10 U.S.C. § 7522. Contracts for research**

(a) The Secretary of the Navy and, by direction of the Secretary, the Chief of Naval Research and the chiefs of bureaus may, without advertising, make contracts or amendments or modifications of contracts for services and materials necessary to conduct research and to make or secure reports, tests, models, or apparatus. A contractor supplying such services or materials need not be required to furnish a bond.

~~(b) Subsections (a) and (b) of section 3324 of title 31 do not apply to advance, progress, or other payments made with respect to a contract under this section.~~

(eb) This section does not authorize the use of the cost-plus-a-percentage-of-cost system of contracting.

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<sup>5</sup>The Panel received one comment which pointed out differences in scope between section 7522(a) and 10 U.S.C. § 2358. Letter from the Office of the Chief of Naval Research, signed by William Garvert, to Stuart A. Hazlett, Acquisition Law Task Force, Defense Systems Management College (Dec. 17, 1992).

## **1.4.18. 10 U.S.C. § 9503**

### **Research and development Programs**

#### **1.4.18.1. Summary of the Law**

This statute gives the Secretary of the Air Force authority to conduct and participate in research and development programs. There is a prohibition on using the authority in this section for the development of prototype aircraft intended primarily for civilian use.

#### **1.4.18.2. Background of the Law**

This statute had its origins in the Army and Air Force Authorization Act of 1949. The Secretary of the Air Force was specifically authorized to "conduct, engage, and participate in research and development programs related to Air Force activities." Further, the Secretary was authorized to procure or contract for facilities, equipment, services, and supplies as needed.<sup>1</sup> The restriction on utilizing funds for prototype aircraft intended primarily for commercial use was DOD-wide.<sup>2</sup> These provisions were codified in present form by the 1956 reorganization amendments.<sup>3</sup>

#### **1.4.18.3. Law in Practice**

The acquisition of research and development is implemented in FAR Part 35 and DFARS Part 235.

#### **1.4.18.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute. Authority to conduct these activities is present in 10 U.S.C. § 2358.<sup>4</sup>

#### **1.4.18.5. Relationship to Objectives**

Repeal will streamline the acquisition process by elimination of a duplicative statute.

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<sup>1</sup>Army and Air Force Authorization Act of 1949, Pub. L. No. 81-604, § 205, 1950 U.S.C.C.A.N. (64 Stat.) 325, 327-28.

<sup>2</sup>*Id.* at § 304.

<sup>3</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, 70A Stat. 134.

<sup>4</sup>Memorandum from Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition) signed by Ira L. Kemp, Associate Deputy to Theresa Squillacote, Acquisition Law Task Force, Defense Systems Management College (Nov. 20, 1992). *See also* the related analysis of 10 U.S.C. §§ 2358 and 4503 at Chapters 1.4.6 and 1.4.15, respectively, of this Report.

## 1.5. Procurement Protests

### 1.5.0. Introduction

Congress admonished the Panel to limit the statutory provisions which govern DOD procurements to those provisions which are "necessary to . . . protect . . . fundamental governmental policies."<sup>1</sup> Competition is one of those fundamental governmental policies, and Congress in 1984 emphasized its belief that protests are "necessary" to protect competition.<sup>2</sup> Indeed, restrictions on competition have been the subject of protests for over 60 years.<sup>3</sup>

Congress has repeatedly expanded and strengthened the bid protest system over the past ten years. In 1982, the Federal Courts Improvement Act (FCIA) gave the Court of Federal Claims the power to grant equitable relief in bid protest actions filed before contract award.<sup>4</sup> The Competition in Contracting Act (CICA) codified and strengthened the General Accounting Office (GAO) Procurement Protest System in 1984<sup>5</sup> and created a bid protest remedy for acquisitions of automatic data processing equipment (ADPE) in the General Services Board of Contract Appeals (GSBCA).<sup>6</sup> In 1986, the Paperwork Reduction Reauthorization Act expanded and strengthened the GSBCA bid protest remedy.<sup>7</sup> As a consequence, parties who object to an agency procurement action can now file a protest in four different forums external to the contracting agency: the GAO, the GSBCA, the Court of Federal Claims or a district court.<sup>8</sup>

The Panel recognizes the important role of protests in assuring full and open competition and therefore has made recommendations to increase the efficiency and effectiveness of the existing protest remedies. The Panel's recommendations propose specific changes to the current bid protest system. The recommendations reinforce the continuing congressional support for GAO and GSBCA protests.<sup>9</sup> However, the Panel believes that the 1982 creation of the Claims Court, with its grant of bid protest jurisdiction and the interpretation of this jurisdiction by various courts of appeals, has created confusion and unnecessarily impeded the expeditious and efficient resolution of judicial bid protests. Accordingly, the Panel recommends that Congress consolidate,

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<sup>1</sup>S. REP. NO. 34, 101st Cong., 2d Sess. 195 (1990).

<sup>2</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, 1984 U.S.C.C.A.N. (98 Stat.) 494; H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1435 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2123.

<sup>3</sup>JOHN CIBINIC, JR. & RALPH NASH, JR., *FORMATION OF GOVERNMENT CONTRACTS* 1006 (2d ed. 1986).

<sup>4</sup>Pub. L. No. 97-164, 1982 U.S.C.C.A.N. (96 Stat.) 25. The Claims Court was renamed the Court of Federal Claims by the Federal Courts Administration Act of 1992. Pub. L. No. 102-572, § 902, 1992 U.S.C.C.A.N. (106 Stat.) 4506.

<sup>5</sup>31 U.S.C. §§ 3551-56.

<sup>6</sup>40 U.S.C. § 759(f).

<sup>7</sup>Pub. L. No. 99-500, § 831, 1986 U.S.C.C.A.N. (100 Stat.) 1783-344.

<sup>8</sup>District courts have authority, pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706, 3105, 3344, to review post-award, and, in some circuits, pre-award challenges brought by disappointed bidders. *See Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970); *Cubic Corporation v. Cheney*, 914 F.2d 1501 (D.C. Cir. 1990).

<sup>9</sup>Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 831, 1986 U.S.C.C.A.N. (100 Stat.) 1783.

into a single judicial forum, the current bid protest jurisdiction of the Court of Federal Claims and the district courts.

The Panel also proposes that Congress consider whether protests need to be decided by four different forums in three different branches of the Government. The Panel therefore recommends that Congress consider whether the competition policy would be better served through nonjudicial resolution of protests by a single independent agency, located within the executive branch, with powers comparable to those exercised by the existing four forums. With proper authority, this exclusive administrative forum could provide more uniform and cost effective treatment of protests. This agency could provide two different procedures for consideration of protests. The first procedure would be similar to the relatively inexpensive and expeditious procedure now provided by the GAO. The second procedure would be similar to the adjudicatory procedure provided by the GSBCA. However, the GSBCA-type procedure would not be limited, as it is now limited, to protests regarding the award of automatic data processing equipment and services. Rather, the GSBCA-type procedure would be available for all types of procurements.

The Panel believes that its recommendations for changes to the statutory charters of the existing bid protest forums are well supported and can lead to immediate improvements. Accordingly, the Panel recommends that they be given priority over its recommendation for congressional consideration of an exclusive bid protest forum. Because the latter recommendation will require careful analysis and will likely be the subject of considerable debate, the Panel recognizes that it may be some years before this concept will be ready for formal legislative action.

The recommendations in this Report deal primarily with protests which are not filed with a contracting agency because the Panel found no reason to change these informal agency protest procedures. The Panel did ask for comments on whether protesters should be required to file a protest with an agency before filing a protest with the GAO, the GSBCA, or the courts. There was virtually no support for this idea. Comments from both Government and private sector parties indicated that protesters should be free to choose between filing with an agency or using an external forum and that agencies should be free to keep the agency protest process as informal, inexpensive, and flexible as possible.

The discussion that follows gives a brief history of the bid protest process and highlights key Panel recommendations.

#### **1.5.0.1. Development Of A Formal Bid Protest System**

In the 1920s the GAO became the first forum, outside the contracting agency, to consider protests to award of contracts.<sup>10</sup> Initially, the Comptroller General considered protests under its authority to settle the accounts of the executive branch agency and to render advance decisions on payment questions submitted by federal disbursing and certifying officers or heads of Federal

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<sup>10</sup>Comp. Gen. Dec. A-10024 (Aug. 19, 1925).



agencies.<sup>11</sup> By 1984, when Congress gave the GAO express authority to consider protests, the GAO was receiving more than 2,000 protests a year.<sup>12</sup>

In 1956, the Court of Claims became the first court to consider bid protests when in *Heyer Products v. United States*,<sup>13</sup> it ruled that a disappointed offeror, whose offer was improperly rejected by an agency, was entitled to recover monetary damages as measured by bid and proposal costs. Compared to the GAO, the Court of Claims considered relatively few bid protest decisions before it received authority in 1982 to enjoin contract awards during protest resolution.

In 1970, in *Scamwell Laboratories, Inc. v. Schaffer*,<sup>14</sup> a case of first impression, the Court of Appeals for the District of Columbia Circuit ruled that district courts had jurisdiction under the Administrative Procedure Act (APA) to consider protests of contract awards.<sup>15</sup> Under the APA, a district court has authority to hold unlawful and set aside agency actions, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"<sup>16</sup> In the ensuing years, the other 11 regional courts of appeals also have held that, based on the APA, the district courts in their circuits had this authority to consider bid protests.<sup>17</sup>

In 1984, Congress enacted the Competition in Contracting Act (CICA), which effected sweeping changes in virtually all aspects of federal procurement law. These changes required that bidders or offerors on Government contracts be given an opportunity for full and open competition. The House Conference Report on CICA explained as follows:

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids and proposals for proposed procurements. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government.<sup>18</sup>

In providing the GAO and the GSBICA with statutory authority to conduct bid protests, the CICA conferees recognized the vital role of protests in assuring full and open competition, stating that:

The conferees believe that a strong enforcement mechanism is necessary to insure the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief. To accomplish this, the conference added a new subchapter to Chapter 35 of Title 31 United States

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<sup>11</sup>CIBINIC & NASH, *supra* note 8, at 1006.

<sup>12</sup>H.R. REP. NO. 1157, 98th Cong., 2d Sess. 23 (1984).

<sup>13</sup>135 Ct. Cl. 63, 140 F. Supp. 409 (1956); *see* CIBINIC & NASH, *supra* note 8, at 1006.

<sup>14</sup>424 F.2d 859 (D.C. Cir. 1970).

<sup>15</sup>U.S.C. §§ 551-559, 701-706, 3105, 3344.

<sup>16</sup>U.S.C. § 706(2)(A).

<sup>17</sup>Jeffrey M. Villet, *Equitable Jurisdiction in Government Contract "Bid Protest" Cases: Discerning the Bounds of Equity*, 17 PUB. CONT. L.J. 152 (1987).

<sup>18</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1422 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2110.

Code, which codifies and strengthens the bid protests function currently in operation at the General Accounting Office (GAO).<sup>19</sup>

Today, the vast majority of external protests are filed with the GSBGA or the GAO. The following chart displays the number of protests in the various forums for the period 1988-91.

#### BID PROTESTS FILED IN THE VARIOUS FORUMS<sup>20</sup>

YEAR	GAO	GSBGA	COURT OF FEDERAL CLAIMS
1988	2633	215	8
1989	2673	283	23
1990	2489	268	19
1991	2887	250	17

#### 1.5.0.2. GAO Protests<sup>21</sup>

At the GAO, protests are resolved through written decisions, initiated by a letter outlining the basis of the protest.<sup>22</sup> The GAO will consider protests which object to the terms of a solicitation, a proposed award or award of a contract,<sup>23</sup> and must generally decide protests within 90 working days.<sup>24</sup> The GAO bases its decision on the written agency report submitted in response to the protest and the protester's written comments to the agency report.<sup>25</sup> In order to develop a full record on the protested action, a protester may request the agency to submit to the GAO additional agency records with the agency report.<sup>26</sup> Where appropriate, the GAO may conduct hearings and receive sworn testimony on contested issues of fact.<sup>27</sup> Hearings are the exception rather than the rule under the GAO procedure.

<sup>19</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1435 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2123. A similar rationale was provided in support of the new GSBGA protest procedures. H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1430 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2118.

<sup>20</sup>These figures are based upon inquiries to the various administrative offices of the forums. No agency collects statistics on protests filed in the federal district courts. However, David M. Cohen, Branch Director of the Commercial Litigation Branch in the Civil Division of the United States Department of Justice, has advised the Panel that his Branch reviews the "vast majority of district court protests" and the number reviewed each year is "far fewer than 100."

<sup>21</sup>The GAO protest procedures are set out in detail in the GAO bid protest regulations, 4 C.F.R. Part 21.

<sup>22</sup>4 C.F.R. § 21.1.

<sup>23</sup>*Id.*

<sup>24</sup>31 U.S.C. § 3554.

<sup>25</sup>4 C.F.R. § 21.3.

<sup>26</sup>*Id.*

<sup>27</sup>4 C.F.R. § 21.5.

If the agency action is found to be in violation of law or regulation, the GAO may grant the protest and may recommend that the agency cancel the solicitation, award a contract to another bidder, cancel an award, or take other such appropriate action. Additionally, the GAO may award bid and proposal costs or legal fees incurred during the protest.

If a protest is filed with the GAO before contract award or if the agency is notified by the GAO of a protest within 10 calendar days after contract award, agencies must ordinarily suspend contract award or stop work on awarded contracts.<sup>28</sup> Only under special circumstances can agencies allow award to be made or performance to continue.

### 1.5.0.3. GSBCA<sup>29</sup>

The Administrator of the General Services Administration coordinates the procurement of automatic data processing equipment and services by Federal agencies, including a portion of DOD procurements.<sup>30</sup> In furtherance of this authority, the Administrator either procures the ADPE or issues a delegation of procurement authority (DPA) to authorize the purchase of ADPE by an agency.<sup>31</sup> The actual procurements are conducted by the agencies under their procurement statutes. The GSBCA bid protest authority is limited to those ADPE procurements for which a DPA is necessary.<sup>32</sup>

The GSBCA conducts a formal adjudicatory-type procedure. Protests filed with the GSBCA must be resolved to the maximum extent possible within 45 working days.<sup>33</sup> The GSBCA procedure typically begins with an initial conference.<sup>34</sup> At that time, an administrative judge establishes a process for conducting discovery and may establish a limitation on the amount of discovery. The judge also establishes a time period for completion of discovery and for filing of dispositive motions.

If a protest is filed before contract award or within 10 days of contract award, the GSBCA holds a hearing to determine whether to suspend the agency DPA.<sup>35</sup> If the DPA is suspended, agencies are precluded from making award of a contract where the protest is filed before award or from allowing continuance of performance of the contract in those cases where the protest is filed after award.<sup>36</sup>

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<sup>28</sup>31 U.S.C. § 3553.

<sup>29</sup>The GSBCA bid protests are governed by the GSBCA Rules of Procedure. 48 C.F.R. §§ 6100-6199.

<sup>30</sup>Under the "Warner Amendment," the jurisdiction of the GSA over ADPE does not extend to DOD ADPE if the function, operation, or use of the ADPE involves intelligence activities or the command and control of military forces, or is equipment which is an integral part of a weapon or weapons system, or is critical to the direct fulfillment of military or intelligence missions. Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 908(a)(1), 1982 U.S.C.C.A.N. (95 Stat.) 1117, 40 U.S.C. § 759(a)(3).

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>48 C.F.R. § 6101.10.

<sup>35</sup>48 C.F.R. § 6101.19.

<sup>36</sup>40 U.S.C. § 759(f)

Under the GSBICA's procedures, agencies are required to file the "Rule 4 File" with the GSBICA and provide copies to the parties.<sup>37</sup> This Rule 4 File constitutes the record of the agency decision forming the basis of the protest. If they so desire, protesters may seek to supplement that record.

At the conclusion of discovery, and well before the end of the 45 working day period for a decision, the GSBICA may conduct an evidentiary hearing on the protest. The typical hearing is completed in less than three days. Following the hearing and receipt of briefs from the parties, the GSBICA issues its final decision. Decisions of the GSBICA may be appealed as a matter of right to the Court of Appeals for the Federal Circuit by either the Government or any interested party.<sup>38</sup>

#### **1.5.0.4. Judicial Procedures<sup>39</sup>**

Protests filed in the district courts or the Court of Federal Claims proceed in a manner similar to those filed before the GSBICA. Parties filing protests in the courts file a complaint generally seeking both a declaratory judgment that an agency action was improper and a temporary restraining order or preliminary injunction to stop the agency from proceeding with award or performance of a contract.<sup>40</sup> Before any hearing is held, the courts will often allow limited discovery.

No prescribed time periods exist for resolution of bid protests filed in the courts, and there are no prescribed rules for issuance of decisions. Protests are often disposed of by the grant or denial of a preliminary injunction. In many cases, this grant or denial is not accompanied by a formal decision.

Upon appeal of either party, decisions of the district courts may be reviewed as a matter of right to one of the twelve regional courts of appeals.<sup>41</sup> Decisions of the Court of Federal Claims are reviewed on appeal by the Court of Appeals for the Federal Circuit.<sup>42</sup>

#### **1.5.0.5. Basis Of Recommendations**

The Panel adopted the following four principles to provide guidance in formulating its recommendations for changes to the bid protest system:

- Disappointed bidders and offerors should have reasonable access to the reasons for adverse agency actions.

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<sup>37</sup>48 C.F.R. § 6101.4.

<sup>38</sup>40 U.S.C. § 759(e)(6)(A).

<sup>39</sup>The 1991 *Report of the American Bar Association Public Contract Law Section Bid Protest Committee Courts Subcommittee Project* [hereinafter *ABA Courts Subcommittee Project*] contains a thorough discussion of the bid protest procedures in Federal courts.

<sup>40</sup>See e.g., 28 U.S.C. § 1491(a)(3).

<sup>41</sup>28 U.S.C. § 1291.

<sup>42</sup>28 U.S.C. § 1295(a)(3).

- Contracting officers, like other Government officials, are entitled to a presumption of regularity for their actions.
- Protests should be resolved in a fair, expeditious, and efficient manner.
- Overlapping, duplicative, and conflicting protest procedures should be eliminated.

Based on the above guidance, the Panel has made a series of recommendations to the existing bid protest system which offer some immediate benefits:

- Precipitous protests can be avoided;
- Greater uniformity in both decisions and practice can be gained among the bid protest forums; and
- The bid protest system will become more efficient and thereby save resources for protesters, intervenors, and agencies.

Moreover, the Panel has recommended that Congress consider a more far-reaching reform of replacing the four existing bid protest forums with an exclusive bid protest forum in the executive branch. The Panel fully recognizes that it would be premature to implement this far-reaching reform without considerably more analysis and debate. Regardless of whether Congress eventually finds merit to an exclusive bid protest forum, the Panel believes consideration should be given to the immediate improvements recommended by this Report.

#### **1.5.0.6. Disappointed Offerors Should Have Reasonable Access To The Reasons For Adverse Agency Action**

Frequently, a disappointed offeror can obtain complete and timely information on the reasons for an agency's rejection of its offer only by filing a protest. Providing offerors with more complete and timely information on the reasons for an agency's adverse action would eliminate one of the reasons that cause contractors to file protests.<sup>43</sup> This would in turn shorten the procurement cycle, save time, and reduce needless expense. To make this requirement meaningful, the period of suspension should be extended to accommodate the debriefing. For this reason and for other reasons explained in its detailed proposal, the Panel recommends that:

- Offerors be given timely and complete debriefings which provide meaningful information on the strengths and weaknesses of their proposals.
- After contract award, agencies must ordinarily suspend contract performance whenever a protest is filed within ten days of contract award or within three calendar days after the date set by an agency for any requested and required debriefing.

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<sup>43</sup>In *The Protest Experience Under the Competition in Contracting Act* (1989), the Bid Protest Committee of the American Bar Association, Section of Public Contract Law documented the commonly-held belief that some protests would not have been filed if a meaningful debriefing had been available.

The Panel recognizes the effectiveness of protective orders in GAO protests. The use of protective orders was recently instituted through the unilateral actions of the GAO. Protective orders permit interested parties to review competition-sensitive and proprietary information which they otherwise could not review. This practice allows for a more comprehensive examination of the facts with a more equitable decision. The Panel believes that the authority for this useful tool should be made permanent. Accordingly, the Panel recommends that:

- The Comptroller General should be given express authority to use protective orders to provide access to competition-sensitive or proprietary information to attorneys and technical consultants of the interested parties.

#### **1.5.0.7. Contracting Officers, Like Other Government Officials, Are Entitled To A Presumption Of Regularity For Their Actions**

It is a well-established principle of administrative law that "in the absence of clear evidence to the contrary, courts presume that [Government officials] have properly discharged their official duties."<sup>44</sup> Sound public policy reasons support the presumption of regularity, including the need to allow for the reasonable exercise of discretion by Government officials. In approving the Federal Courts Improvement Act of 1982 (FCIA), the Senate recognized this policy's application to protests:

... [S]ection 133 gives the new Claims Court the power to grant declaratory judgments and give equitable relief in contract actions prior to award. Since the funds which the Government utilizes to purchase goods and services are derived solely from public sources, the public possesses a strong interest in the ability of the Government to fulfill its requirements in these areas at the lowest possible cost. Accordingly, in the vast majority of circumstances, the Government must be permitted to exercise its right to conduct business with those suppliers it selects and to do so in an expeditious manner.<sup>45</sup>

The Panel believes that this presumption should continue and that matters which are entrusted to agency discretion should be upheld in a protest if the Government is able to provide a reasonable basis for its actions.

The Government does not have unfettered discretion to conduct business with the suppliers it chooses. It must comply with the laws and regulations governing the Federal procurement process. Indeed, the legislation authorizing the GAO and the GSBGA protest procedures specifically instructs that relief can be granted where the agency action violates law or regulation.

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<sup>44</sup>*United States v. Chemical Foundation, Inc.* 272 U.S. 1, 14-15 (1926).

<sup>45</sup>S. REP. NO. 275, 97th Cong., 2d Sess. 23 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 32-33.

The need to adhere to these laws and regulations is grounded in sound public policy. As the Court of Appeals for the Eleventh Circuit has stated, "the public and . . . bidders have a strong interest in certainty in the bidding process . . . . To achieve this certainty, strict adherence to the procedures for bidding is necessary."<sup>46</sup> A logical corollary to this principle is the need for consistency among the various protest forums as to how a protest is reviewed. A single standard of review for all protest forums will result in increased consistency and greater certainty in result, will reduce forum shopping, and will enhance the perception that the protest system is fair. Accordingly, the Panel recommends:

- The establishment of a single standard of review for agency actions that authorizes the courts, like the GAO and the GSBICA, to set aside agency action which violates procurement law or regulation. On matters committed to agency discretion, the agency should be required to establish a reasonable basis for its actions.

As an additional enhancement of the bid protest system's integrity, the Panel recognizes a need to provide for a penalty for those who bring a protest knowing it is baseless or, after having discovered that fact, continue the protest. While the Panel believes that this situation is relatively uncommon, the very presence of this penalty will deter frivolous protests and will add to the overall perception that the entire process is fair and even-handed. Accordingly, the Panel recommends that:

- Where the GAO, the GSBICA, or a court expressly finds that a protest is frivolous or not filed or pursued in good faith, the Government should be entitled to recover its costs in defending against the protest.

#### **1.5.0.8. Protests Should Be Resolved In A Fair, Expeditious And Efficient Manner**

Although protests further the Government policy of competition, protests also delay the procurement of services and supplies necessary for efficient and effective Government operation. It is essential, therefore, that protests be both fairly and expeditiously resolved. In enacting the Competition in Contracting Act (CICA), Congress recognized this principle and required the GAO and the GSBICA by statute to resolve protests expeditiously.<sup>47</sup> The courts should be similarly obligated. Accordingly, the Panel recommends that:

- The Courts, like the GAO and the GSBICA, should be directed by statute to resolve protests expeditiously.

The Panel also believes that any impediment to early resolution and settlement of a protest where appropriate should be removed. One impediment is the perceived inability of a contracting agency to completely resolve and settle a protest by the payment of bid and proposal costs and legal fees. Currently, if an agency determines that there is merit to a protest, the agency can take action to resolve the protest, but some believe it is not clear that an agency can pay bid and proposal costs, attorneys fees, or consultant and expert witness fees associated with the protest.

<sup>46</sup>*Choctaw Manufacturing Co., Inc. v. United States*, 761 F.2d 609, 619 n.17 (11th Cir. 1985).

<sup>47</sup>31 U.S.C. § 3555; 40 U.S.C. § 759(f).

With an express grant of authority to pay such expenses for meritorious protests, the agencies may completely resolve and settle such protests at any stage of the protest and avoid unnecessary administrative and legal expenses. Accordingly, the Panel recommends that:

- Agencies should be given express authority to pay bid and proposal costs, attorney fees, and consultant or expert witness fees in order to settle meritorious protests.

The Panel has also identified several changes to the procedures of the two administrative protest forums. These changes are intended to streamline the protest process, encourage use of express protest procedures, and institute provisions to use electronic filings to speed the processing of protests. Accordingly, the Panel recommends that:

- Whenever possible, amended protests should be resolved within the statutory time period established for resolution of initial protests.
- The GAO should have the authority to resolve protests under an express option which, like GSBCA protests, require the GAO to render a decision within 65 calendar days.
- The GAO and the GSBCA should issue procedures which allow for electronic filing of protest documents.
- The GAO and the GSBCA should use the term "calendar day" and not "working day" to specify when statutory deadlines should be met.

#### **1.5.0.9. Overlapping, Duplicative, And Conflicting Protest Procedures Should Be Eliminated**

The existence of four protest forums has naturally resulted in inefficiencies. The Panel, in its recommendations discussed below, offers for consideration and further study an alternative which would eliminate these overlaps and inefficiencies. However, the Panel specifically has addressed less fundamental changes to the existing system.

The most glaring inefficiency in the current system arises out of the confusing jurisdictional problems created by the Federal Courts Improvement Act of 1982 (FCIA). Recognizing the pervasive nature of the problems with the current system, a committee of the Section of Public Contract Law of the American Bar Association has noted that "as we enter the third decade of bid protest jurisdiction in the Federal courts, jurisdictional problems continue to permeate the process."<sup>48</sup> These problems are reflected in a host of Federal court decisions which seek to determine if the district courts or the Court of Federal Claims has jurisdiction over a particular protest.

FCIA created two fundamental jurisdictional problems. The first problem stems from the FCIA amendments to the Tucker Act where Congress directed that the Court of Federal Claims

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<sup>48</sup>ABA Courts Subcommittee Project, *supra* note 39, at 1.



had "exclusive jurisdiction" to consider pre-award protests.<sup>49</sup> In the past 10 years at least five regional courts of appeals have addressed this problem. Two of the circuit courts found that the district courts in their circuits were divested of pre-award jurisdiction by FCIA and one suggested as much.<sup>50</sup> Conversely, two circuit courts have held that, notwithstanding FCIA, the district courts in their circuits retained pre-award protest jurisdiction.<sup>51</sup>

The second jurisdictional problem arises out of the Court of Appeals for the Federal Circuit's ruling that the bid protest jurisdiction of the Court of Federal Claims is limited to protests filed by parties submitting bids or proposals.<sup>52</sup> As a result of this ruling, numerous decisions have been issued holding that the Court of Federal Claims had no jurisdiction to hear all the types of protests routinely considered by the GAO and the GSBICA. These types of protests include those filed before bids or proposals are submitted, which allege that a solicitation unduly restricts competition.<sup>53</sup>

The congressional intent for the expeditious and inexpensive resolution of protests is not being served where the parties must first litigate problematic jurisdictional issues before the merits of the protest can be decided:

If there is a less profitable expenditure of the time and resources of federal courts and federal litigants than resolving a threshold issue of which particular federal court should have jurisdiction, it does not readily come to mind.<sup>54</sup>

The Panel agrees.

The Panel has thoroughly considered the problems resulting from the existence of two judicial protest forums and has concluded that this dual authority should be consolidated into one forum. The Panel has identified no substantive justification for having two forums with the same jurisdiction, as some have recommended. Splitting the jurisdiction between the two courts based upon whether the protest was brought before or after award is not justified because it creates numerous interpretation problems and adds potential delays to the speedy resolution of protests. The system of dual forums also invites forum shopping and engenders a lack of uniform precedent and practice. Accordingly, the Panel recommends:

- There should be only one judicial system for consideration of bid protests and that forum should have jurisdiction to consider all protests which can now be considered by the district courts and by the Court of Federal Claims.

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<sup>49</sup>28 U.S.C. § 1491(a)(3).

<sup>50</sup>*Cubic Corporation v. Cheney*, 914 F.2d 1501 (D.C. Cir. 1990), discusses the cases decided by the respective circuits regarding whether 28 U.S.C. § 1491(a)(3) divests district courts of pre-award protest jurisdiction.

<sup>51</sup>*Id.*

<sup>52</sup>*United States v. Grimberg*, 702 F.2d 1362 (Fed. Cir. 1983).

<sup>53</sup>*ABA Courts Subcommittee Project*, *supra* note 39, at 26-34.

<sup>54</sup>*Sharp v. Weinberger*, 798 F.2d 1521, 1522 (D.C. Cir. 1986) (observation made by Justice Antonin Scalia in a case involving a conflict in the jurisdiction of the district courts and the Court of Federal Claims).

In choosing the appropriate forum for the judicial protest authority, the Panel considered the need to provide a knowledgeable entity that would be reasonably available to protesters and which could handle the number of protests that have been historically brought in the courts. For numerous reasons, the Panel concluded that the Court of Federal Claims was best suited for this responsibility. In its discussion of 28 U.S.C. § 1491 at Chapter 1.5.8 of this Report, the Panel discusses in detail its rationale for recommending that the Court of Federal Claims serve as the single judicial forum. Among the reasons is the fact that divergent opinions can occur in the hundreds of district courts and in the twelve regional federal circuits undermining the essential need for uniform and predictable guidance for DOD on procurement laws and regulations. Moreover, in complex protests, the Government, protester, and other interested parties are located in diverse parts of the country, and the Court of Federal Claims is the only court with nation-wide jurisdiction. The judges on the Court of Federal Claims are also far more experienced in Government contract issues than the district court judges. The former are authorized to, and do, conduct hearings around the country, and therefore can be available to protesters outside Washington, D.C. Appropriate changes to the statutory jurisdiction of the Court of Federal Claims can eliminate any possible restrictions on the ability of the court to provide complete relief to disappointed bidders. Finally, there are unresolved standing to sue questions,<sup>55</sup> as well as jurisdictional issues,<sup>56</sup> which arise out of the fundamental differences between statutory bases for protest jurisdiction in the district courts and the Court of Federal Claims. Accordingly, the Panel recommends that:

- The Court of Federal Claims should be the single judicial forum with jurisdiction to consider all protests that can presently be considered by any district court or by the Court of Federal Claims.
- The Court of Federal Claims should be authorized to set aside agency actions in protests that establish that the agency has violated procurement law or regulation; it should be authorized to provide relief comparable to that provided by the GAO and the GSBCA. The authority of the GAO, the GSBCA and the courts should be parallel where possible.

#### **1.5.0.10. Exclusive Bid Protest Forum**

If a disappointed offeror in New England believes that a DOD administrative agency improperly rejected its offer of automatic data processing equipment, the offeror can protest a proposed contract award at the GAO, the GSBCA, the Court of Federal Claims, or the local district court. In "shopping" for the right forum to file the protest, the offeror must weigh carefully a myriad of factors. The following chart illustrates some of these factors.

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<sup>55</sup>Those circuit courts of appeal that have considered whether protesters have standing to sue have developed varying tests in making this determination. See *ABA Courts Subcommittee Project, supra*, note 39 at 6-20.

<sup>56</sup>In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), for example, the Supreme Court suggested that suits which can be brought in the district courts for declaratory and injunctive relief do not seek monetary damages and cannot therefore be brought in the U.S. Court of Federal Claims. In contrast, a suit by a disappointed bidder for bid and proposal costs seeks monetary damages and cannot ordinarily be brought in the district court. See *Fairview Township v. United States Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985); *Heyer Products v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

## A COMPARISON OF PROTEST FORUMS

Forum	GAO	GSBCA	Federal District Courts	U.S. Court of Federal Claims
<b>Speediness</b>	Decisions generally issued within 90 working days	Decisions generally issued within 45 working days	No time limit	No time limit
<b>Suspension/Injunction</b>	Suspension of contract award or performance available	Suspension of contract award or performance available	Injunctive relief to suspend award or performance available	Injunctive relief to suspend award or performance available
<b>Discovery</b>	Document production only	Depositions, document production, interrogatories and admissions	Depositions, document production, interrogatories and admissions	Depositions, document production, interrogatories and admissions
<b>Protective Orders</b>	Available	Available	Available	Available
<b>Subpoena Authority</b>	None	Available	Available	Available
<b>Sanctions/Contempt Authority</b>	Available on a limited basis	Available on a limited basis	Available	Available
<b>Hearings</b>	Hearings available, but infrequently granted	Trial-like hearings available	Trials are available	Trials are available
<b>Jurisdiction</b>	Procurements by the Government and for the Government	Procurements of Automatic Data Processing Equipment and related services; certain military ADPE exempted	Post-award jurisdiction is established; courts are split as to pre-award jurisdiction	Pre-award jurisdiction only
<b>Recovery of B&amp;P Costs, Attorney Fees and related costs of protests</b>	Available to prevailing protester (but currently under judicial review)	Available	B&P cost recovery cannot exceed \$10,000*	B&P costs can be recovered*
<b>Expense/Cost</b>	Generally less expensive than other forums	Generally more expensive than GAO	Generally more expensive than GAO	Generally more expensive than GAO

\* Recovery of attorneys fees might be available under the Equal Access to Justice Act. See generally the discussion of 31 U.S.C. § 3554 at Chapter 1.5.5 of this Report, commencing at note 22.

After extensive analysis and discussion, the Panel has discerned no compelling rationale for four independent bid protest forums. There is no sound public policy reason for the forum shopping which the current system engenders. In addition, in the eight years since the four forums have been available, an increasing divergence has occurred in decisions on some fundamental issues ranging from jurisdiction to timeliness. Inefficiencies and delays inevitably result from this divergence, as the Government is required to reconcile conflicting interpretations and to adopt policies and practices which respond to these conflicting interpretations.<sup>57</sup> Substantial differences also exist in the practices and procedures of the various forums which lead

<sup>57</sup>"Uniformity and predictability" are essential attributes of every legal system. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970).

to further inefficiencies.<sup>58</sup> Moreover, it simply takes more time for all parties to become familiar with these different practices and procedures. This extra time results in increased costs for all Federal procurements which are subject to protests.

The fact that the GAO is the busiest bid protest forum and is located in the legislative branch leads to further problems. For example, shortly after the Competition in Contracting Act (CICA) was passed in 1984, the Department of Justice argued that Congress violated the constitutional separation of powers doctrine by giving the GAO, a legislative branch agency, the power to control and direct day-to-day executive branch procurement actions. This cast into doubt the ability of the GAO to fully implement its protest authority. It was only after the Court of Appeals for the Third Circuit in 1986 issued its decision in *Ameron, Inc. v. United States Army Corps of Engineers*<sup>59</sup> that the Justice Department decided to let the issue lie. The two-year delay in resolution of this issue, however, increased the financial and administrative burden of resolving protests not only in the contract involved in the *Ameron* case, but also in other contracts. More recently, the Government has questioned the authority of the GAO to direct payment by executive branch agencies of attorney's fees in cases where a protest is sustained.<sup>60</sup>

At the GSBICA, issues of statutory interpretation have also contributed to delays in the resolution of protests and have thereby added costs and inefficiencies to the procurements which were the subject of these protests.<sup>61</sup> These problems arise out of decisions dealing with two provisions of the Brooks Act: (1) whether the protest involves the procurement of ADPE as defined in the Act, and (2) whether a protester is an "interested party" as defined in the Act.<sup>62</sup> In numerous cases, protests have been filed at the GSBICA in reliance on a reasonable interpretation of the Brooks Act or on the decisions of the GSBICA, only to have the Court of Appeals for the Federal Circuit find that the GSBICA does not, in fact, have jurisdiction over these protests.<sup>63</sup> Ambiguities in the GSBICA's authority and the resulting uncertainties and delays create burdens both for the Government and for protesters. The Government must pay added costs and suffer unnecessary delays, and contractors electing to file with the GSBICA (in reliance on prior GSBICA precedent) may end up with no effective resolution of their protests and no additional recourse if

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<sup>58</sup>The divergent practices of the federal courts on discovery issues is one of the many problems engendered by the different procedures in the different forums. As the ABA noted in its analysis of judicial bid protests, "the absence of reported precedent contributes to a surprising lack of uniformity in discovery practice." *ABA Courts Subcommittee Project, supra* note 39, at 43. There are also substantial differences in practices between the GAO and GSBICA on similar procedures, such as discovery.

<sup>59</sup>809 F.2d 979 (3d Cir. 1986), cert. granted, 485 U.S. 958, cert. dismissed, 488 U.S. 918 (1988).

<sup>60</sup>*United States v. Instruments S.A., Inc.*, No. 91-1574 (D.D.C. Nov. 13, 1992) (granting motion to dismiss for lack of jurisdiction).

<sup>61</sup>In 1986, Congress overruled the Federal Circuit's holding in *Electronic Data Systems Federal Corp. v. General Services Board of Contract Appeals*, 792 F.2d 1569 (Fed. Cir. 1986), which had held that the GSBICA did not have jurisdiction to decide whether a procurement should have been conducted under the Brooks Act. Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 824, 1986 U.S.C.A.N. (100 Stat.) 1783-344. Congress also directed the Federal Circuit to interpret broadly the GSBICA's jurisdiction. *SMS Data Products Group, Inc. v. United States*, 853 F.2d 1547, 1555 (Fed. Cir. 1988).

<sup>62</sup>*MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed. Cir. 1989).

<sup>63</sup>See e.g., *U.S. West Communications Services, Inc. v. United States*, 940 F.2d 622 (Fed. Cir. 1991). In the last two years, the number of jurisdictional problems confronted by the Court of Appeals for the Federal Circuit have decreased as the court's interpretations of the Brooks Act have stabilized.

the Court of Appeals for the Federal Circuit later rules that the GSBICA lacked jurisdiction to hear the case.<sup>64</sup>

Jurisdictional problems in interpreting the protest authority of the courts have resulted in the innumerable delays and inefficiencies described earlier. These problems led one commentator to observe in 1987 that the judicial protest system is in "chaos."<sup>65</sup>

The Panel believes that the problems created by the availability of four protest forums unduly and unnecessarily burdens the procurement system. Therefore, the Panel believes that Congress should give serious consideration to changing the existing procurement protest system. Accordingly, the Panel recommends that:

- An analysis be made as to whether the federal acquisition process can be better served by an exclusive bid protest forum within the executive branch rather than the four existing bid protest forums.

Under the Panel's alternative, protesters could choose between two procedures: (1) a simplified procedure for protest resolution, similar to that now available at the GAO, and (2) a formal adjudicatory-type proceeding, similar to what is now available from the GSBICA. Contracts under \$100,000 would be awarded under simplified acquisition procedures, recommended at Chapter 4.1 of this Report, and protests for such contracts would be considered under the simplified protest procedure. Protests for larger contracts could be considered under either procedure. Decisions of the exclusive bid protest forum could be appealed by the head of the Federal agency concerned or any interested party to the Court of Appeals for the Federal Circuit.

Protests for all types of procurements, which can now be heard by either the GAO or the GSBICA, could be considered by the exclusive forum under the adjudicatory-type proceeding. This recommendation would thus expand the types of contracts for which adjudicatory-type hearings would be provided and would include all Federal agency procurements. The Panel believes this expansion is warranted by the congressional endorsement of the use of adjudicatory proceedings for bid protests. The Panel further believes that there is simply no justification for distinguishing between ADPE-type contracts and other types of contracts in determining whether or not to grant an adjudicatory proceeding. It is the opinion of the Panel that this adjudicatory proceeding would serve as a meaningful replacement for the judicial protest procedures of the district courts and the Court of Federal Claims.

The Panel recognizes that there are certain disadvantages to this recommendation. For example, the GAO and the GSBICA provide well-defined procedures for resolving protests and have the strong support of Congress. The Panel's recommendation would replace these

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<sup>64</sup>See *United Telephone of Northwest*, Comp. Gen. B-246977, 92-1 CPD ¶ 374, *aff'd on reconsideration*, 1992 WL 172782 (July 14, 1992).

<sup>65</sup>Villet, *supra* note 17, at 184. Mr. Villet argued that only Congress can resolve the chaos. No changes have been made in the bid protest statutes since this article was written.

procedures with a new and untried procedure that could lead to unintended problems.<sup>66</sup> Therefore, care must be taken to preserve the expertise, resources, and precedents of the GAO and the GSBICA. One way to accomplish this would be to transfer personnel and resources from the GAO and the GSBICA to the new executive agency.<sup>67</sup>

The Panel also recognizes that adjudicatory-type proceedings for all contracts impose additional burdens on Federal agencies and on contractors. The Panel, therefore, believes that the adjudicatory-type proceeding should be coupled with a uniform standard of review, common sense protest procedures and strict time limits similar to those adopted by GSBICA.

In conclusion, the Panel recommends the concept of an exclusive bid protest forum to Congress as one which is worthy of consideration and further study. The Panel has not attempted to fully evaluate or resolve the many problems associated with adoption and implementation of this recommendation and believes that this task can be better accomplished by further examination.

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<sup>66</sup>The Computer and Business Equipment Manufacturers Association (CBEMA) expressed its concerns as follows: "[T]he alternative proposal to establish a single new forum within the executive branch is premature. Overall, the current protest process works." CBEMA favors implementing improvements to the current process, such as those which we have suggested herein, and allowing sufficient time to evaluate fully their efforts on the process before considering the establishment of a new net forum. Letter from John L. Pickitt, CBEMA President to Maj Gen John D. Slinkard, USAF and Mr. Thomas J. Madden (Oct. 20, 1992).

<sup>67</sup>The transfer of resources from the GSBICA must be done in a manner that enables the GSBICA to preserve its ability to deal with contract claims within its jurisdiction under the Contract Disputes Act.

## 1.5.1. 5 U.S.C. §§ 701 - 706

### Administrative Procedure Act

#### 1.5.1.1. Summary of the Laws

The provisions of 5 U.S.C. §§ 701-706 constitute the Judicial Review Chapter of the Administrative Procedure Act (APA).<sup>1</sup> The APA embodies a "comprehensive regulatory scheme, governing such aspects of agency action as investigations, adjudications, rule making, licensing, and open meeting and disclosure requirements, as well as providing for judicial review of administrative proceedings."<sup>2</sup> A simplistic reading of Chapter 7 of the APA suggests that agency actions regarding the award of contracts can be held unlawful and set aside if such actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.<sup>3</sup> However, as indicated in the discussion of 28 U.S.C. § 1491 at Chapter 1.5.8 of this Report, there can be significant problems to obtaining a judicial forum to apply the APA.

Examining each section individually, section 701 provides definitions and addresses the application of Chapter 7 of the APA. For example, "agency" is broadly defined to include almost all of the executive branch.<sup>4</sup> There are two noteworthy exceptions to the application of the chapter. The first exception applies to statutes that preclude judicial review.<sup>5</sup> The second exception applies to agency action that is "committed to agency discretion by law."<sup>6</sup>

Section 702 provides that a person who suffers legal wrong because of agency action or is adversely affected or aggrieved by agency action may seek judicial review of such action.<sup>7</sup> Hence, section 702 creates a legal right of action.

Section 703 specifies the form and venue of proceeding. Absent a special statutory review proceeding in a court specified by statute, declaratory judgments, writs of prohibitory or mandatory injunction, and habeas corpus are mentioned as applicable forms of legal action.<sup>8</sup> Where a court is not specified by statute, such an action can proceed "in a court of competent jurisdiction."<sup>9</sup> Under section 704, agency actions made reviewable by statute and final agency actions are subject to judicial review.<sup>10</sup>

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<sup>1</sup> 5 U.S.C. §§ 551-559, 701-706, 3105, 3344.

<sup>2</sup> Fed Proc, L Ed § 2:1.

<sup>3</sup> 5 U.S.C. § 706(2)(A).

<sup>4</sup> 5 U.S.C. § 701(b)(1)(A)-(H).

<sup>5</sup> 5 U.S.C. § 701(a)(1).

<sup>6</sup> 5 U.S.C. § 701(a)(2).

<sup>7</sup> 5 U.S.C. § 702.

<sup>8</sup> 5 U.S.C. § 703.

<sup>9</sup> 5 U.S.C. § 703.

<sup>10</sup> 5 U.S.C. § 704.

Section 705 authorizes an agency, as well as a court, to "postpone the effective date of action" pending judicial review.<sup>11</sup> Section 706 addresses the scope of judicial review. In particular, the reviewing court shall hold unlawful and set aside any agency actions, findings, and conclusions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>12</sup>

### 1.5.1.2. Background of the Laws

Congress originally enacted the terms that presently comprise 5 U.S.C. §§ 701-706 as part of the Administrative Procedure Act of 1946. The provisions were initially codified as part of 5 U.S.C. § 1009.<sup>13</sup> In 1966, Congress recodified such provisions in Chapter 7 of Title 5 to more efficiently organize statutes related to Government employees, the organization and power of Federal agencies, and administrative procedures.<sup>14</sup> In 1976, Congress amended the statute to eliminate the defense of sovereign immunity in Federal court actions for specific relief claiming unlawful action by a Federal agency, officer, or employee.<sup>15</sup> The statute also was amended to permit a plaintiff in an action for nonstatutory review of administrative action to name the United States, the agency, or the appropriate officer as defendant.<sup>16</sup> The amendment was designed to overcome technical problems in pleadings.<sup>17</sup>

### 1.5.1.3. Laws in Practice

Prior to 1970, district courts were precluded from hearing cases concerning the bidding phase of a procurement. In a landmark decision, *Perkins v. Lukens Steel*, the Supreme Court held that prospective bidders lacked standing because the applicable procurement laws protected the Government and not potential offerors.<sup>18</sup> The *Lukens Steel* decision dominated the Federal procurement community for 30 years.

In 1970, the Court of Appeals for the District of Columbia Circuit decided *Scanwell Laboratories, Inc. v. Shaffer*, reflecting a major change in law.<sup>19</sup> The decision recognized that, based upon the APA, an unsuccessful offeror on a Federal Aviation Administration solicitation had standing to bring a declaratory judgment action to determine the validity of a contract award. In reaching this decision, the court observed:

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<sup>11</sup>5 U.S.C. § 705.

<sup>12</sup>5 U.S.C. § 706(2)(A).

<sup>13</sup>Ch. 324, § 10, 60 Stat. 243 (1946).

<sup>14</sup>Pub. L. No. 89-554, 1966 U.S.C.C.A.N. (80 Stat. 378) 429; S. REP. NO. 1380, 89th Cong., 2d Sess. 18 (1966); H.R. REP. NO. 901, 89th Cong., 1st Sess. 1 (1965).

<sup>15</sup>Pub. L. No. 94-574, 1976 U.S.C.C.A.N. (90 Stat.) 2721; H.R. REP. NO. 1656, 94th Cong., 2nd Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6121.

<sup>16</sup>*Id.*

<sup>17</sup>See Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 CATH. U. L. REV. 517 (1991); David M. Cohen, *Claims for Money in the Claims Court*, 40 CATH. U. L. REV. 533 (1991).

<sup>18</sup>310 U.S. 113, 125-128 (1940).

<sup>19</sup>424 F.2d 859 (D.C. Cir. 1970).



The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a "private attorney general."<sup>20</sup>

After *Scanwell* first allowed a disappointed offeror access to the district courts, the courts defined limits on its application. In the following year, the Court of Appeals for the District of Columbia Circuit announced that "courts should not overturn any procurement determination unless the aggrieved bidder demonstrates that there was no rational basis for the agency's decision."<sup>21</sup> Furthermore, although *Scanwell* is widely accepted by other courts of appeals, doubts have arisen as to whether the standing issue can withstand scrutiny under developments in the law of standing since *Scanwell* was decided.<sup>22</sup>

As *Scanwell* lawsuits became more frequent, a district court occasionally would enjoin contract award or performance while seeking an advisory opinion from the Comptroller General. In *Wheelabrator Corp. v. Chafee*, the Court of Appeals for the District of Columbia Circuit acknowledged that a "felicitous blending of remedies" occurs when a district court works with the GAO for a "mutual reinforcement of forums."<sup>23</sup> For the disappointed bidder, this "felicitous blending of remedies" was often unsatisfactory unless the district court permitted discovery. Moreover, unlike the automatic suspension under the Competition in Contracting Act (CICA) for timely GAO and GSBCA protests, a preliminary injunction from a district court invokes a four-pronged test that considers: (1) the probability of success on the merits; (2) the alleged irreparable injury; (3) the public interest; and (4) the relative balance of harms.<sup>24</sup> In actual practice, "the truth of the matter is that *Scanwell* suits are frequently unsuccessful in obtaining injunctions."<sup>25</sup>

In addition to the problems previously identified, the ability of disappointed offerors to obtain relief under the APA has been curtailed by statutes that limit the jurisdiction of district courts. For example, the term "exclusive jurisdiction" in the Federal Courts Improvement Act of 1982 (FCIA)<sup>26</sup> has resulted in the Fourth and Ninth Circuits holding that district courts do not have *Scanwell* jurisdiction before contract award and the First and Third Circuits holding that district courts do have *Scanwell* jurisdiction before award.<sup>27</sup>

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<sup>20</sup>*Id.* at 864.

<sup>21</sup>See *M. Steinthal & Co., Inc. v. Seamans*, 455 F.2d 1289, 1301 (D.C. Cir. 1971).

<sup>22</sup>See *American Bar Association Public Contract Law Section Courts Subcommittee Project* (1991); Phillip M. Kannan, *Jurisdiction of District Courts in Cases Involving Government Contracts*, 21 Pub. Cont. L.J. 416 (1992).

<sup>23</sup>455 F.2d 1306, 1316 (D.C. Cir. 1971).

<sup>24</sup>See *Compu-Serve Data Systems, Inc. v. Freedman*, 498 F. Supp. 1316, 1319 (D.D.C. 1980).

<sup>25</sup>Donald P. Arnavas and Peter S. Latham, *Implied Government Duties*, BRIEFING PAPERS NO. 83-8 (August 1983), at 7.

<sup>26</sup>28 U.S.C. § 1491(a)(3).

<sup>27</sup>*Cubic Corporation v. Cheney*, 914 F.2d 1501 (D.C. Cir. 1990). For an analysis of each circuit, see Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for Its Amendment*, 21 PUB. CONT. L.J. 1 (1992).

Another significant limitation is found at 28 U.S.C. § 1346, the Little Tucker Act. This statute prohibits district courts from taking jurisdiction where the United States is the defendant in a civil action exceeding \$10,000 that involves an express or implied contract or involves liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act.<sup>28</sup> If the dispute is not a suit for money damages, so that it can be heard in district court under 5 U.S.C. § 702, then it apparently cannot be heard in the Court of Federal Claims. The distinction between the Court of Federal Claims and district court jurisdiction often is unclear. A Supreme Court decision, *Bowen v. Massachusetts*,<sup>29</sup> is illustrative of the jurisdictional problems caused by the APA and 28 U.S.C. § 1346.

*Bowen* involved the administration of the Medicaid program. In *Bowen*, the Secretary of Health and Human Services (HHS) disallowed Massachusetts' claim to funding for certain rehabilitative services. The state brought suit for declaratory and injunctive relief in district court. HHS countered that the suit was for money damages because the state intended to secure payment from the U.S. Treasury; therefore, the action had to be brought in the Court of Federal Claims.

The Supreme Court upheld the jurisdiction of the district court,<sup>30</sup> however, the holding is unclear. The Court concluded that the state was not seeking "money damages" even though the effect of injunctive relief would be to require payment by the U.S. Treasury.<sup>31</sup> The Court suggested that money due under a grant program does not constitute money damages because money damages are compensation for injury while money due under a grant program does not provide compensation for injury.<sup>32</sup>

For disappointed bidders, *Bowen* presents the potential for future controversy. By upholding the district court jurisdiction in *Bowen*, the Supreme Court recognized that a suit for the payment of money can be brought in district court where the suit seeks declaratory and injunctive relief rather than money damages. In addition, the Supreme Court suggested, but did not hold, that suits that can be brought in district court under 5 U.S.C. § 702 could not be brought in the Court of Federal Claims because such suits do not seek "damages," but rather seek money to which the plaintiff has a legal right. In contrast, if a disappointed bidder seeks only monetary damages, *i.e.*, bid and proposal costs, then the disappointed bidder ordinarily cannot invoke district court jurisdiction.<sup>33</sup>

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<sup>28</sup>28 U.S.C. § 1346(a)(2). The jurisdiction granted by this statute has been the subject of a number of Federal court cases. While some courts have concluded that the district courts have no jurisdiction over suits against the United States founded on contracts with the United States, other courts have argued that questions brought under the Contract Disputes Act involve statutory claims within the jurisdiction of the district courts. See *Mark Dunning Industries, Inc. v. Cheney*, 934 F.2d 266, 269 (11th Cir. 1991).

<sup>29</sup>487 U.S. 879 (1988).

<sup>30</sup>*Id.* at 912.

<sup>31</sup>*Id.* at 893.

<sup>32</sup>*Id.* at 893-901.

<sup>33</sup>See *Fairview Township v. United States Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985); *Heyer Products v. United States* 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

In summary, with respect to the application of the APA to the pre-contract award process, the following observation aptly describes the law in practice:

In an orderly environment, an entity injured by Government action, even in a commercial context, might learn of the path to equitable relief (if any) through modest inquiry. Unfortunately, the Government contracts market place is far from orderly in this respect; the path to equitable relief is often obscured by elusive notions of jurisdiction.<sup>34</sup>

#### **1.5.1.4. Recommendation and Justification**

##### **Retain**

The Panel sought comments from industry and Government agencies concerning the application of 5 U.S.C. §§ 701-706 to the review of contract award actions in district courts. The comments were helpful in focusing upon the utility of this portion of the APA; however, no issues were identified that warrant amendments to the APA. The relative ability of the district courts to review contract award actions under 5 U.S.C. §§ 701-706 and of the U.S. Court of Federal Claims to review contract award actions under 28 U.S.C. § 1491 has engendered much needless litigation. The Panel believes that much of the confusion described in the previous paragraphs will be eliminated by amending 28 U.S.C. § 1491.

#### **1.5.1.5. Relationship to Objective**

Sections 701-706 are consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. These statutes are consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

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<sup>34</sup>Jeffrey M. Villet, *Equitable Jurisdiction In Government Contract "Bid Protest" Cases: Discerning The Boundaries of Equity*, 17 PUB. CONT. L.J. 152, 153 (1987).

## 1.5.2. 31 U.S.C. § 3551

### Definitions

#### 1.5.2.1. Summary of the Law

This is the first of five sections of Title 31 that appear as Subchapter V of Title 31 and are collectively entitled "Procurement Protest System." This section defines the term "protest" as "a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for an [sic] proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract."<sup>1</sup> This section also defines "interested party" to mean "with respect to a contract or proposed contract . . . an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."<sup>2</sup> Finally, this section defines "Federal agency" and gives it the same meaning that is used in the Federal Property and Administrative Services Act.<sup>3</sup>

#### 1.5.2.2. Background of the Law

The Procurement Protest System provisions of Title 31 were enacted in 1984 to provide express statutory authority for the GAO protest procedure.<sup>4</sup> In providing this express authority, the Conference Committee stated that this new authority "codifies and strengthens the bid protest function currently in operation at the General Accounting Office."<sup>5</sup>

#### 1.5.2.3. Law in Practice

The definitions that appear in 31 U.S.C. § 3551 are further explained in the GAO Bid Protest Regulations, 4 C.F.R. Part 21, and have been subject to numerous Comptroller General decisions. The decisions of the GAO have adequately defined instances where there is uncertainty regarding the definitions in section 3551. The term "protest," for example, has been interpreted by the GAO to mean a written objection to a solicitation issued by a Federal agency as well as to a solicitation issued by a contractor, such as a managing and operating contractor, acting on behalf of Federal agencies.<sup>6</sup> Similarly, the GAO lacked jurisdiction over a procurement by the Resolution Trust Corporation because it was a mixed-ownership corporation rather than a Federal agency.<sup>7</sup>

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<sup>1</sup>31 U.S.C. § 3551(1).

<sup>2</sup>31 U.S.C. § 3551(2).

<sup>3</sup>40 U.S.C. § 472.

<sup>4</sup>The Procurement Protest System provisions were enacted as part of the Competition in Contracting Act of 1984 (CICA) and CICA was in turn a part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 1984 U.S.C.C.A.N. (98 Stat.) 494.

<sup>5</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1435 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2123.

<sup>6</sup>*Rohde and Schwartz--Polarad, Inc.*, Comp. Gen. B-219108.2, 85-2 CPD ¶ 33.

<sup>7</sup>*Kennan Auction Company*, Comp. Gen. B-248965, 92-1 CPD ¶ 503.

Where an award has been made, the GAO Bid Protest Regulations limit the definition of "interested party" for the purpose of participating in a protest to an awardee.<sup>8</sup> Where the protest challenges the terms of a solicitation, only those parties eligible to bid are interested parties.<sup>9</sup> The GAO does not regard entities such as associations, labor unions, or prospective suppliers to prime contractors to be interested parties.<sup>10</sup>

#### **1.5.2.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retaining 31 U.S.C. § 3551 as presently written. The Panel sought comments from industry and Government agencies concerning the statute and determined that it fills a valid need, and no issues were identified which warranted an amendment. The existing body of Comptroller General decisions has adequately resolved any confusion regarding the statutory definitions of protest, interested party, and Federal agency.

#### **1.5.2.5. Relationship to Objectives**

The statute is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

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<sup>8</sup>4 C.F.R. § 21.0(b).

<sup>9</sup>*Pacific Coast Welding and Machine, Inc.*, 64 Comp. Gen. 500 (1988), 85-1 CPD ¶ 488.

<sup>10</sup>*Beneco Enterprises, Inc. - Reconsideration*, Comp. Gen. B-245895.3, 92-1 CPD ¶ 781.

### 1.5.3. 31 U.S.C. § 3552

#### Protest by interested parties concerning procurement actions

##### 1.5.3.1. Summary of the Law

This section of the Procurement Protest System provisions of Title 31 provides that the Comptroller General shall consider properly filed and authorized protests concerning alleged violations of procurement statutes or regulations. This section further provides that an interested party who has filed a protest with the GSBICA may not file a protest with respect to that same matter with the GAO.

##### 1.5.3.2. Background of the Law

Refer to the analysis of 31 U.S.C. § 3551 at Chapter 1.5.2 of this Report.

##### 1.5.3.3. Law In Practice

The basic authority for the Comptroller General to decide protests is provided by this section. The Comptroller General is given the authority to consider a protest that alleges a "violation of a procurement statute or regulation."<sup>1</sup> This authority is similar to the authority given to the GSBICA to consider protests under the Brooks Act.<sup>2</sup>

In actual practice, the Comptroller General looks beyond statutes and regulations to examine whether an agency's actions are "reasonable." For example, the agency's evaluation of a protester's technical proposal must be fair, reasonable, and in accordance with the evaluation criteria.<sup>3</sup> Similarly, an agency's evaluation of a cost proposal must be reasonable.<sup>4</sup> Likewise, if a specification is alleged to be ambiguous, the Comptroller General will examine whether the agency's interpretation is reasonable.<sup>5</sup>

The GAO Bid Protest Regulations provide, among other things, that the GAO may summarily dismiss protests which fail to comply with any of the bid protest regulations.<sup>6</sup> They also provide that the GAO will summarily dismiss protests which on their face do not state a valid basis for protest.<sup>7</sup> In a presentation to the Panel, representatives of the GAO indicated that about

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<sup>1</sup>31 U.S.C. § 3552.

<sup>2</sup>40 U.S.C. § 759(f)(1).

<sup>3</sup>*Cybernated Automation Corp.*, Comp. Gen. B-242511.3, 91-2 CPD ¶ 293; *Naho Construction, Inc.*, Comp. Gen. B-244226, 91-2 CPD ¶ 241.

<sup>4</sup>*Purvis Systems Incorporated*, Comp. Gen. B-245761, 92-1 CPD ¶ 132.

<sup>5</sup>*Pulse Electronics, Inc.*, Comp. Gen. B-243769, 91-2 CPD ¶ 122.

<sup>6</sup>4 C.F.R. § 21.1(f).

<sup>7</sup>4 C.F.R. § 21.3(m).

50% of all protests are summarily dismissed.<sup>8</sup>

If a protest is filed before the GSBICA, the GAO will not consider a protest involving that procurement, even if from another party, while the protest is pending before the GSBICA.<sup>9</sup>

#### **1.5.3.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retaining 31 U.S.C. § 3552 as presently written. The Panel sought comments from industry and Government agencies concerning the statute and determined it fulfills a valid need, and no issues were identified warranting amendment.

#### **1.5.3.5. Relationship to Objectives**

The statute is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

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<sup>8</sup>Minutes of the August 13, 1992 meeting of the Panel.

<sup>9</sup>GAO Office of General Counsel, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE 9 (4th ed. 1991).

#### 1.5.4. 31 U.S.C. § 3553

### Review of protests; effect on contracts pending decision

#### 1.5.4.1. Summary of the Law

This section of the Procurement Protest System provisions of Title 31 establishes the procedures for agency submission of reports on protests. It also provides for suspension of contract award or performance.

A Federal agency must submit a detailed report to the Comptroller General under this section unless the protest has been dismissed as frivolous or because it fails on its face to state a valid basis for protest. Furthermore, the section establishes deadlines for the submission of these agency reports. Finally, the section requires each Federal agency to provide to an interested party any document which is relevant to a protested procurement action, including the agency report, provided that release of the document would not give the party a competitive advantage.

When a protest has been filed prior to the award of any procurement, the contract may not be awarded while the protest is pending unless the head of the procuring activity responsible for the award of the contract makes written findings that urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for a decision from the Comptroller General, and the Comptroller General is so advised.

Where the Comptroller General has notified the agency of a protest within 10 calendar days of the date of contract award, the agency must immediately direct the contractor to suspend performance under the contract.<sup>1</sup> It is insufficient that the protester notified the agency within 10 calendar days; the notice must come from the GAO.<sup>2</sup> Performance of the contract may not be resumed during the pendency of the protest unless the head of the procuring activity responsible for the contract award authorizes performance of the contract. This can occur when the head of the procuring activity makes a written finding that: (1) performance of the contract is in the best interest of the United States, or (2) urgent and compelling circumstances significantly affecting the interests of the United States will not permit waiting for the decision of the Comptroller General. The GAO will not review an agency's decision to authorize contract performance despite the pendency of a protest.<sup>3</sup>

#### 1.5.4.2. Background of the Law

This section made two fundamental changes in the manner in which the GAO treated protests prior to 1984. First, the section requires Federal agencies to provide interested parties

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<sup>1</sup>The ten days are measured in calendar days and not working days. *Survival Technology, Inc. v. Marsh*, 719 F. Supp. 18 (D.D.C. 1989).

<sup>2</sup>*Motorola, Inc.*, Comp. Gen. B-235599, 89-2 CPD ¶ 252 n.2.

<sup>3</sup>*Corbin Superior Composites, Inc.*, Comp. Gen. B-236777.2, 90-1 CPD ¶ 2.



with copies of documents which are relevant to a protest, provided that release of such documents would not give the party an unfair competitive advantage. This requirement greatly expanded protesters' access to the agency record. Second, the section requires agencies to delay contract award or suspend contract performance pending the resolution of protests. Prior to the enactment of these changes, agencies frequently awarded contracts or allowed contract performance to continue despite the pendency of a protest.

#### 1.5.4.3. Law in Practice

This section, like other sections of the Procurement Protest System, is implemented through the GAO Bid Protest Regulations<sup>4</sup> and through provisions of Part 33 of the FAR.<sup>5</sup> The GAO Bid Protest Regulations and the FAR specify the contents of the agency report and establish procedures for the release of documents by agencies to interested parties.

The GAO Bid Protest Regulations provide that documents which would give an interested party a competitive advantage may be released to certain counsel for the interested party or to independent experts under a protective order.<sup>6</sup> If an agency refuses to release documents to interested parties, the GAO may draw an adverse inference or impose sanctions, such as not allowing an agency to respond to a particular ground for protest.<sup>7</sup>

The Bid Protest Regulations also provide procedures for notification to the GAO when a contract award has been made after a protest has been filed or when performance is allowed to continue.<sup>8</sup> In August 1992, representatives of the GAO told the Panel that in the past year only eight contracts were awarded after a protest was filed with the GAO.<sup>9</sup> For post-award protests, Government agencies determined in 175 cases to allow performance to continue after a protest was filed within 10 calendar days of contract award.<sup>10</sup>

In its initial implementation of 31 U.S.C. § 3553, the GAO provided interested parties with modest access to relevant agency records and provided only informal conferences to review disputed issues.<sup>11</sup> Under rules issued in 1991, the GAO greatly expanded this access by allowing the use of protective orders to provide interested parties with access to a broad range of agency documents. Under the new rules, the GAO may also conduct a formal hearing and take testimony from agency officials and witnesses who are testifying on behalf of a protester or as experts on procurement matters.<sup>12</sup>

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<sup>4</sup>4 C.F.R. Part 21.

<sup>5</sup>48 C.F.R. Subpart 33.1.

<sup>6</sup>4 C.F.R. § 21.3.

<sup>7</sup>4 C.F.R. § 21.3(h).

<sup>8</sup>4 C.F.R. § 21.4.

<sup>9</sup>Minutes of August 13, 1992 meeting of the Panel.

<sup>10</sup>*Id.*

<sup>11</sup>*See generally* Bid Protest Regulations, 56 Fed. Reg. 3759 (1991).

<sup>12</sup>4 C.F.R. § 21.5; *see generally* William L. Walsh, Jr. & Thomas J. Madden, *Due Process for Bid Protesters: Are the 1991 GAO Rules Working?*, ACQUISITION ISSUES, March 1992, Vol. 2, No. 3.

#### 1.5.4.4. Recommendations and Justification

##### Amend

The Panel received relatively few comments concerning 31 U.S.C. § 3553. In general, the respondents expressed no desire to significantly amend this section. After consideration of comments and analysis of the law, the Panel believes it is appropriate to make changes to assure more expeditious and efficient resolution of protests, to modify provisions that have led to confusion on the meaning of this section, and to address debriefings.

##### I

**The Procurement Protest System provisions of Title 31 should use consistent terminology for the time in which statutory action must be taken by using the term "calendar days."**

Various provisions of 31 U.S.C. §§ 3553 and 3554 use the terms "working days" and "day" or "days" to specify when certain actions must be taken. Similar usage occurs in 40 U.S.C. § 759 with respect to protests filed at the GSBICA. There is no statutory definition of these terms in Titles 31 and 40. Titles 31 and 40 do not provide an express provision for computing time periods. The GAO Bid Protest Regulations and the GSBICA rules provide some guidance on this topic.

This difference in use of terminology has led to confusion, to numerous decisions which seek to define and apply these terms, and to conflict between the GAO protest decisions and the decisions of the GSBICA on similar provisions. The GAO General Counsel observed that every year, GAO spends time:

[D]ocumenting decisions on whether a snow day on Thursday was a calendar day or actually a working day. The San Diego protester actually has trouble understanding this act of nature.<sup>13</sup>

The use of calendar days is well accepted in law and the Panel believes that this is an appropriate terminology.

##### II

**The provision of 31 U.S.C. § 3553 which requires suspension of contract performance when a protest is filed within 10 days of contract award should be modified to also require an agency to suspend contract performance if a protest is filed within 3 calendar days after the date set by an agency for any requested and required debriefing.**

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<sup>13</sup>Minutes of the August 13, 1992 meeting of the Panel.

Where a Federal agency receives notice of a protest after a contract has been awarded, the Panel believes that 31 U.S.C. § 3553 should be modified to provide that the agency must suspend contract performance if a protest is filed within 10 calendar days of the date of the contract award or within 3 calendar days from the date set by an agency for any requested and required debriefing of an unsuccessful offeror, whichever is later. In another section of this Report, the Panel is recommending changes to 10 U.S.C. § 2305 to require regulations to provide more meaningful and timely debriefings and to specify when debriefings are required to be offered. These changes would be made in regulations also providing that the debriefing explain the strengths and weaknesses of the offeror's proposal.<sup>14</sup>

In its 1989 Report on Bid Protests, the American Bar Association Section of Public Contract Law listed the results of a survey conducted of protesters and attorneys who represented protesters.<sup>15</sup> These results documented the commonly accepted belief that a number of protests are filed before debriefings on information and belief that the agency improperly conducted the acquisition. A protest might not have been filed if a meaningful debriefing had been provided in a timely manner. The proposed change is intended to eliminate such needless protests.<sup>16</sup>

The Panel believes that there is a simple rationale for this change. The proposed changes address one of the fundamental principles the Panel adopted for making changes to existing protest statutes, *i.e.*, by providing offerors access to nonprivileged information on agency decisions, needless protests can be avoided. This change will require agencies to provide timely and meaningful debriefings. It should be noted that the Commission of Government Procurement, after observing that inadequate debriefings led to unnecessary protests, made a recommendation in 1972 that meaningful debriefings be offered to disappointed parties, and this recommendation has not yet been fully adopted.<sup>17</sup>

The change which the Panel recommends provides that the period for suspension ends three days after an unsuccessful offeror has been given an opportunity to attend a debriefing. The Panel chose the date an unsuccessful offeror has been given an opportunity to attend a debriefing because an offeror should not be able to extend the opportunity to suspend performance by delaying the conducting of the debriefing to the detriment of the agency, the awardee, or other unsuccessful offerors. The Panel believes that regulations on debriefing should specify how the offer of a debriefing would be made and how notice of that offer can be given. This could be accomplished in a variety of ways including the use of a provision in a solicitation which specifies when and how debriefing will be conducted.

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<sup>14</sup>See Chapter 1.2.2 of this Report.

<sup>15</sup>*The Protest Experience under the Competition in Contracting Act*, Bid Protest Committee, American Bar Association, Section of Public Contract Law (1989).

<sup>16</sup>No comments were received that were adverse to this proposed change. The Computer and Communications Industry Association (CCIA), the Council of Defense and Space Industry Associations (CODSIA), and the Computer and Business Equipment Manufacturers Association (CBEMA) approved of the recommendation. See letter from Stephanie Biddle, CCIA President, to Mr. Thomas J. Madden (Nov. 19, 1992); letter from CODSIA Panel Members to Rear Admiral Vincent (Dec. 1, 1992) and letter from John Pickett, CBEMA President, to Maj Gen John D. Slinkard, USAF and Mr. Thomas J. Madden (Oct. 20, 1992).

<sup>17</sup>Commission on Government Procurement, Part G, ch. 3, p. 45 (1972).

The Panel recognizes that an unsuccessful offeror must rapidly prepare a protest to comply with the three-day deadline. Conversely, the Panel appreciates the disruptive impact to agencies when protests are unduly extended. The Panel struck a balance of three days. Congress might determine that a different period of time is appropriate.

There are many innovative approaches to debriefing which can be used to implement the Panel's recommendation and which are now being used by DOD agencies. For example, the Defense Intelligence Agency has held a group debriefing in which all offerors were invited to come, shortly after the contract award, to learn of the agency's rationale for selecting the successful offeror. In conjunction with that group debriefing, offerors were provided an opportunity immediately after the group debriefing for individual debriefings.<sup>18</sup> This procedure can readily assure that all required debriefings are accomplished within 10 calendar days of contract award and would not lead to any change in the required period of time under current law for filing protests in order to invoke the suspension provisions of 31 U.S.C. § 3553.

When the agency suspends contract performance after award, the agency will ordinarily issue a stop work order. The Panel appreciates that stop work orders pursuant to FAR 52.233-3 can be expensive to both the agency and the contractor. Accordingly, nothing in these recommendations should preclude an agency from offering debriefings within 10 days of contract award.

### III

**The terminology in 31 U.S.C. §§ 3553 and 3554, which specifies that certain actions should be taken by the head of the procuring activity, should be changed to require such actions to be taken by the head of the contracting activity.**

Sections 3553 and 3554 of 31 U.S.C. establish obligations for the head of a procuring activity. For example, 31 U.S.C. § 3553 states that the head of the procuring activity may make written findings that would authorize the performance of a contract when a protest is filed within 10 calendar days of award. It further provides that the head of the procuring activity may not delegate this responsibility.

Unfortunately, no definition is provided for the term "head of the procuring activity," and this has led to confusion, delay, and unnecessary expenditure of legal resources in determining congressional intent. The FAR uses and defines the term "head of the contracting activity" in stating who has responsibility for significant procurement decisions.<sup>19</sup> The Panel believes that this term is well understood and recommends that the Procurement Protest System provisions of Title

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<sup>18</sup>This information was provided by Mr. Robert Beery, an attorney for the Defense Intelligence Agency.

<sup>19</sup>In the FAR, 48 C.F.R. § 2.101, the head of the contracting activity is defined as "the official who has overall responsibility for managing the contracting activity." The contracting activity is defined as "an element of an agency designated by the agency head and delegated broad authority regarding acquisition functions."

31 be modified to substitute the term "head of the contracting activity" for "head of the procuring activity."

#### IV

**The Comptroller General should be given express authority to issue protective orders to allow attorneys and technical consultants for interested parties access to competition-sensitive or proprietary information.**

The GAO Bid Protest Regulations were amended in 1991 to authorize the GAO to issue protective orders which allow access by certain counsel for interested parties and expert witnesses to information in the procurement file where unrestricted release of this information might give an interested party a competitive advantage in a procurement.<sup>20</sup> The GAO Bid Protest Regulations provide detailed guidance on when protective orders can be issued and who can access information under the protective orders.<sup>21</sup>

Some Federal agencies have asserted that because the Comptroller General does not have express authority to issue protective orders, release of information to interested parties under protective orders would violate the Trade Secrets Act, 18 U.S.C. § 1905. This provision of law makes it a crime for Federal agencies to release trade secrets of a private party. These agencies have also argued that release of competition-sensitive information could violate the Procurement Integrity Act, 40 U.S.C. § 423, and other provisions of law applicable to protection of sensitive information.

During a presentation to the Panel, GAO representatives identified the lack of authority to issue protective orders as a problem. When asked if statutory authority to issue protective orders would be helpful, the GAO General Counsel responded affirmatively.<sup>22</sup> Accordingly, the Panel recommends that the Comptroller General be given express statutory authority to issue protective orders. The recommended provision is modeled, in part, on Rule 26(c) of the Federal Rules of Civil Procedure.<sup>23</sup>

The recommended provision provides that, notwithstanding any other provision of law, the Comptroller General can issue an appropriate protective order allowing access to documents or information, including Federal agency documents, under restricted terms and conditions. The recommended provision also expressly provides that procurement-sensitive trade secrets, proprietary or confidential business records, or similar information can be provided under a protective order with restrictions on disclosure. Finally, the provision provides that a protective order can be issued for any hearing to be conducted by the GAO so as to assure that only those persons who have agreed to the terms of the protective order may participate in a hearing.

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<sup>20</sup>4 C.F.R. § 21.3(d).

<sup>21</sup>*Id.*

<sup>22</sup>Minutes of the August 13, 1992 meeting of the Panel.

<sup>23</sup>Fed. R. Civ. P. 26(c).

The Panel intends that the phrase "notwithstanding any other provision of law" would be given its normal usage and, as used in the recommendation, would mean that the authority to issue protective orders would supersede all applicable existing laws, such as the provisions of 18 U.S.C. § 1905.<sup>24</sup>

The Panel recognizes that some sanctions are necessary if a protective order is violated. The GAO rules provide that any "violation of the terms of a protective order may result in the imposition of such sanctions as the General Accounting Office deems appropriate, including but not limited to referral of a possible violation to appropriate bar associations or other disciplinary bodies, and restricting the practice of counsel before the General Accounting Office."<sup>25</sup> However, there is a basis for concern that technical consultants could willfully violate a protective order without being properly disciplined. The Panel has addressed this concern in a proposed revision to 41 U.S.C. § 423.<sup>26</sup>

#### **1.5.4.5. Relationship to Objectives**

Adoption of these recommendations is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

#### **1.5.4.6. Proposed Statute**

##### **31 U.S.C. § 3553. Review of protests; effect on contracts pending decision**

(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.

(b)(1) Within one ~~working~~ calendar day ~~from the date~~ of the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.

(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement --

(A) within ~~25-working~~ 35 calendar days from the date of the agency's receipt of that notice;

<sup>24</sup>See *Liberty Maritime Corp. v. U.S.*, 1990 U.S. Dist. LEXIS 20046, at 17-18 (D.D.C. Feb. 6, 1990) (mem.), *aff'd*, 928 F.2d 413 (D.C. Cir. 1991).

<sup>25</sup>4 C.F.R. § 21.3(d)(5).

<sup>26</sup>See Chapter 6.2 of this Report.

(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require a longer period, within the longer period determined by the Comptroller General; or

(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within ~~20 working~~ 25 calendar days from the date of the Federal agency's receipt of that determination.

(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(3) of this title.

(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

(2) The head of the ~~procuring~~ contracting activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section) --

(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

(B) after the Comptroller General is notified of that finding.

(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 calendar days from the date of the finding thereafter.

(d)(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but (A) within 10 calendar days of the date of the contract award or (B) within 3 calendar days from the debriefing date offered to an unsuccessful offeror for any requested and required debriefing, whichever is later, the Federal agency (except as provided under paragraph (2)) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

(2) The head of the ~~procuring~~ contracting activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)--

(A) upon a written finding --

(i) that performance of the contract is in the best interests of the United States; or

(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

(B) after the Comptroller General is notified of that finding.

(e) The authority of the head of the ~~procuring~~ contracting activity to make findings and to authorize the award and the performance of contract under subsections (c) and (d) of this section may not be delegated.

(f) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive; provided, however, that the Comptroller General, under the procedures established pursuant to 31 U.S.C. § 3555, may make an appropriate protective order specifying that notwithstanding any other provision of law (1) access to documents or information, including any Federal agency documents or information, may be had on specific terms and conditions, (2) procurement sensitive, trade secret or other proprietary and confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way, and (3) any hearing be conducted with no one present except persons designated by the Comptroller General.



## **1.5.5. 31 U.S.C. § 3554**

### **Decisions on protests**

#### **1.5.5.1. Summary of the Law**

This section of the Procurement Protest System provisions of Title 31 establishes the process and timing by which protests that are filed with the GAO are resolved. This section also requires the Comptroller General to recommend certain enumerated actions if the Comptroller General determines that a solicitation, a proposed award, or an actual award violates a procurement statute or regulation. The recommended actions could include terminating a contract and recompeting the acquisition. Where a protest is sustained, the Comptroller General may declare that an interested party is entitled to the costs of filing and pursuing the protest, including reasonable attorneys fees and bid or proposal preparation costs.

The guiding principle for resolution of GAO bid protests is set forth in the opening paragraph of this section which states that "[t]o the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter."<sup>1</sup> In furtherance of this principle, this section requires the Comptroller General to issue a final decision concerning protests within 90 working days after the protest is submitted to the Comptroller General.<sup>2</sup> This section also requires the Comptroller General to establish an express option for deciding protests which the Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted.<sup>3</sup>

#### **1.5.5.2. Background of the Law**

Refer to analyses of 31 U.S.C. §§ 3551, 3552, and 3553 at Chapters 1.5.2, 1.5.3, and 1.5.4, respectively, of this Report.

#### **1.5.5.3. Law in Practice**

In discussions with the Panel, representatives of the GAO stated that the GAO currently averages 48 calendar days for deciding all protests.<sup>4</sup> The time period for resolving an initial protest may be reset whenever an amendment raising a material new ground for protest is filed. According to the GAO representatives, the express option procedure had only been determined suitable for 10 protests since 1987.<sup>5</sup>

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<sup>1</sup>31 U.S.C. § 3554(a)(1).

<sup>2</sup>*Id.* ("[T]he Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General.").

<sup>3</sup>31 U.S.C. § 3554(a)(2).

<sup>4</sup>Minutes of the August 13, 1992 meeting of the Panel.

<sup>5</sup>*Id.*

When the Comptroller General reviews a protest and determines that an agency's actions do not comply with a procurement statute or regulation, the Comptroller General recommends that the Federal agency take certain enumerated actions, including opening the procurement for further competition or issuing a new solicitation. In practice, Federal agencies follow the recommendations of the GAO and rarely depart from these recommendations.<sup>6</sup>

The authority of the Comptroller General to make such recommendations was the subject of litigation shortly after the enactment of the Competition in Contracting Act (CICA). In *Ameron v. United States Army Corps of Engineers*,<sup>7</sup> the court ruled that the Procurement Protest System provisions of Title 31 are constitutional.<sup>8</sup>

The Comptroller General is also authorized to declare that an interested party is entitled to the costs of filing and pursuing a protest, including reasonable attorneys' fees. Such costs must be paid by the contracting agency. The authority of the Comptroller General to make such recommendations has been the subject of pending litigation.<sup>9</sup> In *U.S. v. Instruments S.A., Inc.*, the Department of Justice argued that Congress violated the constitutional separation of powers doctrine when it authorized the GAO, a legislative branch agency, to declare that an executive branch agency must pay such costs.<sup>10</sup>

#### 1.5.5.4. Recommendations and Justification

##### Amend

The Panel sought comments from Government and private sector entities concerning 31 U.S.C. § 3554. In general, respondents expressed no desire to fundamentally change this section. After consideration of comments and analysis of the law, the Panel believed that certain changes should be made to improve the efficiency and effectiveness of the GAO bid protest process with respect to the decision process set forth in 31 U.S.C. § 3554.

##### I

**The period for considering protests under the express option alternative of 31 U.S.C. § 3554 should be expanded from 45 calendar days to 65 calendar days after the date the protest is submitted.**

The Comptroller General is required to provide "for the inexpensive and expeditious resolution of protests" under the Procurement Protest Systems provisions of Title 31.<sup>11</sup> The

<sup>6</sup>In its January 31, 1989 Bid Protest Report, for example, the GAO stated that "there are no reportable FY 1988 cases where our recommendations were not followed." GAO Report B-158766 (Jan. 31, 1989).

<sup>7</sup>809 F.2d 979 (3d Cir. 1986), cert. granted, 485 U.S. 958, cert. dismissed, 488 U.S. 918 (1988).

<sup>8</sup>*Id.* at 989-99.

<sup>9</sup>*United States v. Instruments, S.A., Inc.*, No. 91-1574 (D.D.C., Nov. 13, 1992) (granting motion to dismiss for lack of jurisdiction).

<sup>10</sup>*Id.*

<sup>11</sup>31 U.S.C. § 3554(a)(1).

Comptroller General is directed to establish an express option for deciding those protests which are suitable for resolution within 45 calendar days from the date the protest is submitted. The Panel believes it is in the best interest of DOD to have efficient, expeditious resolution of bid protests and strongly supports the use of the express option.

The Panel originally sought comments from industry on a change to the express option provision which would have required that the express option be used in every case in which the head of the contracting activity determined to proceed with award or performance of the contract even though a protest may have been filed before award or within 10 calendar days of contract award. As noted earlier, 31 U.S.C. § 3553 requires suspension of award or performance unless the head of the procuring activity makes certain findings. Numerous Government and private sector respondents objected to this use of the express option.<sup>12</sup>

While supporting expeditious resolution of protests, Government representatives were concerned that the burden imposed on the agencies to assist the GAO in resolving protests in 45 calendar days would cause agencies to suspend contract performance even though it was in the best interest of the United States to allow contract performance to continue, or even though there were urgent and compelling circumstances to allow performance to continue. The Panel was persuaded by these comments not to make the use of the express option mandatory in these circumstances.

At the August 13, 1992, Panel meeting, GAO representatives indicated that the GAO was open to suggestions for changes to expedite the protest process and minimize transaction costs. The GAO representatives cautioned against reducing the overall period of time for resolving protests from the current 90-day working period.<sup>13</sup> They indicated that the 90-day working period serves several important purposes. First, they indicated that the GAO currently averages 48 calendar days for deciding all protests. They then stated that the 90-day working period allows GAO to manage variations in its workload. This is valuable because the GAO workload varies seasonally, and there are more protests filed around the end of the fiscal year as the Government is making final decisions on many contract awards. The 90-day working period gives the GAO sufficient flexibility to decide those protests. The 90-day working period also, according to the GAO, provides time for the Government and protesters to take the actions needed to resolve a protest, including preparation and delivery of documents and agency reports, as well as for discussions leading to the release of documents under protective orders. The GAO cautioned that reducing the current 90-day working period could force GAO to use more formal, judicial types of methods for resolution of issues. They indicated it could require more extensive use of discovery techniques, such as depositions and interrogatories, and might require the use of hearings in every case in order to get the issues resolved as quickly as possible. There was also

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<sup>12</sup>See memorandum to John S. Pachter, Chair, American Bar Association, Section of Public Contract Law from Bid Protest Committee (Aug. 4, 1992) [hereinafter ABA Comments]; letter from Col Smith, Chief of Army Contract Law Division, to Mr. Stuart A. Hazlett (July 10, 1992); letter from Edward Saul, Deputy Counsel, Naval Air Systems Command, to Mr. Donald Freedman (July 10, 1992).

<sup>13</sup>Minutes of the August 13, 1992 Panel meeting.

support for the GAO's concern in comments prepared for submission to the Panel by the American Bar Association Section of Public Contract Law.<sup>14</sup>

The representatives of the GAO indicated that the express option as currently established is of little utility in expeditiously resolving protests. According to these representatives, only 10 protests have been decided by the express option since 1987.<sup>15</sup> However, since 1987, approximately 400 requests were received for resolution of protests under the express option.<sup>16</sup> In response to a question from the Panel, the GAO representatives indicated that it was likely that more protests could be decided under the express option if the time period were extended.

The Panel determined that it was appropriate to recommend extension of the period for resolution of protests under the express option to 65 calendar days. This is similar to the period of time that is imposed on the resolution of bid protests by the GSBCA under the Brooks Act.<sup>17</sup> While the Brooks Act procedures impose significant burdens on agencies to gather the record and defend protests in a 60-65 calendar day period, the agencies have adjusted to the GSBCA procedures and now routinely and capably defend protests before the GSBCA within 60-65 days.

The Panel believes that if agencies can resolve protests within 60-65 days before the GSBCA with its discovery and adjudicatory procedures, agencies should be able to resolve many more protests than are currently resolved under the 45 calendar day express option within the recommended 65 calendar day period. This is particularly true in light of the fact that the GAO bid protest procedures impose far fewer burdens on agencies than those imposed by the GSBCA.

The recommended change in time for the express option relieves part of the express option burden on agencies by recommending that 31 U.S.C. § 3553(b)(2) be changed to provide that agency reports be due in 25 calendar days.

## II

**31 U.S.C. § 3554 should be amended to provide to the maximum extent practicable that amendments which add new grounds of protest should be resolved within the same time period established for resolution of the initial protest. The Comptroller General should be authorized to resolve amended protests through the use of the express option if the amended protest cannot be resolved within the time period established for resolution of the initial protest.**

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<sup>14</sup>ABA Comments, *supra* note 12.

<sup>15</sup>Minutes of the August 13, 1992 Panel Meeting.

<sup>16</sup>*Id.*

<sup>17</sup>The GSBCA must now decide its protests in 45 working days. *See* 40 U.S.C. § 759(f)(4)(B). The Panel has recommended that working days be changed to calendar days and has rounded the 45 working-day period up to 65 days.

Under current procedures, protesters usually receive the agency report within 25 working days after filing the initial protest. The agency report typically includes numerous documents, including documents provided in response to the document requests filed by protesters. A review of the agency report and the document request response may lead to the filing of new grounds of protest and new document requests. When new grounds of protest are filed at this stage, or at any stage during the protest, and the new basis of protest requires a new report from the agency, the GAO generally treats the amended protest as though it were a new protest and starts the clock running for decision of the protest from the date of the filing of the amended protest. While this practice is understandable, it can lead to protests which extend for months beyond the 90 calendar day period which began at the filing of the initial protest. This can add to the delays and burdens imposed on Government agencies and offerors alike.

The Panel believes that amendments adding new grounds of protest should be resolved to the maximum extent practicable within the time limits for resolution of the initial protest. Accordingly, the Panel recommends additional language to 31 U.S.C. § 3554 which will address this issue. The Panel also recommends that the Comptroller General be given authority to resolve an amended protest which cannot be resolved within the original time limit through use of the express option. This change could shorten considerably the period for resolution of protests.<sup>18</sup>

### III

**Where the Comptroller General expressly finds that a protest or a portion of a protest is frivolous or has not been brought or pursued in good faith, the interested party who is responsible for pursuing such a matter should pay the costs of the Government to defend its action.**

Bid protests are an essential feature of the statutory scheme for assuring full and open competition for Government contracts. However, protests can impose substantial costs and administrative burdens on the Government as well as on prospective or actual recipients of contract awards. Accordingly, the Panel believes that the protest process should help ensure that only meritorious protests are filed or pursued.

After considerable debate, discussion, and consideration of public comments, the Panel concluded that sanctions should be imposed on parties who file frivolous protests or who do not file or pursue protests in good faith. Under the Panel's recommendations, Congress should enact legislation to provide that interested parties would be liable to the United States for payment of the cost of defending protests or issues in protests which are frivolous or have not been brought or pursued in good faith. Only those interested parties who file or pursue such protests would be liable for payment of Government costs.

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<sup>18</sup>The only comment made on this proposed recommendation came from the Computer and Business Equipment Manufacturers Association (CBEMA). That organization perceived the recommendation to be "reasonable and could further increase the efficiency of the protest process without diminishing its efficacy." Letter from Mr. John Pickett, CBEMA President, to Maj Gen John D. Slinkard, USAF, and Mr. Thomas J. Madden (Oct. 20, 1992).

The Panel's recommendations provide that there would be no liability where special circumstances make payment unjust. There should also be no liability where a protester or interested party promptly withdraws its protest or a portion of its protest after receiving information which shows that the protest or an issue in the protest is in fact frivolous or can no longer be brought in good faith.

The Panel recognizes that there are significant definitional problems which must be resolved before this legislation can be fully implemented. Accordingly, in 31 U.S.C. § 3555, the Panel has recommended that regulations be issued to address: (1) the calculation and proof of Government costs including specific elements of Government costs which can be recovered; (2) the special circumstances that would make payment unjust; (3) the factual circumstances which would constitute prompt withdrawal of a protest or a protest issue to avoid the imposition of fees; and (4) the definition of what constitutes a frivolous protest or a protest not brought or pursued in good faith.

The rationale for the imposition of such costs includes the following considerations:

- Some protests are simply frivolous or are not filed in good faith. In addition, protests are sometimes pursued even after it becomes readily apparent that the protest is frivolous or does not state valid grounds for protest. Such actions are particularly objectionable when an incumbent contractor seeks to benefit from extended contract performance to the detriment of the awardee.<sup>19</sup>
- Congress intended to discourage frivolous or bad faith protests when it enacted CICA. The Comptroller General, for example, was authorized to dismiss protests at any time under 31 U.S.C. § 3554(a)(3) because it was "the intent of the conferees [on CICA] to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit."<sup>20</sup>
- Imposition of monetary sanctions for frivolous protests or protests not brought or pursued in good faith should streamline the acquisition process by discouraging such protests.

The thrust of this recommendation is directed at those protests which add cost and burden to the protest process. It is not directed at the many protests which are summarily dismissed by the GAO at the beginning of the protest process. During a presentation to the Panel, for example, the General Counsel of the GAO indicated that of the approximately 3,000 protests which are filed each year, about half are summarily dismissed by GAO under its current regulations.<sup>21</sup> These regulations, based on 31 U.S.C. § 3554(a)(3), allow dismissal of protests which fail to

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<sup>19</sup>This practice apparently has been observed by the Air Force Contract Law Center. Letter from Brig Gen Roan, USAF, to Mr. Stuart A. Hazlett (May 15, 1992).

<sup>20</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1436-37 (1984), *reprinted in* 1984 U.S.C.A.N. 1445, 2124-25.

<sup>21</sup>Minutes of the August 13, 1992 Panel meeting.

comply with any of the requirements of the Bid Protest Regulations or which do not on their face state valid grounds for protest.<sup>22</sup>

The Panel has no estimate of the number of protests to which these provisions would apply and believes that the GAO, through the regulatory process, will be better able to define and limit its recommendations to assuring that the fee sanctions are imposed only in those cases which impose unnecessary costs on the procurement system or create an unfair competitive advantage for the party pursuing a frivolous protest or a protest not brought in good faith.

The Panel's original proposal would have imposed the fee sanction in those cases where the protest or an issue in the protest was not substantially justified. The Panel chose to seek public comments on this standard because it had been used in other fee-shifting statutes, including the Equal Access to Justice Act (EAJA)<sup>23</sup> and the provision of Title 10 dealing with validation to proprietary data restrictions which allows the Government to recover its costs of establishing that a private party's assertion of proprietary rights in technical data was not "substantially justified."<sup>24</sup> However, the Panel was persuaded after receiving comments from the Section of Public Contract Law of the American Bar Association, and others, that the use of this standard could impose an unwarranted barrier to the filing of bid protests.<sup>25</sup> There are, for example, many decisions involving EAJA which indicate that the "substantially justified" standard could result in the imposition of fees in cases where an unsuccessful protester had an arguably meritorious protest. These decisions suggest that the "substantially justified" term is subject to broad interpretation.<sup>26</sup>

The Panel decided to limit the imposition of fees to those protests where the Comptroller General makes an express finding that a protest is frivolous or not brought in good faith. By requiring an express finding by the Comptroller General, this provision should avoid the type of needless litigation that can occur in EAJA cases where the issues of payment of attorneys fees are routinely litigated at the end of a case. It is the Panel's expectation that the finding of the Comptroller General would be made as part of the protest decision. The only issue to be disputed would be the actual costs to be paid to the Government.<sup>27</sup>

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<sup>22</sup>4 C.F.R. §§ 21.1(f), 21.3(m).

<sup>23</sup>Pub. L. No. 96-481, 1980 U.S.C.C.A.N. (94 Stat.) 2325, amended by Equal Access to Justice Act, Extension and Amendment, Pub. L. No. 99-80, 1985 U.S.C.C.A.N. (99 Stat.) 183. EAJA amends 5 U.S.C. § 504, Cost and Fees of Parties (awarded by an agency in agency action), and 28 U.S.C. § 412, Costs and Fees (awarded by courts in judicial actions). Under EAJA, the Government must pay fees, in certain classes of cases, where its position is "not substantially justified."

<sup>24</sup>10 U.S.C. § 2321.

<sup>25</sup>ABA Comments, *supra* note 12. Informal research has shown that there are almost 400 published decisions where the substantially justified test has been litigated. Out of the 35 reported decisions in the first nine months of 1992 where a party argued that the Government's position was not substantially justified, in only seven of those cases was the Government's position upheld. Letter from Deneen J. Melander to Mr. Thomas J. Madden (Dec. 18, 1992).

<sup>26</sup>See e.g., *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988); see Donald J. Kinlin, *Equal Access to Justice Act*, 16 PUB. CONT. L.J. 266, 273-276 (Aug. 1986), which contains a detailed discussion of the EAJA "substantially justified" test, noting that the "test has been interpreted many ways." *Id.* at 273.

<sup>27</sup>There are a number of ways in which the United States could recoup its costs from the protester. If the protester has an existing contract with the United States, FAR Subpart 32.6 suggests the agency can set off the costs against that contract. [The Panel expresses no opinion whether such a setoff would violate the Debt Collection Act of 1982.

In choosing to limit the sanction to frivolous protests or protests that are not in good faith, the Panel has looked to several sources, including the provisions of the Rule 11 of the Federal Rules of Civil Procedure.<sup>28</sup> This rule allows the imposition of sanctions on parties who bring litigation which is frivolous or is not pursued in good faith. Rule 11 provides, among other things, that a person signing a document which is filed in court certifies that they have:

Read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>29</sup>

The body of case law interpreting Rule 11 should provide some guidance to the regulation writers. Rule 11 decisions recognize, for example, that special circumstances, such as *pro se* matters, may not justify fee-shifting.<sup>30</sup> The standard for determining if a "reasonable inquiry" has been made must, of course, be far less restrictive in bid protests than in other matters to which Rule 11 applies because of the need to file bid protests expeditiously and because of the public policy interests in full and open competition. The Panel recognizes that any use of Rule 11 as a model should be tempered by the concerns raised by the Section of Public Contract Law of the American Bar Association. Specifically, the Section noted that bid protests are characterized by short time frames and an inability to conduct the fullest measure of due diligence, similar to that which can be conducted in a civil proceeding between private parties, because of the procuring agency's control of many of the facts.

In determining the type of fees for which the Government could seek payment, the Panel believes reference can be made to the various Federal fee-shifting statutes including 28 U.S.C. § 2412(d)(2)(A).

The Panel considered and rejected recommendations from Government agencies which would have created a so-called "English Rule" for fee-shifting (i.e., a rule that the losing party pays the fees of the party who prevails). Some Government agencies, for example, argued that since protesters or interested parties who prevail on protest matters are sometimes entitled to recover their attorneys' fees, the Government should be entitled to recover its attorneys' fees if the Government prevails in a protest. The Panel believes that this would unduly restrict the filing of protests and would be inconsistent with the concept that protesters are acting as private attorneys

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*See generally* Thomas P. Barletta, Contract Debts, BRIEFING PAPERS NO. 92-8 (July 1992).] Under 28 U.S.C. § 2461, the United States could file a civil action to recover its costs.

<sup>28</sup>Fed. R. Civ. P. 11.

<sup>29</sup>*Id.*

<sup>30</sup>Fed. R. Civ. P. 11 (as amended Feb. 1, 1991) advisory committee's note on 1983 amendments.



general in filing bid protests with Government agencies.<sup>31</sup> As private attorneys general, protesters are seeking to ensure that the requirements of full and open competition are met. The Panel feels that its proposal is an adequate counterbalance to the current fee-shifting provisions of Title 31.

#### IV

**Where the Comptroller General determines that an interested party is entitled to the cost of filing and pursuing the protest, the Comptroller General may declare the interested party is entitled to consultant and expert witness fees.**

The recovery of protest costs, including consultant and expert witness fees, advances the purposes of CICA. Such recovery is necessary "to relieve parties with valid claims of the burden of vindicating the public interests which Congress seeks to promote."<sup>32</sup> Recently, the GSBCA deviated from its past precedent of awarding consultant and expert witness fees.<sup>33</sup> Although the GAO has not re-examined its position on consultant and expert witness fees, the Panel has concerns that the GAO will follow the lead of the GSBCA. Recovery of these fees is appropriate for reasons stated by the GAO.<sup>34</sup> Accordingly, the Panel recommends that Congress clarify section 3554 to assure that consultant and expert witness fees may be paid to an interested party.

##### 1.5.5.5. Relationship to Objectives

The statute, as amended, is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute, as amended, is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

##### 1.5.5.6. Proposed Statute

##### **31 U.S.C. § 3554. Decisions on protests**

(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within ~~90~~ working 125 calendar days from the date the protest is submitted to the Comptroller General.

<sup>31</sup>See e.g., *Armour of America, Inc.--Claims for Costs*, Comp. Gen. B-237690.2, 92-1 CPD ¶ 257 ("In essence, entitlement to bid protest costs relieves a protester of the financial demands of acting as a private attorney general where it brings to light an agency's failure to conduct a procurement in accordance with law and regulation.").

<sup>32</sup>*Hydro Research Science, Inc.--Claim for Costs*, Comp. Gen. L-228501.3, 89-1 CPD ¶ 572 (quoting *Computer Lines*, GSBCA No. 8334-C, 86-2 BCA ¶ 19,403).

<sup>33</sup>See *Sterling Federal System, Inc. v. National Aeronautics and Space Administration*, GSBCA No. 10000-C, 92-3 BCA ¶ 25,118.

<sup>34</sup>See *Armour of America, Inc.--Claims for Costs*, Comp. Gen. B-237690.2, 92-1 CPD ¶ 257.

(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option deciding those protests which the Comptroller General determines suitable for resolution within 45 65 calendar days from the date the protest is submitted.

(3) Amendments which add new grounds of protest should be resolved, to the maximum extent practicable, within the time limits established under paragraph (1) of this subsection for the initial protest. If amended protests cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection.

~~(3)~~(4) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency --

(A) refrain from exercising any of its options under the contract;

(B) recompete the contract immediately;

(C) issue a new solicitation;

(D) award a contract consistent with the requirements of such statute and regulation;

(E) implement any combination of recommendations under clauses (A), (B), (C), and (D), or

(F) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

(2) If the head of the ~~procuring~~ contracting activity responsible for a contract makes a finding under section 3553(d)(2)(A)(i) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of --

(A) filing and pursuing the protest, including reasonable attorneys' fees (and consultant and expert witness fees); and

(B) bid and proposal preparation.

(2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.

(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring contracting activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

(e)(1) The head of the procuring contracting activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented these recommendations within 60 calendar days of receipt of the Comptroller General's recommendations under subsection (b) of this section.

(2) Not later than January 31 of each year, the Comptroller General shall transmit to Congress a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year. The report shall also describe each instance where a final decision was not rendered within 125 calendar days.

(f) If the Comptroller General expressly finds that a protest or a portion of a protest is frivolous or has not been brought or pursued in good faith, the protester or other interested party, who joins the protest, shall be liable to the United States for payment of all or that portion of the United States costs, for which such a finding is made, of reviewing the protest including the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in defending the protest, unless (1) special circumstances would make such payment unjust, or (2) the protester obtains documents or other information for the first time, after the protest is filed with the Comptroller General, which establishes that the protest or a portion is frivolous or has not been brought in good faith and the protester then promptly withdraws the protest or portion of the protest.

## **1.5.6. 31 U.S.C. § 3555**

### **Regulations; authority of Comptroller General to verify assertions**

#### **1.5.6.1. Summary of the Law**

This section of the Procurement Protest System provisions of Title 31 authorizes the Comptroller General to issue regulations. In issuing regulations, the Comptroller General is directed to prescribe procedures for the "expeditious decision of protests."<sup>1</sup> Section 3555 also states that the regulations shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided.<sup>2</sup> The Comptroller General is given authority to verify any assertions made by parties in protests filed under the Procurement Protest System provisions.<sup>3</sup>

#### **1.5.6.2. Background of the Law**

Refer to the analysis of 31 U.S.C. § 3551 at Chapter 1.5.2 of this Report.

#### **1.5.6.3. Law in Practice**

In 1985, the Comptroller General issued regulations implementing the Procurement Protest System provisions of Title 31.<sup>4</sup> The regulations were further revised in 1988 and in 1991.<sup>5</sup> The regulations appear in Title 4 of the Code of Federal Regulations.

Consistent with the section 3555 requirement for timely filing of protests and expeditious decisions, the GAO has promulgated two basic rules. The first rule is that protests based upon apparent improprieties in a solicitation must be filed prior to bid opening or prior to the time set for receipt of initial proposals.<sup>6</sup> The second rule is that, except in circumstances addressed in the first rule, protests must be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier.<sup>7</sup>

#### **1.5.6.4. Recommendations and Justification**

##### **Amend**

The Panel sought comments from the Government and industry concerning 31 U.S.C. § 3555. In general, respondents expressed their support for the GAO Bid Protest Regulations and

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<sup>1</sup>31 U.S.C. § 3555(a).

<sup>2</sup>*Id.*

<sup>3</sup>31 U.S.C. § 3555(b).

<sup>4</sup>4 C.F.R. Part 21 (1985).

<sup>5</sup>4 C.F.R. Part 21 (1988); 4 C.F.R. Part 21 (1991).

<sup>6</sup>4 C.F.R. § 21.2(a)(1).

<sup>7</sup>4 C.F.R. § 21.2(a)(2).

expressed no desire to significantly amend the law. After consideration of comments, and in light of its recommendations to amend 31 U.S.C. §§ 3553 and 3554, the Panel recommends that regulations be issued in three specific areas.

## I

### **Regulations should be issued for computation of periods of time prescribed or allowed by the Procurement Protest System provisions of Title 31.**

The Panel recommends that the GAO Bid Protest Regulations provide detailed guidance for computing the periods of time specified by the Procurement Protest System provisions of Title 31. The Panel's recommendations for change to 31 U.S.C. § 3555 provide a method for computing days based on calendar days, and reference should be made to the discussion of that section for the particular language which deals with computation of time periods. The recommended changes to 31 U.S.C. § 3555 for computing periods of time are derived from Rule 6 of the Federal Rules of Civil Procedure.<sup>8</sup> The recommended changes provide, for example, that if the last day of the calendar period falls on a Saturday, Sunday, or legal holiday, then the next day on which the GAO would be open for business would be the day on which a required GAO filing must be completed. This change could avoid the confusion that has occurred in computing time periods and that has led to a number of protest decisions which seek to define and explain the time period for which certain actions must be taken.

## II

### **Regulations should be issued to implement the Panel's recommendation for payment of the costs of frivolous protests or protests not filed in good faith.**

The Panel recommends that regulations address implementation of the payment of costs where a frivolous protest is filed or where a protest is not filed in good faith. Reference should be made to the discussion of this topic under 31 U.S.C. § 3554 found at Chapter 1.5.5 of this Report.

## III

### **Regulations should be issued for electronic filing and dissemination of protest documents.**

The Panel recommends that the GAO issue regulations which would allow for electronic filing of all or part of the agency report or any other documents now required to be filed with the GAO. The regulations should take into account the ability of both interested parties and the

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<sup>8</sup>Fed. R. Civ. P. 6 (as amended Feb. 1, 1991).

Government to achieve electronic access to such filings.

The rationale of this change is threefold. First, it can speed up the protest process and reduce costs of duplicating and preparing material. Second, it is consistent with current Government practices of allowing contractors to submit proposals on electronic media. Third, it is consistent with modern litigation and administrative practices followed by many Federal courts and agencies to allow or even require the filing of pleadings, motions, and agency record documents in both hard copy and electronic media.

The suggestion for allowing electronic filing was made to one of the Panel members by the General Counsel of a large systems integration company. In discussions with industry and Government representatives, it was determined that electronic filing of all or portions of the agency report is now feasible and practical. Over time, this change could result in considerable costs savings. Because electronic filing may not be feasible or desirable in all circumstances, the regulations, as recommended by the Panel, should simply provide for or authorize electronic filing. The regulation should not mandate electronic filings in all cases.

#### **1.5.6.5. Relationship to Objectives**

The statute, as amended, is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. Also, as amended, it is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

#### **1.5.6.6. Proposed Statute**

##### **31 U.S.C. § 3555. Regulations; authority of Comptroller General to verify assertions**

(a) ~~Not later than January 15, 1985,~~ The Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing.

(b) In computing any period of time prescribed or allowed by this subchapter, the procedures shall provide that the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper at the General Accounting Office or a Federal agency, a day on which weather or other conditions have made the General Accounting Office or Federal agency inaccessible, in which event the period runs until the end of the next day which is not one of the previously mentioned days.

(c) The procedures may provide for electronic filing and dissemination of documents and information required under this subchapter and in so providing shall consider the ability of all

parties to achieve electronic access to such documents and records.

(d) The procedures shall address the implementation of the provisions for payment of costs under section 3554(f) including the composition, proof and calculation of such costs, the special circumstances that make such payment unjust and what constitutes prompt withdrawal of the protest.

(b)(e) The Comptroller General may use any authority available under Chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

## **1.5.7. 31 U.S.C. § 3556**

### **Nonexclusivity of remedies; matters included in agency record**

#### **1.5.7.1. Summary of the Law**

The statute provides that the Comptroller General's jurisdiction over protests is not exclusive and that an interested party may file a procurement protest with the contracting agency, a district court, or the Court of Federal Claims. Agency reports submitted in response to a procurement protest filed with the General Accounting Office (GAO) are part of the agency record which is subject to judicial review.<sup>1</sup>

#### **1.5.7.2. Background of the Law**

Congress added this statute as part of the Competition in Contracting Act of 1984 (CICA). It did so to clarify that 31 U.S.C. §§ 3551-6, regarding procurement protests, did not alter "the current rights of any person to seek administrative or judicial review of any alleged violation of a procurement statute or regulation."<sup>2</sup>

#### **1.5.7.3. Law in Practice**

The statute is implemented by GAO Bid Protest Regulations.<sup>3</sup> See discussion in 31 U.S.C. §§ 3551-5.

#### **1.5.7.4. Recommendation and Justification**

##### **Amend**

The Panel recommends retaining this statute as modified. The Panel sought comments from the private sector and Government agencies concerning the statute and determined that it still fulfills a valid need. Consistent with the Panel's recommendation to discontinue *Scanwell* jurisdiction in district courts, reference to "a district court of the United States" is deleted.<sup>4</sup>

#### **1.5.7.5. Relationship to Objectives**

Adoption of this recommendation is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute, as amended, is consistent with the Panel's objective that acquisition laws should provide

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<sup>1</sup>31 U.S.C. § 3556.

<sup>2</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1437 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, 2125.

<sup>3</sup>4 C.F.R. Part 21.

<sup>4</sup>See Chapter 1.5.8 of this Report for discussion of 28 U.S.C. § 1491 concerning *Scanwell* jurisdiction.



the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

#### **1.5.7.6. Proposed Statute**

##### **31 U.S.C. § 3556. Nonexclusivity of remedies; matters included in agency record**

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in ~~a district court of the United States~~ or the United States Claims Court of Federal Claims. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

**1.5.8. 28 U.S.C. § 1491**

**Claims against the United States generally; actions involving  
Tennessee Valley Authority**

**1.5.8.1. Summary of the Law**

This section, commonly referenced as the Tucker Act, gives the Court of Federal Claims jurisdiction to consider claims against the United States for monetary damages which are based on an "express or implied contract."<sup>1</sup> In bid protest actions, the contract on which the Tucker Act claim is based is the "implied contract" that the contract bid will be "fairly and honestly considered."<sup>2</sup> The Court's jurisdiction over contract claims extends to any contract of the United States, except those issued by the Tennessee Valley Authority.<sup>3</sup>

**1.5.8.2. Background of the Law**

The Claims Court was established on October 1, 1982, by the Federal Courts Improvement Act of 1982 (FCIA) and was given the trial court responsibilities of the former Court of Claims.<sup>4</sup> Prior to enactment of FCIA, the Court of Claims could only grant monetary relief, such as bid and proposal costs, to disappointed bidders for Federal contracts.<sup>5</sup> FCIA gave the Court of Federal Claims the "exclusive jurisdiction" to provide equitable relief, including the power to enjoin contract award in protests filed before contract award.<sup>6</sup>

Prior to the enactment of FCIA, the district courts were the only Federal courts which provided equitable relief in bid protests. The consideration of such protests began in 1970 when the Court of Appeals for the District of Columbia Circuit held in *Scanwell Laboratories, Inc. v. Schaffer* that the district courts had this authority.<sup>7</sup> Even though the jurisdiction of the Court of Federal Claims over pre-award protests was stated to be "exclusive" in FCIA, the legislative history of FCIA suggests that Congress intended to retain concurrent jurisdiction over pre-award contracts in the district courts. The Senate Report on FCIA for example, contains the following statement:

By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process,

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<sup>1</sup>28 U.S.C. § 1491(a)(1). The Claims Court was renamed the Court of Federal Claims by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 1992 U.S.C.C.A.N. (106 Stat.) 4506.

<sup>2</sup>28 U.S.C. § 1491(a)(1); *United States v. Grimberg*, 702 F.2d 1362, 1368 n.11 (Fed. Cir. 1983).

<sup>3</sup>28 U.S.C. § 1491(a)(1), (b).

<sup>4</sup>Pub. L. No. 97-164, 1982 U.S.C.C.A.N. (96 Stat.) 25.

<sup>5</sup>See, e.g., *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

<sup>6</sup>28 U.S.C. § 1491(a)(3).

<sup>7</sup>424 F.2d 859 (D.C. Cir. 1970). *Scanwell* has been effectively adopted by all of the circuit courts of appeal. Jeffrey M. Villet, *Equitable Jurisdiction in Government Contract "Bid Protest" Cases: Discerning the Boundaries of Equity*, 17 PUB. CONT. L.J. 152 (1987); see discussion of 5 U.S.C. §§ 701-706 at Chapter 1.5.1 of this Report.

the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the Scanwell Doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left intact [sic].<sup>8</sup>

### 1.5.8.3. Law in Practice

Over the past 10 years, protests in the Court of Federal Claims have been enmeshed in an endless web of jurisdictional issues. Scores of decisions have been written in an unsuccessful effort to untangle these issues. These decisions have delayed, disrupted, and increased the costs of procurements which have been the subject of these protests.<sup>9</sup> In a 1987 article, one practitioner thought the judicial bid protest system had reached the point where it was "chaos."<sup>10</sup> By 1988, the number of bid protests filed in the Court of Federal Claims had dropped to eight from a high of 69 cases in 1983, the first year after the enactment of FCIA.<sup>11</sup> In FY88, by contrast, 2,633 protests were filed with the GAO.<sup>12</sup>

There are two dominant issues which create these jurisdictional problems. The first deals with whether the Court of Federal Claims has exclusive jurisdiction over pre-award bid protests or whether its pre-award jurisdiction is concurrent with the district courts. The second dominant issue is whether the Court of Federal Claims has jurisdiction over the type of agency wrongdoing for which the GAO and the GSBICA customarily grant relief.

The first dominant issue is intertwined in the language of the Senate Report that is quoted above. That language has led to substantial litigation as the courts have attempted to define what, if any, significance to place on congressional intent. This has created unresolved conflicts between the courts in different parts of the country on whether the Court of Federal Claims is the exclusive judicial forum to consider pre-award bid protests. The problems with the pre-award jurisdiction issues were highlighted in the decision of the Court of Appeals for the District of Columbia in *Cubic Corporation v. Cheney*.<sup>13</sup> The opinion described the confusion among the courts as follows:

[Intervenor] argues that the Federal Courts Improvement Act of 1982 vested the Claims Court with exclusive jurisdiction over pre-award challenges to procurement decisions, and that the district court was therefore without jurisdiction over this cause of action. The 1982 statute provides that "before the contract is awarded, the [Claims Court] shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems

<sup>8</sup>S. REP. NO. 275, 97th Cong., 2d Sess. 23 (1982), reprinted in 1982 U.S.C.C.A.N. 11, 33.

<sup>9</sup>The delays, disruptions, and costs are compounded when the Government and other interested parties must wait not only for a decision of a district court, but also, as often happens, for a decision of a circuit court of appeals.

<sup>10</sup>Villet, *supra* note 7, at 184.

<sup>11</sup>*American Bar Association, Public Contract Law Section Bid Protest Committee Courts Subcommittee Project* (1991) [hereinafter *Courts Subcommittee Project*].

<sup>12</sup>This figure was provided by the GAO. See also chart accompanying note 20 at Chapter 1.5.0 of this Report.

<sup>13</sup>914 F.2d 1501 (D.C. Cir. 1990).

proper, including but not limited to injunctive relief." (28 U.S.C. § 1491(a)(3)).

Of those courts of appeals that have confronted the issue, two have held that jurisdiction over pre-award challenges is exclusive in the Claims Court, see *J.P. Francis & Assocs., Inc. v. United States*, 902 F.2d 740 (9th Cir. 1990); *Rex Systems, Inc. v. Holiday*, 814 F.2d 994, 997-98 (4th Cir. 1987); two have said as much in dicta, see *F. Alderete General Contractors, Inc. v. United States*, 715 F.2d 1476, 1478 (Fed. Cir. 1983); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 721 n.4 (2d Cir. 1983), and two have found concurrent jurisdiction in the district courts, see *Ulstein Maritime, Ltd. v. United States*, 833 F.2d 1052, 1057-58 (1st Cir. 1987) (district courts have "concurrent power to award injunctive relief in pre-award contract cases"); *Coco Bros. v. Pierce*, 741 F.2d 675, 677-79 (3d Cir. 1984) ("A superficial reading of the language in section 1491(a)(3) leads one to a result never intended by Congress"); see also *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1374-75 (Fed. Cir. 1983) (dictum that Senate and House Reports indicate that jurisdiction "is exclusive only of contract boards").<sup>14</sup>

As indicated by the above language, the law concerning the jurisdiction of district courts on pre-award challenges is at a disjunction.

The second dominant issue concerns whether the Court of Federal Claims has subject matter jurisdiction to consider the types of agency wrongdoing for which the GSBCA and the GAO customarily grant relief. Shortly after FCIA was passed, the Court of Appeals for the Federal Circuit ruled that Congress did not intend to change the legal basis for seeking consideration of bid protests in the Court of Federal Claims. This legal basis is the alleged breach of the Government's implied-in-fact contract to fairly and honestly consider bids or proposals which are received in response to a solicitation.<sup>15</sup>

The Court of Federal Claims jurisdiction is severely limited by the need to find that the Government breached this implied contract. Since the implied contract only arises when bids or proposals are submitted, numerous protests which are considered today by other bid protest forums will not be heard by the Court of Federal Claims.<sup>16</sup>

In a series of decisions, the Court of Appeals for the Federal Circuit and the Court of Federal Claims have ruled that protests will not be considered if: (1) they allege deficiencies in the

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<sup>14</sup>*Id.* at 1503.

<sup>15</sup>*United States v. Grimberg*, 702 F.2d 1362, 1367-68 (Fed. Cir. 1983); *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 140 F. Supp 409 (1956); *Ingersoll-Rand Co. v. United States*, 2 Cl. Ct. 373 (1983).

<sup>16</sup>*Ingersoll-Rand Co. v. United States*, 2 Cl. Ct. 373, 376 (1983).

solicitation prior to the required submission of bids;<sup>17</sup> (2) they allege general deficiencies in competition which apply equally to all offerors;<sup>18</sup> or (3) they are filed by certain nonbidders.<sup>19</sup> However, the Court of Federal Claims will consider protests to sole-source or noncompetitive awards where no solicitation is issued.<sup>20</sup>

In addition to the two dominant issues already discussed, there are three potentially troublesome issues that can impact the law in practice. The first of these potentially troublesome issues is that the Government can cogently argue that a district court lacks authority to grant an unsuccessful offeror his bid and proposal fees in excess of \$10,000.<sup>21</sup> The second issue is that a potential offeror may not have standing to challenge the agency's conduct.<sup>22</sup> Finally, although it has yet to be a serious obstacle, unsuccessful offerors must be prepared to establish that they have suffered "an injury in fact."<sup>23</sup>

The previous discussion provides a brief summary of how 28 U.S.C. § 1491 has evolved in practice. In one study, the American Bar Association Section of Public Contract Law made the following observation:

The 1980s witnessed a dramatic evolution of the protest as a remedy for complaints for disappointed bidders in Federal procurements. The Federal Courts Improvement Act of 1982 and the Competition in Contracting Act of 1984 (CICA) created new courts, a unique forum to resolve Automatic Data Processing Equipment (ADPE) for procurement protests, stay provisions, statutory authority for the General Accounting Office (GAO) to resolve bid protests, and new procedural rules and practices with the GAO. These developments produced increased confusion over disappointment with protests in the courts. As we enter the third

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<sup>17</sup>*Id.*; *International Graphics v. United States*, 5 Cl. Ct. 100 (1984).

<sup>18</sup>See Frederick W. Claybrook, Jr., *The Federal Courts Improvement Act Needs Improvement: A Renewed Call for its Amendment*, 21 PUB. CONT. L.J. 1, 18 (1992).

<sup>19</sup>*Howard v. United States*, 21 Cl. Ct. 475, 478 (1990). For a more detailed discussion of this topic see generally, Villet, *supra* note 7, and *Courts Subcommittee Project*, *supra* note 11.

<sup>20</sup>See *Western Pioneer, Inc. v. United States*, 8 Cl. Ct. 291 (1985) (implied contract only arises out of agency obligation to consider responses to published notice of intent to make a noncompetitive award).

<sup>21</sup>*Fairview Township v. United States Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985) (action challenging denial of a Federal grant contract found to be a monetary claim within exclusive jurisdiction of Claims Court); see discussion of 5 U.S.C. §§ 701-706, *supra*, at Chapter 1.5.1 of this Report.

<sup>22</sup>In *Control Data Corp. v. Baldrige*, 655 F.2d 283 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 881, potential bidders lacked standing to enjoin the Government from promulgating standards for specifications to be used in computer acquisitions. The potential bidders did not fall within the zone of interests to be protected by the statute under which the standards were promulgated. See also *Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d 1080 (6th Cir. 1975), where the court found that a party had standing to bring a cause of action based on denial of a contract where the statute authorizing the procurement indicated a congressional intent to bring the protester within the "zone of interests" to be protected.

<sup>23</sup>For a discussion of the different tests used by the various circuits, see Kannan, *supra* note 21, at 421-39.

decade of bid protest jurisdiction in the Federal courts, jurisdictional problems continue to permeate the process.<sup>24</sup>

#### **1.5.8.4. Recommendations and Justification**

The Panel sought comments from Government and the private sector concerning the bid protest jurisdiction of the Federal courts. In general, respondents expressed little desire for significant amendments to the bid protest jurisdiction of the courts. However, after consideration of comments and analysis of the law, the Panel believes that a significant change should be made in the jurisdiction of the Federal courts to consider bid protests.

### **I**

**There should be only one judicial system for consideration of all bid protests and that forum should have jurisdiction to consider all bid protests which can now be considered by the district courts and by the Court of Federal Claims.**

The Panel recognizes that Congress has determined on at least two occasions in the past 10 years that it is appropriate to have a bid protest remedy available in the Federal courts. The Panel, therefore, does not propose to change that determination in its basic recommendations. The Panel believes, however, that there is simply no justification for the jurisdictional confusion created by the availability of two separate judicial systems for consideration of bid protests. There is no need for separate and overlapping bodies of legal precedent on protests<sup>25</sup> and for separate procedures for processing protests.<sup>26</sup> The disputes arising out of such differences unnecessarily delay the resolution of protests and only add confusion and costs to the procurement process. They do not further the goals of full and open competition and efficient procurement. Accordingly, the Panel believes that the best solution to the jurisdictional problem created by the availability of two separate judicial systems is to place all of the jurisdiction of both systems into a single system.

### **II**

**The Court of Federal Claims should be the single judicial forum with jurisdiction to consider all bid protests that can now be considered by any of the district courts or by the Court of Federal Claims.**

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<sup>24</sup>*Courts Subcommittee Project, supra* note 11, at 1.

<sup>25</sup>Each of the 12 circuits, for example, has adopted a slightly different test for determining if a protester has standing to bring an action. *See Kannan, supra* note 21, at 21-39. While this has not been a significant problem, it highlights the potential for conflicts.

<sup>26</sup>The procedures for discovery, for example, vary from district court to district court, leading to hundreds of different rules. *See Courts Subcommittee Project, supra* note 11, at 43, noting "a surprising lack of uniformity in [discovery] practice."

After extensive discussion and analysis, the Panel believes that the single court to initially consider bid protests should be the Court of Federal Claims. The rationale for this is straightforward.

(1) Only the Court of Federal Claims can effectively serve as the unified judicial forum. Under current law, the jurisdictional issues that arise out of multiple judicial forums create delays, disruptions, and inefficiencies that are inconsistent with streamlining the congressional requirement for expeditious resolution of protests and for streamlining DOD procurements. If the single judicial forum system were the district courts and the regional courts of appeal or if the district courts had concurrent jurisdiction with the Court of Federal Claims, as discussed above, there would still be a potential for jurisdictional problems for the protesters who used the district courts. These jurisdictional problems arise, in part, out of the congressional designation of the Court of Federal Claims as the exclusive forum for claims against the United States, including claims for bid and proposal costs, whereas the Administrative Procedure Act provides that the district courts have jurisdiction to grant declaratory and injunctive relief in bid protest actions.<sup>27</sup>

(2) If the over 500 district courts and 12 regional circuit courts continue to consider bid protests, the potential abounds for conflicting decisions on fundamental procurement issues. This problem was highlighted by two law professors who wrote on another topic that "divergence among the Circuits on so many issues undermines the uniformity and predictability of trials in the Federal Circuits."<sup>28</sup> The Supreme Court has noted that "uniformity and predictability" are fundamental requirements for any legal system and has identified three distinct benefits to uniformity and predictability:

- To enable the parties to plan their affairs by providing a clear guide for their conduct;
- To eliminate the need "to relitigate every relevant proposition in every case," and
- To maintain "public faith in the judiciary as a source of impersonal and reasoned judgments."<sup>29</sup>

The existing system for judicial bid protests lacks these benefits. A single forum at the Court of Federal Claims would make these benefits achievable.

(3) The current system encourages protesters to engage in forum shopping in an effort to select the court in pre-award or post-award cases that would best serve the protester's interests.

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<sup>27</sup>For further discussion of this problem, see the analysis of 5 U.S.C. §§ 701-706 at Chapter 1.5.1 of this Report.

<sup>28</sup>Edward R. Becker and Aviva Overstein, *Is the Evidence All In?*, 78 A.B.A. J. 82 (Oct. 1992). The divergence discussed in this article was on evidentiary issues. The lack of uniformity on evidentiary decisions in the Federal circuits arises, in part, because, as in Government contract cases, only the Supreme Court can resolve the conflicts in circuit court cases, and "the Supreme Court rarely grants certiorari on evidentiary issues." *Id.* at 85. See *supra*, note 26.

<sup>29</sup>*South Corporation v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1983) (quoting *Moragne v. States Marine Lines, Inc.* 398 U.S. 375, 403 (1970), in support of decision of Court of Appeals for the Federal Circuit to adopt the precedent of the United States Court of Claims).

(4) The Court of Federal Claims has substantially more Government contract expertise than the district courts. The Court of Federal Claims has jurisdiction over major Contract Disputes Act cases and, over the years, has considered many more Federal contract cases than have been considered in all the 500 district courts.<sup>30</sup>

(5) The Court of Federal Claims can hold hearings throughout the United States. The Court of Federal Claims is authorized by the law to hold court proceedings anywhere in the United States (including territories and possessions) and even in foreign countries in order to minimize inconvenience and expense to litigants, and thus can hold hearings where the majority of the witnesses are located.<sup>31</sup>

(6) Appeals from the Court of Federal Claims are taken to a single court of appeals: the Court of Appeals for the Federal Circuit. Uniformity is better assured with exclusive jurisdiction in the Court of Federal Claims because, unlike the district courts with their 12 separate circuit courts of appeals, there is only one appellate court that considers appeals for the Court of Federal Claims. In addition, this court of appeals has Government contract law expertise that is based on reviews of appeals of decisions of the Court of Federal Claims and agency boards of contract appeals under the Contract Disputes Act.<sup>32</sup>

(7) The Court of Federal Claims can give more priority to bid protest cases. Federal law requiring speedy trial of criminal cases mandates a higher priority on resolution of these cases in district courts.<sup>33</sup> This generally delays the resolution of civil cases and makes it difficult to obtain speedy resolution of bid protests in district courts.

(8) The Government can be more effectively represented in the Court of Federal Claims. The Government position in Court of Federal Claims cases is now defended by lawyers from the Department of Justice Civil Division in Washington. These attorneys already have Government contract law expertise from defending cases in the Court of Federal Claims. By contrast, Scanwell-type actions in a district court are often defended by an Assistant United States Attorney with comparably less Government contract expertise.

(9) The Court of Federal Claims is the only court with national jurisdiction. The district courts have jurisdiction only within the state or region of the state in which the district is established.<sup>34</sup> By contrast, the Court of Federal Claims enjoys nationwide jurisdiction.<sup>35</sup> The Court of Federal Claims can therefore issue subpoenas for witnesses and document production anywhere in the United States.<sup>36</sup> Because a district court's territorial jurisdiction is limited,

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<sup>30</sup>41 U.S.C. § 609(a)(1). The district courts currently have jurisdiction over contract cases involving \$10,000 or less under the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

<sup>31</sup>See 28 U.S.C. § 1295(a)(3)-(4).

<sup>32</sup>*Id.*

<sup>33</sup>Speedy Trial Act of 1974, Pub. L. No. 93-619, 1975 U.S.C.C.A.N. (88 Stat.) 2076 (amended 1979).

<sup>34</sup>In some states, such as Maryland, there is a single Federal district court whose jurisdiction is limited to the boundaries of that state. In other states, such as California, there are two or more Federal district courts in the state.

<sup>35</sup>*Courts Subcommittee Project, supra* note 11, at 42.

<sup>36</sup>*Id.*



protesters may have difficulty obtaining personal jurisdiction over necessary parties,<sup>37</sup> and this can be a difficult problem where the protester challenges an award to a contractor who does not reside or do business in the Federal court where the Government agency is located. There are no venue problems for the Court of Federal Claims because its jurisdiction is national.

(10) The United States Court of Federal Claims can now offer monetary or nonmonetary relief in protests which fall within its jurisdiction.<sup>38</sup>

The American Bar Association Section of Public Contract Law opposes abolition of *Scarwell* jurisdiction in the district courts.<sup>39</sup> It lists the following reasons in support of its opposition:

- The Court of Federal Claims is not an effective protest forum because the Court of Federal Claims and the Federal Circuit have restricted the grant of jurisdiction provided to hear protest cases in the Federal Courts Improvement Act of 1982. Furthermore, the Court of Federal Claims has no procedures for expeditious resolution of bid protest cases.
- Restricting access to the Court of Federal Claims would restrict the ability of companies and individuals outside the Washington, D.C. area to use their local district courts.

The first concern will be resolved by the Panel's recommendation that the jurisdiction of the Court of Federal Claims be expanded "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of such a contract." With this new jurisdiction, the Court of Federal Claims will be able to consider every category of bid protest previously considered by district courts.

The American Bar Association concern arises out of existing Court of Federal Claims and the Court of Appeals for the Federal Circuit decisions. The Panel is proposing specific legislation to overturn the previous decisions that concern the American Bar Association. The net result of the new legislation is that the Court of Federal Claims will have subject matter jurisdiction to consider the types of agency wrongdoing for which the GSBICA and the GAO customarily grant relief.

The Panel believes there is a valid basis for the American Bar Association's other concern, (i.e., the need for interested protesters to utilize Washington, D.C. counsel in protests to the Court of Federal Claims). The Court is in Washington, D.C., and the presence of local counsel is beneficial because of the need for rapid and frequent involvement with the Court on protest

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<sup>37</sup>See generally Rule 4 of the Federal Rules of Civil Procedure.

<sup>38</sup>See *Fairview Township v. United States Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985); *Heyer Products v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

<sup>39</sup>Letter from Karen Hastie Williams, Chair, Section of Public Contract Law of the American Bar Association, to Panel (Dec. 4, 1992).

matters. The Panel does not believe that the inconvenience and possible additional expense of retaining counsel in Washington outweigh the ten enumerated advantages to the Panel's recommendations. In addition, the Court of Federal Claims has a statutory mandate to mitigate such concerns. The Court's enabling legislation states:

The times and places of the sessions of the Claims Court shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as practicable.<sup>40</sup>

Furthermore, the use of telefax machines and telephone conferences can also mitigate against some of the possible expense and inconvenience. Moreover, as a practical matter, Congress was well aware that the vast number of protests would be filed in Washington, D.C. when in 1984 it chose a Washington, D.C. forum, the GSBICA, to hear ADPE protests and codified the GAO protest system. Finally, the district courts are not always located in cities adjacent to the affected Government agency or the interested parties' principal places of business. Therefore, some travel and inconvenience is usually necessary for litigation in any forum.

### III

**The Court of Federal Claims should have jurisdiction to consider all protests which allege violations of procurement law or regulation; it should be authorized to provide relief comparable to that provided by the GAO and the GSBICA.**

In expanding the jurisdiction of the Court of Federal Claims to consider bid protests under the Federal Courts Improvement Act of 1982 (FCIA), Congress intended to establish the Court as a viable alternative to the bid protest remedy then available at GAO. In enacting the Competition in Contracting Act (CICA), for example, the conferees characterized judicial protests as "alternative remedies."<sup>41</sup> The conferees stated that the Procurement Protest System of Title 31, which granted bid protest authority by statute to the GAO, "does not alter the current rights of any person to seek . . . judicial review of any alleged violation of a procurement statute or regulation."<sup>42</sup>

If the Court of Federal Claims is to serve as an effective alternative bid protest forum, its jurisdiction and authority to provide relief must be expanded.<sup>43</sup> Its jurisdiction should, as much as possible, parallel that of the GAO and the GSBICA in order to avoid both the forum shopping and type of confusion that has occurred in the past. Additionally, the court should have a common standard of review with the GAO and GSBICA.

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<sup>40</sup>28 U.S.C. § 173.

<sup>41</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1437 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2125.

<sup>42</sup>*Id.*

<sup>43</sup>The Court of Federal Claims, like other Federal courts, has limited resources. If the court's jurisdiction were expanded, its personnel, funding, and other resources would also need to be increased.

Accordingly, the Panel recommends that the Court of Federal Claims' charter be legislatively changed to accomplish the following principles:

- The statute should provide the Court with jurisdiction to consider all bid protest matters that can now be considered by the district courts and the Court of Federal Claims, including all matters that can be considered by the GAO and the GSBCA.
- The statute should provide that the Court, like the GAO and the GSBCA, is authorized to find improper any agency action which violates a procurement law or regulation.
- The statute should provide that the record before the agency may be supplemented by evidence which relates to the validity of the action at the time it was taken. This will make clear that the Court of Federal Claims can hold evidentiary hearings on bid protest matters.
- The statute should be amended to provide that only interested parties, as defined by the Competition in Contracting Act (CICA), can file protests.<sup>44</sup>
- The statute should provide that if the protester prevails in an action, the Court can grant relief similar to that which the GAO and the GSBCA can provide, including attorneys fees and costs.
- The statute should be amended to provide for expeditious resolution of protests.<sup>45</sup>

The Panel also recommends that an interested party should pay the costs incurred by the Government to defend a protest which is frivolous or not brought and pursued in good faith. Further discussion of the Panel's rationale can be found in Chapters 1.5.5 and 1.5.9 of this Report.

The Panel recognizes the inherent problems associated with changes in the jurisdictional statute for any court. Language changing jurisdictional statutes must be carefully considered and evaluated in order to avoid creating unintended consequences or further problems. Accordingly, the language that follows is offered simply as a model. The Panel recognizes that further discussion and research is appropriate and encourages Congress to do so in its consideration of this legislation.

The recommendation that follows hopefully achieves the six principles set out above.

#### **1.5.8.5. Relationship to Objectives**

This statute, as amended, simplifies the confusing process of pursuing bid protests in Federal court. The proposed change maintains a balance between an efficient process and full and

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<sup>44</sup>40 U.S.C. § 759(f)(9)(B) and 31 U.S.C. § 3551(2).

<sup>45</sup>Both the GAO and the GSBCA under 31 U.S.C. §§ 3551-56 and 40 U.S.C. § 759, respectively, are directed to conduct expeditious protests.

open access to the procurement system. Finally, the Court of Federal Claims will provide a means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.

#### 1.5.8.6. Proposed Statute

**28 U.S.C. § 1491. Claims against United States generally; bid protests; actions involving Tennessee Valley Authority**

**(a)(1) Claims against the United States.** The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

**(b)(2) Remedy and Relief.** To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978 [41 U.S.C. § 609(a)(1)], including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

~~(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.~~

**(c) Bid Protests.** The United States Court of Federal Claims shall have exclusive judicial jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract. The court shall have jurisdiction to entertain an action of this nature whether suit is instituted before or after the contract is awarded. To afford relief in such an action, the court may award such relief as it deems proper, including declaratory and injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national

security and the need for expeditious resolution of the action. The district courts shall have no jurisdiction to entertain any such action.

The court shall set aside an agency action if it finds the action violates a statute or regulation. Wherever it makes such a determination, it may, in accordance with section 1304 of Title 31, United States Code, further declare an appropriate interested party entitled to the costs of filing and pursuing the protest, including reasonable attorney's fees, and consultant and expert witness fees, and bid and proposal preparation expenses. The record before the agency at the time of the agency action may be supplemented by evidence which relates to the validity of the agency action at the time the action was taken.

The term "interested party" shall have the meaning given in 31 U.S.C. § 3551.

If the court expressly finds that a protest or a portion of a protest is frivolous or has not been brought or pursued in good faith, the protester or other interested party, who joins the protest, shall be liable to the United States for payment of all or that portion of the United States costs, for which such a finding is made, of reviewing the protest including the fees and other expenses (as defined in section 2412 (d)(2)(A) of title 28) incurred by the United States in defending the protest, unless

(1) special circumstances would make such payment unjust or

(2) the protester obtains documents or other information after the protest is filed with the court, which establishes that the protest or a portion of the protest is frivolous or has not been brought in good faith, and the protester then promptly withdraws the protest or portion of the protest.

(b)(d) Tennessee Valley Authority. Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on provisions of the Tennessee Valley Authority act of 1933 with respect to actions by or against the Authority.

1.5.9. 40 U.S.C. § 759

**The Brooks Act; procurement, maintenance, operation, and utilization of automatic data processing equipment**

1.5.9.1. Summary of the Law

This statute authorizes the Administrator of the General Services Administration (GSA) to coordinate and provide for the purchase, lease, and maintenance of automatic data processing equipment (ADPE) for Federal agencies.<sup>1</sup> The statute broadly defines ADPE to include computers, ancillary equipment, software, firmware, and services including support services.<sup>2</sup> The Administrator's authority is exercised by either the GSA performing the acquisition or through the issuance of delegations of procurement authority (DPAs) to Federal agencies.<sup>3</sup> The GSBICA is authorized under this section to consider bid protests to ADPE procurements.<sup>4</sup> The definition of "protest" is identical to that found in the GAO protest statute.<sup>5</sup> The definition of the "interested" parties who can file a protest or participate in a protest at the GSBICA is also identical to that found in the GAO protest statute.<sup>6</sup> Additionally, the statute provides that where a protest to a proposed procurement is filed with the GSBICA, a protest may not be filed with the GAO with respect to that procurement.<sup>7</sup>

DOD procurements of ADPE are subject to protest before the GSBICA if DOD's authority for the acquisition stems from section 759. If requested by a protester, the GSBICA must hold a hearing to determine whether to suspend the procurement authority of the DOD agency where the protest is filed prior to an award or within 10 calendar days of award.<sup>8</sup> The DPA must be suspended unless the DOD agency establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for a decision of the Board.<sup>9</sup>

The GSBICA is authorized to conduct adjudicatory proceedings and receive testimony from Government and non-Government witnesses. The GSBICA is also authorized to allow such discovery as may be required for the expeditious, fair, and reasonable resolution of the protest.

The GSBICA may suspend, revoke, or revise a DPA if the GSBICA makes a determination that a challenged agency action violates a statute, regulation, or the terms of the DPA.<sup>10</sup> If the

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<sup>1</sup>40 U.S.C. § 759(a).

<sup>2</sup>40 U.S.C. § 759(a)(2)(B).

<sup>3</sup>40 U.S.C. § 759(b)(2).

<sup>4</sup>40 U.S.C. § 759(f)(1).

<sup>5</sup>Compare 40 U.S.C. § 759(f)(9)(A) with 31 U.S.C. § 3551(1).

<sup>6</sup>Compare 40 U.S.C. § 759(f)(9)(B) with 31 U.S.C. § 3551(1).

<sup>7</sup>40 U.S.C. § 759(f)(1).

<sup>8</sup>40 U.S.C. § 759(f)(2) - (3).

<sup>9</sup>40 U.S.C. § 759(f)(2)(B), (3)(B).

<sup>10</sup>40 U.S.C. § 759(f)(5)(B).

Board makes such a determination, it is also authorized to declare that an interested party is entitled to the cost of filing and pursuing the protest, including reasonable attorneys fees and bid and proposal preparation costs.<sup>11</sup> The Board is required to issue a final decision within 45 working days after the protest is filed unless the Board's chairman determines that specific and unique circumstances require a longer period.<sup>12</sup>

An appeal as a matter of right may be taken from final decisions of the GSBICA to the Court of Appeals for the Federal Circuit.<sup>13</sup>

#### 1.5.9.2. Background of the Law

Congress enacted the Brooks Act in 1965 to authorize the GSA to provide a central point for the procurement of data processing services and equipment.<sup>14</sup> The Act was amended several times in the ensuing years to clarify the authority of the Administrator of the GSA and to better define the types of data processing equipment for which a delegation of procurement authority was necessary. In 1982, for example, the Act was amended by the "Warner Amendment" to exclude a large class of DOD procurements from the GSA's authority.<sup>15</sup> The Warner Amendment exempted DOD procurements of ADPE or services where the function, operation, or use of such equipment: (1) involves intelligence activity, (2) involves cryptologic activities relating to the national security, (3) involves command or control of military forces, (4) is an integral part of a weapons system, or (5) is otherwise critical to the direct fulfillment of military or intelligence missions. ADPE used by DOD for routine administrative and business applications is not exempt from GSA authority.<sup>16</sup>

In 1984, the Brooks Act was amended by the Competition in Contracting Act (CICA) to give the GSBICA jurisdiction over bid protests.<sup>17</sup> The 1984 legislation originated in the House Committee on Government Operations, chaired by Congressman Brooks. The Committee Report stated that the GSBICA was given protest authority because "[t]he Committee believes that a new forum is needed to provide a fair, equitable, and timely remedy in this [ADPE] area."<sup>18</sup> The conferees on CICA stated that they were empowering the GSBICA as "a unique and innovative method of handling protests of a highly technical and complex nature."<sup>19</sup> Originally the GSBICA's bid protest jurisdiction was to be a three-year experiment; however, the jurisdiction was made permanent in 1986.<sup>20</sup>

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<sup>11</sup>40 U.S.C. § 759(f)(5)(C).

<sup>12</sup>40 U.S.C. § 759(f)(4)(B).

<sup>13</sup>40 U.S.C. § 759(f)(6)(A).

<sup>14</sup>Brooks Act, Pub. L. No. 89-306, 79 Stat. 1127 (1965).

<sup>15</sup>Department of Defense Authorization Act of 1982, Pub. L. No. 97-86, § 908(a)(1), 1981 U.S.C.C.A.N. (95 Stat.) 1099, 1117, 40 U.S.C. § 759(a)(3).

<sup>16</sup>40 U.S.C. § 759(a)(3)(C).

<sup>17</sup>Pub. L. No. 98-369, 1984 U.S.C.C.A.N. (98 Stat.) 1175, 1182-84.

<sup>18</sup>H.R. REP. NO. 1157, 98th Cong., 2d Sess. 26 (1984).

<sup>19</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1431 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2119.

<sup>20</sup>Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-500, § 831, *reprinted in* 1986 U.S.C.C.A.N. (100 Stat.) 1783-344.

### 1.5.9.3. Law In Practice

In 1985, the GSBICA issued formal Rules of Procedure. These procedures govern the filing of pleadings, the conduct of discovery, and the presentation of evidence at GSBICA hearings.<sup>21</sup> A GSBICA protest typically begins with a prehearing conference where the Board establishes a tentative schedule and limits on discovery.<sup>22</sup> The Board may authorize the taking of depositions of Government and protester witnesses, the submission and answering of requests for document production and interrogatories, as well as admissions of fact.<sup>23</sup> Protective orders are frequently issued to protect documents and testimony. The Board conducts evidentiary hearings in a manner similar to proceedings in Federal courts where cases are tried before judges. The Board also considers requests for motions of dismissal and for summary judgment prior to trial.<sup>24</sup>

In GSBICA proceedings, "the protester has the burden of establishing its case by the preponderance of the evidence."<sup>25</sup> On matters committed to agency discretion, the GSBICA requires the protester to show that the agency's decision lacked a reasonable basis. As stated by the GSBICA:

The law vests considerable discretion in the conduct of technical evaluations. Such evaluations will not be overturned unless the protester has demonstrated that the SSAC's technical evaluation was unreasonable [citations omitted].<sup>26</sup>

The GSBICA has consistently taken the position that "our task is not to decide whether the agency's behavior was ideal -- only whether it was legally correct."<sup>27</sup>

Moreover, the GSBICA has taken a reasonable approach towards the section 759 prohibition of an agency violating a law. The mere violation of a regulation by an agency will not result in the GSBICA sustaining a protest unless it has a significant effect on the procurement.<sup>28</sup>

Because the Board strives to issue final decisions within 45 working days, GSBICA protests are notorious for being arduous work for all the parties.

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<sup>21</sup>General Services Board of Contract Appeal Rules of Procedure, 48 C.F.R. Part 6101.

<sup>22</sup>GSBICA Rule 10(a), 48 C.F.R. § 6101.10(a).

<sup>23</sup>GSBICA Rules 15(a), 15(d), 16, 17, 48 C.F.R. §§ 6101.15(a), (d), 6101.16, 6101.17.

<sup>24</sup>GSBICA Rules 8 and 28, 48 C.F.R. §§ 6101.8, 6101.28.

<sup>25</sup>*Memorex Corporation*, GSBICA No. 7927-P, 85-3 BCA ¶ 18,289.

<sup>26</sup>*Computer Science Corporation*, GSBICA No. 11497-P, 92-1 BCA ¶ 24,703.

<sup>27</sup>*Federal Data Corporation*, GSBICA No. 8545-P, 86-3 BCA ¶ 19,289, (quoting *W.E. Andrews, Inc.*, GSBICA No. 8126-P, 85-3 BCA ¶ 18,455).

<sup>28</sup>*Advanced Technology, Inc.*, GSBICA No. 8878-P, 87-2 BCA ¶ 19,817. See also *Andersen Consulting*, GSBICA No. 10833-P, 91-1 BCA ¶ 23,474, *aff'd*, 959 F.2d 929 (Fed. Cir. 1992), where the Board stated as follows: "Any good lawyer can pick lint off any Government procurement, pundits say. We will not set aside an award, even if violations of law are found, unless those violations have some significance."



#### 1.5.9.4. Recommendations and Justification

##### Amend

The Panel sought comments from the Government and industry concerning the procurement protest provisions of the Brooks Act. In general, respondents in the Government expressed a desire to render GSBICA protests less burdensome to the agencies. Respondents from the private sector generally opposed such amendments. After consideration of comments and analysis of the law, the Panel believed it was appropriate to recommend certain amendments to the Brooks Act. Accordingly, many of the changes that the Panel has recommended to the Procurement Protest System provisions of Title 31 for GAO protests are recommended for the Brooks Act as well.

##### I

**Establish a consistent use of terminology for the time in which statutory action must be taken by using the term "calendar days" in lieu of "working days."**

The term "working days" is used to specify when a decision of the GSBICA must be rendered. In other instances, the statute uses the term "days" to specify when action might be taken. This difference in terminology has led to some confusion and has resulted in conflicting opinions between GAO and GSBICA on interpretation of similar provisions in their respective acts.<sup>29</sup> The use of calendar days in Federal law is well accepted and understood, and the Panel believes that this usage is the more appropriate terminology. The Panel has recommended an amendment to provide a definition of calendar days. This definition is similar to that now used by the GSBICA in its Rules of Procedure.<sup>30</sup> The amendment recommended by the Panel is derived from Rule 6 of the Federal Rules of Civil Procedure.<sup>31</sup> It provides, for example, that if the last day of the calendar for taking an action falls on a Saturday, Sunday, or legal holiday, then the next day in which the Federal agency would be open for business would be the day in which the action must be completed.

##### II

**The provision of 40 U.S.C. § 759(f)(2) which requires suspension of the contract performance when a protest is filed within 10 days of contract award should be modified to also require an agency to suspend contract performance if a protest is filed within 3 calendar days after the date set by an agency for any requested and required debriefing.**

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<sup>29</sup>Compare 31 U.S.C. §§ 3553-55 with 40 U.S.C. § 759(f).

<sup>30</sup>GSBICA Rule 2(c), 48 C.F.R. § 6101.2(c).

<sup>31</sup>Fed. R. Civ. P. 6.

The Panel recommends that when a protest is filed within 10 calendar days of the date of the contract award, or within 3 calendar days from the date set by an agency for any requested and required debriefing of an unsuccessful offeror, whichever is later, a suspension hearing must be held if requested by an interested party. The Panel, in Chapter 1.2.2 of this Report, is recommending changes to 10 U.S.C. § 2305 to: (1) establish the criteria for determining whether an unsuccessful offeror is entitled to a debriefing; (2) provide that any requested debriefing be conducted to the maximum extent practicable within 15 calendar days after contract award; and (3) provide that the debriefing contain information on the strengths and weaknesses of the offeror's proposal. Reference should also be made to the discussion of 31 U.S.C. § 3553 for further explanation of this change.<sup>32</sup>

### III

**The Brooks Act should be amended to provide that, to the maximum extent practicable, amendments which add new grounds of protest should be resolved within the same time period established for resolution of the initial protest.**

The Brooks Act requires the GSBCA to expeditiously resolve protests, and the GSBCA has an excellent record in meeting its statutory deadline. Amendments to protests can extend the statutory period for resolving protests. The Panel believes its recommendation will further the congressional objective by encouraging expeditious resolution of amended protests.

### IV

**Rules should be issued to allow for electronic filing and dissemination of protest documents.**

The Panel recommends that the GSBCA issue rules which would allow for electronic filing of all or part of the agency report or any other documents now required to be filed with the GSBCA. The regulations should take into account the ability of both interested parties and the Government to achieve electronic access to such filings.

The rationale for this change is threefold. First, it can expedite the protest process and reduce costs of duplicating and preparing material. Second, it is consistent with current Government practices of allowing contractors to submit proposals on electronic media. Third, it is consistent with modern litigation and administrative practices followed by many Federal courts and agencies to allow or even require the filing of pleadings, motions, and agency record documents in both hard copy and electronic media.

The suggestion for allowing electronic filing was made to one of the Panel members by the General Counsel of a large systems integration company. In discussions with industry and Government representatives, it was determined that electronic filing of all or portions of the

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<sup>32</sup>See Chapter 1.5.4 of this Report.

agency report is now feasible and practical. Over time, this change could result in considerable cost savings. Because electronic filing may not be feasible or desirable in all circumstances, the regulations as recommended by the Panel should simply provide for or authorize electronic filing. The regulation should not mandate electronic filings in all cases.

## V

**Where the GSBCA expressly finds that a protest or a portion of a protest is frivolous or has not been brought or pursued in good faith, the interested party who is responsible for pursuing such a matter should pay the costs of the Government to defend its action.**

Bid protests are an essential feature of the statutory scheme for assuring full and open competition for Government contracts. However, protests can impose substantial costs and administrative burdens on the Government as well as on prospective or actual recipients of contract awards. Accordingly, the Panel believes that the protest process should help assure that only meritorious protests are filed or pursued.

After considerable debate, discussion, and consideration of public comments, the Panel determined that sanctions should be imposed on parties who file frivolous protests or who do not file protests in good faith. Under the Panel's recommendations, Congress should enact legislation to provide that interested parties would be liable to the United States for payment of the cost of defending GSBCA protests or issues in GSBCA protests which are frivolous or have not been brought or pursued in good faith.<sup>33</sup> Only those interested parties who file or pursue such protests would be liable for payment of Government costs. The thrust of this recommendation is directed at those protests which add cost and burden to the protest process.<sup>34</sup> It is not directed at the many protests which are summarily dismissed.

The Panel's recommendations provide that there would be no liability where special circumstances make payment unjust or where a protester or interested party promptly withdraws its protest, or a portion of its protest, after receiving information which shows that the protest, or an issue in the protest, is in fact frivolous or can no longer be brought or pursued in good faith.

The Panel recognizes that there are significant definitional problems which must be resolved before this legislation can be fully implemented. Accordingly, the Panel has recommended that regulations or rules be issued to address: (1) the calculation and proof of Government costs including specific elements of Government costs which can be recovered; (2) the special circumstances that would make payment unjust; (3) the factual circumstances which would constitute prompt withdrawal of a protest or a protest issue to avoid the imposition of fees;

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<sup>33</sup>Although the GSBCA does have the authority to dismiss frivolous protests, it does not have the authority to dismiss protests brought in bad faith. *VION Corp. v. United States*, 906 F.2d 1564, 1567 (Fed. Cir. 1990).

<sup>34</sup>One Government attorney commented "We believe that some protesters have misused the GSBCA forum for the sole purpose of engaging in discovery . . . Although this conduct is unethical, we believe it has occurred." Letter from Mr. Richard Couch, HQ AMC to Mr. Anthony Gamboa, Army Deputy General Counsel (Apr. 29, 1992).

and (4) the definition of what constitutes a frivolous protest or a protest not brought or pursued in good faith. There are several models that can be used as guides for the regulation criteria including Rule 11 of Federal Rules of Civil Procedure which allows Federal courts to impose sanctions on those who file frivolous or bad faith lawsuits. The Panel recognizes that any use of Rule 11 as a model should be tempered by the concerns of the Section of Public Contract Law of the American Bar Association. Specifically, the Section noted that bid protests are characterized by short time frames and an inability to conduct the fullest measure of due diligence, similar to that which can be conducted in a civil action between private parties, because of the procuring agency's control of many of the facts.<sup>35</sup>

The rationale for the imposition of such costs is discussed in more detail under the discussion of 31 U.S.C. § 3554 at Chapter 1.5.5 of this Report and includes the following considerations:

- Protests are sometimes filed which are frivolous or are not filed in good faith and protests are sometimes pursued after it first becomes readily apparent that the protest is frivolous or does not state valid grounds for protest.
- Congress intended to discourage frivolous or bad faith protests when it enacted the Competition in Contracting Act (CICA). The Comptroller General, for example, was authorized to dismiss protests at any time under 31 U.S.C. § 3554(a)(3) because it was "the intent of the conferees [on CICA] to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit."<sup>36</sup>
- Imposition of monetary sanctions for frivolous protests or protests not brought or pursued in good faith should streamline the acquisition process by discouraging such protests.

## VI

**Where the GSBCA determines that an interested party is entitled to the cost of filing and pursuing the protest, the GSBCA may declare the interested party is entitled to consultant and expert witness fees.**

The recovery of protest costs, including expert witness fees, advances the purposes of the Competition in Contracting Act (CICA). Such recovery is necessary "to relieve parties with valid claims of the burden of vindicating the public interest which Congress seeks to promote." Recently the GSBCA deviated from its past precedent of awarding consulting and expert witness fees in *Sterling Federal Systems, Inc. v. National Aeronautics and Space Administration*.<sup>37</sup> This

<sup>35</sup>Letter from Karen Hastie Williams, Chair, Public Contract Law Section of the American Bar Association to Rear Admiral Vincent (Dec. 4, 1992).

<sup>36</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1436-37 (1984), reprinted in 1984 U.S.C.C.A.N. 1445, ¶124-25.

<sup>37</sup>GSBCA No. 10000-C, 92-3 BCA ¶ 25,118.

recommendation would legislatively overrule the *Sterling* decision to the extent that *Sterling* addressed consultant and expert witness fees. Because protective orders prevent technical employees of a protester gaining access to proprietary information of other offerors, as well as procurement sensitive information, protesters must make extensive use of consultants and expert witnesses if they are to prevail. Unless protesters can recover the fees of consultants and expert witnesses, the CICA protest system is harmed because protesters will have less incentive to pursue this remedy where even a successful protest can result in a significant unreimbursable expense.

#### **1.5.9.5. Relationship to Objectives**

The statute, as amended, is consistent with the Panel's objective of maintaining a balance between an efficient process and full and open access to the procurement system. This statute, as amended, is consistent with the Panel's objective that acquisition laws should provide the means for expeditious and fair resolution of protests through uniform interpretation of laws and implementing regulations.

#### **1.5.9.6. Proposed Statute**

##### **40 U.S.C. § 759. Procurement, maintenance, operation, and utilization of automatic data processing equipment**

(a) Authority of Administrator to coordinate and provide for purchase, lease and maintenance of equipment by Federal agencies.

(1) The Administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

(2)(A) For purposes of this section, the term "automatic data processing equipment" means any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information --

(i) by a Federal agency, or

(ii) under a contract with a Federal agency which --

(I) requires the use of such equipment, or

(II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

(B) Such term includes --

- (i) computers;
- (ii) ancillary equipment;
- (iii) software, firmware, and similar procedures;
- (iv) services, including support services; and
- (v) related resources as defined by regulations issued by the Administrator for General Services.

(3) This section does not apply to --

(A) automatic data processing equipment acquired by a Federal contractor which is incidental to the performance of a Federal contract;

(B) radar, sonar, radio, or television equipment;

(C) the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of which --

(i) involves intelligence activities;

(ii) involves cryptologic activities related to national security;

(iii) involves the command and control of military forces;

(iv) involves equipment which is an integral part of a weapon or weapons system; or

(v) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management; or

(D) The procurement of automatic data processing equipment or services by the Central Intelligence Agency.

(b) Procurement, maintenance, and repair of equipment; transfer between agencies; joint utilization; establishment and operation of equipment pools and data processing centers; delegation of Administrator's authority.

(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to

provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

(2) The Administrator may delegate to one or more Federal agencies authority to operate automatic data processing equipment pools and automatic data processing centers, and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operations, or when such action is essential to national defense or national security. The Administrator may delegate to one or more Federal agencies authority to lease, purchase, or maintain automatic data processing equipment to the extent to which he determines such action to be necessary and desirable to allow for the orderly implementation of a program for the utilization of such equipment.

(3) If the Administrator finds that a senior official of an agency designated pursuant to section 3506(b) of title 44, United States Code, is sufficiently independent of program responsibility and has sufficient experience, resources, and ability to carry out fairly and effectively procurements under this section, the Administrator may delegate to such official the authority to lease, purchase, or maintain automatic data processing equipment pursuant to paragraph (2) of this subsection, except that any such delegation shall not relieve the Administrator of the responsibilities assigned to the Administrator under this section. A delegation by the Administrator under this subsection shall not preclude the Administrator from reviewing individual procurement requests if the Administrator determines that circumstances warrant such a review. The Administrator shall retain authority to revoke such delegations, both in general and with regard to any specific matter. In acting for the Administrator, any official to whom approval authority has been delegated under this subsection shall comply fully with the rules and regulations promulgated by the Administrator.

(c) Inapplicability of other inconsistent provisions of law. The provision following paragraph (4) in section 201(a) of this Act and the provisions of section 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

(d) Standards and guidelines for Federal computer systems; promulgations, disapproval, or modification, etc.

(1) The Secretary of Commerce shall, on the basis of standards and guidelines developed by the National Bureau of Standards pursuant to section 20(a)(2) and (3) of the National Bureau of Standards Act, promulgate standards and guidelines pertaining to Federal computer systems, making such standards compulsory and binding to the extent to which the Secretary determines

necessary to improve the efficiency of operation or security and privacy of Federal computer systems. The President may disapprove or modify such standards and guidelines if he determines such action to be in the public interest. The President's authority to disapprove or modify such standards and guidelines may not be delegated. Notice of such disapproval or modification shall be submitted promptly to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and shall be published promptly in the Federal Register. Upon receiving notice of such disapproval or modification, the Secretary of Commerce shall immediately rescind or modify such standards or guidelines as directed by the President.

(2) The head of a Federal agency may employ standards for the cost-effective security and privacy of sensitive information in a Federal computer system within or under the supervision of that agency that are more stringent than the standards promulgated by the Secretary of Commerce, if such standards contain, at a minimum, the provisions of those applicable standards made compulsory and binding by the Secretary of Commerce.

(3) The standards determined to be compulsory and binding may be waived by the Secretary of Commerce in writing upon a determination that compliance would adversely affect the accomplishment of the mission of an operator of a Federal computer system, or cause a major adverse financial impact on the operator which is not offset by Government-wide savings. The Secretary may delegate to the head of one or more Federal agencies authority to waive such standards to the extent to which the Secretary determines such action to be necessary and desirable to allow for timely and effective implementation of Federal computer systems standards. The head of such agency may redelegate such authority only to a senior official designated pursuant to section 3506(b) of title 44. Notice of each such waiver and delegation shall be transmitted promptly to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and shall be published promptly in the Federal Register.

(4) The Administrator shall revise the Federal information resources management regulations (41 C.F.R. ch. 201) to be consistent with the standards and guidelines promulgated by the Secretary of Commerce under this subsection.

(5) As used in this subsection, the terms "Federal computer system" and "operator of a Federal computer system" have the meaning given in section 20(d) of the National Bureau of Standards Act.

(e) Limitations on authority of Administrator and Secretary of Commerce; notice and review of Administrator's determinations. The authority conferred upon the Administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any



way, the use made of automatic data processing equipment or components thereof by any agency. The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination whether or not the automatic data processing equipment will be provided by the Administrator or whether or not the authority to lease, purchase, or maintain the equipment will be delegated. If the Administrator denies an agency procurement request such denial shall be subject to review and decision by the Director of the Office of Management and Budget, unless the President otherwise directs. Such review and decision shall be made only on the basis of a written appeal, and such written appeal, together with any written communications to the Administrator or any officer or employee of the Office of Management and Budget concerning such denial shall be made available to the public.

(f) Automated data processing dispute resolution.

(1) Upon request of an interested party in connection with any procurement which is subject to this section (including procurements subject to delegation of procurement authority), the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the "board"), shall review any decision by a contracting officer alleged to violate a statute or regulation. Such review shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals. The authority of the board to conduct such review shall include the authority to determine whether any procurement is subject to this section and the authority to review regulations to determine their consistency with applicable statutes. A proceeding, decision, or order of the board pursuant to this subsection shall not be subject to interlocutory appeal or review. An interested party who has filed a protest under subsection V of chapter 35 of title 31, United States Code, with respect to a procurement or proposed procurement may not file a protest with respect to that procurement or proposed procurement under this subsection.

(2)(A) When a protest under this subsection is filed before the award of a contract in a protested procurement, the board, at the request of an interested party and within 10 calendar days of the filing of the protest, shall hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority unless the Federal agency concerned establishes that--

(i) absent action by the board, contract award is likely to occur within 30 calendar days of the hearing; and

(ii) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

(3)(A) If the board receives notice of a protest under this subsection after the contract has been awarded but (A) within 10 calendar days of the date of the contract award or (B) within 3 calendar days from the debriefing date offered to an unsuccessful offeror for any requested and required debriefing, whichever is later, the board shall, at the request of an interested party and within 10 calendar days after the date of the filing of the protest, hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest.

(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

(4)(A) The board shall conduct proceedings and allow such discovery as may be required for the expeditious, fair, and reasonable resolution of the protest.

(B) Subject to any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. § 608(a)), the board shall give priority to protests filed under this subsection. The board shall issue its final decision within ~~45~~ 65 calendar days after the date of the filing of the protest, unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the board shall issue such decision within the longer period determined by the chairman. Amendments which add new grounds of protest should be resolved to the maximum extent practicable, within the time limits established for resolution of the initial protest.

(C) The board may dismiss a protest the board determines is frivolous or which, on its face, does not state a valid basis for protest.

(5)(A) In making a decision on the merits of protests brought under this section, the board shall accord due weight to the policies of this section and the goals of economic and efficient procurement set forth in this section. The board may consider any decision, determination, opinion, or statement made by the Director of the Office of Management and Budget or any officer of any other Federal agency regarding applicability of this section to a particular procurement, and may request the advice of the Director or such officer with regard to such applicability, but shall not be bound by any such decision, determination, opinion, or statement when determining whether a procurement is subject to this section.

(B) If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

(C) Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate interested party to be entitled to the costs of--

(i) filing and pursuing the protest, including reasonable attorney's fees and consultant and expert witness fees, and

(ii) bid and proposal preparation.

(6)(A) The final decision of the board may be appealed by the head of the Federal agency concerned and by any interested party, including interested parties who intervene in any protest filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.).

(B) If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation.

(C) Nothing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation. However, the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section. In addition, nothing contained in this subsection shall affect the right of any interested party to file a protest with the contracting agency or to file an action in ~~a district court of the United States or the United States Claims Court of Federal Claims.~~

(8)(A) In computing any period of time prescribed or allowed by this subchapter, the procedures shall provide that the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper at the board, a day on which weather or other conditions have made the board inaccessible, in which event the period runs until the end of the next day which is not one of the previously mentioned days. Not later than January 15, 1985, the board shall adopt and issue such rules and procedures as may be necessary to the expeditious disposition of protests filed under the authority of this subsection. The procedures may provide for electronic filing and dissemination of documents and information required under this subchapter and in so providing shall consider the ability of all parties to achieve electronic access to such documents and records.

(B) If the board expressly finds that a protest or a portion of a protest is frivolous or has not been brought or pursued in good faith, the protester or other interested party, who joins the protest, shall be liable to the United States for payment of all or that portion of the United States costs, for which such a finding is made, of reviewing the protest including the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28) incurred by the United States in defending the protest, unless (1) special circumstances would make such payment unjust, or (2)

the protester obtains documents or other information after the protest is filed with the board, which establishes that the protest or a portion of the protest is frivolous or has not been brought in good faith, and the protester then promptly withdraws the protest or portion of the protest.

(9) For the purposes of this subsection --

(A) the term "protest" means a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection to a proposed award or the award of such a contract; and

(B) the term "interested party" means, with respect to a contract or proposed contract described in subparagraph (A), an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

(g) Procurement from sole source or by specific make and model. The justification and approvals required by section 303(f)(1) of this Act shall apply in the case of any procurement under this section for which the minimum needs are so restrictive that only one manufacturer is capable of satisfying such needs. Such procurement includes either a sole source procurement or a procurement by specific make and model. Such justification and approval shall be required notwithstanding that more than one bid or offer is made or that the procurement obtains price competition and such procurement shall be treated as a procurement using procedures other than competitive procedures for purposes of section 19(b) of the Office of Federal Procurement Policy Act.

## **1.6. Other Related Statutes**

### **1.6.0. Introduction**

This subchapter includes the Panel's analyses of ten statutes codified in Title 10 and two statutes codified in Title 41, as well as two uncodified sections of the National Defense Authorization Act for Fiscal Years 1990 and 1991.<sup>1</sup> These statutes are included in the Contract Formation Chapter as generally related to contracting authorities and delegations, contractual terms and conditions, or limitations on contracting. They are grouped here as "other related statutes," since they do not readily fit within the theme or subject of other subchapters.

Each analysis is intended to be complete on its own. For convenience, the more significant amendments recommended by the Panel are summarized briefly in this introduction.

The Panel has recommended repealing section 2308, "Assignment and delegations of procurement functions and responsibilities," and combining it with section 2311, "Delegation," into an amended section 2311. Section 2308, which primarily is focused on delegating functions and assigning responsibilities to facilitate joint procurement between two or more agencies, becomes subsection (b), while the general delegation authority of section 2311 is in a modified subsection (a). Subsection (c) has been shown to reflect the recent requirement for regulations on participation in joint programs added by the National Defense Authorization Act for Fiscal Year 1993.<sup>2</sup> However, the Panel recommends it be repealed once the regulations are issued by the Secretary of Defense.

The Panel has recommended amendment of section 2310, "Determinations and decisions," to allow determinations and decision to be made for a class of purchases or contracts, "except when expressly prohibited under this title." A detailed explanation of the reasoning is included in the analysis, but the effect is to provide these prohibitions in the statutes involved and to more clearly distinguish class justifications under section 2304 from the agency head determinations and decisions in section 2304 covered by section 2310. The Panel recommends further amendment of section 2310 by deleting subsection (b), since the requirements of subsection (b) are adequately covered in other laws and are properly implemented at the appropriate places in the FAR and DFARS.

The Panel has recommended amendment of section 2326, "Undefined contractual actions: restrictions," to remove limitations prior to definitization that are stated in terms of expenditures and rely instead on limitations stated in terms of obligations. This recognizes that the Government does not have immediate visibility and control of contractor expenditures, but does control expenditures by limiting the Government's liability to the amount obligated. A further amendment is recommended to allow waiver by the head of the agency of the percentage limitations on obligations of 50 percent (75 percent if a qualifying proposal is timely submitted) prior to definitization, if such waiver is necessary in support of a contingency operation as defined

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<sup>1</sup>Pub. L. No. 101-189, §§ 821 and 822, 103 Stat. 1503 (1989).

<sup>2</sup>Pub. L. No. 102-484, § 820, 106 Stat. 2315, 2459-60 (1992).

in 10 U.S.C. § 101(47)<sup>3</sup> or is otherwise in the best interests of the United States. There are circumstances in which contractors can and should meet an urgent requirement within days. The Panel believes contractors should not unreasonably be discouraged from doing so because the time to award a definitive contract which complies with applicable laws and regulations may exceed the time to physically deliver or perform.

The Panel has recommended repeal of section 2329, "Production special tooling and production special test equipment: contract terms and conditions." This section requires regulations to implement complex and detailed requirements concerning payment for, and amortization of, the cost of production special tooling and test equipment. The Panel considers that this section was an appropriate Congressional response to a particular set of circumstances in which there was controversy and a lack of uniform DOD-wide policy. There have been significant changes in both the circumstances and in the statutory role of the Director of Defense Procurement in approving regulations and clauses that impact contractors' costs and risks.<sup>4</sup> The Panel believes that this subject can again be handled in the regulations, without statutory coverage, with the assurance that uniform and equitable policies will apply throughout DOD.

The Panel has recommended retaining section 2331, "Contracts for professional and technical services," which requires regulations to deal with the controversial subject of "uncompensated overtime." However, the Panel has recommended that subsection (c), waiver of task order limitation, be recodified at section 2304(j) since it applies to master agreements covered there.<sup>5</sup>

The other codified sections included in this subchapter are recommended for retention or minor amendments to implement fully other Panel recommendations. The two uncodified sections require specific regulations to be issued. The Panel recommends repeal of Pub. L. No. 101-189 § 821, "Requirement for certificate of independent price determination in certain department of defense contract solicitations," because the regulatory change has been made. The Panel recommends retention of section 822, "Uniform rules on dissemination of acquisition information," until the final rule is issued. If the final rule is satisfactory, this section should be repealed.

A separate analysis of each of the statutes, in appropriate level of detail, is included in this subchapter.

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<sup>3</sup>See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 631, 105 Stat. 1290, 1380 (1991) (defining "contingency operation").

<sup>4</sup>See 41 U.S.C. § 421(d).

<sup>5</sup>See Chapter 1.2.1 of this Report for analysis.

## **1.6.1. 10 U.S.C. §§ 2308 and 2311**

### **Assignment and delegation of procurement functions and responsibilities**

#### **Delegation**

##### **1.6.1.1. Summary of the Laws**

Although sections 2308 and 2311 both address the ability of an agency head to delegate authority, their focus is different. Section 2308 permits the heads of agencies named in section 2303 (i.e., DOD, the military departments, the Coast Guard, and NASA) to delegate their procurement functions and responsibilities within their own agency or to an official of another agency if the other agency head agrees. The ability to delegate such authority to an official of another agency permits one agency to procure supplies and services for another. This law also authorizes joint procurement activities between these agencies. Section 2308 authority to delegate is subject to the limitation on delegation authority set forth in section 2311.

Section 2311 is a provision of general applicability. This section permits the head of an agency to delegate within that agency any power under Chapter 137 of Title 10 except the authority to determine when the use of other than competitive procedures is in the public interest.<sup>1</sup>

##### **1.6.1.2. Background of the Laws**

Section 2308 was originally enacted by the Armed Services Procurement Act (ASPA) of 1947.<sup>2</sup> By expressly authorizing the delegation of procurement authority to an official of another agency, Congress sought to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services.<sup>3</sup>

Section 2308 remained substantively unchanged until recently. The National Defense Authorization Act for Fiscal Year 1993 directs the Secretary of Defense to prescribe regulations which require approval of the Under Secretary of Defense for Acquisition before a military service terminates or substantially reduces its participation in a joint acquisition.<sup>4</sup> According to the Senate report, the termination or substantial amendment of the partner relationship of a joint program requires formal oversight. When a joint program must be fiscally maintained by a single

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<sup>1</sup>See 10 U.S.C. § 2304(c)(7), (d)(2).

<sup>2</sup>Pub. L. No. 80-413, § 10, 62 Stat. 20, 25 (1948). The statute was initially codified at 41 U.S.C. § 159 and subsequently recodified at 10 U.S.C. § 2308 by Pub. L. No. 84-1028, ch. 1041, 70A Stat. 131 (1956).

<sup>3</sup>S. REP. NO. 571, 80th Cong., 1st Sess. 21 (1947).

<sup>4</sup>Pub. L. No. 102-484, § 820, 106 Stat. 2315, 2458-59 (1992).

service after the other service partners withdraw support, negative program results occur, including higher production costs from the sudden quantity cuts.<sup>5</sup>

Section 2311, like section 2308, originated in the ASPA.<sup>6</sup> As enacted, the agency head was authorized to delegate all powers granted by the Act except for the power to make certain enumerated determinations and decisions. The agency head was precluded from delegating authority to make certain determinations and decisions which pertained to advance payments or to using one of five exceptions to the mandatory method of contracting using formal advertising procedures. The limitation on delegating the authority to make determinations and decisions to allow advance payments was repealed in 1958.<sup>7</sup>

The Competition in Contracting Act of 1984 (CICA) abolished the statutory preference for obtaining supplies and services through formal advertising rather than through negotiations, and the corresponding need for the agency head to make the determinations and decisions necessary to use negotiation rather than formal advertising procedures. Consequently, these limitations were repealed. In their place, the current language was added which points out that section 2304(d)(2) does not allow delegation.<sup>8</sup>

### **1.6.1.3. Laws in Practice**

FAR 1.601 states that the agency head may delegate authority to the heads of contracting activities. DFARS 202.101 defines "contracting activity" and lists for convenience the contracting activities established by the military services and defense agencies. Further delegations are covered in the corresponding military service and defense agency supplements to the FAR. DFARS Subpart 208.70 addresses joint and coordinated acquisitions within DOD, and Subpart 208.71 addresses NASA acquisitions. FAR 6.302-7(c)(1) implements the prohibition stated in section 2304(d)(2) against delegating certain authority.

### **1.6.1.4. Recommendations and Justification**

#### **I**

#### **Repeal section 2308 and move to section 2311.**

The Panel recommends consolidating sections 2308 and 2311 into a single statute. This is accomplished by repealing section 2308 in its entirety and moving the substance of the statute to section 2311, entitled "Delegation." Both sections address the topic of delegation. Consolidation is a natural and logical step towards streamlining acquisition laws.

<sup>5</sup>S. REP. NO. 352, 102d Cong., 2d Sess. 238-39 (1992).

<sup>6</sup>Pub. L. No. 80-413, § 7, 62 Stat. 20, 23, 24 (1948). The statute was initially codified at 41 U.S.C. § 156 and subsequently recodified at 10 U.S.C. § 2308 by Pub. L. No. 84-1028, ch. 1041, 70A Stat. 132 (1956).

<sup>7</sup>Small Business Concerns - Opportunities to Obtain Government Purchases and Contracts, Pub. L. No. 85-800, § 11, 72 Stat. 967 (1958).

<sup>8</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2726, 98 Stat. 494, 1194. CICA rendered moot several intervening amendments. Several months after the passage of CICA, an additional paragraph was added to § 2311 but was repealed within two weeks.



The amendment made to section 2308 by the National Defense Authorization Act for FY93 does not alter the Panel's recommendation to consolidate the two statutes.<sup>9</sup> Upon consolidation, the new provision should be codified in section 2311 as new subsection (c). The Panel notes that the recent amendment requires that the regulations be prescribed by early 1993. The Panel recommends that this new subsection be repealed once regulations have been promulgated which fully implement the statutory requirement.

## II

**Amend what is presently section 2308 by changing the words of limitation on the authority to delegate and assign functions by deleting the words, "Subject to section 2311 of this title."**

The quoted words of limitation launch a trail that begins in section 2308 and leads first to section 2311 and then to section 2304(d)(2) in order to learn what specific authority may not be delegated. The trail is unnecessary. Section 2308 states a general grant of authority whereas section 2304(d)(2) is a specific limitation on that authority. As recently reaffirmed by the Supreme Court, it is a "commonplace of statutory construction" that specific statutory language governs more general statutory language.<sup>10</sup> Thus, deletion of these words will not affect the existing statutory scheme. The Panel recommends deletion in order to streamline and simplify the laws.

## III

**Amend section 2311 by changing the words of limitation on the authority to delegate from, "Except as provided in section 2304(d)(2) of this title," to, "Unless expressly prohibited under this title."**

Section 2311 allows the head of the agency to delegate any power under Chapter 137 of Title 10 "except as provided in section 2304(d)(2) of this title." In turn, section 2304(d)(2) explicitly states that the agency head may not delegate the authority to determine that it is necessary in the public interest to use procedures for entering into a contract other than competitive procedures. The Panel recommends making this change for two reasons. First, it is logical and necessary to have this limitation of authority stated in section 2304 because it is that section which acquisition personnel will look at when they need to use other than competitive procedures for awarding a contract. This limitation is clearly stated in FAR 6.302-7(c)(1). Stating the limitation again in section 2311 is redundant. Second, if Congress places an additional limitation on the agency head's authority to delegate, section 2311 could mislead acquisition personnel into thinking the section 2304(d)(2) limitation was the only limitation, if section 2311 were not amended to reflect the additional limitation. The Panel's recommended language will render such potential amendments to section 2311 unnecessary.

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<sup>9</sup>See note 4, *supra*.

<sup>10</sup>*Morales v. Trans World Airlines, Inc.*, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2031 (1992.)

### 1.6.1.5. Relationship to Objectives

These recommendations are consistent with the Panel's statutory mandate to review acquisition laws applicable to DOD with a view towards streamlining defense acquisition laws. Consolidating these two statutes into a single law will promote more simple and understandable acquisition laws. Further simplification and streamlining will be achieved by deleting the unnecessary words of limitation in section 2308 and by changing the redundant words of limitation in section 2311. The substance of the two laws identify the fundamental requirements without mandating unnecessary implementing methodology and should thus be retained.

### 1.6.1.6. Proposed Statute

#### 10 U.S.C. § 2311. Delegation

~~(a) Except as provided in section 2304(d)(2) of this title, Unless expressly prohibited under this title, the head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter.~~

~~(b)<sup>11</sup> To facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies --~~

~~(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;~~

~~(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and~~

~~(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.~~

~~(c) REGULATIONS REQUIRED--(1) The Secretary of Defense shall prescribe regulations that prohibit each military department participating in a joint acquisition program approved by the Under Secretary of Defense for Acquisition from terminating or substantially reducing its participation in such program without the approval of the Under Secretary.~~

~~(2) The regulations shall include the following provisions:~~

~~(A) A requirement that, before any such termination or substantial reduction in participation is approved, the proposed termination or reduction be reviewed by the Joint Requirements Oversight Council of the Department of Defense.~~

<sup>11</sup>Subsection (b) is identical to the present section 2308, except that the words, "Subject to section 2311 of this title," have been deleted.

(B) A provision that authorizes the Under Secretary of Defense for Acquisition to require a military department approved for termination or substantial reduction in participation in a joint acquisition program to continue to provide some or all of the funding necessary for the acquisition program to be continued in an efficient manner.

## 1.6.2. 10 U.S.C. § 2310

### Determinations and decisions

#### 1.6.2.1. Summary of the Law

Subsection (a) of this statute authorizes the head of an agency to make determinations and decisions required by Chapter 137 of Title 10 on the basis of an individual purchase or contract or a class of purchases or contracts. However, determinations and decisions required under 10 U.S.C. §§ 2304 or 2305 may only be made on an individual purchase or contract basis. All determinations and decisions are final.

Subsection (b) provides that determinations and decisions required by 10 U.S.C. §§ 2306(c), 2306(g)(1), 2307(c), or 2313(c) must be based on written findings clearly substantiating the determination or decision. These four sections, respectively, concern decisions to use cost reimbursement or incentive contracts, to use multiyear contracts, to provide advance payments and to waive the authority of the Comptroller General to examine the books and records of foreign contractors and subcontractors. Findings under these four sections are final. An agency must retain such findings for six years and submit copies of each finding to the General Accounting Office with the contract to which it applies.

#### 1.6.2.2. Background of the Law

This statute was enacted by the Armed Services Procurement Act of 1947.<sup>1</sup> After giving "careful consideration to the troublesome question of the finality of agency determinations and decisions," the Senate concluded agency head decisions and determinations made in good faith should be final and not invalidated or challenged by a court or the Comptroller General, absent a question of legality or evidence of abuse of discretion.<sup>2</sup> Furthermore, the legislation was intended to clearly allow determinations to be made both for individual transactions and for classes of purchases or contracts.<sup>3</sup>

Until the passage of the Competition in Contracting Act of 1984 (CICA), the substance of this statute remained relatively unchanged.<sup>4</sup> CICA substantially revised the law to conform to the amendments CICA made to 10 U.S.C. §§ 2304 and 2305.<sup>5</sup> Subsection (a) was changed to prevent an agency head from making determinations and decisions under sections 2304 or 2305 for a class of purchases or contracts. Subsection (b) reduced the number of determinations and

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<sup>1</sup>Pub. L. No. 80-413, § 7(a), (c) 62 Stat. 23, 24 (1948). The statute was initially codified at 41 U.S.C. § 156 and subsequently recodified at 10 U.S.C. § 2310 by Pub. L. No. 84-1028, ch. 1041, 70A Stat. 132 (1956).

<sup>2</sup>S. REP. NO. 571, 80th Cong., 1st Sess. 19, 20 (1947).

<sup>3</sup>*Id.* at 20 ("For example, a determination that particular equipment is 'technical equipment' and that standardization or interchangeability of parts will justify purchase by negotiation should only have to be made by the agency head once, and not repeated for each individual purchase").

<sup>4</sup>Pub. L. No. 98-369, § 2725, 98 Stat. 494, 1193 (1984).

<sup>5</sup>See S. REP. NO. 50, 98th Cong., 1st Sess. 36 (1983).

decisions which specifically required written findings. This reduction reflected CICA's abolishment of the statutory preference for using formal advertising rather than negotiations for procuring supplies and services.

### **1.6.2.3. Law in Practice**

FAR Subpart 1.7 prescribes general policies and procedures for the use of determinations and findings. Section 2310(a) is implemented in the following manner:

- FAR 1.703 addresses class determinations in general.
- The agency head determination required by section 2304(b)(1) to exclude a particular source is implemented at FAR 6.202(b)(1). This FAR provision states that such a determination may not be made on a class basis. FAR 6.302-7(c) implements the other agency head determination required by section 2304, that at subsection (c)(7)(A). The FAR states that this determination, to use other than competitive procedures when it is in the public interest, may not be made on a class basis.
- The requirement in 10 U.S.C. § 2305(b)(2) that the agency head make a determination before rejecting all sealed bids or proposals is implemented at FAR 14.404-1 (sealed bids) and FAR 15.608(b) (proposals). The requirement in 10 U.S.C. § 2305(d)(4)(A), that the agency head make a determination before requiring a proposal which would enable the Government to later acquire competitively a subsystem or component developed exclusively at private expense, is implemented at DFARS 227.403-71(b)(3). As discussed in the Recommendations and Justification section below, the regulations do not state that determinations and decisions pursuant to section 2305 cannot be made on a class basis.

Section 2310(b) is implemented in the following manner:

- The requirement in § 2310(b) that determinations or decisions be based upon written findings which include sufficient supporting facts and circumstances is reiterated at FAR 1.701 and 1.704.
- FAR 16.301-3 and the corresponding DFARS provision prescribe requirements for determinations and findings for the use of cost reimbursement contracts, while FAR 16.403 addresses determinations and findings for the use of incentive contracts. Only the DFARS covers determinations for the use of multiyear contracts, and it does so at DFARS 217.103-1(b)(iii).
- The statutory requirement concerning advance payment decisions is implemented at FAR 32.402 and 32.410, as well as at DFARS 232.410. A decision to waive Comptroller General authority to examine the books and records of foreign contractors and subcontractors must comply with the provisions at FAR 25.901.

- The requirement that the agency keep findings available for at least six years after the date of the determination or decision is implemented by the general requirements at FAR 4.805 and DFARS 204.805, which govern the disposal of the contract file.

#### **1.6.2.4. Recommendations and Justification**

### **I**

**Amend section 2310(a) to allow determinations and decisions for a class of purchases or contracts "except when expressly prohibited under this title."**

The words, "except for determinations and decisions under section 2304 or 2305 of this title," should be deleted and replaced with, "except when expressly prohibited under this title." The Panel recommends this change for two reasons. First, it is logical and necessary to have words which prohibit the taking of some action located in the statute which addresses that action rather than in a different law. This is because acquisition personnel will look for guidance to the statute which governs their intended action. However, the present statutory scheme does not do this. Nowhere in sections 2304 or 2305 is it stated that a particular agency head determination or decision cannot be made for a class of purchases or contracts. The restrictive language should be inserted in the appropriate place in section 2304 and deleted from section 2310 because retention therein would be redundant.<sup>6</sup> As explained below, the Panel does not believe it is necessary to put such words in section 2305.

Such words are not necessary to be placed in section 2305 because the Panel conceives of no circumstances under which either of the two determinations required to be made by an agency head in this section would, or could, be made on a class basis. It is meaningless to say an agency head cannot determine for a class of purchases or contracts that "[a]ll sealed bids or competitive proposals received in response to a solicitation [should] be rejected."<sup>7</sup> By definition, this is a decision made on a single solicitation and rejecting "all" offers affects the entire class of offers. Furthermore, it is completely unnecessary to say an agency head cannot make the determination called for at section 2305(d)(4)(A) on a class basis because that section calls for a determination as to each original supplier of an item regarding the award of a single development or production contract for a major system. By definition, it would be impossible to make such a determination on a class basis. The FAR correctly omits any statement that such determinations cannot be made on a class basis. The Panel's recommendation to delete the references to section 2305 in section 2310 will remove the existing ambiguity and streamline the law.

The second reason for this recommended change is that the present failure to specify in section 2304 which agency head determinations and decisions cannot be made on a class basis has caused some uncertainty as to whether a justification and approval (J&A) as specified at section 2304(f)(1) can be made on a class basis. The Panel is aware of correspondence from several members of Congress, sent to the heads of the Defense Acquisition Regulations Council and the

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<sup>6</sup>See Chapter 1.2.1 of this Report for the Panel's recommended change to section 2304.

<sup>7</sup>10 U.S.C. § 2305(b)(2).

Civilian Agency Acquisition Council soon after the passage of CICA, which stated the members did not believe CICA allowed class J&As. The Councils responded that they believed the FAR implementation of CICA was correct. FAR 6.303-1(c) permitted, and still permits, justifications and approvals to be made on a class basis, except those to support the award of a contract under FAR 6.302-7 (which implements section 2304(c)(7)).<sup>8</sup>

The Panel believes the FAR correctly implements section 2310. This section only requires a determination by the agency head in two situations. A determination is required to exclude a particular source from a procurement (section 2304(b)(1)) and to use other than competitive procedures when doing so is necessary in the public interest (section 2304(c)(7)). The FAR, at 6.302-7(c) and 6.202(b)(1), respectively, explicitly prohibit agency heads from making class determinations in such instances.

In contrast, J&As are not actions which require a determination by an agency head. According to section 2304(f)(1), a justification is an action taken by a contracting officer, and an approval is an action taken by a specified person which varies according to the amount of the intended contract award. Moreover, as stated previously in the Background of the Law section, the terms "determination" and "decision" have been terms of art since passage of the ASPA. The term "J&A" is the product of CICA. Clearly, determinations and decisions are distinguishable and not interchangeable with the term "J&A."

The legislative history is not entirely dispositive of this issue. One passage in the conference report casts doubt on whether class J&As are allowed. The committee stated that "[a]ll determinations and decisions required for use of the exceptions to competitive procedures provided in this substitute [provision] are to be made on a case-by-case basis. Broad categories or classes of products and services cannot be exempt from competitive procedures."<sup>9</sup> Although the language speaks in terms of "determinations and decisions" rather than J&As, and therefore should not be a source of doubt, the statement is made under the heading, "Justification and Approval Procedures."<sup>10</sup>

In contrast, the conference report also contains language which supports the conclusion that certain J&As may be made on a class basis. Immediately after discussing the first six exceptions to the mandatory use of competitive procedures, the committee stated:

[T]he conference substitute includes a seventh exception which allows the head of an agency, on a non-delegable basis, to determine when it is necessary in the public interest to use procedures other than competitive procedures for a *particular*

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<sup>8</sup>Letter from the Defense Acquisition Regulations Council Deputy Director to Stuart A. Hazlett (Oct. 16, 1992), (containing correspondence including a letter from the Hons. Jack Brooks, William S. Cohen, Frank Horton and Carl Levin (Dec. 12, 1984), and a letter from the Deputy Assistant Secretary of Defense for Procurement, *et. al.*, to the Hon. Jack Brooks (Aug. 16, 1985).

<sup>9</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1427 (1984).

<sup>10</sup>*Id.* at 1426.

*procurement*. This waiver is to be exercised, if at all, on a case-by-case basis, rather than for a class of procurements.<sup>11</sup>

By limiting the ban on class J&As to the seventh exception, Congress evidently considered, and by implication approved, the use of class J&As for the other six exceptions. This legislative history is properly reflected in the statutory wording of section 2304(c). Subsection (c)(7) limits the use of this exemption to "the *particular procurement* concerned." (Emphasis added.) The words, "particular procurement," are not used in conjunction with any of the other six exceptions.

Finally, even if the original FAR implementation were a matter of controversy, the passage of time has established its validity. Since Congress obviously knew of the FAR implementation, and did not require a change by legislation, the appropriate inference is that the regulations are correct. Despite this consensus by the Panel that the FAR is correct, the recommended statutory change should be made to remove any lingering cloud of doubt as to the legality of class J&As.

Class J&As have a legitimate role in the acquisition scheme when they are limited in scope and the contract actions are closely related. The FAR provides for such limitations at FAR 6.303-1(c), which states that whenever a J&A is made on a class basis,

The contracting officer must ensure that each contract action taken pursuant to the authority of the class justification and approval is within the scope of the class justification and approval and shall document the contract file for each contract action accordingly.

The FAR and DFARS contain other appropriate controls as well. Contract awards over \$5 million which result from the J&A process must be publicly announced to the same extent as awards which result from full and open competition. FAR 5.303 makes no distinction. Public notice of the award should encourage acquisition personnel in the J&A process to ensure the contract is within the scope of the class justification in order to avoid protests based upon that issue. Furthermore, FAR 6.304 requires the approval level for a class J&A to be determined by the estimated total value of the class. This means as more contracts are grouped under one class, and the estimated value of the class increases, greater levels of scrutiny are required before the class justification may be approved. In short, sufficient regulatory controls presently exist to ensure the continued proper use of class J&As.

## II

### Delete section 2310(b).

The Panel recommends deleting subsection (b). The Panel agrees with three commenters that this law essentially repeats the requirements already stated within the particular statutes

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<sup>11</sup>*Id.* at 1425 (emphasis added).



which paragraph (b) references.<sup>12</sup> One commenter saw no need to amend the statute.<sup>13</sup> It is logical and necessary to state these requirements in the four specific statutes, because it is those sections which acquisition personnel will look at when they need to make a determination and decision required by one of those laws. In addition, as the preceding Law in Practice section indicates, existing regulations adequately address the requirements of these four statutes. Stating the requirements again in section 2310(b) is redundant.<sup>14</sup>

A concern was voiced by one Panel member that the deletion of subsection (b) might be misinterpreted by some to mean that a determination or decision made pursuant to subsection (a) by the designee of an agency head would not be final. It was therefore initially proposed to insert the words, "or designee" in subsection (a) after the words, "head of an agency" to clearly indicate that such determinations and decisions are final. However, upon further consideration, the Panel decided such modification to subsection (a) is unnecessary. The Panel definitely does not intend the deletion of subsection (b) to alter the existing state of the law regarding subsection (a), and does not believe that it will.

#### **1.6.2.5. Relationship to Objectives**

These recommendations are consistent with the Panel's statutory mandate to review acquisition laws applicable to DOD with a view toward streamlining the defense acquisition laws. Deleting section (b) of this statute eliminates the duplication of requirements currently present in other statutes and in current regulations. Deleting the references to sections 2304 and 2305 in section (a) of this statute, and placing the specific prohibitions against class determinations in section 2304, removes ambiguity from all three statutes.

#### **1.6.2.6. Proposed Statute**

##### **10 U.S.C. § 2310. Determinations and decisions**

(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or, ~~except for determinations and decisions under section 2304 or 2305 of this title,~~ for a class of purchases or contracts except when expressly prohibited under this title. Such a determination or decision are final, ~~including a determination or decision under section 2304 or 2305 of this title, is final.~~

~~(b) Each determination or decision under section 2306(e), 2306(g)(1), 2307(e), or 2313(e) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that—~~

<sup>12</sup>Letter from Defense Contract Management Command (DLA) Plans, Policies, and Systems Division to Stuart A. Hazlett (July 2, 1992); Letter from Council of Defense and Space Industry Associations to Maj Gen John D. Slinkard and Thomas J. Madden (July 15, 1992); Letter from SAF/AQC to Working Group 2 (July 15, 1992).

<sup>13</sup>Letter from DOD Inspector General to Stuart A. Hazlett (Oct. 6, 1992).

<sup>14</sup>Continued reference in § 2310(b) to § 2306(c) would be meaningless if the Panel's recommendation at Chapter 1.2.3 of this Report to delete § 2306(c) is adopted.

~~(1) clearly indicate why the type of contract selected under section 2306(e) of this title is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract;~~

~~(2) support the findings required by section 2306(g)(1) of this title;~~

~~(3) clearly indicate why advance payments under section 2307(e) of this title would be in the public interest; or~~

~~(4) clearly indicate why the application of section 2313(b) of this title to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest.~~

~~Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.~~

### **1.6.3. 10 U.S.C. § 2316**

#### **Disclosure of identity of contractor**

##### **1.6.3.1. Summary of the Law**

This provision is short enough that it may easily be set out in its entirety:

The Secretary of Defense may disclose the identity or location of a person awarded a contract by the Department of Defense to any individual, including a Member of Congress, only after the Secretary makes a public announcement identifying the contractor. When the identity of a contractor is to be made public, the Secretary shall announce publicly that the contract has been awarded and the identity of the contractor.

##### **1.6.3.2. Background of the Law**

This section was enacted in 1982 and has not been amended.<sup>1</sup>

##### **1.6.3.3. Law in Practice**

This section is implemented at FAR 5.303 and DFARS 205.303. The regulations preclude DOD personnel from revealing the identity of a person or corporation awarded a defense contract prior to public announcement of the award and the simultaneous notification of interested members of Congress.

The FAR requires public announcement of awards over \$3 million, unless another dollar amount is specified in agency acquisition regulations. Currently, the dollar threshold for public announcement in the DFARS is \$5 million. Excluded from the FAR reporting requirements are contracts placed with the Small Business Administration under section 8(a) of the Small Business Act and contracts with foreign firms when the place of delivery or performance is outside the United States or its possessions. While the FAR does not specify the type of information to be released, the DFARS lists contract data, competition information, contractor data, funding data, and miscellaneous data as the minimum information to be provided by DOD departments and agencies. More detailed reporting instructions are included in service and DOD agency FAR Supplements.<sup>2</sup>

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<sup>1</sup>Technical Amendments to 10, 14, 37, and 38 U.S.C., Pub. L. No. 97-295, § 1(26)(A), 96 Stat. 1287, 1291 (1982).

<sup>2</sup>See e.g., AF FAR Supplement 5305.303.

#### **1.6.3.4. Recommendation and Justification**

##### **Retain**

The Panel believes this section provides appropriate controls over the release of information. A premature release of information on a contract award could do harm to the integrity of the procurement process and possibly result in an unwarranted financial advantage to a person or entity who received advance information.

#### **1.6.3.5. Relationship to Objectives**

Retention of this law will promote the financial and ethical integrity of the procurement process.

## 1.6.4. 10 U.S.C. § 2326

### Undefinitized contractual actions: restrictions

#### 1.6.4.1. Summary of the Law

The term "undefinitized contractual action" means a new procurement action for which the terms, specifications, or price are not agreed upon before performance is begun, but explicitly excludes actions related to foreign military sales, purchases at or below the small purchase threshold, special access programs, and congressionally mandated long-lead procurement contracts. Also excluded from coverage by this section are procurement actions taken by the Coast Guard and NASA.

As the title suggests, this statute places restrictions on the use of undefinitized contractual actions. Agency head approval is required before an undefinitized contractual action may be entered into, before the scope of an undefinitized contractual action may be modified, and before requirements for spare parts and support equipment that are not urgently needed may be included in an undefinitized contractual action for spare parts and support equipment that are urgently needed. The latter two approvals require the agency head to agree that such action is both a good business practice and in the best interests of the United States. In addition, the agency head must ensure that when the price is not negotiated until after a substantial portion of the work is complete, the allowable profit reflects any reduced cost risk of the contractor.

The statute also places two other limitations on the use of all undefinitized contractual actions except those for the purchase of initial spares. An undefinitized contractual action must contain a definitization schedule which provides for definitization of the terms, specifications and price by the earlier of 180 days after the contractor submits a qualifying proposal or before the funds obligated or expended exceed 50 percent of the ceiling price for the action. Second, the contracting officer may not obligate more than 50 percent of the ceiling price before definitization unless the contractor submits a timely qualifying proposal, in which case the contracting officer may obligate up to 75 percent prior to definitization. A qualifying proposal is a proposal containing sufficient information to facilitate a complete and meaningful audit conducted by the Department of Defense.

#### 1.6.4.2. Background of the Law

Congress enacted this law in 1986 to encourage the services to hold down the amount of funds obligated on undefinitized contractual actions.<sup>1</sup> A minor technical correction followed in 1989<sup>2</sup> and the term "small purchase threshold" was substituted for the dollar figure of \$25,000 in

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3920 (1986) (*identical legislation omitted*); H.R. CONF. REP. NO. 1001, 99th Cong., 2d Sess. 497 (1986).

<sup>2</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, 1604 (1989) ("Congressionally mandated" substituted for "Congressionally-mandated").

1991.<sup>3</sup> When Congress enacted this law, it explained why it exempted four categories of undefinitized contractual actions from coverage. It excluded actions for foreign military sales because agencies could not prevent foreign governments from requesting the most expeditious process for purchasing an item. Small purchases were excluded to reflect the fact that existing regulations concerning undefinitized contractual actions did not cover such purchases. Special access programs were excluded because they were already subject to special Congressional oversight. Finally, an exemption was made for congressionally-mandated long-lead items because agencies cannot control definitization until a full procurement contract is negotiated.<sup>4</sup>

Because Congress recognized that the timing of definitization depends upon submission of a proposal, it rejected a provision calling for definitization within 180 days after the start of an undefinitized contractual action in favor of requiring definitization within 180 days of receiving a qualifying proposal.<sup>5</sup> Initial spares were exempted from the required definitization periods because initial provisioning contracts should not be definitized until enough logistics experience is gained to determine the requirement and configuration for each spare part.<sup>6</sup>

Included with the original enactment of this statute was a requirement that the Secretary of Defense, between October 1, 1986, and March 31, 1989, track the amount of obligated but undefinitized amounts for each six-month period and report to Congress if the undefinitized amount exceeded 10 percent of the amount obligated for all contractual actions. Moreover, the Secretary's authority to enter into additional undefinitized contractual actions was limited if the 10 percent threshold was exceeded. The Secretary could waive these requirements for urgent and compelling considerations relating to national security or public safety.<sup>7</sup> These provisions were never codified and have lapsed with the passage of time.

However, another provision of the original statute, also never codified, remains in effect. This provision requires the DOD Inspector General to periodically audit Defense Department contractual actions and report to Congress on the amount of, and DOD's management of, undefinitized contractual actions.<sup>8</sup>

#### 1.6.4.3. Law in Practice

This statute is primarily implemented at DFARS Subpart 217.74. Although the statutory and regulatory coverage do not apply to the four categories of undefinitized contractual actions described above, DFARS 217.7402 states that contracting officers should apply the policy even to the exempted categories to the maximum extent practicable. DFARS 217.7403 states that it is DOD policy that undefinitized contractual actions shall only be used when definitization prior to the commencement of work is not possible and "the Government's interest demands that the

<sup>3</sup>Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, 105 Stat. 75, 114.

<sup>4</sup>H.R. CONF. REP. NO. 1001, 99th Cong., 2d Sess. 497 (1986).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3918 (1986) (*identical legislation omitted*).

<sup>8</sup>*Id.* at 3919.

contractor be given a binding commitment so that contract performance can begin immediately." DFARS 217.7404-1 reflects that contracting officers must obtain approval from the head of the contracting activity prior to taking any action which statutorily requires agency head approval. Although the statute imposes limitations on the obligation and expenditure of funds, DFARS 217.7404-3 and -4 state the limitations primarily in expenditure terms. The statutory policy regarding the amount of allowable profit is reiterated at DFARS 217.7404-6; however, this policy is actually implemented at DFARS 215.971-3(d)(2), which mandates consideration of any reduced risk to the contractor when the contracting officer uses a structured approach for developing a prenegotiation profit objective.

#### **1.6.4.4. Recommendations and Justification**

### **I**

**Amend section 2326(b) to clarify that limitations are on obligations rather than on expenditures.**

One comment pointed out that confusion exists over the amount of funds a contracting officer may obligate prior to definitization because paragraphs (b)(2) and (b)(3) state the limitations in terms of the amount expended rather than the amount obligated.<sup>9</sup> In the same vein, another stated that the contracting community can control obligations but not expenditures.<sup>10</sup> Both comments recommended that the statutory language be changed to properly place the limitation on the amount of funds obligated. The Panel concurs.

One of the comments also stated that paragraph (b)(1)(B) is ambiguous because it requires definitization when a certain amount of funds are "obligated or expended," and the two key words are not synonymous. Furthermore, it is not clear to which entity, the Government or the contractor, the terms are intended to apply.<sup>11</sup>

Although the term "expended" most likely was intended to refer to the funds expended by the contractor, based upon the regulations which preceded this provision,<sup>12</sup> the Panel believes the proper statutory amendment is to delete the words, "or expended," from this provision. This change will recognize the fact that the Government does not have immediate visibility and control of the amount of funds expended by a contractor but does control expenditures by limiting the Government's liability to the amount obligated.

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<sup>9</sup>Letter from the DOD Inspector General to Stuart A. Hazlett (Oct. 6, 1992).

<sup>10</sup>Letter from SAF/AQC to Stuart A. Hazlett (Oct. 8, 1992).

<sup>11</sup>Letter from the DOD Inspector General to Stuart A. Hazlett (Oct. 6, 1992).

<sup>12</sup>ASPR 3-408(c).

## II

### **Amend section 2326(b) to allow waiver of 50%/75% limitations.**

Two comments suggested that the 50 percent and 75 percent limitations are too rigid and do not permit the necessary flexibility during contingency operations, as defined in 10 U.S.C. § 101(47), or other national emergencies to contract for urgently needed parts which will be delivered before proposals can be prepared.<sup>13</sup> Such restrictions can be a disincentive for contractors to support the Government's urgent requirements. The Panel agrees and recommends agency heads be permitted to waive these limitations if they determine waiver is in the national interest. However, the Panel does not support additional comments that waiver be allowed if the contractor needs additional funds to continue work while definitization efforts are finalized<sup>14</sup> or that waiver be allowed once negotiations are concluded but before a written modification is executed.<sup>15</sup>

## III

### **Amend section 2326(g)(1)(B) to replace "small purchase threshold" with "simplified acquisition threshold."**

This amendment is necessary to conform to the Panel's recommended change to 41 U.S.C. § 403(11), which would establish a simplified acquisition threshold of \$100,000.<sup>16</sup>

#### **1.6.4.5. Relationship to Objectives**

These recommendations will remove ambiguity from the present law and thereby encourage sound and efficient procurement practices as well as retain in the law the fundamental requirements to be achieved while granting the flexibility to acquisition officials to procure essential items.

#### **1.6.4.6. Proposed Statute**

#### **10 U.S.C. § 2326. Undefined contractual actions: restrictions**

(a) **IN GENERAL.**--The head of an agency may not enter into an undefined contractual action unless the request to the head of the agency for authorization of the contractual action includes a description of the anticipated effect on requirements of the military department concerned if a

<sup>13</sup>Letter from Defense Contract Management Command (DLA), Plans, Policies, and Systems Division to Stuart A. Hazlett (Oct. 6, 1992); Letter from SAF/AQC to Stuart A. Hazlett (Oct. 8, 1992).

<sup>14</sup>Letter from DLA, Defense Contract Management Command, Plans, Policies, and Systems Division signed by Jill E. Pettibone, Acting Chief, to Stuart A. Hazlett (Oct. 6, 1992).

<sup>15</sup>Letter from SAF/AQC signed by Ira L. Kemp, Associate Deputy, to Stuart A. Hazlett (Oct. 8, 1992).

<sup>16</sup>A suggestion was made by the Council of Defense and Space Industry Associations in a letter dated September 28, 1992 to Stuart A. Hazlett to limit the applicability of this statute to undefined contractual actions above \$500,000. No explanation was provided for raising the exemption threshold to this higher dollar amount.



delay is incurred for purposes of determining contractual terms, specifications, and price before performance is begun under the contractual action.

**(b) LIMITATIONS ON OBLIGATIONS AND EXPENDITURES OF FUNDS.--**

(1) A contracting officer of the Department of Defense may not enter into an undefinitized contractual action unless the contractual action provides for agreement upon contractual terms, specifications, and price by the earlier of--

(A) the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(B) the date on which the amount of funds obligated ~~or expended~~ under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.

(2) Except as provided in paragraph (3), the contracting officer for an undefinitized contractual action may not ~~expend~~ obligate with respect to such contractual action an amount that is equal to more than 50 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(3) If a contractor submits a qualifying proposal (as defined in subsection (g)) to definitize an undefinitized contractual action before an amount equal to more than 50 percent of the negotiated overall ceiling price is ~~expended~~ obligated on such action, the contracting officer for such action may not ~~expend~~ obligate with respect to such contractual action an amount that is equal to more than 75 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(4) The provisions of this subsection may be waived if the head of the agency determines that waiver is necessary in support of contingency operations, as defined in section 101(47) of this title, or is otherwise in the best interests of the United States.

~~(4)~~(5) This subsection does not apply to an undefinitized contractual action for the purchase of initial spares.

**(c) INCLUSION OF NON-URGENT REQUIREMENTS.--**Requirements for spare parts and support equipment that are not needed on an urgent basis may not be included in an undefinitized contractual action for spare parts and support equipment that are needed on an urgent basis unless the head of the agency approves such inclusion as being--

(1) good business practice; and

(2) in the best interests of the United States.

(d) **MODIFICATION OF SCOPE.**--The scope of an undefinitized contractual action under which performance has begun may not be modified unless the head of the agency approves such modification as being--

- (1) good business practice; and
- (2) in the best interests of the United States.

(e) **ALLOWABLE PROFIT.**--The head of an agency shall ensure that the profit allowed on an undefinitized contractual action for which the final price is negotiated after a substantial portion of the performance required is completed reflects--

- (1) the possible reduced cost risk of the contractor with respect to costs incurred during performance of the contract before the final price is negotiated; and
- (2) the reduced cost risk of the contractor with respect to costs incurred during performance of the remaining portion of the contract.

(f) **APPLICABILITY.**--This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(g) **DEFINITIONS.**--In this section:

(1) The term "undefinitized contractual action" means a new procurement action entered into by the head of an agency for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action. Such term does not include contractual actions with respect to the following:

(A) Foreign military sales.

(B) Purchases in an amount not in excess of the amount of the ~~small-purchase~~ simplified acquisition threshold.

(C) Special access programs.

(D) Congressionally mandated long-lead procurement contracts.

(2) The term "qualifying proposal" means a proposal that contains sufficient information to enable the Department of Defense to conduct complete and meaningful audits of the information contained in the proposal and of any other information that the Department is entitled to review in connection with the contract, as determined by the contracting officer.

**1.6.5. 10 U.S.C. § 2329**

**Production special tooling and production special test equipment: contract terms and conditions**

**1.6.5.1. Summary of the Law**

This statute requires the Secretary of Defense to prescribe regulations for payment to contractors for production special tooling and production special test equipment required or fabricated in the performance of contracts. The regulations are to provide a uniform policy for the Department of Defense.<sup>1</sup> The statute provides that the regulations apply to any production contract awarded by a military department where the production special tooling and test equipment used to perform the contract costs the contractor at least \$1 million.<sup>2</sup> For contracts subject to the statute, the costs for production special tooling and test equipment are to be considered direct costs.<sup>3</sup>

The regulations must provide that:

- The terms and conditions, including the maximum amount to be paid for the acquisition of production special tooling and test equipment, are to be negotiated and specified in the contract;
- Except as provided in paragraph (3) following, the contractor shall be paid the maximum amount agreed upon;
- If at the time of award, it is anticipated that the contractor will use the same production special tooling or test equipment to perform a later contract with the Government, and if that tooling and equipment will not be used by the contractor solely for final production acceptance testing under the contract, the contractor shall be paid a negotiated percentage not less than 50 percent (unless the Secretary of the concerned military department approves a lower rate) of the total payment negotiated and shall be paid the balance according to a negotiated amortization schedule so long as appropriations are available; and
- If the contract or program is terminated for the Government's convenience before payment of the full amount agreed upon, the contractor shall be paid the balance of the maximum amount agreed upon, so long as appropriations are available.<sup>4</sup>

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<sup>1</sup>10 U.S.C. § 2329(a).

<sup>2</sup>10 U.S.C. § 2329(b).

<sup>3</sup>10 U.S.C. § 2329(d).

<sup>4</sup>10 U.S.C. § 2329(e).

### 1.6.5.2. Background of the Law

The traditional method of paying for production special tooling and test equipment was to pay for it under the program contract under which it was acquired or fabricated, and the Government then took title to the equipment. Agencies thus paid the full cost incurred by a contractor in acquiring or fabricating production special tooling or test equipment, subject to the cost principles.

During the height of the military buildup in the mid-1980s, there was a Navy policy initiative to change the payment procedure so that contractors could amortize these items in the same way as they depreciated general purpose tooling and test equipment. It was the perception of some in the Navy that contractors were spending too much on production special tooling and test equipment. It was believed that once a contractor went into the production mode, there was very little possibility the program would be terminated. Because of this stable environment, it was felt contractors ought to provide the production special tooling and test equipment and depreciate it rather than be reimbursed up-front. Requiring amortization was thought to be a way of encouraging contractors to buy production special tooling and test equipment in a more cost effective manner.<sup>5</sup> The result was a policy applied by the Navy that was opposed by many in the other services and by many contractors, as well as a lack of uniformity within DOD.

Legislation appeared as part of the continuing appropriations legislation for fiscal year 1987. Congress included a provision similar to that described above in the Summary of the Law section, except that it specified that payments could not exceed 50 percent of the full acquisition cost of production special tooling and test equipment and allowed the Government to take title.<sup>6</sup> Congress intended this provision to encourage the defense industry to continue and accelerate the use of private investment. However, there was no desire that defense contractors "bet their companies' on any particular contract," so the provision limited the amount of contractor financial exposure to 50 percent of the contractor's proposed requirements for production special tooling and test equipment.<sup>7</sup> Because this provision was part of appropriations legislation, it was not permanent law.

The present statute was added in December of 1987.<sup>8</sup> One minor technical amendment followed.<sup>9</sup> The legislative history emphasizes that the law "is intended to make clear that contractors will be paid for special tooling and test equipment which they acquire, or which they fabricate themselves."<sup>10</sup> As noted above, however, the terms and conditions of payment are negotiable when the threshold for production special tooling and test equipment is exceeded.

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<sup>5</sup>Telephone conversation between Grey Cammack, OASN(RDA) APIA, and Stuart A. Hazlett and Lt Col Michael J. Renner, USAF (Oct. 14, 15, 1992). The comments of Mr. Cammack are his alone and do not necessarily reflect the official Navy position.

<sup>6</sup>Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, § 9105, 100 Stat. 1783-119 (1986).

<sup>7</sup>H.R. CONF. REP. NO. 1005, 99th Cong., 2d Sess. 480 (1986).

<sup>8</sup>National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 810(a)(1), 101 Stat. 1019, 1130 (1988).

<sup>9</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 1233(j), 102 Stat. 1918, 2058 (1988) (added the subsection heading).

<sup>10</sup>H.R. CONF. REP. NO. 446, 100th Cong., 1st Sess. 663 (1987).

### **1.6.5.3. Law in Practice**

The regulations mandated by this statute are found at DFARS 215.871. In addition to implementing the statutory requirements, the regulations contain additional guidance. They provide that the statute does not apply to contracts where the price is, or is based on, established catalog or market prices of commercial items sold in substantial quantities to the general public, to contracts where the price is set by law or regulation, or to contracts awarded as a result of sealed bidding.

Furthermore, the regulations state the Government generally pays the full amount of the production special tooling and test equipment costs when the contracting officer does not expect the contractor to be awarded future contracts for the same or similar items or when such costs are less than \$1 million. The regulations further provide that the unamortized portion of production special tooling and test equipment costs shall not be considered in developing the profit objective and shall not be included in the facilities capital employed base.

Special tooling and special test equipment costs are covered by their own cost principle. FAR 31.205-40 states that such costs are allowable and are charged as direct costs; however, the costs are allowable only as depreciation or amortization if the contractor acquired the special items prior to contract award or the contract schedule specifically excludes such costs. The DFARS does not expand upon this principle.

### **1.6.5.4. Recommendation and Justification**

#### **Repeal 10 U.S.C. § 2329.**

Comments were received from four sources. The Council of Defense and Space Industry Associations (CODSIA) recommended repealing the statute so that contractors could recover all of their production special tooling and production special test equipment costs, reasoning that:

Reduced defense spending creates an increasingly unacceptable risk of recovery on follow-on contracts.

PST and PSTE may expend their serviceable life on the instant contract.

If the percentage of PST/PSTE cost to total cost on the contract is great enough, 50% recovery will create a loss contract which will impact reimbursement under the progress payment clause as the loss ratio is backed out of progress payment requests.<sup>11</sup>

A second commenter stated that a prime impetus for this law no longer exists. Recent studies now show that since about 1987, contractors have obtained about the same return on

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<sup>11</sup>Letter from CODSIA to Stuart A. Hazlett (Sept. 28, 1992).

investment on their government work as on their commercial work. Therefore, he would have no objection to repeal of this statute. Additionally, repeal would make sense because the existing framework can cause an administrative burden since it is difficult to precisely identify the allocation between payment and amortization, given that amortization must be on a specific piece of equipment rather than on a generic pool.<sup>12</sup>

A third commenter recommended amending the statute to effectively eliminate the \$1 million threshold in order to give the Government greater flexibility.<sup>13</sup> The final commenter opined the statute was still relevant and necessary but did not elaborate.<sup>14</sup>

Several of the Panel members were involved in discussions within DOD, with the Congressional staffs, and between the industry and DOD during the time the Navy policy and the emerging legislation were matters of significant controversy. Although memories differ as to the motivations for the policy and legislation, there is a clear consensus among the Panel that section 2329 should be repealed.

This consensus is based upon the view that the legislation resulted from a perceived need for Congress to address an area, traditionally covered by regulations, in which there was controversy and a lack of uniform policy within DOD. Section 2329 requires regulations, but provides a detailed rule structure.

In recent years, the statutory requirements for publicizing and approving regulations have been made more stringent, both in law and in practice. The Director of Defense Procurement now clearly has both the authority and the duty to approve or disapprove proposed or final rules which significantly affect offerors or contractors.<sup>15</sup> The Panel believes, and the Director of Defense Procurement agrees, that production special tooling and test equipment is an area that can again be handled in the regulations, without statutory coverage, with the assurance that uniform and equitable policies will apply throughout DOD.

#### **1.6.5.5. Relationship to Objectives**

Repeal of this statute would promote the Panel's goal of simplifying and streamlining the body of acquisition laws, by reserving to the regulations the detailed methodology of paying contractors for their production special tooling and test equipment. In addition, repeal would promote the development and preservation of an adequate industrial base.

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<sup>12</sup>See note 5, *supra*.

<sup>13</sup>Letter from Headquarters Air Force Materiel Command Deputy Principal Judge Advocate to DOD Advisory Panel (Sept. 9, 1992).

<sup>14</sup>Letter from the DOD Inspector General signed by Dorek J. Vander Schaaf, Deputy Inspector General to Stuart A. Hazlett, Acquisition Law Panel, Defense Systems Management College (Oct. 6, 1992).

<sup>15</sup>41 U.S.C. § 421(d). DFARS 201.304(2) grants to the USD(A)(DP) the authority to issue the policies, procedures, clauses and forms necessary to supplement the FAR or DFARS.

## 1.6.6. 10 U.S.C. § 2331

### Contracts for professional and technical services

#### 1.6.6.1. Summary of the Law

Subsections (a) and (b) of this statute require the Secretary of Defense to issue regulations which will ensure "to the maximum extent practicable," that DOD acquires professional and technical services on the basis of the task to be performed rather than on the basis of the number of hours of services provided. The regulations must include requirements to (1) minimize the use of contracts which acquire services on the basis of the number of hours; (2) ensure source selection emphasis is placed on technical and quality factors rather than price; and (3) evaluate proposals on the basis of "cost realism."

Subsection (c) of this law replaces the dollar limitations on the use of master agreements levied by 10 U.S.C. § 2304(j)(4) with a higher dollar threshold if the Secretary of Defense elects to waive the limitations imposed by section 2304(j)(4). The waiver becomes effective 60 days after notice of the waiver is published in the Federal Register.

#### 1.6.6.2. Background of the Law

Section 804 of the National Defense Authorization Act for 1989 called for the establishment of a Government-industry committee to recommend criteria for the evaluation of proposals for professional and technical services. The committee was to develop evaluation criteria which would ensure contractors were not encouraged to propose mandatory uncompensated overtime for professional and technical employees.<sup>1</sup>

The committee report defined uncompensated overtime as "hours worked in excess of the normal 8 hours per day, 40 hours per week, by professional employees, who are exempt from the Fair Labor Standards Act, without additional compensation."<sup>2</sup> Contractors use mandatory uncompensated overtime as a competitive pricing technique, most frequently on cost reimbursement and time and materials type contracts. The report noted that mandatory uncompensated overtime has a negative impact on the quality of professional services rendered and on the Government's ability to make meaningful comparisons among competitors as to the quality of the offered services.

The report recommended that DOD incorporate into the DFARS a policy which stressed that the Government should not award contracts for professional and technical services solely on the basis of price competition or make price the most significant evaluation factor. Instead, awards should be based on the best overall value to the Government. Such a policy would go a long way towards not encouraging contractors to propose uncompensated overtime.

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<sup>1</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 804, 102 Stat. 1918, 2009 (1988).

<sup>2</sup>DOD REPORT ON UNCOMPENSATED OVERTIME, (Mar. 29, 1990) (emphasis original).

The report also stated that the problem of uncompensated overtime would be diminished by using "master agreements" with contractors for buying certain work for specified periods of time, thus reducing the need to award time and materials type contracts. Finally, the report recommended that contractors be allowed to account for their professional and technical services in different ways, so long as they complied with Government accounting rules and regulations.

After considering the committee report, Congress passed section 2331.<sup>3</sup> Subsection(a) reflects Congressional belief that uncompensated overtime might be greatly reduced by acquiring services on the basis of the task to be performed rather than on a time and materials basis.<sup>4</sup> Subsection (b) prescribes regulations which essentially enact the recommendations of the committee report. Subsection (c) reflects Congressional intent to promote the use of master agreements in order to simplify the acquisition of professional and technical services and to diminish the potential for uncompensated overtime.<sup>5</sup> Although the conference report clearly states the statute should not be construed as taking a position on the type of accounting practices a contractor should employ,<sup>6</sup> the Senate report suggests Congress might take a position in the future.<sup>7</sup>

### **1.6.6.3. Law in Practice**

Because section 2331 did not take effect until 1991, experience with the law is limited. DFARS 215.608(a) and 237.701 implement the regulations prescribed by section 2331(a) and (b) concerning uncompensated overtime. DFARS 237.270-3 addresses waiver of the dollar limitations when using master agreements.

### **1.6.6.4. Recommendations and Justification**

#### **I**

#### **Retain section 2331(a) and (b).**

The Panel received one comment which recommended changes to the implementing regulations<sup>8</sup> and another comment which recommended extending the safeguards contained in this statute concerning the uncompensated overtime of professional and technical services contracts to all types of service contracts costing \$100,000 or more.<sup>9</sup> The latter comment also noted that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have

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<sup>3</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 834(a)(1), 104 Stat. 1485, 1613 (1990).

<sup>4</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 196 (1990).

<sup>5</sup>*Id.*

<sup>6</sup>H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess. 663 (1990).

<sup>7</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 196 (1990).

<sup>8</sup>Letter from CODSIA to Stuart A. Hazlett, DOD Advisory Panel, Defense Systems Management College (Sept. 28, 1992).

<sup>9</sup>Letter from DOD Inspector General signed by Derek J. Vander Schaaf, Deputy Inspector General, to Stuart A. Hazlett (Oct. 6, 1992).



proposed to incorporate a clause into the DFARS which would extend such safeguards to these presently uncovered service contracts.

The Panel recommends retaining these two subsections as written. They do not appear to impose any significant cost or administrative burden on DOD procurement. The recommendations contained in the comments may be appropriately dealt with in the implementing regulations.

## II

### **Amend section 2331(c) by recodifying at 10 U.S.C. § 2304(j)(4).**

Section 2331(c) sets forth when the dollar limitations imposed by 10 U.S.C. § 2304(j)(4) on the use of master agreements may be waived. Because both sections address the subject of master agreements, section 2331(c) more properly belongs in section 2304(j)(4) and the Panel recommends such recodification. However, the Panel has recommended amending 10 U.S.C. § 2304(j) in such a manner that will obviate further need for section 2331(c).<sup>10</sup>

## III

### **Delete section 2331(c)(3).**

As stated in the preceding recommendation, the Panel has recommended amending 10 U.S.C. § 2304(j) in such a manner that will obviate the need for any portion of section 2331(c). However, if the Panel's recommendation regarding section 2304(j) is not adopted and section 2331(c) is recodified at section 2304(j), the Panel recommends the repeal of section 2331(c)(3).

Although section 2331(c) allows the Secretary of Defense to waive the limitation on the total value of task orders for specific contracting activities, subsection (c)(3) provides that the waiver only becomes effective 60 days after publication in the Federal Register. The Panel received one recommendation to reduce or eliminate this limitation on the effectiveness of the waiver because the 60-day period is "excessive."<sup>11</sup> The Panel agrees. A contracting activity could have an urgent need to issue a task order within 60 days, but need a Secretarial waiver because of the limitation in section 2304(j)(4). Under the present statutory scheme, the contracting activity could not issue the task order until 60 days after publication in the Federal Register. Elimination of this 60-day waiting period would prevent such a problem without abolishing the safeguard of requesting and receiving a waiver.

#### **1.6.6.5. Relationship to Objectives**

Subsections (a) and (b) establish broad policy and the fundamental requirements to be achieved while leaving the detailed implementation to the regulations. Recodifying section

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<sup>10</sup>See Chapter 1.2 of this Report for the Panel's recommendations to amend 10 U.S.C. § 2304.

<sup>11</sup>Letter from Headquarters Air Force Materiel Command Principal Deputy Staff Judge Advocate to DOD Advisory Panel (Sept. 9, 1992).

2331(c) at section 2304(j)(4) would simplify and make more understandable the statutory scheme concerning master agreements. Deleting section 2331(c)(3) would remove a burdensome and unnecessarily restrictive provision, and thereby encourage the exercise of sound judgment on the part of acquisition personnel.

#### **1.6.6.6. Proposed Statute**

#### **10 U.S.C. § 2331. Contracts for professional and technical services**

(a) In General. The Secretary of Defense shall prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided.

(b) Content of Regulations. With respect to contracts to acquire services on the basis of the number of hours of services provided, the regulations described in subsection (a) shall--

- (1) include standards and approval procedures to minimize the use of such contracts;
- (2) establish criteria to ensure that proposals for contracts for technical and professional services are evaluated on a basis which does not encourage contractors to propose uncompensated overtime;
- (3) ensure appropriate emphasis on technical and quality factors in the source selection process;
- (4) require identification of any hours in excess of 40-hour weeks included in a proposal;
- (5) ensure that offerors are notified that proposals which include unrealistically low labor rates or which do not otherwise demonstrate cost realism will be considered in a risk assessment and evaluated appropriately; and
- (6) provide guidance to contracting officers to ensure that any use of uncompensated overtime will not degrade the level of technical expertise required to perform the contract.

~~(c) Waiver of Task Order Limitation. (1) The Secretary of Defense may waive the limitation in section 2304(j)(4) of this title on the total value of task orders for specific contracting activities to the extent the Secretary considers the use of master agreements necessary in order to further the policy set forth in subsection (a).~~

~~(2) During any fiscal year, such a waiver may not increase the total value of task orders under master agreements of a contracting activity by more than 20 percent of the value of all contracts for advisory and assistance services awarded by that contracting activity during fiscal year 1989.~~

~~(3) Such a waiver shall not become effective until 60 days after the Secretary of Defense has published notice thereof in the Federal Register.~~

## 1.6.7. 10 U.S.C. § 2381

### Contracts: regulations for bids

#### 1.6.7.1. Summary of the Law

This statute expressly permits, but does not require, the Secretary of a military department to "prescribe regulations for the preparation, submission and opening of bids for contracts with that department."<sup>1</sup> The statute also expressly permits, but does not require, the Secretary of a military department to require a bidder to accompany its bid with a "written guarantee" that the bidder will timely enter into a contract and furnish a performance bond if the bid is accepted.<sup>2</sup> If the successful bidder does not timely enter into a contract and furnish the bond, the agency has no choice but to take two actions: the agency shall contract with another person and shall hold the defaulting bidder and his guarantors jointly or severally liable for the difference between the bid amount and the amount for which a contract is made with the other person.<sup>3</sup>

#### 1.6.7.2. Background of the Law

This law had its origins in 1878,<sup>4</sup> was part of a major recodification in 1956,<sup>5</sup> and underwent minor technical amendments in 1984.<sup>6</sup> According to FAR 28.001, the purpose of providing bid guarantees is to secure the bidder's liability (a) for failing to enter into a contract within the specified time and (b) for failing to furnish acceptable payment or performance bonds or guarantees. One source believes that Government personnel feel bid guarantees also perform a filtering function in that sureties do not provide bonds for incompetent or under-financed firms. However, the filtering process can be bypassed if the contractor deposits security.<sup>7</sup>

#### 1.6.7.3. Law in Practice

The FAR implements this law at FAR Subparts 28.1 and 28.2. There is no DFARS coverage; however, the military departments do have supplements to the FAR. FAR 28.101-1 sets forth the policy as to when bid guarantees are required. A bid guarantee must be required, unless the chief of the contracting office waives the requirement, and can only be required, if a performance or payment bond is required. Despite the language in the statute which requires agencies to take two actions when a bidder fails to comply with a solicitation requirement for a bid guarantee, the FAR lists nine circumstances where the noncompliance should be waived. This listing is in response to decisions by the Comptroller General. The regulations apply to both sealed bidding and negotiated procurement.

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<sup>1</sup>10 U.S.C. § 2381(a)(1).

<sup>2</sup>10 U.S.C. § 2381(a)(2).

<sup>3</sup>10 U.S.C. § 2381(b).

<sup>4</sup>Act of Apr. 10, 1878, ch. 58, 20 Stat. 36.

<sup>5</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, § 1, 70A Stat. 136.

<sup>6</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, 98 Stat. 2492, 2624 (1984).

<sup>7</sup>Cibinic, *Bid Guarantees: The Tail's Still Wagging!*, 6 Nash & Cibinic Report, 6, ¶ 36 (1992).

Two recent articles point out some of the problems associated with this topic. These problems involve determining what security deposits are acceptable; determining what procedures to follow if a security deposit is to be made, since the regulations do not set out any such procedures; determining who can be a proper surety; determining the type of assets which can be pledged; and, where the guarantees fail to conform to the requirements, determining whether the failure may be waived as a minor informality or is a material defect which mandates rejection of the bid as nonresponsive.<sup>8</sup>

#### 1.6.7.4. Recommendation and Justification

**Amend section 2381(a) to clarify who may prescribe regulations.**

The first line of this statute should be amended by clarifying that the Secretary of Defense may also prescribe pertinent regulations to implement this statute. Such clarification is consistent with the Panel's recommendation elsewhere, and with the inclusion of the regulations in the FAR.

Two comments were received. One indicated the statute did not need revision<sup>9</sup> and the other related more to performance bonds.<sup>10</sup> The primary critique comes from one of the articles cited previously, wherein it was stated:

It is evident . . . bid guarantees add an incredible amount of complexity and cost to sealed bid procurement. It is extremely doubtful whether such cost and complexity is justified by whatever benefits the Government receives from bonds and guarantees. It is time to cut off the tail that wags the dog. The procuring agencies should attempt sealed bid contracting *without* bid bonds or guarantees. If, as we believe, the integrity of the competitive system will not be adversely affected, they should be permanently discarded.<sup>11</sup>

The Panel notes that the statute gives to the regulators the flexibility to conduct such a test program. Indeed, the statute does not even mandate that regulations concerning bid guarantees be written. While there is thus no need to amend the statute in this regard, the Panel nevertheless recommends that the regulators consider such a test program.

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<sup>8</sup>*Id.*; Cibinic, *Bid Bonds and Bid Guarantees: Is the Tail Wagging the Dog?*, 2 Nash & Cibinic Report, 3, ¶ 16 (1988).

<sup>9</sup>Letter from DOD Inspector General signed by Derek J. Vander Schaaf, Deputy Inspector General to Stuart A. Hazlett, Acquisition Law Panel, Defense Systems Management College (Oct. 6, 1992).

<sup>10</sup>Letter from CODSIA to Stuart A. Hazlett, DOD Advisory Panel (Sept. 28, 1992).

<sup>11</sup>Cibinic, *Bid Bonds and Bid Guarantees: Is the Tail Wagging the Dog?*, 2 Nash & Cibinic Report, 3, ¶ 16 (1988) (emphasis original).

### **1.6.7.5. Relationship to Objectives**

This law identifies a broad policy objective and explicitly leaves detailed implementing methodology to the acquisition regulations.

### **1.6.7.6. Proposed Statute**

#### **10 U.S.C. § 2381. Contracts: regulations for bids**

(a) The Secretary of Defense or the Secretary of a military department may--

(1) prescribe regulations for the preparation, submission, and opening of bids for contracts with that department; and

(2) require that a bid be accompanied by a written guaranty, signed by one or more responsible persons, undertaking that the bidder, if his bid is accepted, will, within the time prescribed by the Secretary or other officer authorized to make the contract, make a contract and furnish a bond with good and sufficient sureties for the performance of the contract.

(b) If a bidder, after being notified of the acceptance of his bid, fails within the time prescribed under subsection (a)(2) to enter into a contract and furnish the prescribed bond, the Secretary concerned or other authorized officer shall--

(1) contract with another person; and

(2) charge against the defaulting bidder and his guarantors the difference between the amount specified by the bidder in his bid and the amount for which a contract is made with the other person, this difference being immediately recoverable by the United States for the use of the military department concerned in an action against the bidder and his guarantors, jointly or severally.

(c) Proceedings under this section are subject to regulations under section 205 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 486), unless exempted therefrom under section 201(a) of that Act (40 U.S.C. § 481(a)).

## **1.6.8. 10 U.S.C. § 2384**

### **Supplies: identification of supplier and sources**

#### **1.6.8.1. Summary of the Law**

This statute requires defense contractors to mark or otherwise identify the supplies they are furnishing with the identity of the contractor, the national stock number (if there is such a number), and the contractor's identification number for the supplies. Further, the Secretary of Defense is required to issue regulations which call for, whenever practicable, more detailed identification, including the identification number of the actual manufacturer or producer (or source of supply) of the item and the source of any technical data delivered under the contract. However, the more detailed identification called for in the regulations is not required for a contract for commercial items sold in substantial quantities to the general public if the contract acquires such supplies at established catalog or market prices or is awarded through the use of competitive procedures.

#### **1.6.8.2. Background of the Law**

This statute is traceable to the Civil War.<sup>1</sup> It was later revised and codified at 34 U.S.C. § 583, and then revised and eventually recodified in 1956 at its present location, where it read:

Each contractor furnishing supplies to a military department shall mark them with his name in the manner directed by the Secretary of that department. No supplies may be received unless so marked.<sup>2</sup>

Amendments in 1984 added the requirements that supplies be marked with the national stock number and that the Secretary of Defense issue regulations mandating identification of the actual manufacturer or producer and source of technical data.<sup>3</sup> These amendments were intended to give DOD the ability to assess whether to purchase an item directly from the actual producer or manufacturer and to determine which contractor generated the technical data.<sup>4</sup>

Congress amended the law again in 1986, whereby it added the paragraph exempting commercial items sold in substantial quantities to the general public from the additional requirements imposed by the 1984 amendments.<sup>5</sup> Congress believed that when the exemption criteria is satisfied, "the government is assured of the reasonableness of the price, and attempting to identify the actual manufacturer is not essential to ensuring the reasonableness of that price."<sup>6</sup>

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<sup>1</sup>Act of July 17, 1862, ch. 200, § 15, 12 Stat. 596.

<sup>2</sup>Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 1041, § 1, 70A Stat. 130.

<sup>3</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1231(a), 98 Stat. 2492, 2599 (1984).

<sup>4</sup>H.R. REP. NO. 690, 98th Cong., 2d Sess. 19 (1984).

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3016, 3936 (1986) (*identical legislation omitted*).

<sup>6</sup>H.R. CONF. REP. NO. 1001, 99th Cong., 2d Sess. 504 (1986).

Furthermore, streamlining the acquisition of commercial products was deemed a higher priority than the possibility the exemption might eliminate some potential for product breakout.<sup>7</sup>

### **1.6.8.3. Law in Practice**

This statute is implemented at DFARS Subpart 217.73. There is no coverage in the FAR. DFARS 217.7303 lists several exemptions to the marking and identification requirements which are in addition to the statutory exemption for certain commercial items. Although DFARS 211.7004-1(g) does not specifically implement this statute, it is in harmony with the law because it provides that commercial items are normally to be marked in accordance with a contractor's standard practices.

### **1.6.8.4. Recommendation and Justification**

#### **Amend section 2384(b)(2) to exempt all commercial items from subsection (b)(1).**

The partial exemption in the 1986 amendments was a positive step towards removing barriers to the acquisition of commercial items. However, the exemption does not apply unless the commercial item (1) is sold in substantial quantities to the general public and (2) is sold at established catalog or market prices or is purchased through the use of competitive procedures. The Panel believes these additional limitations are unnecessary to ensure a commercial item is reasonably priced. Furthermore, retention of these limitations would be inconsistent with the revised Congressional policies the Panel has recommended in 10 U.S.C. § 2301 and with the Panel's recommended definition in 10 U.S.C. § 2302(5).

Two comments were received. One indicated that no part of the statute should apply to commercial products.<sup>8</sup> The other suggested expanding the commercial item exemption by deleting the requirement that the commercial item be sold at established catalog or market prices or be purchased through the use of competitive means, so that the only requirement for the exemption to apply would be if the commercial item was sold in substantial quantities to the general public.<sup>9</sup> The first recommendation would go too far while the second would not go far enough. Through additional research, it was determined the statute does not cause any problems for bar code methods of identification.<sup>10</sup>

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<sup>7</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 265 (1986).

<sup>8</sup>Letter from DOD Inspector General signed by Derek J. Vander Schaaf, Deputy Inspector General, to Stuart A. Hazlett (Oct. 6, 1992).

<sup>9</sup>Letter from Headquarters Air Force Materiel Command Deputy Principal Judge Advocate to DOD Advisory Panel (Sept. 9, 1992).

<sup>10</sup>Telephone conversation between James Whitaker, the Air Force LOGMARS Program Management Officer (HQ AFMC/LGTX) and Lt Col Michael J. Renner, USAF (Nov. 12, 1992).



#### **1.6.8.5. Relationship to Objectives**

Amending this statute as recommended will facilitate the purchase by DOD or its contractors of commercial items, both as end items and components, by removing requirements for special markings that a commercial vendor would not normally make.

#### **1.6.8.6. Proposed Statute**

##### **10 U.S.C. § 2384. Supplies: identification of supplier and sources**

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

(b)(1) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, each contract requiring the delivery of supplies (other than a contract described in paragraph (2)) shall require that the contractor identify--

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

(B) the national stock number of the item (if there is such a number) and the identification number of the actual manufacturer or producer of the item or of each source of supply of the contractor for the item; and

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

(2) Paragraph (1) does not apply to a contract that requires the delivery of supplies that are commercial items, as defined in section 2302 of this title, sold in substantial quantities to the general public if the contract-

~~(A) provides for the acquisition of such supplies by the Department of Defense at established catalog or market prices; or~~

~~(B) is awarded through the use of competitive procedures.~~

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

**1.6.9. 10 U.S.C. § 2410a**

**Appropriated funds: availability for certain contracts for 12 months**

**1.6.9.1. Summary of the Law**

This provision is short enough that it may easily be set out in its entirety:

Funds appropriated to the Department of Defense for a fiscal year shall be available for payments under contracts for any of the following purposes for 12 months beginning at any time during the fiscal year:

(1) The maintenance of tools, equipment, and facilities.

(2) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.

(3) Depot maintenance.

(4) The operation of equipment.

**1.6.9.2. Background of the Law**

This law was codified in 1988 as part of a general enactment<sup>1</sup> which codified "in title 10, United States Code, various provisions of law that [had] been free-standing permanent provisions of law since 1970."<sup>2</sup> This particular statute was not one of those which had been free-standing since 1970, but was instead first enacted as a stand-alone provision in 1985.<sup>3</sup> It was later amended in 1991 to include "equipment" in paragraph (1) and to add new paragraph (4) concerning the operation of equipment.<sup>4</sup>

**1.6.9.3. Law in Practice**

DFARS 237.106(2) implements paragraphs (1), (3), and (4) of this section.

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<sup>1</sup>Codification of Military Laws Act of 1988, Pub. L. No. 100-370, § 1(5)(h)(B), 102 Stat. 840, 847.

<sup>2</sup>H.R. REP. NO. 696, 100th Cong., 2d Sess. 3 (1988).

<sup>3</sup>Further Continuing Appropriations, 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1203.

<sup>4</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 342, 105 Stat. 1291, 1343 (1991).

#### **1.6.9.4. Recommendation and Justification**

##### **Retain**

Two comments were received. One indicated, without elaboration, that the law need not be applied to commercial products.<sup>5</sup> The other suggested extending the time period funds are available to 13 months rather than 12 months.<sup>6</sup>

#### **1.6.9.5. Relationship to Objectives**

Retention of this law facilitates the exercise of sound judgment by acquisition personnel. The law is simple and understandable and encourages efficient procurement practices.

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<sup>5</sup>Letter from DOD Inspector General signed by Derek J. Vander Schaaf, Deputy Inspector General, to Stuart A. Hazlett (Oct. 6, 1992).

<sup>6</sup>SAF/AQC letter to Stuart A. Hazlett (Oct. 8, 1992).

## **1.6.10. 41 U.S.C. § 12**

### **No contract to exceed appropriations**

#### **1.6.10.1. Summary of the Law**

This section is short enough that it may easily be set out in its entirety:

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.

#### **1.6.10.2. Background of the Law**

This section originated in 1868<sup>1</sup> and has not been subsequently amended. There appears to be no relevant legislative history.

#### **1.6.10.3. Law in Practice**

This law has little, if any, impact on DOD acquisitions, which are generally conducted under general appropriations. The restrictions on appropriated funds for DOD purposes are generally covered by the Anti-Deficiency Act, 31 U.S.C. § 1341. The 1868 law, however, still requires that construction or improvements of public buildings be paid for by specific appropriations, and the law has been cited by the Comptroller General in enforcing this rule.<sup>2</sup>

Although the FAR does not reference this section specifically, it does clearly implement its intent within FAR 32.702, which states, "No officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. § 1341), unless otherwise authorized by law."

#### **1.6.10.4. Recommendation and Justification**

##### **Retain**

The Panel believes the purpose of this section remains valid. Retention is recommended because even though it does not significantly impact acquisitions by DOD, it continues to affect acquisitions by other agencies.

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<sup>1</sup>R. S. § 3733, derived from Act of July 25, 1868, ch. 233, §3, 15 Stat. 177.

<sup>2</sup>See J. Cibinic and R. Nash, FORMATION OF GOVERNMENT CONTRACTS 36, 37 (2d ed. 1986), and the decisions cited therein.

#### **1.6.10.5. Relationship to Objectives**

Retention of this law will promote the financial and ethical integrity of the procurement process.

## **1.6.11. 41 U.S.C. § 413**

### **Tests of innovative procurement methods and procedures**

#### **1.6.11.1. Summary of the Law**

Section 413 was added to the Office of Federal Procurement Policy (OFPP) Act by the OFPP Act Amendments of 1983. This section authorized the Administrator for Federal Procurement Policy to develop innovative procurement methods and procedures to be tested by selected agencies. These methods must be consistent with the policies in 41 U.S.C. § 401.

In developing a program to test innovative procurement methods, section 413(a) directs that the Administrator consult with the heads of executive agencies to:

- ascertain the need for and specify the objectives of such program;
- develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;
- evaluate the potential costs and benefits that may be derived from the innovative procurement methods and procedures tested under such program;
- select the appropriate executive agencies or components of executive agencies to carry out such program;
- specify the categories and types of products or services to be procured under such program; and
- develop the methods to analyze the results of such program.

In addition, prior to implementation, a program brought under section 413 requires approval by the head of the executive agency selected to carry out the program.

Section 413(b) permits the OFPP Administrator, whenever necessary, to request from the House Committee on Government Operations and the Senate Committee on Governmental Affairs a waiver of the application of any provision of law in order to carry out a proposed program brought under subsection (a). The request to Congress must include a description of the proposed program, the executive agency responsible for the program, the procedures the agency will follow in carrying out the program, the provisions of law to be waived, and the provisions of law affected by the program.

### **1.6.11.2. Background of the Law**

41 U.S.C. § 413 was added to the OFPP Act by the OFPP Act Amendments of 1983.<sup>1</sup> The purpose of the 1983 amendments was to improve the management of the Federal procurement process by strengthening OFPP.<sup>2</sup>

### **1.6.11.3. Law in Practice**

This statute provides a vehicle to develop innovative procurement methods and procedures to be tested by selected agencies.

### **1.6.11.4. Recommendation and Justification**

#### **Retain**

This section should be retained as it encourages agencies to try more efficient procurement methods. It also provides the necessary authority and an orderly procedure to act on that authority.

### **1.6.11.5. Relationship to Objectives**

This statute encourages innovative solutions to acquisition related issues. Therefore, retention of this statute is in the best interests of DOD.

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<sup>1</sup>Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. No. 98-191, § 7, 97 Stat. 1325, 1329-30.  
<sup>2</sup>S. REP. NO. 214, 98th Cong., 1st Sess. 1 (1983).

## **1.6.12. Public Law Number 101-189 § 821**

### **Requirement for certificate of independent price determination in certain department of defense contract solicitations**

#### **1.6.12.1. Summary of the Law**

This section of public law requires the Secretary of Defense to propose a revision to FAR 3.103-1 so that it no longer exempts work performed by foreign suppliers outside the United States from having to execute a Certificate of Independent Price Determination (a certificate against collusive bidding practices).

#### **1.6.12.2. Background of the Law**

The National Defense Authorization Act for Fiscal Years 1990 and 1991 enacted this section.<sup>1</sup>

#### **1.6.12.3. Law in Practice**

This section has been implemented and FAR 3.103-1 no longer includes such a provision.

#### **1.6.12.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this section, since the change to the appropriate FAR Subpart has been accomplished.

#### **1.6.12.5. Relationship to Objectives**

Adoption of the Panel's recommendation will help streamline the body of acquisition laws.

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<sup>1</sup>Pub. L. No. 101-189, § 821, 103 Stat. 1352, 1503 (1989).



## **1.6.13. Public Law Number 101-189 § 822**

### **Uniform rules on dissemination of acquisition information**

#### **1.6.13.1. Summary of the Law**

This section of public law requires the Secretary of Defense to amend the DFARS so that it contains a single, uniform regulation for DOD regarding dissemination of, and access to, acquisition information.

#### **1.6.13.2. Background of the Law**

The National Defense Authorization Act for Fiscal Years 1991 and 1992 enacted this section.<sup>1</sup> According to the Senate report,<sup>2</sup> this provision was in response to "Ill Wind." The House Armed Services Committee stated in its report on the National Defense Authorization Act for Fiscal Years 1990 and 1991:

. . . this provision is intended to improve the efficiency and effectiveness of Department of Defense acquisition practices and is not intended to provide a basis for a private party to challenge the validity of any implementing rule issued by a Department of Defense component on the ground that it is inconsistent with Department of Defense or government-wide policy.<sup>3</sup>

#### **1.6.13.3. Law in Practice**

An interim rule has been published in the Federal Register.<sup>4</sup>

#### **1.6.13.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retaining this section until the final rule has been published. At that time, the section should be repealed.

#### **1.6.13.5. Relationship to Objectives**

This section supports the Panel's objective of identifying a broad policy objective, but leaving the detailed implementing methodology to the regulators.

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<sup>1</sup>Pub. L. No. 101-189, § 822, 103 Stat. 1352, 1503 (1989).

<sup>2</sup>S. REP. NO. 81, 101st Cong., 1st Sess. 197 (1989).

<sup>3</sup>H.R. REP. NO. 331, 101st Cong., Sess. 611 (1989).

<sup>4</sup>55 Fed. Reg. 28614 (1990).

**Chapter 2**  
**Contract Administration**

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**STREAMLINING**  
**DEFENSE**  
**ACQUISITION LAWS**

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**Report**  
**of the**  
**Acquisition Law Advisory Panel**

**to the**  
**United States Congress**



**January**  
**1993**

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2. CONTRACT ADMINISTRATION .....	1
2.0. Introduction.....	1
2.0.1. The Contract Administration Process .....	2
2.0.2. Summary of Panel Recommendations .....	5
2.1. Contract Payment .....	9
2.1.0. Introduction .....	9
2.1.1. 10 U.S.C. § 2307 .....	11
2.1.2. 10 U.S.C. § 2355 .....	17
2.1.3. 10 U.S.C. § 7312 .....	19
2.1.4. 10 U.S.C. § 7364 .....	21
2.1.5. 10 U.S.C. § 7521 .....	23
2.1.6. 31 U.S.C. § 1341 .....	27
2.1.7. 31 U.S.C. § 3324 .....	29
2.1.8. 31 U.S.C. §§ 3901 - 3907 .....	31
2.1.9. Public Law Number 101-510 § 831 .....	37
2.2. Cost Principles.....	41
2.2.0. Introduction .....	41
2.2.1. 10 U.S.C. § 2324 .....	43
2.2.2. 10 U.S.C. § 2382 .....	61
2.2.3. 41 U.S.C. § 420 .....	65
2.3. Audit and Access to Records .....	69
2.3.0. Introduction .....	69
2.3.1. 5 U.S.C. App. 3 §§ 1-12.....	71
2.3.2. 10 U.S.C. § 2313 .....	77
2.3.3. 10 U.S.C. § 2406 .....	85
2.3.4. 18 U.S.C. § 1516 .....	89
2.4. Cost Accounting Standards.....	91
2.4.0. Introduction .....	91
2.4.1. 10 U.S.C. § 2410b.....	93
2.4.2. 41 U.S.C. § 422 .....	95
2.4.3. Public Law Number 91-379, § 103 .....	101
2.5. Administration of contract provisions relating to price, delivery, and product quality... 103	
2.5.0. Introduction .....	103
2.5.1. 10 U.S.C. § 2312 .....	105
2.5.2. 10 U.S.C. § 2383 .....	107

2.5.3.	10 U.S.C. § 2403 .....	111
2.5.4.	10 U.S.C. § 4534 .....	121
2.5.5.	10 U.S.C. § 9534 .....	123
2.5.6.	15 U.S.C. §§ 1535 - 1536 .....	125
2.5.7.	31 U.S.C. § 6306 .....	127
2.5.8.	41 U.S.C. § 15 .....	129
2.5.9.	41 U.S.C. § 20 .....	135
2.5.10.	41 U.S.C. § 417 .....	137
<b>2.6.</b>	<b>Claims and Disputes.....</b>	<b>141</b>
2.6.0.	Introduction .....	141
2.6.1.	5 U.S.C. §§ 581 - 593 .....	145
2.6.2.	10 U.S.C. § 2405 .....	151
2.6.3.	10 U.S.C. § 2410 .....	159
2.6.4.	28 U.S.C. § 1346 .....	165
2.6.5.	31 U.S.C. § 1304 .....	171
2.6.6.	31 U.S.C. § 3717 .....	173
2.6.7.	41 U.S.C. §§ 601 - 613 .....	177
<b>2.7.</b>	<b>Extraordinary Contractual Relief.....</b>	<b>191</b>
2.7.0.	Introduction .....	191
2.7.1.	50 U.S.C. §§ 1431-1435 (Pub. L. No. 85-804).....	193

## **2. CONTRACT ADMINISTRATION**

### **2.0. Introduction**

This Chapter sets forth the Panel's recommendations concerning laws relating to contract administration. These laws apply primarily to matters arising after award of a DOD contract, although in some cases there is preaward application such as the use of cost principles in pricing contracts and determining the need for and the scope of a warranty provision. Similarly, other laws such as the Truth in Negotiations Act which have substantial post award application were not considered as part of the Panel's construct of contract administration. The Panel divided the laws into the following seven categories:

- Contract Payment
- Cost Principles
- Contract Audit and Access to Records
- Cost Accounting Standards
- Administration of Contract Provisions Relating to Price, Delivery and Product Quality
- Claims and Disputes
- Extraordinary Contractual Relief

The Panel's statutory mandate to streamline the acquisition process and eliminate laws that are unnecessary for the establishment and administration of the buyer and seller relationship has particular application to laws relating to contract administration. Acquisition laws should focus on the contract formation process at which point national policies favoring competition, protection and support for small businesses, and domestic content laws are implemented. Lacking statutory guidance, decisions by procurement officials would not necessarily reflect the national policy decisions articulated in the laws passed by Congress and approved by the President.

After the contract is awarded, however, the normal buyer and seller relationships and dynamics should apply. At this point, the focus is on compliance by both parties to previously agreed upon terms. The buyer wants a conforming item delivered on time and the seller wants timely payment and the opportunity to establish expertise and credibility for subsequent procurements of the same or similar items. There should be little difference from the forces that affect buyers and sellers in the private sector. Only in those limited areas where this normal, mutually understood relationship fails to protect the pre-established rights and obligations of the parties should extraordinary measures be taken. Even here, most matters of concern could be addressed through regulation.

The Panel was keenly aware that the contract administration process involves millions of discrete actions each year such as acceptance of items, payment, cost determinations, assertion of warranty actions or contractor claims among many others. Given the large number and variety of actions, drafting laws is a venture that should clearly be demonstrated as being worth the cost imposed on buyers and sellers. Any attempt should not in turn create worse problems for the much larger number of contractors in the universe which has been identified for reform by new legislation.

The contract administration process should focus on the most efficient manner to ensure contract compliance. The cost of administration to the Government should be commensurate with the results of the effort expended, and the cost to the contractor should be the minimum amount necessary to demonstrate compliance with contract terms and conditions. The Panel had as one of its guiding principles to facilitate the entry and retention of small businesses and companies selling commercial items in the DOD market. To the extent that costs of verifying contract compliance markedly increase the costs of commercial items or items that small businesses can readily supply, this key objective will not be met.

Finally, the Panel felt that, particularly in the area of contract administration, the laws should be easily located, understood and susceptible to compliance. The tens of thousands of companies ranging from the largest multidivisional companies to the "Mom and Pop" operations should not have to seek extensive advice or counsel or assistance from their elected representatives to locate and understand the laws that relate to contract compliance with their customer - the Government.

### **2.0.1. The Contract Administration Process**

The contract administration process involves those activities necessary to ensure that the parties fulfill their respective obligations under the contract. The process runs from the day the contract is awarded through contract close-out. It includes monitoring the contractor's performance at a level deemed appropriate to ensure the quality of the services or product, adjusting the specifications and pricing of the contract as necessary to reflect changes in assumptions about the work to be done, formally accepting the services or product to allow for contract payment and resolving disputes.

The level of contract administration activity can vary widely depending on the nature, object, and duration of the contract. A competitively awarded firm, fixed price contract for 30 day delivery of a commercial, off-the-shelf item will usually require no more than destination inspection and acceptance and payment. In contrast, a large cost reimbursement contract for engineering, developing and producing technologically complex systems over a period of years may require placing full-time contract management personnel in a contractor's plant to identify and solve problems.

FAR Part 42 prescribes general policies and procedures for assigning and performing contract administration functions and related audit services. FAR 42.3 breaks contract administration functions into sixty-seven specific activities. DFARS 242.203 assigns

administration functions for most Defense contracts to the Defense Contract Management Command (DCMC), a component of the Defense Logistics Agency (DLA). DCMC and two Defense agencies, the Defense Contract Audit Agency (DCAA) and the Defense Finance and Accounting Service (DFAS), perform almost all post award functions in DOD.

The establishment and operation of these agencies have not been without difficulties both for DOD contractors and the DOD buying activities. However, these agencies were established with the stated purposes of providing one face to industry in their functional areas, greater uniformity of application of the contract administration laws and regulations, and better service to both buyers and sellers by economies of scale, automation initiatives, and use of the best management practices. Many initiatives are underway to achieve these goals although much remains to be done. The Panel's recommendations take into account these organizational structures and initiatives designed to facilitate a more efficient acquisition process. A brief description of the agencies is set forth below.

### **Defense Contract Management Command**

Prior to 1990, contract administration was performed by the individual military services and DLA. The services managed contracts for major weapons systems. DLA managed contracts for weapons systems, consumable items and spare parts. In February 1990, DCMC was formed and in June 1990 the majority of DOD contract administration functions were consolidated under DCMC. DCMC was one of the first major initiatives to result from the Defense Management Review (DMR), DOD's blueprint for streamlining and improving its operations.

The DMR noted that the consolidation would streamline contract administration services, save overhead and personnel costs and present one unified face to industry on contract administration policies and regulations. Currently, DCMC with 19,000 personnel worldwide is responsible for contract administration involving 25,000 contractors and 413,000 contracts valued at \$740 billion.

DCMC has adopted a number of initiatives to facilitate the effective performance of its mission. One initiative that allows DCMC to allocate resources effectively and efficiently in the performance of its mission is called Process-Oriented Contract Administration Services (PROCAS). Under PROCAS, Government and contractor representatives work together to identify key contractor processes for improvement. The goals of PROCAS are to prevent problems before they occur, continuously improve a contractor's processes and products, and monitor contract performance to the extent necessary.

### **Defense Contract Audit Agency**

The Defense Contract Audit Agency, established in 1965, is a Defense agency under the direction, authority, and control of the DOD Comptroller. DCAA's mission is to perform all contract audits for DOD and provide accounting and financial advisory services for the negotiation, administration, and settlement of contracts and subcontracts. The charter also authorizes providing contract audit services to other Federal agencies on a reimbursable basis.

DCAA conducts independent audits in accordance with generally accepted Government auditing standards issued by the Comptroller General of the United States.

To assure contract compliance and prevention of fraud, waste, and abuse without greatly increasing audit oversight, there is coordination and communication among all audit entities -- Federal auditors, company internal auditors, and outside CPA firms. DCAA's goal is to work with contractors to improve their internal control systems to document that they comply with Federal procurement regulations and to ensure that those contractors who are successful receive less Government oversight.

DCAA has made progress reaching this goal through its support and implementation of the DOD Contractor Risk Assessment Guide (CRAG) Program. CRAG is designed to encourage DOD contractors to develop more effective internal control systems and to improve the effectiveness and efficiency of DOD oversight. Contractors who can demonstrate the implementation of internal control systems that meet CRAG control objectives receive less direct Government oversight. Under CRAG, the scope of DCAA audit oversight can be reduced by assessing the effectiveness of internal controls on contractor accounting and audit systems, thereby enabling DCAA to concentrate its resources on known problem areas.

#### **Defense Finance and Accounting Service**

The Defense Finance and Accounting Service (DFAS) was established as a separate DOD agency in January 1991 as the result of a Defense Management Review (DMR) initiative. DFAS is responsible for the finance and accounting functions of all DOD components. During the next several years, DFAS plans to consolidate operations; standardize policy, systems, and operations; expand innovative use of technology; increase civilian and military work force productivity; and eliminate unnecessary policies and procedures.

Within five years, DOD component finance and accounting functions, except some direct customer support and data input functions, will be consolidated into several DFAS Centers of Excellence. Organizational structures and operating procedures will be standardized by function when the same function exists at more than one DFAS Center. DFAS projects that these initiatives, among others, will reduce its operating costs by half.

Finance and accounting policies will be implemented consistently throughout DOD. Standard DOD-wide policy and procedural guidance suitable for use at all levels will be developed and maintained by DFAS management. There will be a single, standard contract payment system, which will significantly improve efficiency and expedite payments to contractors.

As with DCMC and DCAA, DFAS is committed to streamlining and reducing the costs of its operations. The initiatives of these three Defense agencies are consistent with the Panel's goal of making the acquisition process more efficient and cost effective.



## **2.0.2. Summary of Panel Recommendations**

One hundred and seven laws were identified as falling within the category of contract administration. Nineteen were eliminated from further consideration as "not acquisition related" in the initial screening. The Panel's recommendations on the remaining 88 are:

- Repeal 14
- Amend 12
- Retain 43
- Delete 1
- No action 18

The Panel's recommendations on the subelements of contract administration laws are as follows:

### **2.0.2.1. Contract Payment**

The fifteen laws relating to payment were among the most duplicative, dispersed, and difficult to understand of any of the contract administration laws. The primary recommendations are to consolidate a number of these laws into a single statute, renamed "Contract financing," and to add statutory guidance on making such payments with special attention to the needs of small businesses. In addition to recommending repeal of several outmoded statutes, the Panel recommends amending the Prompt Payment Act to change the procedures for computing discounts. As discussed in more detail later in this report, recent statutory changes to this act have slowed rather than expedited payment to contractors.

### **2.0.2.2. Cost Principles**

Three laws were categorized as cost principles although these included the Vinson-Trammell Act, which is actually a limitation on profits. However, the Panel objectives were satisfied by including this law with the laws more generally accepted as relating to cost principles. Section 2324 of Title 10 received the most attention from those who provided comments to the Panel during its deliberations. This included extensive input from both industry and Government sources and resulted in extended discussion during Panel meetings. The keen interest in this law was exemplified by the action of the Congress in amending it in the National Defense Authorization Act for Fiscal Year 1993. The amendments to the so called "penalty provisions" were similar to those which the Panel had been considering and should alleviate most of the concerns expressed by industry about the law. In addition, the Panel recommends that the detailed coverage on individual cost elements be repealed and left to the regulatory process. This will allow flexibility in future application while taking into account the Congressional interest in this area. Consistent with the Panel's objective of placing policy guidance and basic concepts in law while leaving implementation to regulations, the Panel also recommends that 10 U.S.C. § 2324 be amended to include guidance on total costs, on what constitutes a cost, and cost allowability.

### **2.0.2.3. Contract Audit and Access to Records**

This category of contract administration laws also generated extensive comments from both industry and Government commentators. Of the twenty-one laws identified, 10 U.S.C. § 2313 received the most scrutiny and became the centerpiece of the Panel's recommendations. The Panel recommends that a consolidated audit and access to records statute be enacted by the Congress, eliminating duplication or outmoded elements, while adding exemptions and new categories of contracts to be audited. These exemptions and categories of contracts had been set forth in regulations for many years without a clear trail back to the statute. Consistent with its objective of facilitating the purchase of commercial items, the Panel recommends that 10 U.S.C. § 2313 be listed as one of the statutes inapplicable to procurement of commercial items.

### **2.0.2.4. Cost Accounting Standards**

The Panel's consideration of cost accounting standards focused on the impact of these standards on the purchase of commercial items. The Panel was informed of an increasingly prevalent practice of DOD suppliers maintaining separate production facilities for commercial and DOD work due to the additional costs occasioned by DOD laws and regulations such as the cost accounting standards. Many suggestions for changes to the standards or their application to contractors or classes of contractors were made to the Panel. The Panel felt that imposition of these standards could add significantly to the cost of doing business for a basically commercial contractor and that a number of the suggestions for changes to the standards or their application had merit. However, after reviewing the enabling statute for the Cost Accounting Standards Board, the Panel decided that necessary improvements or reforms could be carried out by the Cost Accounting Standards Board using its existing authority. Thus, the Panel makes no recommendation for legislative action, but recommends that the Cost Accounting Standards Board take early action to consider the issues brought to the Panel's attention. Of particular importance to a strong industrial base and expansion of competition would be regulatory changes to facilitate the purchase of commercial items.

### **2.0.2.5. Administration of Contract Provisions Relating to Price, Delivery, and Product Quality**

Although not falling into easily recognizable categories such as audit and access to records or cost accounting standards, there are eleven laws relating to contract administration issues such as product quality, place of delivery, and assignment of contracts. Of these laws, 10 U.S.C. § 2403 covering warranties on major weapons systems and 41 U.S.C. § 15 covering assignment of contracts were the subjects of most of the comments and recommendations to the Panel. After reviewing the results of several studies addressing the cost effectiveness of warranties on major weapons and hearing both industry and Government sources question the utility of a mandatory warranty for major weapons systems, the Panel recommends the repeal of 10 U.S.C. § 2403. Alternatively, if the Congress continues to mandate the use of such warranties, recommendations are made for changes to the current law to meet some of the concerns expressed to the Panel. With respect to 41 U.S.C. § 15, the Panel recommends retention of this law which has served its

purpose well, but also recommends that its application to contracts not be dependent upon a state of war or national emergency.

#### **2.0.2.6. Claims and Disputes**

The primary statute governing contract claims and disputes is the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. The Panel gave extensive consideration to the CDA and other statutes that taken together, comprise the claims and disputes process. Under the CDA, there is overlapping jurisdiction between the United States Claims Court<sup>1</sup> and the agency boards of contract appeals, and any thorough consideration of claims and disputes must take into account whether such duplication is warranted. Congress had choices to make in determining the jurisdiction of the dispute resolution forums and could have chosen, for example, to grant judicial review only after exhaustion of administrative remedies. Alternatively, if the Claims Court is to have original jurisdiction, a duplicative, heavily proceduralized administrative forum is not, strictly speaking, necessary. The choices have already been made, however, and Congress established what has proven to be a workable system.

After completing its top to bottom review of claims and disputes, the Panel concluded that while major changes are not necessary, the claims and disputes process does need fine tuning in some areas.

Because some United States District Courts have persistently but erroneously asserted jurisdiction over contract claims under the Little Tucker Act, 28 U.S.C. § 1346, the Panel recommends a clarifying amendment to this statute. Other Panel recommendations would achieve the following: a uniform appeal period of ninety days both at the Claims Court and the agency boards of contract appeals; a simplified, uniform certification requirement for all contract claims; a \$100,000 threshold rather than the current \$50,000 threshold for claims certification; a \$25,000 threshold rather than the current \$10,000 for accelerated appeals at the boards of contract appeals; and a six year statute of limitations for the filing of contract claims.

Statutory amendments in section 907 of the Federal Courts Administration Act of 1992 and in the National Defense Authorization Act for Fiscal Year 1993 have gone a long way to correcting problems with claims certification and also with shipbuilding claims. Few additional adjustments are needed in these areas that have been problematic for the Government contracting community in the past.

#### **2.0.2.7. Extraordinary Contractual Relief**

The authority, contained in 50 U.S.C. §§ 1431-1435 dates back in one form or another to extraordinary authority granted by the Congress in World War II. Departments and agencies, acting under authority delegated by the President, are authorized to award or amend contracts, make advance payments without regard to other laws, or indemnify against unusually hazardous

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<sup>1</sup>During the writing of this report, Congress changed the name of the Claims Court to the Court of Federal Claims. See Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) & (b).

or nuclear risks. More detailed guidance is contained in an executive order and implementing regulations. Comments to the Panel and review of the actions taken pursuant to the law demonstrate its continued need and that the law is being carried out prudently. However, as with 41 U.S.C. § 15, the Panel recommends that the law be available for use even when the United States is not at war or in a state of national emergency. There are contingency military operations or relief operations following natural disasters that make a compelling case for the use of this extraordinary authority at any time.

## **2.1. Contract Payment**

### **2.1.0. Introduction**

The Panel identified 15 statutes in the area of contract administration relating to contract payment. Further examination revealed that, while 10 U.S.C. § 2307, "Advance payments," was the primary payment statute in Title 10 addressing advance, progress and partial payments, there were several other similar statutes scattered throughout the U.S. Code. These statutes, 10 U.S.C. § 7312, "Repair or maintenance of naval vessels: progress payments under certain contracts," 10 U.S.C. § 7364, "Advancement of funds for salvage operations," and 10 U.S.C. § 7521, "Progress payments for work done; lien based on payment," all relate to allowances for progress payments and liens in certain types of naval contracts, including vessel repair and maintenance, and salvage operations. Keeping in mind its statutory mandate to streamline the defense acquisition process, the Panel recommends that the other payment statutes be repealed as independent sections and that their substance be merged into 10 U.S.C. § 2307 as new subsections. This move would retain the authority of these various statutes in a centralized location in the Code.

The Panel also recommends renaming 10 U.S.C. § 2307 from "Advance payments" to "Contract financing." The new title more accurately reflects the purpose and context of the proposed consolidated statute and is the same title as the major implementing payment regulation. Finally, an introductory provision was added to 10 U.S.C. § 2307 that clearly states DOD's policy of making payments in a timely manner to facilitate contract performance while protecting the security interests of the Government. The Panel believes that both the Government and the private sector will benefit from the development of this centralized, consolidated statute.

While examining the payment statutes, the Panel noted that 31 U.S.C. § 3324, "Advances," which is applicable to all Government agencies, contained authority duplicative of that contained in 10 U.S.C. § 2307. The Panel considered recommending repeal of this statute in favor of the proposed consolidated statute at 10 U.S.C. § 2307, but was concerned that eliminating 31 U.S.C. § 3324 would cause unnecessary questions regarding the applicability of this authority to all Government agencies. The Panel, therefore, recommends that this statute be retained.

The Panel received several comments from Government and industry representatives on the current use and effectiveness of the Prompt Payment Act, 31 U.S.C. §§ 3901- 3907. The consensus among the commenters and the Panel was that the Act is a useful and necessary tool in the business relationship between the Government and the contracting community. However, one significant problem was identified. 31 U.S.C. § 3904 contains a provision allowing a discount if a payment is made within a certain time period. The current statute provides that this time period will begin from the date of the invoice. Various Government representatives noted that the additional time needed for mailing and routing of these invoices made it very difficult to pay these invoices in time to benefit from the discount. If the discount cannot be taken, the paying office waits until near the end of the thirty day period. This is done because of sound cash management principles. To solve this problem, the Panel recommends that 31 U.S.C. § 3904 be amended to allow the discount period to begin at the later of the receipt of the invoice or receipt of the goods

**and services. This proposal will give the Government more time to make payments and increase the likelihood that the payments will be made within the discount time limit. The Government will benefit from the discount and industry will benefit by receiving its payments more quickly.**

## 2.1.1. 10 U.S.C. § 2307

### Advance payments

#### 2.1.1.1. Summary of the Law

This section allows an agency to make advance, partial, or progress payments under contracts for property or services, not to exceed the unpaid contract price, provided adequate security is given to the Government and such payments are in the public interest. It also specifies a procedure to be followed if a remedy coordination official determines that a contractor has requested advance, partial, or progress payments based on fraud.

#### 2.1.1.2. Background of the Law

Prior to the enactment of 10 U.S.C. § 2307, the advance of public money was prohibited by statute unless allowed by the appropriation.<sup>1</sup> Express statutory authority permitting the use of advance payments was necessary to overcome this prohibition.<sup>2</sup> This section was part of the Armed Services Procurement Act of 1947.<sup>3</sup> Legislative history shows that Congress passed this section in response to the difficulties some defense contractors experienced in trying to obtain necessary financial support from commercial lending sources during World War II.<sup>4</sup> Congress intended that defense contractors producing products and services necessary to DOD would have the critical financial backing necessary to ensure their availability to the armed services in the event of a national emergency.<sup>5</sup>

Several amendments were later made to this section. A 1958 amendment permitted the head of any agency to delegate his powers to other agency officers.<sup>6</sup> In 1978, Congress added a provision requiring written notification to the Senate and House Armed Services Committees of payments exceeding \$25 million, with an opportunity for either Committee to disapprove such payment.<sup>7</sup> The 1985 amendment permitted progress payments only if the work done satisfied the quality requirements in the contract, and then only for 80% of the work done on the project so long as the contractual terms, specifications, and price are not definite.<sup>8</sup> This section was later repealed, but its substance was included in subsection (d) of the statute.<sup>9</sup> Finally, in 1990,

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<sup>1</sup>R.S. § 3648 (1875), as amended by 31 U.S.C. § 529 (1952).

<sup>2</sup>Office of General Counsel of the Department of the Navy, *Navy Contract Law*, 2d ed. (1959).

<sup>3</sup>Armed Services Procurement Act of 1947, ch. 65, § 5, 62 Stat. 20, 23.

<sup>4</sup>S. REP. NO. 571, 80th Cong., 2d Sess. 18-19 (1947), reprinted in 1948 U.S.C.C.A.N. 1048, 1066-67.

<sup>5</sup>*Id.* at 18.

<sup>6</sup>Act of August 28, 1958, Pub. L. No. 85-800, § 9, 72 Stat. 966, 967.

<sup>7</sup>Department of Defense Appropriation Authorization Act of 1974, Pub. L. No. 93-155, § 807(c), 87 Stat. 605, 616 (1973).

<sup>8</sup>National Defense Authorization Act for Fiscal Year 1986, Pub. L. No. 99-145, § 916, 99 Stat. 583, 688-89 (1985).

<sup>9</sup>Codification of Military Laws, Pub. L. No. 100-370, § 1(f)(1)(A), 102 Stat. 840, 846 (1988).

Congress authorized the agency head to reduce or suspend further payments to contractors based on substantial evidence of fraud.<sup>10</sup>

In spite of numerous changes, the legislative history of this section shows almost universal support for the practice of advance, partial, and progress payments.<sup>11</sup> The only argument against this provision concerned the increased financial risk to the Government as a result of the increased financial support to contractors.<sup>12</sup> More recently, this section has been used with special peacetime contracts that demand payments prior to completion, such as contracts with nonprofit institutions or contracts with very long lead times.<sup>13</sup>

### **2.1.1.3. Law in Practice**

There are numerous provisions concerning payments throughout the Federal Acquisition Regulation (FAR) and the Defense Federal Acquisition Regulation Supplement (DFARS). Advance payments are specifically addressed in FAR Part 32 and 52.232-12 and 52.232-16.

The Office of the General Counsel of the Department of the Air Force noted that most acquisition statutes impose conditions, restrictions, or limitations on contracting officials. When statutes do grant authority, as this one does, it is usually given to overcome other statutory restrictions.<sup>14</sup> Since 10 U.S.C. § 2307 is one of the few statutes that gives DOD actual authority, the Air Force recommends its retention in some form.<sup>15</sup> Headquarters, Air Force Systems Command, supports the consolidation of the payment laws.<sup>16</sup> The Defense Systems Management College recommended that the title of this statute be changed to reflect the approach used in FAR Part 32 which differentiates between "financing" and "payment" methods. It also mentioned that FAR section 32.104 would provide an excellent basis for a policy section in this statute.<sup>17</sup>

### **2.1.1.4. Recommendations and Justification**

**Retain the current authority contained in this statute and merge the substance of three other payment statutes into this statute.**

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<sup>10</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 836(a), (b), § 1322(a)(4), 104 Stat. 1485, 1615-16, 1671 (1990).

<sup>11</sup>George Washington University Government Contracts Program, *The Armed Services Procurement Act of 1947: A Legislative Abstract* (1991).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Memorandum from John P. Janeczek, Assistant General Counsel (Procurement), Department of the Air Force to Abner Young, SAF/AQCP, Department of the Air Force (Mar. 3, 1992).

<sup>15</sup>*Id.*

<sup>16</sup>Memorandum from Brig. Gen. John M. Nauseef, Deputy Chief of Staff, Financial Management & Comptroller, Department of the Air Force (Mar. 6, 1992).

<sup>17</sup>Memorandum from LtCol Terry Raney, USAF, Department Chair, Contractor Finance Department, Defense Systems Management College to the Chairman of the DOD Advisory Panel on Streamlining and Codifying Acquisition Laws (Apr. 30, 1992).



This section should be renamed "Contract financing" and the substance of 10 U.S.C. §§ 7312, 7364, and 7521 should be incorporated into the renamed 10 U.S.C. § 2307. 10 U.S.C. § 2307 is currently named "Advance payments." The consolidation of these statutes will eliminate duplication, and the renaming of 10 U.S.C. § 2307 will more accurately reflect the purpose and context of the proposed consolidated statute.

The new "Contract financing" statute should be organized as follows:

- An introductory policy section that states that payments shall be made in a timely manner to facilitate contract performance while protecting the security interests of the Government.
- Several subsections covering advance payments, progress payments, and other special payment situations should be included.

10 U.S.C. § 2307 is the section on payment most used by DOD. 10 U.S.C. §§ 7312, 7364, and 7521 all relate to allowances for progress payments and liens in certain types of naval contracts, including vessel repair and maintenance, and salvage operations. These sections should be repealed as independent sections and merged into the proposed consolidated 10 U.S.C. § 2307 as subsections.

The Navy has expressed a concern about merging the substance of 10 U.S.C. § 7521 into the proposed consolidated payment statute.<sup>18</sup> This statute is specific to shipbuilding and has been cited in the Navy's standard liens and titles clause used in all shipbuilding contracts.<sup>19</sup> The Navy was concerned that this authority could be impacted if the section were merged into 10 U.S.C. § 2307.<sup>20</sup> After being assured by the Panel that no change would be made, the Navy agreed to the consolidation of 10 U.S.C. § 7521 and the Panel has included the Navy's proposed statutory language in 10 U.S.C. § 2307.<sup>21</sup>

#### **2.1.1.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law. Small businesses will also benefit from the retention of the Government's authority to make advance, partial, and progress payments.

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<sup>18</sup>Letter from Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Gary Quigley and Jack Harding (Aug. 5, 1992).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

## 2.1.1.6. Proposed Statute

### Section 2307. ~~Advance payments~~ Contract financing

(a) Payments, authorized under this section and made for financing purposes, should be made periodically and in a timely manner to facilitate contract performance while protecting the security interests of the Government. Government financing shall be provided only to the extent actually needed for prompt and efficient performance, considering the availability of private financing. The contractor's use of contract financing provided and the contractor's financial status shall be monitored. If the contractor is a small business concern, special attention shall be given to meeting the contractor's financial need.

(ab) The head of any agency may--

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid-solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(bg) Payments made under subsection (ab) may not exceed the unpaid contract price.

(ed) Advance payments made under subsection (ab) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any all other liens and is effective immediately upon the first advancement of funds without filing, notice or any other action on the part of the United States.

(dg)(1) The Secretary of Defense shall ensure that any payment for work in progress (including materials, labor, and other items) under a defense contract that provides for such payments is commensurate with the work already accomplished that meets standards of quality established under the contract. The contractor shall provide such information and evidence as the Secretary of Defense determines necessary to permit the Secretary to carry out the preceding sentence.

(2) The Secretary shall ensure that progress payments referred to in paragraph (1) are not made for more than 80 percent of the work accomplished under a defense contract so long as the Secretary has not made the contractual terms, specifications, and price definite.

(3) This subsection ~~does not apply~~ applies only to any contracts for an amount net in excess of the amount of equal to or greater than the small simplified purchase acquisition threshold.

(f) For contracts made by the Department of the Navy, the Secretary of the Navy--

(1) shall provide that the rate for progress payments on any contract awarded by the Secretary for repair, maintenance, or overhaul of a naval vessel shall be not less than--

(A) 95 percent, in the case of firms considered to be small businesses, and

(B) 90 percent, in the case of all other firms.

(2) may advance to private salvage companies such funds as he considers necessary to provide for the immediate financing of salvage operations, provided such advances are made on terms the Secretary considers adequate for the protection of the United States.

(3) shall provide that partial, progress or other payments made under contracts for construction or conversion of naval vessels shall be secured by a lien in favor of the United States upon work in progress and on property acquired for performance of the contract on account of all payments so made. This lien is paramount to all other liens.

(g) For all contracts or amendments or modifications of contracts for services and materials necessary to conduct research and to make or secure reports, tests, models, or apparatus made by the Secretary of Defense or the Secretaries of the military departments, the provisions of this section and subsections (a) and (b) of title 31 do not apply to any advance, progress or other payments made on said contracts.

(eh)(1) In any case in which the remedy coordination official of an agency finds that there is substantial evidence that the request of a contractor for advance, partial, or progress payment under a contract awarded by that agency is based on fraud, the remedy coordination official shall recommend that the head of the agency reduce or suspend further payments to such contractor.

(2) The head of an agency receiving a recommendation under paragraph (1) in the case of a contractor's request for payment under a contract shall determine whether there is substantial evidence that the request is based on fraud. Upon making such a determination, the agency head may reduce or suspend further payments to the contractor under such contract.

(3) The extent of any reduction or suspension of payments by the head of an agency under paragraph (2) on the basis of fraud shall be reasonably commensurate with the anticipated loss to the United States resulting from the fraud.

(4) A written justification for each decision of the head of an agency whether to reduce or suspend payments under paragraph (2) and for each recommendation received by such agency head in connection with such decision shall be prepared and be retained in the files of such agency.

(5) The head of an agency shall prescribe procedures to ensure that, before such agency head decides to reduce or suspend payments in the case of a contractor under paragraph

(2), the contractor is afforded notice of the proposed reduction or suspension and an opportunity to submit matters to the head of the agency in response to such proposed reduction or suspension.

(6) Not later than 180 days after the date on which the head of an agency reduces or suspends payments to a contractor under paragraph (2), the remedy coordination official of such agency shall--

(A) review the determination of fraud on which the reduction or suspension is based; and

(B) transmit a recommendation to the head of such agency whether the suspension or reduction should continue.

(7) The head of an agency shall prepare for each year a report containing the recommendations made by the remedy coordination official of that agency to reduce or suspend payments under paragraph (2), the actions taken on the recommendations and the reasons for such actions, and an assessment of the effects of such actions on the Federal Government. The Secretary of each military department shall transmit the annual report of such department to the Secretary of Defense. Each such report shall be available to any member of Congress upon request.

(8) This subsection applies to the agencies named in paragraphs (1), (2), (3), and (4) of section 2303(a) of this title.

(9) The head of an agency may not delegate responsibilities under this subsection to any person in a position below level IV of the Executive Schedule.

(10) In this subsection, the term "remedy coordination official", with respect to an agency, means the person or entity in that agency who coordinates within that agency the administration of criminal, civil, administrative, and contractual remedies resulting from investigations of fraud or corruption related to procurement activities.

## 2.1.2. 10 U.S.C. § 2355

### Contracts: vouchering procedures

#### 2.1.2.1. Summary of the Law

This section allows the Secretaries of the military departments, with the approval of the Secretary of Defense and the Comptroller General, to promulgate regulations on the extent of the itemization, substantiation, and certification required of fund vouchers for research and development contracts prior to payment, notwithstanding laws relating to the expenditure of, and accounting for, public funds.

#### 2.1.2.2. Background of the Law

This section was originally enacted in 1952<sup>1</sup> and later codified in Title 10 and Title 32. The legislative history of the original enactment shows that the military departments had experienced problems negotiating research and development contracts with universities, nonprofit organizations, and other civilian institutions because these entities were not equipped to handle the detailed vouchering and auditing procedures involved with Government contracts.<sup>2</sup> The Senate noted that the vouchering and auditing procedures had been relaxed during World War II for research and development contracts and that this practice had been highly successful.<sup>3</sup> At the time of its enactment, there were no dissenting opinions noted in the legislative history.

#### 2.1.2.3. Law in Practice

The Council of Defense and Space Industry Associations (CODSIA) noted that this law is outdated and has created inefficiencies and hardships because of cumbersome processing procedures. It recommended that this law be repealed in order to promote uniform vouchering procedures throughout all Government agencies. CODSIA also stated that this statute has placed an onerous administrative burden on the contractors to which it applies.<sup>4</sup> The Defense Systems Management College (DSMC) noted that to adopt simplified vouchering procedures for all contracts, substantial clarification would be needed because of the differing performance requirements of cost versus fixed price type contracts. Most research and development contracts are cost type, while the majority of production contracts are fixed price. DSMC recommends that a detailed discussion of the implications of the simplified vouchering system should be included in the legislation or implementing regulations.<sup>5</sup>

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<sup>1</sup> Act of July 16, 1952, ch. 882, § 6, 66 Stat. 725, 726.

<sup>2</sup> S. REP. NO. 936, 82nd Cong., 1st Sess. 4 (1952), *reprinted in* 1952 U.S.C.C.A.N. 2278, 2281.

<sup>3</sup> *Id.*

<sup>4</sup> Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>5</sup> Letter from LtCol. Terry Raney, USAF, Department Chair, Contractor Finance Department, Defense Systems Management College to Chairman of the DOD Advisory Panel on Streamlining and Codifying Acquisition Laws (Apr. 30, 1992).

#### **2.1.2.4. Recommendation and Justification**

##### **Repeal**

This statute gives the Secretaries of the military departments the authority to promulgate rules to simplify the vouchering procedures for only research and development contracts. In the interest of streamlining the acquisition process, the simplified vouchering procedures permitted in this statute should be applied to all Government contracts, not just to research and development. The Panel further recommends that these simplified procedures be promulgated in the regulations, not in the statute. There are numerous provisions in the Federal Acquisition Regulation (FAR) regarding vouchering procedures. The implementation in the regulations provides a greater degree of flexibility in application than do the provisions of the statute. The Panel recommends this statute be repealed, but that the concept of simplified vouchering procedures and the implications of this policy change be fully explained in subsequent regulations.

#### **2.1.2.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication of authority currently present in the procurement process by repealing statutes that have been successfully implemented in the applicable regulations. This recommendation will also facilitate Government access to all types of commercial technologies and skills, not merely those associated with research and development.

### 2.1.3. 10 U.S.C. § 7312

#### **Repair or maintenance of naval vessels: progress payments under certain contracts**

##### 2.1.3.1. Summary of the Law

This law requires the Secretary of the Navy to provide the rate of progress payments on naval ship contracts for repair, maintenance, or overhaul to be not less than 95% for small businesses and not less than 90% for all other businesses.

##### 2.1.3.2. Background of the Law

This law was originally passed in 1987<sup>1</sup> and provided that the progress payments made by the Navy on naval ship contracts would be 90% to small businesses and 85% to all other businesses.<sup>2</sup> It was amended in 1988 to add the words "shall be" before the existing words "not less than."<sup>3</sup> This provision was proposed by the House to establish that the specified rates were minimum rates. The Senate receded.<sup>4</sup> The last amendment to this statute, enacted in 1989,<sup>5</sup> increased the minimum rates in the law by 5% and extended "the applicability of the provision to nuclear-powered vessels and to ship work required to be performed in greater than one year."<sup>6</sup>

##### 2.1.3.3. Law in Practice

One comment was received on the impact this law has had in practice. The Council of Defense and Space Industry Associations (CODSIA) noted that this law is necessary for the integrity of the buyer/seller relationship, particularly in the current economic climate.<sup>7</sup> It mentioned that many of its members are experiencing financial difficulties, not because of the law itself, but because its implementation has thrust the costs of financing on individual contractors and subcontractors.<sup>8</sup> It recommended amending the statute to allow for 100% recoupment of financing costs within 30 days of accrual and progress billing.<sup>9</sup>

<sup>1</sup>National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 1102(a)(1), 101 Stat. 1019, 1145 (1987).

<sup>2</sup>H.R. CONF. REP. NO. 446, 100th Cong., 1st Sess. 674 (1987), *reprinted in* 1987 U.S.C.C.A.N. 1018, 1786.

<sup>3</sup>National Defense Authorization Act for Fiscal Year 1989, Pub. L. No. 100-456, § 1223, 102 Stat. 1918, 2054 (1988).

<sup>4</sup>H.R. CONF. REP. NO. 989, 100th Cong., 2d Sess. 459 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2503, 2587.

<sup>5</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1612, 103 Stat. 1352, 1601 (1989).

<sup>6</sup>H.R. CONF. REP. NO. 331, 101st Cong., 1st Sess. 669 (1989), *reprinted in* 1989 U.S.C.C.A.N. 838, 1126.

<sup>7</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

#### **2.1.3.4. Recommendations and Justification**

##### **Repeal and merge in 10 U.S.C. § 2307 as a subsection.**

This law should be repealed as an independent statute and the substantive portions of the law should be merged into the proposed consolidated version of 10 U.S.C. § 2307, "Contract financing," as recommended by the Panel in its review of 10 U.S.C. § 2307. The Panel has recommended that all statutes within Title 10 relating to contract payment and financing be consolidated within a single comprehensive statute. This single statute will centralize all pertinent requirements regarding Title 10 contract financing while eliminating duplication within the United States Code. The Panel agrees with CODSIA that 10 U.S.C. § 7312 is necessary to ensure the financial and ethical integrity of the acquisition process; however, the Panel does not concur that a provision requiring 100% contractor recoupment is necessary. The substance of 10 U.S.C. § 7312, as currently written, has been included in the proposed language of the consolidated 10 U.S.C. § 2307.

#### **2.1.3.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It eliminates the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law. Small businesses will also benefit from the retention of the Government's authority to make advance, partial, and progress payments.



## 2.1.4. 10 U.S.C. § 7364

### Advancement of funds for salvage operations

#### 2.1.4.1. Summary of the Law

This law authorizes the Secretary of the Navy to advance funds to provide for the immediate financing of salvage operations. These advances may be made on any terms the Secretary deems adequate for the protection of the United States.

#### 2.1.4.2. Background of the Law

This law was passed in 1948.<sup>1</sup> The legislative history reveals that, at the beginning of World War II, there was only one naval salvage company in operation capable of performing offshore salvage operations, and none had operated on the west coast between 1937 and 1941.<sup>2</sup> When the United States entered World War II, the Navy commandeered the one existing salvage company and contracted with it to cover the east coast, west coast, and the Caribbean.<sup>3</sup> The Navy also developed a large internal salvage operation during this time that operated primarily in war zones.<sup>4</sup>

Providing advancements for salvagers was an effort by the Congress to encourage the growth of the salvage market.<sup>5</sup> It wished to relieve the Navy of some of its salvage responsibility during peacetime while enabling new salvage companies to emerge.<sup>6</sup> Congress also realized that these salvage companies might not have the liquid capital necessary to perform large offshore salvage operations.<sup>7</sup>

#### 2.1.4.3. Law in Practice

The Council of Defense and Space Industry Associations (CODSIA) stated that, although this law is not outdated and does not contain ambiguous terms, it is duplicative of 10 U.S.C. § 2307 and other advance payments statutes.<sup>8</sup> The Navy Comptroller (NAVCOMPT) noted that this statute contains "fairly favorable authority which doesn't require determinations and

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<sup>1</sup> Act of May 4, 1948, ch. 256, § 1(c), 62 Stat. 209.

<sup>2</sup> S. REP. NO 1158, 80th Cong., 2d Sess. 1-2 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1510, 1511.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

findings."<sup>9</sup> It expressed concern that merging this statute into a consolidated statute could cause the Navy to lose necessary flexibility.<sup>10</sup>

#### **2.1.4.4. Recommendations and Justification**

##### **Repeal and merge in 10 U.S.C. § 2307 as a subsection.**

It is the Panel's recommendation that all statutes within Title 10 relating to contract payment and financing should be consolidated within a single comprehensive statute. The Panel recommends that 10 U.S.C. § 7364 be repealed as an independent statute and the substantive portions of the law be merged into the proposed consolidated version of 10 U.S.C. § 2307, "Contract financing," as a subsection. Notwithstanding NAVCOMPT concerns, the Panel believes that by incorporating the exact wording of 10 U.S.C. § 7364 into the new "Contract financing" statute as a subsection, the Navy will retain the authority and flexibility it has now. This single comprehensive statute will centralize all pertinent requirements regarding Title 10 contract payment and financing while eliminating duplication within the U.S. Code.

#### **2.1.4.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It eliminates the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law. Small businesses will also benefit from the retention of the Government's authority to make advance, partial, and progress payments.

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<sup>9</sup>Informal comment from Ted Belazis, Deputy Counsel, Office of the Navy Comptroller, to Harvey Wilcox, Deputy General Counsel (Logistics), Department of the Navy (Mar. 11, 1992).

<sup>10</sup>*Id.*

## 2.1.5. 10 U.S.C. § 7521

### Progress payment for work done; lien based on payment

#### 2.1.5.1. Summary of the Law

This law authorizes the Secretary of the Navy to make partial payments during the progress of work on a naval contract, provided the payments do not exceed the value of the work done and the contract provides for such a payment. Each contract that provides for partial payments will also contain a provision granting a paramount lien to the Government on the contracted item when partial payments are made.

#### 2.1.5.2. Background of the Law

This law was passed in 1911<sup>1</sup> and codified in 1956. As originally proposed, the law would have allowed partial payments of only 90% of the value of the work already performed.<sup>2</sup> The Secretary of the Navy objected to this draft provision, claiming that it would violate existing provisions in naval contracts.<sup>3</sup> The Secretary also said that a 90% limitation on partial payments would put the Government in a position in the future of having to pay, as part of the contract price, the cost of financing the whole contract.<sup>4</sup> He observed that very few contractors have the capital to fund a multimillion dollar project without partial payments along the way.<sup>5</sup> The Secretary felt that the safeguards and precautions already in place to protect the public were extensive and further limitations on the Navy's ability to make partial payments were not needed.<sup>6</sup> The statute incorporates the Navy's recommendations. There have been no further amendments to this law.

#### 2.1.5.3. Law in Practice

The Council of Defense and Space Industry Associations (CODSIA) stated that the ambiguous terms in this statute have led to interpretation problems.<sup>7</sup> Specifically, there is an "ever increasing perception that more detailed audits are necessary, notwithstanding the fact that most of the contracts have been fixed price contracts where the contractor is assuming risks."<sup>8</sup> Even with these problems, CODSIA recommended that this law be retained, but agreed the authority could be adequately included within a subsection of the proposed consolidated statute.<sup>9</sup>

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<sup>1</sup>Act of August 22, 1911, ch. 42, 37 Stat. 32, 33.

<sup>2</sup>S. REP. NO. 28, 62nd Cong., 1st Sess. 1 (1911).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 2.

<sup>6</sup>*Id.* at 2.

<sup>7</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

However, the accompanying legislation should explain the significant difference between progress payments based on cost and shipbuilding progress payments based on percentage of completion.<sup>10</sup> The Defense Contract Management District Mid-Atlantic (DCMDM) of the Defense Logistics Agency commented that, while this statute provides that the Government will have a paramount lien over inventory in exchange for partial payments, U.S. Bankruptcy Courts and state courts have failed to consistently recognize the Government's lien as superior.<sup>11</sup> DCMDM suggested that the language granting the Government a superior lien on inventory financed by advance or progress payments could be reinforced.<sup>12</sup> DCMDM also noted that the requirement of a paramount lien should not be limited to naval contracts but should apply to all Government contracts in which progress payments are permitted.<sup>13</sup>

The Department of the Navy submitted significant comments on the current operation of this law. The Office of the General Counsel of the Department of the Navy stated that this statute is used by the Navy almost daily in shipbuilding contracts.<sup>14</sup> The Naval Sea Systems Command noted that "shipbuilding contracts are different from other types of contracts in that they generally involve both extended periods of performance, some up to 10 years, and significant payments by the Government prior to the delivery of the vessels."<sup>15</sup> Because of this, the Navy has found it helpful to cite a specific statute in court for the Government's claimed interest in parts or materials.<sup>16</sup> In fact, the Office of the General Counsel stated that this statute has been the authority cited in the Navy's standard "Liens and Titles" clause and has been incorporated in more than \$14 billion in open contracts.<sup>17</sup> In the 80 years the Navy has been using this authority, an understanding has developed between the Navy, its shipbuilders, and suppliers that "a Government lien attaches when progress payments are made, and that title passes when delivery is made to the shipyard."<sup>18</sup> While the Navy would prefer to keep this statute, it did agree that the essence of the statute could be incorporated into the Panel's proposed consolidated payment statute, 10 U.S.C. § 2307, "Contract financing."<sup>19</sup>

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<sup>10</sup>*Id.*

<sup>11</sup>Letter from Michael J. Guerrero, Director of Contract Management, Defense Contract Management District Mid-Atlantic (DCMDM-A) to Maria Ventresca, Defense Contract Management District Mid-Atlantic (DCMDM-G) (Feb. 28, 1992).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Letter from Harvey J. Wilcox, Deputy General Counsel (Logistics), Office of the General Counsel of the Department of the Navy, to Gary Quigley and Jack Harding (Aug. 5, 1992).

<sup>15</sup>Memorandum from Eugene P. Angrist, Counsel, Naval Sea Systems Command, Department of the Navy (Aug. 4, 1992).

<sup>16</sup>Letter from Harvey J. Wilcox, Deputy General Counsel (Logistics), Office of the General Counsel of the Department of the Navy, to Gary Quigley and Jack Harding (Aug. 5, 1992).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

#### **2.1.5.4. Recommendations and Justification**

##### **Repeal and merge in 10 U.S.C. § 2307 as a subsection.**

It is the Panel's recommendation that all statutes within Title 10 relating to contract payment and financing should be consolidated within a single comprehensive statute. The Panel recommends that 10 U.S.C. § 7521 be repealed as an independent statute and that substantive portions of the law be merged into the revised version of 10 U.S.C. § 2307, "Contract financing," as a subsection. While the Panel believes that CODSIA and DCMDM have posed valid points, it is of the opinion that these concerns would be better addressed in the regulations. This single comprehensive statute will centralize all pertinent requirements regarding Title 10 contract payment and financing while eliminating duplication within the U.S. Code.

#### **2.1.5.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law.

## **2.1.6. 31 U.S.C. § 1341**

### **Limitations on expending and obligating amounts**

#### **2.1.6.1. Summary of the Law**

This statute prohibits an officer or employee of the U.S. Government or the District of Columbia from making or authorizing an expenditure or obligation in excess of that available in an appropriation or fund or involving either Government in a contract or obligation for the payment of money before the obligation is made. It also prohibits the authorization of an expenditure or obligation of funds or the involvement of either Government in a contract or obligation for the payment of money required to be sequestered under the Balanced Budget and Emergency Deficit Control Act of 1985. This subsection does not apply to a corporation getting amounts to make loans without legal liability of the U.S. Government. An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

#### **2.1.6.2. Background of the Law**

This statute was originally enacted in 1905.<sup>1</sup> Congress has made only minor amendments to it since that time and has not discussed these amendments in any of its reports. The statute was codified in 1982.<sup>2</sup>

#### **2.1.6.3. Law in Practice**

No comments were received on this statute. It is referenced in FAR 32.702.

#### **2.1.6.4. Recommendation and Justification**

##### **No Action**

This law is not unique to contracting or to DOD acquisition. It does not present a core acquisition issue and only has an indirect relationship to contracting.

#### **2.1.6.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

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<sup>1</sup>Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257.

<sup>2</sup>Act of September 13, 1982, Pub. L. No. 97-258, 96 Stat. 923.

## **2.1.7. 31 U.S.C. § 3324**

### **Advances**

#### **2.1.7.1. Summary of the Law**

This statute provides that a contract payment for services or delivery of items to the U.S. Government is limited to the value of the items or services already delivered. The statute allows advances only if authorized by a specific appropriation, or authorized by the President to an individual serving in the armed forces at a distant station, or a disbursing official after determining that the advance is necessary to carry out the duties of the official or to satisfy the Government's obligation. The law also allows the head of an agency to advance funds from appropriations for the payment of charges for the purchase of publications, and to the Secretary of the Army for charges for messages, tolls of commercial carriers, leasing, installing, and maintaining facilities for sending messages.

#### **2.1.7.2. Background of the Law**

This law was passed in 1894 as a limitation on the ability of heads of agencies to make advance payments on contracts.<sup>1</sup> In 1930, the statute was amended to permit advance payment for the purchase of subscriptions of newspapers, magazines, and other periodicals for official use.<sup>2</sup> Amendments in the years to follow all involved the ability of the agencies to make advance payments for publications. In 1961, this grant was extended to include the purchase of any publications for technical use including technical and professional books, treatises, and pamphlets.<sup>3</sup> The final substantive amendment to this law, enacted in 1974, permitted the agencies to make advance payments to purchase publications in alternative media such as microfilm, microfiche, and audio tape.<sup>4</sup> The intent of Congress in all of these amendments was the same: to allow the agencies to remain as current as possible by allowing them to purchase up-to-date publications. It also wanted the agencies to take advantage of the substantial savings associated with advance payments for these publications.

#### **2.1.7.3. Law in Practice**

Comments were received from the Navy and the Council of Defense and Space Industry Associations (CODSIA) on this law. CODSIA stated that this statute overlaps the authority in 10 U.S.C. § 2307, "Advance payments," and should be consolidated into a single advance payment

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<sup>1</sup>Act of July 31, 1894, ch. 174, § 11, 28 Stat. 162, 209.

<sup>2</sup>Act of June 12, 1930, ch. 470, 46 Stat. 580. *See also* S. REP. NO. 873, 71st Cong., 2d Sess. 1-2 (1930).

<sup>3</sup>Act of July 20, 1961, Pub. L. No. 87-91, § 1, 75 Stat. 211. *See also* H.R. REP. NO. 560, 87th Cong., 1st Sess. 1-2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2117, 2118.

<sup>4</sup>Act of Dec. 22, 1974, Pub. L. No. 93-534, 88 Stat. 1731.

statute.<sup>5</sup> The Navy stated that, although this law is duplicative of 10 U.S.C. § 2307, it is used by all Government agencies and should be retained.<sup>6</sup>

#### **2.1.7.4. Recommendation and Justification**

##### **Retain**

Notwithstanding the Panel's recommendation that all statutes within Title 10 relating to contract payment and financing should be consolidated within a single comprehensive "Contract financing" statute, the Panel recommends that 31 U.S.C. § 3324 be retained in its current form. The Navy and Air Force expressed their concern that merging this law into the proposed consolidated payment statute in 10 U.S.C. § 2307 might be viewed as limiting its authority to DOD, although this authority would be available to the non-defense agencies even if it were only in Title 10. The Panel is concerned, however, that eliminating this statute in favor of the consolidated payment statute in Title 10 would cause unnecessary questions regarding the applicability of this authority to all Government agencies.

#### **2.1.7.5. Relationship to Objectives**

This recommendation promotes the purchase of commercial products at commercial market prices and encourages the exercise of sound judgment on the part of acquisition personnel.

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<sup>5</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>6</sup>Informal comments from Ted Belazis, Deputy Counsel, Office of the Navy Comptroller, and Steve Berman, Naval Sea Systems Command, Department of the Navy, to Harvey Wilcox, Deputy General Counsel (Logistics), Office of the General Counsel of the Department of the Navy (Mar. 11, 1992).



## **2.1.8. 31 U.S.C. §§ 3901 - 3907**

### **Prompt Payment Act<sup>1</sup>**

#### **2.1.8.1. Summary of the Law<sup>2</sup>**

The Prompt Payment Act gives the Federal Government an incentive to pay contractors promptly by providing for the payment of interest on late payments.

31 U.S.C. § 3901 defines key terms used in subsequent sections of the Act as well as making its provisions applicable to the various Federal agencies, the Tennessee Valley Authority, and the U.S. Postal Service.

31 U.S.C. § 3902 provides for the payment of interest on any late payment. This interest is to be computed at the rate established by the Secretary of the Treasury and published in the Federal Register. A business entity is not required to request the interest payment to receive it, and each interest payment will be accompanied by a notice stating the rate and amount of the interest. If a business entity is owed an interest penalty that is not paid and makes a written demand, it is entitled to an additional penalty equal to a percentage of such late payment interest penalty specified in regulations to be promulgated by the Director of the Office of Management and Budget. The interest unpaid in any 30 day period shall be added to the principal and interest will accrue on it. No additional appropriations will be given for the payment of interest.

31 U.S.C. § 3903 requires the Director of the Office of Management and Budget to promulgate regulations to carry out the previous section. The statute outlines some specific issues to be addressed in these regulations, including the required payment dates of contracts, the payment of periodic payments, the review and payment of invoices, and the methods of computing interest rates.

31 U.S.C. § 3904 limits the use of discount payments. This statute permits discounts only when made within the specific time stated in the contract, which begins from the date of the invoice.

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<sup>1</sup>The following statutes are contained within the Act and will be discussed here:

- 10 U.S.C. § 3901 - Definitions and applications
- 10 U.S.C. § 3902 - Interest penalties
- 10 U.S.C. § 3903 - Regulations
- 10 U.S.C. § 3904 - Limitations on discount payments
- 10 U.S.C. § 3905 - Payment provisions relating to construction contracts
- 10 U.S.C. § 3906 - Reports
- 10 U.S.C. § 3907 - Relationship to other laws

<sup>2</sup>For a more complete summary of the Prompt Payment Act, see Michael J. Renner, *Prompt Payment Act: An Interest(ing) Remedy for Government Late Payment*, 21 PUB. CON. L. J. 177, 195-97 (1992).

31 U.S.C. § 3905 requires a construction contractor to notify the contracting agency of any payments and interest owed by the contractor based on substandard work. It further mandates that each construction contract contain a clause requiring the prime contractor to pay the subcontractor within seven days of receiving payment from the agency and a clause allowing interest to be paid to the subcontractor on any payments not made by the prime. The subcontractor is likewise obligated to include the payment and interest penalty clauses in any contracts with other subcontractors. These clauses are not meant to impair the rights of the prime and subcontractor to negotiate to permit retention of a portion of the progress payments to ensure satisfactory performance without incurring a late payment interest penalty, and to permit a determination that all or part of the subcontractor's payment may be withheld per the subcontract. If the subcontract allows for the withholding of all or part of the payment due to the subcontractor, the prime contractor must make notice to the subcontractor and the Government, pay the subcontractor as soon as is practicable, and pay the Government interest on the withheld payments from the eighth day after receipt of the payment from the Government. If the prime contractor is notified by a supplier or subcontractor of the first-tier subcontractor of the deficiency of performance of the first-tier subcontractor, the prime may withhold payment without incurring interest penalties, but must pay the first-tier subcontractor as soon as is practicable.

31 U.S.C. § 3906 requires the head of each agency to submit to the Office of Management and Budget a report detailing the payment practices of the agency during that fiscal year, which must contain certain enumerated information outlined in the statute.

31 U.S.C. § 3907 establishes that a claim for interest penalty may be filed under section 6 of the Contract Disputes Act and states when such a claim will accrue. This section does not limit accrual of such a claim to the time stated in this law but permits a claim to accrue according to section 12 of the Contracts Disputes Act as well.

#### **2.1.8.2. Background of the Law**

The Prompt Payment Act of 1981<sup>3</sup> was enacted to provide incentives for the Federal Government to pay contractors promptly as payments became due. The passage of the Act came about as a result of the failure of the Federal Government to promptly pay contractors in the past.<sup>4</sup> Prior to the Act, a contractor's only recourse for late or nonpayment was to make a claim under the Contract Disputes Act of 1978. This was not often done because of the expense involved in making a claim, the small amount of interest usually involved, and the contractors' apprehension that making such a claim would prejudice them when bidding on future contracts. Some of the resultant problems included overbidding to cover costs of late payments and lack of competition as small businesses ceased bidding on contracts.<sup>5</sup>

While the Prompt Payment Act of 1981 helped the situation, it was not long before the agencies discovered many loopholes that drastically reduced its effectiveness.<sup>6</sup> After numerous

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<sup>3</sup>Prompt Payment Act, Pub. L. No. 97-177, 96 Stat. 85 (1982).

<sup>4</sup>S. REP. NO. 78, 100th Cong., 1st Sess. 1-2 (1982).

<sup>5</sup>*Id.* at 2.

<sup>6</sup>*Id.* at 5.

complaints from the business community, the Prompt Payment Act of 1988 was passed to close the loopholes.<sup>7</sup> The Act was strengthened by providing the automatic payment of interest, an expanded agency reporting requirement, implementation of the Act in the Federal Acquisition Regulation (FAR), elimination of the 15 day payment grace period, and assistance to small businesses. At the time of passage, support was widespread for the amendments, with the exception of the provisions concerning coverage of subcontractors involved in Federal construction contracts.<sup>8</sup>

### 2.1.8.3. Law in Practice

In the years following the passage of the Prompt Payment Act of 1988, numerous complaints have been logged. Many have involved the implementation of the Act in the FAR, primarily in subpart 32.9, and the Office of Management and Budget (OMB) Circular A-125. These complaints include the fact that payment due dates vary by both the types of payments made under the Government contract and the event used as the starting point to determine when payment is due.

Several other complaints have been received from both industry and military organizations. The U.S. Army Armament, Munitions and Chemical Command noted that when payment is made late on a judgment resulting from a contractor's claim, the interest that accrues is not paid by the agency paying the judgment amount.<sup>9</sup> The payment laws are ambiguous as to who is responsible for the payment of late payment penalty fees and interest.<sup>10</sup> The Defense Finance and Accounting Service mentioned that there seems to be no statute of limitations on the filing of claims for prompt payment interest.<sup>11</sup> It stated that it often receives claims for the payment of interest on invoices that were paid four to six years ago.<sup>12</sup> It recommended including a statute of limitation on the presentation of claims for interest.<sup>13</sup>

Global Associates, an industry source, noted that definitions contained in OMB Circular A-125 are ambiguous and these ambiguities affect the determination of which contracts qualify for prompt payment interest.<sup>14</sup> It complained that, although the Federal Government takes title to property upon arrival at the installation, this does not constitute acceptance by the Government for contractual and advance payment purposes.<sup>15</sup> The Council on Governmental Relations (COGR) noted another problem with the OMB Circular. COGR stated that the definition of

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<sup>7</sup>*Id.* at 5; Prompt Payment Act Amendments of 1988, Pub. L. No. 100-196, 102 Stat. 2455.

<sup>8</sup>S.REP. NO. 78, 100th Cong., 1st Sess. 24 (1988); H.R. REP. NO. 927, 99th Cong., 2d Sess 14 (1987).

<sup>9</sup>Letter from Larry M. Goodknight, Director, B&P Policy and Management Directorate, Headquarters, U.S. Army Armament, Munitions and Chemical Command, Department of the Army to Joanne Barreca, Acquisition Law Task Force, Defense Systems Management College (Feb. 3, 1992).

<sup>10</sup>*Id.*

<sup>11</sup>Informal comment from Steve Giebelhaus, Defense Finance and Accounting Service, to Robert Burton, Office of General Counsel, Defense Logistics Agency (Feb. 11, 1992).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Letter from W.H. Dearing, Global Associates, to Joanne Barreca, Acquisition Law Task Force, Defense Systems Management College (Jan. 6, 1992).

<sup>15</sup>*Id.*

"invoice payment" contained in the circular excludes vouchers submitted for payment under cost reimbursement contracts for Federal research at the nation's nonprofit colleges and universities; thus, they are not protected by the Prompt Payment Act and receive no interest for late payments.<sup>16</sup> It recommended amending the statute to prevent "such inequitable implementation."<sup>17</sup>

The major complaint voiced about the Act appears to be the starting point of the discount period contained in 31 U.S.C. § 3904. One of the amendments to the Act in 1988 was to change the starting point of the discount period to the date of the invoice. Prior to 1988, the discount period began at the later of the receipt of the invoice or the receipt of the goods or services. The Office of the Comptroller of the Department of Defense, the Office of General Counsel for the Department of the Navy, the Command Counsel of Headquarters, Air Force Systems Command, the Office of General Counsel for the Department of the Air Force, and the Office of Financial Management & Comptroller of Headquarters, Air Force Systems Command all agree that a change should be made to the current language concerning the beginning of the discount period.<sup>18</sup> The Command Counsel of the Air Force Systems Command noted that the current discount period is virtually impossible to meet in the 10 days allotted for payment since days are lost in mailing, processing, and weekends.<sup>19</sup> The Office of the Comptroller of the Department of Defense (DOD Comptroller) stated that it has experienced a 15% increase in lost discounts from FY90 to FY91.<sup>20</sup> It also mentioned that once the discount period is lost, the Government often holds the invoice and does not pay it until the end of the 30 day period.<sup>21</sup>

The Air Force commentators and the DOD Comptroller suggested a return to the pre-1988 language of 31 U.S.C. § 3904, thereby extending the discount period to the later of the receipt of the invoice or the receipt of the goods or services.<sup>22</sup> The General Counsel of the Navy

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<sup>16</sup>Letter from Kate Phillips, Council on Government Relations, to Joanne Barreca, Acquisition Law Task Force, Defense Systems Management College (Mar. 18, 1992).

<sup>17</sup>*Id.*

<sup>18</sup>Letter from Alvin Tucker, Deputy Chief Financial Officer, Office of the Comptroller of the Department of Defense to the Honorable Edward Mazur, Controller of the Office of Federal Financial Management, Office of Management and Budget (Feb. 12, 1992); Letter from Theodore T. Belazis, Deputy Counsel, Office of Comptroller of the Navy, to Gary Quigley, Deputy General Counsel, Defense Logistics Agency (Apr. 28, 1992); Memorandum from Anthony J. Perfilio, Command Counsel, Headquarters Air Force Systems Command (Mar. 6, 1992); Memorandum from John P. Jancek, Assistant General Counsel (Procurement), Office of General Counsel, Department of the Air Force to Abner Young, SAF/AQCP (Mar. 3, 1992); Memorandum from Brigadier General John M. Nauseef, USAF, DCS/Financial Management & Comptroller, Headquarters Air Force Systems Command (Mar. 6, 1992).

<sup>19</sup>Memorandum from Anthony Perfilio, Command Counsel, Headquarters Air Force Systems Command (Mar. 6, 1992).

<sup>20</sup>Letter from Alvin Tucker, Deputy Chief Financial Officer, Office of the Comptroller of the Department of Defense to the Honorable Edward Mazur, Controller of the Office of Federal Financial Management, Office of Management and Budget (Feb. 12, 1992).

<sup>21</sup>*Id.*

<sup>22</sup>Memorandum from Brigadier General John M. Nauseef, USAF, DCS/Financial Management & Comptroller, Headquarters Air Force Systems Command (Mar. 6, 1992); Memorandum from Anthony J. Perfilio, Command Counsel, Headquarters Air Force Systems Command (Mar. 6, 1992).

also suggested a change to this statute but that would limit the discount period to the receipt of the invoice only.<sup>23</sup>

#### **2.1.8.4. Recommendations and Justification**

##### **Amend 31 U.S.C. § 3904 to extend the discount period and retain the rest of the Prompt Payment Act.**

The Panel recommends amending 31 U.S.C. § 3904 to allow the discount period to begin at the later of the receipt of the invoice or the receipt of the goods and services. The Panel agrees with the Air Force and DOD Comptroller that this extension of the discount period will be beneficial to Government and industry alike. This proposal will give the Government the full 10 days to make payments and increase the likelihood that the payments will be made within that time. The Government will benefit from the discount, and industry will benefit by receiving its payments promptly. The Panel recommends that the rest of the Prompt Payment Act be retained as written. Although certain commentators have expressed specific concerns with the implementation of the Act, these concerns are mainly with the coverage in OMB Circular A-125 and the regulations. The Act has served a useful purpose in requiring the payment of contractors within 30 days or awarding them interest for late payments and has solved problems experienced by contractors before the passage of the Act. The Panel recognizes that the Prompt Payment Act is a useful and necessary tool in the relationship between the Government and contracting community and should be retained.

#### **2.1.8.5. Relationship to Objectives**

This recommendation furthers the development and preservation of an industrial base. It assists small businesses with limited capital in receiving early payment for their work and promotes the purchase of commercial or modified-commercial products and services by the Department of Defense.

#### **2.1.8.6. Proposed Statute**

##### **Section 3904. Limitation on discount payments**

The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. ~~For the purpose of the preceding sentence, the specified time shall be determined from the date of the invoice.~~ For the purpose of the preceding sentence, the specified time shall be determined from the later of the receipt of the goods or services, or the receipt of an invoice in the proper office of the agency. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under sections 3902 and 3903 of this title, except

<sup>23</sup>Letter from Theodore T. Belazis, Deputy Counsel, Office of the Navy Comptroller, to Gary P. Quigley, Deputy General Counsel, Defense Logistics Agency (Apr. 28, 1992).

that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid.

## **2.1.9. Public Law Number 101-510 § 831**

### **Mentor-Protégé Pilot Program**

#### **2.1.9.1. Summary of the Law**

This section established the mentor-protégé pilot program "to provide incentives for major DOD contractors to furnish disadvantaged small business concerns with assistance designed to enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under DOD contracts and other contracts and subcontracts in order to increase the participation of such business concerns as subcontractors and suppliers under DOD contracts, other Federal Government contracts, and commercial contracts."<sup>1</sup>

#### **2.1.9.2. Background of the Law**

This section established a program that would "encourage large defense contractors to enter voluntarily into agreements to enhance the capabilities of small disadvantaged businesses (SDBs) to perform in the defense subcontract vendor base."<sup>2</sup> The mentor business would impart knowledge and skills necessary to help the small businesses to compete in the defense market. Congress intended that this program provide "a flexible framework for a mentor firm to develop SDBs capable of meeting available defense opportunities and should foster the establishment of stable, long-term business relationships."<sup>3</sup> Congress also expressed a hope that mentor firms would work with both established and emerging SDBs.<sup>4</sup>

By permitting the Secretary of Defense to promulgate regulations as to the types of firms permitted to participate in the programs, Congress expressed an intention that these regulations should encourage graduates of the Small Business Administration's section 8(a) program to participate as mentor firms.<sup>5</sup> Subsequent subsections provided for a developmental agreement between the parties. Congress intended this agreement would include "agreed upon factors to assess the protégé firm's progress under the program and parameters concerning the number and type of subcontracts the protégé firm may anticipate being awarded."<sup>6</sup> The procedures the parties should follow in the event of termination should also be enumerated in the agreement.<sup>7</sup> Congress emphasized that the termination of the mentor-protégé agreement should not be construed as requiring the mentor and protégé to terminate or otherwise impair an existing subcontract

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831, 104 Stat. 1485, 1607-12 (1990).

<sup>2</sup>H.R. REP. NO. 665, 101st Cong., 2nd Sess. 630, 104 Stat. 2931, 3187 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3187.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.* at 631.

awarded under the program.<sup>8</sup> The public law provides for financial assistance by the mentor firm in the form of progress payments, advance payments, and loans. Further, the public law provides for reimbursement to the mentor firm for the total amount of any progress payment or advance payment and reimbursement for costs of other assistance to a protégé.<sup>9</sup>

Congress emphasized that an increase in the number of subcontracts awarded to small disadvantaged businesses would be the largest indicator of success of this program.<sup>10</sup>

### **2.1.9.3. Law in Practice**

This program was passed in 1990,<sup>11</sup> implemented in 1991, and amended during the Persian Gulf crisis in 1991.<sup>12</sup> To date, 12 firms are enrolled in the program. Headquarters Air Force Systems Command noted that the 1991 amendment strengthened the original program by allowing mentor firms to recover costs incurred in assisting protégé firms as direct items of cost on defense contracts, through indirect expense recovery or through separate contracts or agreements.<sup>13</sup> The Air Force commented that the future cost impacts of the amended program may be substantial.<sup>14</sup> No other comments were received.

Section 807 of the National Defense Authorization Act for 1993 continued the pilot mentor-protégé program and authorized \$55 million for the performance of its functions.<sup>15</sup> This section directed the Secretary of Defense to publish DOD's policy on the program and any regulations or guidance it has issued in the DOD Supplement to the Federal Acquisition Regulation.<sup>16</sup> Congress also directed the Secretary to make certain changes to strengthen the program's small business aspects.<sup>17</sup>

### **2.1.9.4. Recommendation and Justification**

#### **Retain**

The Panel recommends that this statute be retained as written. Its provisions providing for payments by the mentor to the protégé and reimbursement of the mentor's expenses facilitate the entry of new businesses into the DOD vendor base. Because this is a recent statute for which the implementation process has only begun one year ago, time should be given for the program to be

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<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 632.

<sup>11</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831, 104 Stat. 1485, 1607 (1990).

<sup>12</sup>Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 704(c), 105 Stat. 75, 119-120.

<sup>13</sup>Memorandum from Anthony J. Perfillo, Command Counsel, Headquarters Air Force Systems Command, Department of the Air Force (Mar. 6, 1992).

<sup>14</sup>*Id.*

<sup>15</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 807, 106 Stat. 2315 (1992).

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*



set into motion and its provisions observed in practice before any changes are made. The lack of comments on this law is a strong indication that the acquisition community has yet to discover any major problems requiring improvements to this law. Congress has endorsed this recommendation by retaining the statute in the 1993 National Defense Authorization Act and by providing for its implementation in the regulations. This statute is included in this section of the Report to provide a complete review of payment laws. This statute is discussed more fully in Chapter 4 of this Report.

#### **2.1.9.5. Relationship to Objectives**

This recommendation and this program will aid the Government in establishing a balance between an efficient procurement process with defined socioeconomic policies and full and open access to the commercial marketplace. This recommendation will also help small businesses by giving them added opportunities for participation in the defense acquisition process.

## **2.2. Cost Principles**

### **2.2.0. Introduction**

In the course of its review of laws relating to contract administration, the Panel identified three statutes addressing issues of cost principles. 10 U.S.C. § 2324, "Allowable costs under defense contracts," contains a comprehensive listing of specific unallowable costs as well as a provision assessing penalties for the inclusion of unallowable costs. Following a review of the history of this provision and the comments received from Government and industry, the Panel determined that this statute was passed in response to the few highly publicized cases of contractor abuse and the evidence of abuse discovered by Government auditors in 1985. There was extensive subsequent implementation of this statute in the FAR and DFARS; however, the specificity of the provisions prevented flexible regulatory changes. The Panel believes that the regulatory process is a more flexible alternative for addressing changing situations and specific problems in the acquisition process. The process by which statutory changes are achieved is complex and, in the face of a rapidly changing acquisition process, too slow for effective administration. The Panel recommends that the specific provisions addressing allowable costs be deleted from 10 U.S.C. § 2324 and guidance continued in the regulations. By recommending repeal of this authority from the statute, the Panel notes that it is not making any judgment on the substantive issues of allowability or allocability nor is it, in any way, urging the repeal of the cost principles already present in the regulations. The Panel also determined that a general policy statement regarding costs was necessary as a result of the removal of the specific cost language from 10 U.S.C. § 2324 and included such a statement at the beginning of the proposed statute.

After reviewing the legislative changes mandated by Congress in the National Defense Authorization Act for Fiscal Year 1993, the Panel determined that these changes addressed the major problems voiced by the commentators, while retaining the penalty incentives of the statute. The legislative changes to the penalty provision are very similar to those initially reached by the Panel after lengthy discussion on this issue. The Panel believes that the penalty scheme represents a substantial and important concern to both Government and contractors and should be outlined in the statute to make clear to both groups the specific actions that would subject a contractor to penalties and how those penalties are assessed. The Panel also believes that Congress' changes addressed many of the problems enumerated by the commentators and currently present in the defense procurement system. Experience should be gained under the new law and any implementing regulations before any more changes are made to the penalty process.

In addition to the penalty and cost principle provisions, the remaining substantive authority in this statute addresses the burden of proof to be used in appeals of unfavorable determinations, the requirement of evaluation by the Comptroller General on the implementation of the authority, and the definition of "covered contracts." The Panel decided that it was important to address the burden of proof statutorily because it was not clear that the provision would be enforceable if found only in regulation. The Panel recognizes the importance of oversight of the implementation of this statute by the legislative branch through the Comptroller General and recommends that this authority remain in the statute as well. Finally, the term "covered contract" was used in 10 U.S.C. § 2324. The Panel believes this definition should remain in the statute for clarity's sake. However,

the Panel recommends raising the threshold amount in this definition from \$100,000 to \$500,000, in response to inflation and current conditions in the defense procurement process. The Panel believes that the higher amount is more appropriate in today's economy.

During its review of 10 U.S.C. § 2324, the Panel noted that 41 U.S.C. § 420, "Travel expenses of government contractors," presented a similar problem. 41 U.S.C. § 420 contained very specific statutory authority addressing travel costs by Government contractors. This authority has been addressed in regulatory guidance, but the specificity of the statute has inhibited flexibility in the regulations. It is the Panel's opinion that the regulatory system affords a greater and more efficient response to the changing situations in the defense procurement process. Therefore, it recommends that 41 U.S.C. § 420 be repealed in favor of the regulatory guidance. In the interests of encouraging the integration of the defense and commercial markets, the Panel further recommends that any subsequent regulations promulgated in place of this statute require contractors to keep travel costs to a reasonable level, without restricting them to rigid rate schedules.

The final statute examined in this section was 10 U.S.C. § 2382, "Contract profit controls during emergency periods." During its review of this statute's history, the Panel noted that Congress had reviewed the problems with this law for over 40 years and had suspended its provisions for most of that time in favor of more efficient systems of limiting excess profits. The Panel agrees with the Senate of the 97th Congress that this law is outdated and inefficient. Any procedures considered necessary to limit profits could be adequately addressed in the FAR and DFARS.

## **2.2.1. 10 U.S.C. § 2324**

### **Allowable costs under defense contracts**

#### **2.2.1.1. Summary of the Law**

This section provides that the Secretary of Defense shall require that a covered contract provide that if a contractor submits a proposal for settlement of indirect costs incurred on a contract with the Department of Defense and that proposal contains costs that violate the cost principles in either the FAR or DFARS, the cost will be disallowed. If the Secretary of Defense determines that a cost is unallowable by clear and convincing evidence, the Secretary of Defense shall assess a penalty against the contractor equal to the amount of the disallowed costs plus interest, to compensate the United States for the funds a contractor was paid in excess of what he was entitled. In addition to this penalty, the Secretary of Defense shall assess a further penalty if it is determined that a contractor has submitted a cost that was previously determined to be unallowable. This penalty will be two times the amount of the costs determined to be unallowable. Under the Contract Disputes Act, these actions are considered final and are appealable. The statute also gives the Secretary of Defense the discretion to assess an additional penalty of not more than \$10,000 per proposal.

The section also enumerates many costs that are unallowable under covered contracts. These include, but are not limited to, costs of entertainment, contributions or donations, payments of fines or penalties, costs incurred in the defense of any civil or criminal fraud proceeding, and costs of severance pay. The statute also requires the Secretary of Defense to prescribe regulations to implement this section and to amend current provisions in the DFARS dealing with allowability of contractor costs. One subsection outlines the specific cost principles Congress intended the regulations to address, such as air shows, recruitment, community relations, dining facilities, travel, public relations, and advertising. The regulations shall require that a contracting officer obtain adequate documentation and the opinion of the defense contract auditor before resolving a questioned cost. The defense contract auditor should also be present at any meeting or negotiation regarding the allowability of indirect costs. The regulation also shall provide that any costs that are questioned by the defense contract auditor will be enumerated by individual amounts in his report. The costs of promoting the export of products of the U.S. defense industry are allowable in the regulations provided that they are allocable and reasonable, are determined by the Secretary of Defense to be likely to result in future cost advantages to the United States, and are not more than 110 percent of the costs incurred in the previous fiscal year. These regulations shall also apply to subcontracts.

The section provides that a proposal for settlement of indirect costs shall include a certification by an official of the contractor that, to his knowledge, all costs claimed therein are allowable. This certification requirement may be waived in exceptional cases by the Secretary of Defense or the Secretaries of the military departments if the secretary determines that it would be in the best interest of the United States to waive the certification and states the reasons for this determination in writing. If the proposal for settlement contains a cost that is specified by statute

or regulation as unallowable, the submission shall be subject to the provisions of 18 U.S.C. § 287 and 31 U.S.C. § 3729.

When the contractor appears before the Armed Services Board of Contract Appeals, the U.S. Claims Court or other Federal court seeking the reimbursement of indirect costs, the burden of proof shall be on the contractor to prove such costs are reasonable. Costs incurred by a contractor in connection with any civil, criminal, or administrative proceeding begun by the United States or a state for violation of a Federal or state regulation or statute will not be allowed as a reimbursable cost. The types of dispositions that prevent costs from being allowable include a conviction in a criminal proceeding, a determination of contractor liability in a civil or administrative proceeding alleging fraud, imposition of a monetary penalty in a civil or administrative proceeding, a final decision by DOD to debar or suspend the contractor or to rescind, void, or terminate the contract for default, or a disposition by consent or compromise that could have resulted in one of the above dispositions. If the consent or compromise agreement permits the reimbursement of costs, then they will be allowable.

If the proceeding is commenced by a state, the head of the agency that awarded the contract involved may permit the reimbursement of legal costs incurred if it is determined that the costs were incurred as a result of a specific term or condition of the contract or specific instructions by the agency. If such costs are determined allocable and allowable under the FAR, the amount of reimbursable costs shall not exceed 80% of the actual costs incurred. The regulations shall also provide for appropriate consideration of the complexity of the litigation, generally accepted principles governing the award of legal fees in civil actions, and other factors when determining the amount of costs to be reimbursed.

The final provisions of this statute define the terms "proceeding," "costs," "penalty", and "covered contracts." The Comptroller General is also required to periodically evaluate the implementation of this statute by the Secretary of Defense and to submit a report to Congress on such evaluation.

#### **2.2.1.2. Background of the Law**

This section was enacted in the Department of Defense Authorization Act of 1986.<sup>1</sup> Legislative history showed that Congress was outraged at the highly publicized cases of contractor abuse as well as evidence of abuse found by the Government's own auditors.<sup>2</sup> This law was meant to spell out for the Government and the contractors exactly what was and what was not an allowable cost with as few gray areas as possible.<sup>3</sup> The original version of this section included a long list of what was considered by Congress to be an unallowable cost and provided monetary penalties for the filing of a claim for an unallowable cost.<sup>4</sup> The law also gave the Secretary of Defense the power to promulgate regulations to give guidance to contractors on

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<sup>1</sup>Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 911(a)(1), 99 Stat. 583, 682 (1985).

<sup>2</sup>131 Cong. Rec. 17111 (June 25, 1985).

<sup>3</sup>Department of Defense Authorization Act, 1986, Pub. L. No. 99-145 § 911(a)(1), 99 Stat. 583, 682 (1985).

<sup>4</sup>*Id.*

costs that fall into the "gray areas" between allowable and unallowable.<sup>5</sup> Also, contractors were required to submit current, accurate, and complete documentation of any claims and all costs incurred when the final settlement was proposed.<sup>6</sup>

While the majority of the Congress was in favor of this provision at its inception, a few complaints were voiced. Some members felt that the publicized cases of abuse illustrated only the few bad contractors in a group of thousands and that a more thorough investigation into the exact extent of contract abuse should be made.<sup>7</sup> It was also said that Congress was trying to micromanage the procurement system and by doing so, would take away DOD's flexibility in this area.<sup>8</sup> However, the public outcry and Congressional outrage over the excessive overspending were enough to outweigh these concerns.

Over the next few years, several amendments to this law were made, most of which addressed costs determined to be unallowable. These included golden parachute payments,<sup>9</sup> insurance taken out against a contractor's cost of correcting defects in materials or workmanship,<sup>10</sup> and severance costs paid to a foreign national employed by a contractor outside the United States.<sup>11</sup> Most recently, Congress determined that the contractor costs incurred in defense of a fraud proceeding would be unallowable.<sup>12</sup> Congress felt that contractors should be in the same position as any other litigant, who cannot recover the costs of defending itself in a criminal proceeding.

### 2.2.1.3. Law in Practice

This statute has been implemented in, or been the basis of, numerous provisions in the FAR and DFARS. Industry representatives have commented extensively on this statute. The Council of Defense and Space Industry Associations (CODSIA) made the following comments.<sup>13</sup> This law imposes arbitrary penalties on contractors, even those who have made the effort to provide adequate safeguards to reasonably protect the Government.<sup>14</sup> Penalties should not be assessed without evidence of a contractor's negligence or intent to defraud.<sup>15</sup> Because of the possibility of penalties if the submission is not 100% accurate, the contractor certification process has slowed to allow for review of all costs.<sup>16</sup> It contends that the Defense Contract Management Command (DCMC) and the Defense Contract Audit Agency (DCAA) have interpreted this

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<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>131 Cong. Rec. 17113 (June 25, 1985).

<sup>8</sup>131 Cong. Rec. 17116 (June 25, 1985).

<sup>9</sup>National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 805(a), 101 Stat. 1019, 1126 (1987).

<sup>10</sup>Act of July 19, 1988, Pub. L. No. 100-370, § 1(f)(2)(A), 102 Stat. 840, 846.

<sup>11</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 322(a), 102 Stat. 1918, 1952 (1988); Major Fraud Act of 1988, Pub. L. No. 100-700, § 8(b)(1)(A), 102 Stat. 4631, 4636.

<sup>12</sup>Major Fraud Act of 1988, Pub. L. No. 100-700, § 8(b)(1)(A), 102 Stat. 4631, 4636.

<sup>13</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

statute strictly to subject contractors to penalties for even inadvertent errors.<sup>17</sup> It stated that it is greatly concerned that the guidance issued by the Defense Logistics Agency (DLA) and DCAA runs counter to the intent of contractors' participation in the Defense Industry Initiative and will damage or undo many of the positive accomplishments already achieved under existing contractor self-governance programs and the Contractor Risk Assessment Guide (CRAG) program.<sup>18</sup> CODSIA also argued that top Government procurement officials have stated that the strict language of the statute leaves no room for flexibility in implementation.<sup>19</sup> CODSIA's ultimate recommendation was that this statute should be repealed or substantially modified.<sup>20</sup>

The Aerospace Industries Association (AIA) commented separately from CODSIA on this statute.<sup>21</sup> It also believes that penalties should not be assessed without evidence of a contractor's negligence or fraudulent intent and that the strict interpretation in the supplemental guidance provided by DLA and DCAA hinders the positive accomplishments achieved under existing contractor self-governing programs.<sup>22</sup> AIA also recommends that this statute be repealed or substantially modified.<sup>23</sup>

The Defense Contract Audit Agency (DCAA) noted that because the provisions of this statute were enacted at different times they are not well integrated.<sup>24</sup> It believes that the costs identified in the statute should be replaced with a general policy statement and the specifics should be left to the regulators.<sup>25</sup> Accordingly, subsection (e)(2) of the statute, which allows for flexibility in the regulations, should be placed at the beginning of the statute and clarified for the regulation writers.<sup>26</sup> DCAA uses the subsection that disallows severance costs for foreign nationals as an example of how the specificity of the law has led to the inflexibility of the subsequent rule, because the regulators were afraid to interpret such a specific statute section.<sup>27</sup> DCAA argues that the law encourages inconsistent treatment among agencies in the application of cost principles and related regulations.<sup>28</sup>

DCAA believes that the penalty provisions should remain in the statute.<sup>29</sup> It does not see the penalty scheme as an impediment to contracting but rather as an effective internal control.<sup>30</sup>

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<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to John A. Phillips, Director, Contract Policy, Raytheon Company (Mar. 26, 1992).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>Memorandum from William J. Sharkey, Assistant Director, Policy and Plans, Defense Contract Audit Agency to the Advisory Panel on Streamlining and Codifying Acquisition Laws (Mar. 26, 1992).

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>Memorandum from Michael J. Thibault, Assistant Director, Policy and Plans, Defense Contract Audit Agency to the Advisory Panel on Streamlining and Codifying Acquisition Laws (Apr. 27, 1992).

<sup>29</sup>*Id.*

<sup>30</sup>Memorandum from William J. Sharkey, Assistant Director, Policy and Plans, Defense Contract Audit Agency to the Advisory Panel on Streamlining and Codifying Acquisition Laws (Mar. 26, 1992).

DCAA does not agree that contractor errors should be permitted to be excepted from the application of the penalty provision. In that case, every contractor would assert an "error" defense whenever an unallowable cost was found.<sup>31</sup> It also believes that the legislative history of the statute does not support industry assertions that the law was intended to penalize only intentional and negligent inaccuracy.<sup>32</sup> DCAA believes it is appropriate that the details of the penalty scheme should remain in the statute itself and should be retained as currently written.<sup>33</sup>

The Defense Contract Management District Mid-Atlantic (DCMDM) of DLA believes that DOD is interpreting this statute too strictly.<sup>34</sup> The opinion is that, once submitted, the contractor cannot withdraw the proposal for a voluntary removal of unallowable costs.<sup>35</sup> DCMDM argues that if a contractor, of its own accord, discovers that unallowable costs have been inadvertently included in the proposal, it should be allowed to withdraw the proposal and remove the cost.<sup>36</sup> It also believes that the law or implementing regulation should contain a clear and convincing evidence test to be used when making a determination.<sup>37</sup> DCMDM feels that this test will promote consistency in the assessment of penalties throughout DOD.<sup>38</sup> DCMDM also noted some problems that have arisen in contractor relationships with auditors.<sup>39</sup> It recommended that language should be added to the law to clarify that the auditor-recommended costs subject to penalty should identify the amounts of unallowable costs by each applicable contract, not just by amount.<sup>40</sup> The interpretation of what constitutes adequacy of documentation is vague in the law and will undoubtedly lead to some disagreements with auditors.<sup>41</sup> Finally, DCMDM also noted that mandating the presence of the auditor at cost negotiations appears to take away the negotiator's authority to assemble his own support staff for the negotiation process.<sup>42</sup>

The final comment received on this statute came from the Inspector General of the Department of Defense (DODIG).<sup>43</sup> The DODIG believes that this law is serving its intended purpose without creating inefficiencies or unduly burdening the buyer/seller relationship.<sup>44</sup>

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<sup>31</sup>Memorandum from Michael J. Thibault, Assistant Director, Policy and Plans, Defense Contract Audit Agency to the Advisory Panel on Streamlining and Codifying Acquisition Laws (Apr. 27, 1992).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>Letter from Maria Ventresca, Associate Counsel, Contracts, Defense Contract Management District Mid-Atlantic, Defense Logistics Agency to Robert Burton, DLA-G (May 19, 1992).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>Letter from Robert J. Lieberman, Assistant Inspector General for Auditing, Inspector General for the Department of Defense to Joanne Barreca, Acquisition Law Task Force, Defense Systems Management College (Apr. 7, 1992).

<sup>44</sup>*Id.*



In the National Defense Authorization Act for Fiscal Year 1993, Congress made a number of changes to the penalty provisions of 10 U.S.C. § 2324.<sup>45</sup> It limited the monetary penalty that could be assessed to either the amount of the disallowed cost, or, in cases where a disallowed cost is resubmitted, to twice the amount of the disallowed cost.<sup>46</sup> The provision allowing for the imposition of an additional \$10,000 penalty was eliminated as was the "clear and convincing evidence" burden of proof.<sup>47</sup> A new subsection was added that directed the Secretary of Defense to promulgate regulations allowing for the waiver of penalties if the contractor voluntarily withdraws the proposal for settlement of indirect costs, if the amount of unallowable costs found is insignificant, or if the contractor can demonstrate that he has an adequate internal control system and that the unallowable cost was inadvertently submitted in the proposal.<sup>48</sup> Congress noted that the penalty provisions are meant to ensure that the contractors remain responsible for screening their indirect cost submissions for unallowable costs, not the Government.<sup>49</sup>

#### **2.2.1.4. Recommendations and Justification**

**Amend 10 U.S.C. § 2324 to include a statement defining allowable costs and to retain only the provisions addressing the penalty scheme as amended by the National Defense Authorization Act for Fiscal Year 1993, the burden of proof, the evaluation by the Comptroller General, and the definition of "covered contract."**

The Panel recommends that the portion of the statute addressing cost principles be repealed and only the provisions addressing the penalty scheme, burden of proof, evaluation by the Comptroller General, and definition of "covered contract" be retained. The Panel agrees with the industry and DCAA comments that noted this statute was enacted by Congress in response to a specific problem that surfaced at the time of passage. There is extensive coverage of the cost principles in the FAR and DFARS, and addressing the cost principles in the regulations is more appropriate than enumerating them in the statute. DCAA even mentioned that statutory coverage of certain principles subsequently led to inflexibility in rules and regulations. The regulatory process is a more flexible alternative for addressing changing situations and specific problems in the acquisition process. The Panel recommends that the specific provisions addressing the cost principles be deleted from this statute and continued in the regulations. By recommending repeal of the cost principles coverage from the section, the Panel wishes to make clear that it is not making any judgment on the substantive issues of allowability nor is it, in any way, urging the repeal of the cost principles already present in the regulations.

The Panel believes that the legislative changes mandated by Congress in the National Defense Authorization Act for Fiscal Year 1993 address the major problems voiced by the commentators, particularly those of CODSIA, AIA, and DCMDM, while retaining the penalty

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<sup>45</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 818, 106 Stat. 2457 (1992).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>H.R. Conf. Rep. No. 966, 102d Cong., 2d Sess. (1992).

language within the statute as DCAA recommended. The legislative changes to the penalty provision are very similar to those initially reached by the Panel after lengthy discussion of this issue. The Panel believes that the penalty scheme represents a substantial and important concern to both Government and contractors and should be outlined in law to make clear to both groups the specific actions that would subject a contractor to penalties and how those penalties are assessed. Experience should be gained under the new law and any implementing regulations before any more changes are made to the penalty process.

In addition to the penalty and cost principle provisions, the remaining substantive authority in this section addresses the burden of proof to be used in appeals of unfavorable determinations, the requirement of evaluation by the Comptroller General on the implementation of the authority, and the definition of "covered contracts." The Panel feels that it is important to address the burden of proof statutorily to make the standard clear and unambiguous. The Panel recognizes the importance of oversight of the implementation of this statute by the legislative branch through the Comptroller General and recommends that this authority remain in the statute as well. Finally, the term "covered contract" is used in the provision addressing penalties and this definition should remain in the statute to define its applicability. However, the Panel has recommended raising the threshold amount in this definition from \$100,000 to \$500,000, in response to inflation and the Panel's recommendation to maintain the TINA threshold at \$500,000. The Panel believes that the higher amount is more appropriate in today's economy.

The Panel believes that a general statement regarding costs is appropriate as a result of the removal of the specific cost language from the statute and has included such a statement at the beginning of the proposed statute. The Panel has also identified 41 U.S.C. § 256 as being duplicative of 10 U.S.C. § 2324(k), which has been recommended for repeal. 41 U.S.C. § 256 does not apply to DOD by statutory exclusion; thus, it is outside the Panel's scope of review. Although the Panel has not made a specific recommendation on 41 U.S.C. § 256, it would urge Congress to repeal this statute as well 10 U.S.C. § 2324(k).

#### **2.2.1.5. Relationship to Objectives**

This recommendation promotes the broad policy objectives and fundamental policy requirements of the Panel. This recommendation promotes the continued commercialization of the defense procurement process by relaxing the harsh consequences for the possibly inadvertent submission of unallowable costs. The recommendation adopts the changes recently approved by Congress to the penalty provision.

2.2.1.6. Proposed Statute<sup>50</sup>

§ 2324. Allowable costs under defense contracts

(a) The total cost of a defense contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits, plus any allocable cost of money. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used, including standard costs properly adjusted for applicable variances. Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable in accordance with the Federal Acquisition Regulation and the Department of Defense Supplement to the Federal Acquisition Regulation. The Secretary shall define in detail and in specific terms those costs, not addressed in the Federal Acquisition Regulation, which are unallowable, in whole or in part, under covered contracts.

~~(a)(1)~~ (1) The Secretary of Defense shall require that a covered contract provide that if the contractor submits to the Department of Defense a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or the Department of Defense Supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

~~(2)(c)~~ (1) If the Secretary determines ~~by clear and convincing evidence~~ that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under paragraph (1) under a cost principle referred to in subsection (b) that defines the allowability of specific selected costs, the Secretary shall assess a penalty against the contractor in an amount equal to --

(A) the amount of the disallowed costs cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on regulations issued by the Secretary) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

~~(b) If the Secretary~~ (2) If the Secretary determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the Secretary shall assess a penalty against the contractor, ~~in addition to the penalty assessed under subsection (a)~~, in an amount equal to two times the amount of such cost the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

<sup>50</sup>This proposed language in new subsections (c), (d), and (e) incorporates the changes made by Congress to the penalty provision of this statute in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 807, 106 Stat. 2448 (1992). In view of the recent amendment and the substantial changes recommended by the Panel, the proposed section, with the amendments included and deletions recommended by the Panel, is also set forth as it would appear in the U.S. Code.

(d) The Secretary shall prescribe regulations providing for a penalty under subsection (c) to be waived in the case of a contractor's proposal for settlement of indirect costs when--

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and resubmits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that-

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

~~(e)~~(e) An action of the Secretary under subsection (a) or (b) --

(1) shall be considered a final decision for the purposes of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605); and

(2) is appealable in the manner provided in section 7 of such Act (41 U.S.C. § 606).

~~(d) If any penalty is assessed under subsection (a) and (b) with respect to a proposal for settlement of indirect costs, the Secretary may assess an additional penalty of not more than \$10,000 per proposal.~~

~~(e)(1) the following costs are not allowable under a covered contract:~~

~~— (A) Costs of entertainment, including amusement, diversion and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).~~

~~— (B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress or a State legislature.~~

~~— (C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).~~

~~— (D) Payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local or foreign laws and regulations, except where incurred as a result of compliance with specific terms and conditions of the contract or specific written~~

~~instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations of the Secretary of Defense.~~

~~— (E) Costs of membership in any social, dining, or country club or organization.~~

~~— (F) Costs of alcoholic beverages.~~

~~(G) Contributions or donations, regardless of the recipient.~~

~~— (H) Costs of advertising designed to promote the contractor or its products.~~

~~(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.~~

~~(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial airfare.~~

~~(K) Costs incurred in making any payment (commonly known as a "golden parachute payment") which is --~~

~~— (i) in an amount in excess of the normal severance pay paid by the contractor to an employee upon termination of employment; and~~

~~— (ii) is paid to the employee contingent upon, and following, a change in management control over, or ownership of, the contractor or a substantial portion of the contractor's assets.~~

~~(L) Costs of commercial insurance that protects against the costs of contractor for correction of the contractor's own defects in materials or workmanship.~~

~~(M) Costs of severance pay paid by the contractor to foreign nationals employed by the contractor under a service contract performed outside the United States, to the extent that the amount of severance pay paid in any case exceeds the amount paid in the industry involved under the customary or prevailing practice for firms in that industry providing similar services in the United States, as determined under regulations prescribed by the Secretary of Defense.~~

~~(N) Costs of severance pay paid by the contractor to a foreign national employed by the contractor under a service contract performed in a foreign country if the termination of the employment of the foreign national is the result of the closing of, or the curtailment of activities at, a United States military facility in that country at the request of the government of that country.~~

~~(O) Costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State, to the extent provided in subsection (k).~~

~~—(2) The Secretary shall prescribe regulations to implement this section. Such regulations may establish appropriate definitions, exclusions, limitations, and qualifications.~~

~~(f)(1) The Secretary shall prescribe proposed regulations to amend these provisions of the Department of Defense Supplement to the Federal Acquisition Regulations dealing with the allowability of contractor costs. The amendments shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. These regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:~~

~~— (A) Air shows.~~

~~(B) Membership in civic, community, and professional organizations.~~

~~(C) Recruitment.~~

~~(D) Employee moral and welfare.~~

~~(E) Actions to influence (directly or indirectly) executive branch action on regulatory or contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).~~

~~(F) Community relations.~~

~~(G) Dining facilities.~~

~~(H) Professional and consulting services, including legal services.~~

~~(I) Compensation.~~

~~(J) Selling and marketing.~~

~~(K) Travel.~~

~~(L) Public relations.~~

~~(M) Hotel and meal expenses.~~

~~(N) Expense of corporate aircraft.~~

~~(O) Company furnished automobiles.~~

~~(P) Advertising.~~

~~—(2) The regulations shall require that a contracting officer not resolve any questioned costs until he has obtained—~~

~~(A) adequate documentation with respect to such costs; and~~

~~(B) the opinion of the defense contract auditor on the allowability of such costs.~~

~~—(3) The regulations shall provide that, to the maximum extent practicable, the defense contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.~~

~~—(4) The regulations shall require that all categories of costs designated in the report of the defense contract auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.~~

~~—(5) The regulations shall provide that costs to promote the export of the products of the United States defense industry, including costs of exhibiting or demonstrating products, shall be allowable to the extent that such costs—~~

~~(A) are allocable, reasonable, and not otherwise unallowable;~~

~~(B) with respect to the activities of the business segment to which such costs are being allocated, are determined by the Secretary of Defense to be likely to result in future cost advantages to the United States; and~~

~~(C) with respect to a business segment which allocates to Department of Defense contracts \$2,500,000 or more of such costs in any fiscal year of such business segment, are not in excess of the amount equal to 110 percent of such costs incurred by such business segment in the previous fiscal year.~~

~~(g) The regulations of the Secretary required to be prescribed under subsections (e) and (f)(1) shall require, to the maximum extent practicable, that such regulations apply to all subcontractors of a covered contract.~~

~~(h)(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed by the Secretary.~~

~~—(2) The Secretary of Defense or the Secretary of the military department concerned may, in an exceptional case, waive the requirement for certification under paragraph (1) in the case of any contract if the Secretary—~~

~~(A) determines in such case that it would be in the interest of the United States to waive such certification; and~~

~~(B) states in writing the reasons for that determination and makes such determination available to the public.~~

~~(i) The submission to the Department of Defense of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of section 287 of title 18 and section 3729 of title 31.~~

(j) In a proceeding before the Armed Services Board of Contract Appeals, the United States Claims Court, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

~~(k)(1) Except as otherwise provided in this subsection, costs incurred by a contractor in connection with any criminal, civil, or administrative proceeding commenced by the United States or a State are not allowable as reimbursable costs under a covered contract if the proceeding (A) relates to a violation of, or failure to comply with, a Federal or States statute or regulation, and (B) results in a disposition described in paragraph (2).~~

~~(2) A disposition referred to in paragraph (1)(B) is any of the following:~~

~~(A) In the case of a criminal proceeding, a conviction (including a conviction pursuant to a plea of nolo contendere) by reason of the violation or failure referred to in paragraph (1).~~

~~(B) In the case of a civil or administrative proceeding involving an allegation of fraud or similar misconduct, a determination of contractor liability on the basis of the violation or failure referred to in paragraph (1).~~

~~(C) In the case of any civil or administrative proceeding, the imposition of a monetary penalty by reason of the violation or failure referred to in paragraph (1).~~

~~(D) A final decision by the Department of Defense—~~

~~(i) to debar or suspend the contractor;~~

~~(ii) to rescind or void the contract; or~~

~~(iii) to terminate the contract for default;~~

~~—by reason of the violation or failure referred to in paragraph (1).~~



~~(E) A disposition of the proceeding by consent or compromise if such action could have resulted in a disposition described in subparagraph (A), (B), (C), or (D).~~

~~—(3) In the case of a proceeding referred to in paragraph (1) that is commenced by the United States and is resolved by consent or compromise pursuant to an agreement entered into by a contractor and the United States, the costs incurred by the contractor in connection with such proceeding that are otherwise not allowable as reimbursable costs under such paragraph may be allowed to the extent specifically provided in such agreement.~~

~~—(4) In the case of a proceeding referred to in paragraph (1) that is commenced by a State, the head of an agency that awarded the covered contract involved in the proceeding may allow the costs incurred by the contractor in connection with such proceeding as reimbursable costs if the agency head determines, under regulations prescribed by such agency head, that the costs were incurred as a result of (A) a specific term or condition of the contract, or (B) specific written instructions of the agency.~~

~~—(5)(A) Except as provided in subparagraph (C), costs incurred by a contractor in connection with a criminal, civil, or administrative proceeding commenced by the United States or a State in connection with a covered contract may be allowed as reimbursable costs under the contract if such costs are not disallowable under paragraph (1), but only to the extent provided in subparagraph (B).~~

~~(B)(i) The amount of the costs allowable under subparagraph (A) in any case may not exceed the amount equal to 80 percent of the amount of the costs incurred, to the extent that such costs are determined to be otherwise allowable and allocable under the Federal Acquisition Regulation.~~

~~—(ii) Regulations issued for the purpose of clause (i) shall provide for appropriate consideration of the complexity of procurement litigation, generally accepted principles governing the award of legal fees in civil actions involving the United States as a party, and such other factors as may be appropriate.~~

~~(C) In the case of a proceeding referred to in subparagraph (A), contractor costs otherwise allowable as reimbursable costs under this paragraph are not allowable if (i) such proceeding involves the same contractor misconduct alleged as the basis of another criminal, civil, or administrative proceeding, and (ii) the costs of such other proceeding are not allowable under paragraph (1).~~

~~—(6) In this subsection:~~

~~(A) The term "proceeding" includes an investigation.~~

~~(B) The term "costs", with respect to a proceeding--~~

~~(i) means all costs incurred by a contractor, whether before or after the commencement of any such proceeding; and~~

~~(ii) includes --~~

~~(I) administrative and clerical expenses;~~

~~(II) the cost of legal services, including legal services performed by an employee of the contractor;~~

~~(III) the cost of the services of accountants and consultants retained by the contractor; and~~

~~(IV) the pay of directors, officers, and employees of the contractor for time devoted by such directors, officers and employees to such proceeding.~~

~~(C) The term "penalty" does not include restitution, reimbursement, or compensatory damages.~~

(g)(1) The Comptroller General shall periodically evaluate the implementation of this section by the Secretary of Defense. Such evaluation shall consider the extent to which --

(A) such implementation is consistent with congressional intent;

(B) such implementation achieves the objective of eliminating unallowable costs charged to defense contracts; and

(C) such implementation (as well as the provisions of this section and the regulations prescribed under this section) could be improved or strengthened.

(2) The Comptroller General shall submit to the ~~committees named in subsection (e)(2)(C)~~ Committees on Armed Services and the Committees on Appropriations of the Senate and House of Representatives a report on such evaluation within 90 days of publication by the Secretary of Defense in the Federal Register of regulations that make substantive changes in regulations ~~prescribed under subsection (e) or (f) or in any other regulations of the Department of Defense~~ pertaining to allowable costs under covered contracts.

(h) In this section, the term "covered contract" means a contract for an amount more than \$150,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

**2.2.1.7. Text of revised 10 U.S.C. § 2324 as it would appear in the U.S. Code.**

**§ 2324. Allowable costs under defense contracts**

(a) The total cost of a defense contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits, plus any allocable cost of money. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used, including standard costs properly adjusted for applicable variances. Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable in accordance with the Federal Acquisition Regulation and the Department of Defense Supplement to the Federal Acquisition Regulation.

(b) The Secretary of Defense shall require that a covered contract provide that if the contractor submits to the Department of Defense a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or the Department of Defense Supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(c)(1) If the Secretary determines that a cost submitted by a contractor in its proposal for settlement is expressly unallowable under a cost principle referred to in subsection (b) that defines the allowability of specific selected costs, the Secretary shall assess a penalty against the contractor in an amount equal to --

(A) the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted; plus

(B) interest (to be computed based on regulations issued by the Secretary) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(2) If the Secretary determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the Secretary shall assess a penalty against the contractor in an amount equal to two times the amount of the disallowed cost allocated to covered contracts for which a proposal for settlement of indirect costs has been submitted.

(d) The Secretary shall prescribe regulations providing for a penalty under subsection (c) to be waived in the case of a contractor's proposal for settlement of indirect costs when--

(1) the contractor withdraws the proposal before the formal initiation of an audit of the proposal by the Federal Government and resubmits a revised proposal;

(2) the amount of unallowable costs subject to the penalty is insignificant; or

(3) the contractor demonstrates, to the contracting officer's satisfaction, that-

(A) it has established appropriate policies and personnel training and an internal control and review system that provide assurances that unallowable costs subject to penalties are precluded from being included in the contractor's proposal for settlement of indirect costs; and

(B) the unallowable costs subject to the penalty were inadvertently incorporated into the proposal.

(e) An action of the Secretary under subsection (b) or (c) --

(1) shall be considered a final decision for the purposes of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605); and

(2) is appealable in the manner provided in section 7 of such Act (41 U.S.C. § 606).

(f) In a proceeding before the Armed Services Board of Contract Appeals, the United States Claims Court, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that those costs are reasonable.

(g)(1) The Comptroller General shall periodically evaluate the implementation of this section by the Secretary of Defense. Such evaluation shall consider the extent to which --

(A) such implementation is consistent with congressional intent;

(B) such implementation achieves the objective of eliminating unallowable costs charged to defense contracts; and

(C) such implementation (as well as the provisions of this section and the regulations prescribed under this section) could be improved or strengthened.

(2) The Comptroller General shall submit to the Committees on Armed Services and the Committees on Appropriations of the Senate and House of Representatives a report on such evaluation within 90 days of publication by the Secretary of Defense in the Federal Register of regulations that make substantive changes in regulations pertaining to allowable costs under covered contracts.

(h) In this section, the term "covered contract" means a contract for an amount more than \$500,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

## 2.2.2. 10 U.S.C. § 2382

### Contract profit controls during emergency periods

#### 2.2.2.1. Summary of the Law

This statute authorizes the President to promulgate regulations to control excessive profits on defense contracts following a declaration of war by the Congress or declaration of national emergency by the President or Congress. These regulations must be transmitted to Congress within sixty days following the declaration of war or national emergency. These regulations shall establish the standards and procedures for determining what constitutes excessive profits and establishing thresholds for coverage and exemptions. The statute also defines the term "excessive profits." Regulations transmitted to Congress will take effect within sixty legislative days after their transmittal unless both Houses of Congress adopt a concurrent resolution disapproving the regulations. If the regulations are not disapproved by both Houses of Congress, they shall remain in effect for a maximum of five years. They can be extended for up to one year by a concurrent resolution of both Houses of Congress. The U.S. Claims Court has exclusive jurisdiction over claims arising under this section or its regulations. The President is required to transmit an annual report to Congress on the operation of this statute during the time in which the regulations are in effect and at the end of any war or national emergency.

#### 2.2.2.2. Background of the Law

Government efforts to control profits during World War I were unsuccessful and, as a result, Congress began imposing profit limitations on shipbuilding contracts in the 1930s.<sup>1</sup> When initially promulgated in 1934 as part of the Vinson-Trammell Act, this statute was meant to promote the construction of naval vessels, including aircraft.<sup>2</sup> The law required the President to use Government aircraft facilities for building at least 10% of all aircraft.<sup>3</sup> It also provided that aircraft contractors could realize only a reasonable profit and, if contractor bids were found to be inflated, the President could award those contracts to Government facilities.<sup>4</sup> For any contract over \$10,000, 10% of the total contract price was the maximum profit a contractor could realize.<sup>5</sup> Contractors were required to report under oath the amount of profit upon completion of the contract.<sup>6</sup> This report would be forwarded to the Secretary of the Treasury to determine if the profit amount exceeded 10% of the contract price and, if so, the Treasury Department would collect the excess.<sup>7</sup>

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<sup>1</sup>Office of the General Counsel of the Department of the Navy, *Navy Contract Law*, 2d ed. (1959).

<sup>2</sup>Vinson-Trammell Act of 1934, ch. 95, § 3, 48 Stat. 503,505.

<sup>3</sup>H.R. REP. NO. 1032, 73d Cong., 2d Sess. 2 (1934).

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 5.

<sup>6</sup>*Id.* at 5.

<sup>7</sup>*Id.* at 5.

This law was amended in 1939<sup>8</sup> to permit contractors who had a loss on a ship or aircraft contract to take credit for that loss over the next four years when computing their excess profits.<sup>9</sup> The prior law allowed contractors to take credit for losses in one year only.<sup>10</sup> Subsequent amendments limited this statute to aircraft and raised the maximum allowable profit amount to 12% of the contract price for aircraft procurement. Following the imposition of the excess-profits tax in the Second Revenue Act of 1940, Congress suspended the profit limitation provisions of the Vinson-Trammell Act.<sup>11</sup>

Following World War II, the termination of renegotiation provisions and the repeal of the excess profits tax left the Vinson-Trammell Act "as the only statutory control of excessive profits for post-war procurement."<sup>12</sup> With the start of the Cold War and increased defense procurement in 1948, Congress enacted the Renegotiation Act of 1948 and extended its provisions to all contracts of the military departments for the procurement of ships, aircraft, and their spare parts.<sup>13</sup> In 1949, Congress made clear that any contract subject to the Renegotiation Act of 1948 would not be subject to the Vinson-Trammell Act as well.<sup>14</sup> The Renegotiation Act was extended a number of times and the Vinson-Trammell Act exemption has been extended accordingly.<sup>15</sup>

In 1981,<sup>16</sup> the Senate recommended the repeal of this law.<sup>17</sup> The view in the Senate was that this law imposed obsolete and unworkable profit limitations on the limited areas of ship and aircraft procurement.<sup>18</sup> Congress refused to repeal the statute but limited its application to contracts entered into or modified in a significant way during war or national emergency.<sup>19</sup> The amendment eliminated the specific profit limitations and instead authorized the President to promulgate regulations to limit excessive profits should a war or national emergency arise.<sup>20</sup> Congress did, however, limit the applicability of this statute and prohibited its implementation or enforcement for contracts made before October 1, 1981.<sup>21</sup>

### 2.2.2.3. Law in Practice

The excess-profit tax was passed in 1940 after "it became clear that the Vinson-Trammell approach of limiting profits to specific percentages of contract prices was of doubtful validity even in peacetime since it curtailed incentives to reduce costs much in the same manner as the

<sup>8</sup>Act of April 3, 1939, ch. 35, § 14, 53 Stat. 555, 560.

<sup>9</sup>H.R. REP. NO. 2256, 76th Cong., 3d Sess. 2 (1939).

<sup>10</sup>*Id.*

<sup>11</sup>Office of the General Counsel of the Department of the Navy, *Navy Contract Law*, 2d ed. (1959).

<sup>12</sup>*Id.* (citations omitted).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 911, 95 Stat. 1099, 1120-22 (1981).

<sup>17</sup>H.R. CONF. REP. NO. 311, 97th Cong., 1st Sess. 126 (1981), reprinted in 1981 U.S.C.C.A.N. 1781, 1867.

<sup>18</sup>H.R. REP. NO. 71, 97th Cong., 1st Sess. 1 (1981), reprinted in 1981 U.S.C.C.A.N. 1781, 1842.

<sup>19</sup>H.R. CONF. REP. NO. 311, 97th Cong., 2d Sess. 127 (1981), reprinted in 1981 U.S.C.C.A.N. 1781, 1868.

<sup>20</sup>*Id.*

<sup>21</sup>Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, § 911(c), 95 Stat. 1099, 1120-22; Pub. L. No. 96-342, § 1005, 94 Stat. 1120 (1980).

cost-plus-a-percentage-of-cost type contract."<sup>22</sup> Implementation of the provisions of the Vinson-Trammell Act during wartime had proven to be inflexible because it treated "the rate of profit return of all contractors alike without regard to such controlling distinctions as the extent of risk assumed, production efficiency, capital investment, and the many other factors that bear on reasonableness of profit."<sup>23</sup> As recently as 1981, the Senate had called for the repeal of this statute for much the same reasons as those articulated by Congress in the 1940s.

#### **2.2.2.4. Recommendation and Justification**

##### **Repeal 10 U.S.C. § 2382.**

The Panel recommends that 10 U.S.C. § 2382 be repealed. Congress has discussed the problems with this law for over 40 years and has suspended its provisions for most of that time in favor of more efficient systems of limiting excess profits. The Panel agrees with the Senate of the 97th Congress that this law is outdated and inefficient. Any procedures considered necessary to limit profits should be addressed in the FAR and DFARS. The regulatory process is a more flexible alternative for addressing changing situations and specific problems that may arise in the procurement process.

#### **2.2.2.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to the Department of Defense with a view toward streamlining the defense acquisition process. This recommendation will also remove from the procurement process a statute which has proven to be confusing to small businesses and commercial companies.

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<sup>22</sup>Office of General Counsel of the Department of the Navy, *Navy Contract Law*, 2d ed. (1959) (citations omitted).

<sup>23</sup>*Id* (citations omitted).

## **2.2.3. 41 U.S.C. § 420**

### **Travel expenses of government contractors**

#### **2.2.3.1. Summary of the Law**

This section is divided into two subsections. Subsection (a) permits the travel, lodging, subsistence, and incidental travel expenses of Government contractors or their employees to be claimed as an allowable cost, subject to the rates codified in Title 5 or promulgated by the Administrator of General Services or the President.

Subsection (b) exempts state institutions or nonprofit institutions involved in contracts for Federally funded research or related activities from the restrictions in subsection (a). The travel costs incurred by the employees of an institution will be paid if the costs are within the price range normally paid by the institution and within the limits established in regulations by the Director of the Office of the Management and Budget. These regulations provide that, should the institution not have a policy regarding travel costs, the rates described in Title 5 will apply.

#### **2.2.3.2. Background of the Law**

This section was amended in 1986 to its current form. At that time Congress was examining the efficiency of travel reimbursement procedures for Government employees because of complaints the payment system took too long and reimbursement rates were too low, forcing Government employees to underwrite travel expenses incurred on official business.<sup>1</sup> Congress directed the Administrator of General Services to promulgate regulations allowing for a per diem allowance for food and other incidentals, based on locality studies, and for the payment of the actual cost of lodging. Congress believed that this system would not only be more equitable, but that it would be more efficient by reducing administrative costs.<sup>2</sup>

After establishing this new system for Government employees, Congress extended it to cover the allowable travel costs for the employees of Government contractors.<sup>3</sup> It felt that contractors who charge travel expenses against Government contracts should only be able to claim what a Federal employee on the same trip could claim.<sup>4</sup> The statute also recognizes an exception for employees of institutions involved in Government research. For contracts involving State or nonprofit institutions involved in Government research, these institutions are able to claim their actual travel costs as long as these costs do not exceed those normally allowed by the institution in its regular operation.

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<sup>1</sup>131 CONG. REC. 38, 346-38, 349, 38, 490-38, 494, 38, 629-38, 630 (1986).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*



### 2.2.3.3. Law in Practice

There is a marked difference of opinion between the Government and industry sectors regarding the restrictions on the costs allowed for travel by contractor employees. The Defense Contract Audit Agency (DCAA) has been firm in its position that, while the level of detail in the statute is perhaps excessive, limiting contractor employees to the travel rates imposed on Government employees prevents contractor abuse in this area.<sup>5</sup> The comments received from members of the contracting industry have presented a different point of view. The Council of Defense and Space Industry Associations (CODSIA)<sup>6</sup> and the Aerospace Industries Association (AIA)<sup>7</sup> both believe that the limits on reimbursement of contractor travel are unreasonable and unrealistic. They point out that the Government is often able to negotiate lower airfares and hotel costs than those available to the civilian community, and to avoid the payment of hotel taxes, which can save as much as ten percent in lodging costs.<sup>8</sup> In addition, CODSIA stated:

[T]he arbitrary attempt to limit travel costs unrealistically ignores sound business practices and accounting controls as they relate to DOD, as opposed to commercial, related business trips. Additionally, for contractors that have substantial commercial and government business, it forces a choice between two inefficient options - either continue to have an orderly single set of travel policies for all company employees and thereby absorb substantial unallowable costs, or create a cumbersome inefficient dual set of travel policies and accounting procedures which are fundamentally inconsistent with a TQM approach that seeks to optimize the highest quality of performance of all employees for the lowest net cost to the contractor, and thereby reduce collateral overhead expenses.<sup>9</sup>

The industry commentators agree that contractors should be restricted to claiming only those costs that are reasonable and allocable to the individual contracts, but should not be restricted to the rates allowed Government employees.<sup>10</sup>

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<sup>5</sup>Memorandum from William J. Sharkey, Assistant Director, Policy and Plans, Defense Contract Audit Agency, to the Advisory Panel on Streamlining and Codifying Acquisition Laws (Mar. 26, 1992).

<sup>6</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>7</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association, to John A. Phillips, Director, Contract Policy, Raytheon Company (Mar. 26, 1992).

<sup>8</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992); Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association, to John A. Phillips, Director, Contract Policy, Raytheon Company (Mar. 26, 1992).

<sup>9</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Apr. 23, 1992).

<sup>10</sup>*Id.* See also Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association, to John A. Phillips, Director, Contract Policy, Raytheon Company (Mar. 26, 1992).

#### **2.2.3.4. Recommendation and Justification**

##### **Repeal**

The policies and procedures reflected in this statute should be implemented in the Federal Acquisition Regulation (FAR). Currently, there are several complex and comprehensive provisions in the FAR governing the allowability and allocability of contractor travel expenses. Because the regulatory process provides greater flexibility in implementation and quicker responses to changing conditions, it is unnecessary to retain this authority statutorily. In the interests of encouraging the integration of the defense and commercial markets, it is further recommended that the regulations promulgated in the place of this statute require contractors to keep travel costs to a reasonable level, without restricting them to rigid rate schedules.

#### **2.2.3.5. Relationship to Objectives**

This recommendation would enable a company to integrate the production of both commercial and defense unique products in a single business unit without altering their accounting or management procedures relating to the payment of travel expenses. It would also promote the participation of small businesses in the defense acquisition process by permitting them to use one method of determining their employees' travel expenses.

## **2.3. Audit and Access to Records**

### **2.3.0. Introduction**

The Panel identified 21 laws relating to the audit of and access to contractor records in the contract administration area. The majority of these statutes are part of the Inspector General Act, 5 U.S.C. App. §§ 1-12, which provided for the establishment of the various Offices of the Inspector General in many executive agencies. After researching the history of this Act and the comments received on it, the Panel determined that the Offices of the Inspector General serve an important function in the acquisition process and are necessary to the continued financial and ethical integrity of the procurement process. The Panel noted that 5 U.S.C. App. § 9, which created and established the various Offices, is no longer necessary. The Offices of the Inspector General were created according to the law and have been functioning for many years. There is no continued need to transfer resources; thus, the statute has served its purpose and has no further use. In the interest of streamlining the acquisition process, the Panel recommends that 5 U.S.C. App. § 9 be repealed and the remaining statutes of the Inspector General Act be numbered to reflect this repeal.

The Panel noted that while 10 U.S.C. § 2313 is the primary authority addressing audit and access to contractor records, other statutes also contain similar audit provisions, including subsection (f) of 10 U.S.C. § 2306a, "Truth in Negotiations Act," and 10 U.S.C. § 2406, "Availability of cost and pricing records." Keeping in mind the statutory mandate of streamlining the acquisition process, the Panel recommends that a centralized, comprehensive audit statute be developed at 10 U.S.C. § 2313 and the other audit authority be repealed. To this end, the Panel recommends that the authority contained in 10 U.S.C. § 2306a and the audit coverage at FAR section 52.215-2 be merged into 10 U.S.C. § 2313 to form this comprehensive audit statute.

The Panel determined that the scope of the audit authority in the statute should be extended to more types of contracts. The Panel has included those types of contracts currently listed in FAR section 52.215-2 in subsection (a)(1) of its proposed audit statute. The Panel recognized that industry commentators have noted that this amendment actually expands the statute's scope; however, these types of contract are already listed in the regulation implementing the current statute.

In subsection (a)(2) of the proposed audit statute, the Panel has included the essence of 10 U.S.C. § 2306a(f), the audit provision of the Truth in Negotiations Act. It is the Panel's opinion that this language adequately addresses the audit authority necessary for contracts for which cost and pricing data are required.

The Panel recommends retention of the subpoena authority included in subsection (d) of the current language. Although industry commentators have objected to the inclusion of this authority, the Panel believes that the subpoena authority is a necessary enforcement tool in the defense procurement process. While the Panel has chosen not to include in its proposed audit statute an exemption for contracts for commercial items, the Panel has recommended the adoption of a new statute addressing the purchase of commercial items, which contains a new pricing

subsection and an audit provision tailored specifically to that pricing provision. The proposed audit clause, if enacted, would be the sole source of audit rights for commercial item acquisitions. In addition, one subsection of the new statute will list certain existing statutes that will be superseded by the new commercial item statute when the Government is purchasing a commercial item. 10 U.S.C. § 2313 would be one of the listed statutes. The Panel has included the provisions in FAR subsection 15.106-1 that exempt small purchases and utility services from the provisions of 10 U.S.C. § 2313.

The Panel recognizes that some industry representatives felt that the current three year records retention requirement was overreaching and expensive; however, the ability to audit the books and records of a Government contractor even after the contract has been completed is necessary to maintain the financial and ethical integrity of the acquisition process.

With the development of this centralized, comprehensive audit statute at 10 U.S.C. § 2313, the Panel recommends that the similar audit authority contained in 10 U.S.C. § 2406, "Availability of cost and pricing records," be repealed. The Panel recognizes that the authority contained in this statute is important to the continued financial and ethical integrity of the defense procurement process; however, it believes that 10 U.S.C. § 2313 and the proposed amendments to that law provide adequate audit authority.

## **2.3.1. 5 U.S.C. App. 3 §§ 1-12**

### **Inspector General Act<sup>1</sup>**

#### **2.3.1.1. Summary of the Law**

The Inspector General Act has been codified into twelve sections of the U.S. Code. Section 1 names the short title of the Act. Section 2 states the purposes of the Office of Inspector General, including conducting and supervising independent, objective audits and investigations into programs and operations of affected establishments, and detecting and preventing fraud, waste, and abuse.

Section 3 requires the President, with the consent of the Senate, to appoint an Inspector General (IG) at the head of each office. This appointment will be made without regard to the appointee's political affiliation and will be based on integrity and demonstrated ability in a variety of categories.

Section 4 requires the IG to establish policy direction and supervise, conduct, and coordinate audits and investigations in the agency in which the Office is established; to establish policy and coordinate any programs designed to promote economy and efficiency in management; and to detect and prevent fraud and waste.

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<sup>1</sup>The Inspector General Act includes the following statutes:

- 5 U.S.C. App. 3 § 1 - Short title
- 5 U.S.C. App. 3 § 2 - Purpose and establishment of Offices of Inspector General; departments and agencies
- 5 U.S.C. App. 3 § 3 - Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations
- 5 U.S.C. App. 3 § 4 - Duties and responsibilities; report of criminal violations to Inspector General
- 5 U.S.C. App. 3 § 5 - Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems; disclosure of information; definitions
- 5 U.S.C. App. 3 § 6 - Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment
- 5 U.S.C. App. 3 § 7 - Complaints by employees; disclosure of identity; reprisals
- 5 U.S.C. App. 3 § 8 - Additional provisions with respect to the Inspector of the Department of Defense
- 5 U.S.C. App. 3 § 8A - Special provisions relating to the Agency for International Development
- 5 U.S.C. App. 3 § 8B - Special provisions relating to the Nuclear Regulatory Commission
- 5 U.S.C. App. 3 § 8C - Special provisions concerning the Department of the Treasury
- 5 U.S.C. App. 3 § 8D - Special provisions concerning the Department of Justice
- 5 U.S.C. App. 3 § 8E - Requirements for Federal entities and designated Federal entities
- 5 U.S.C. App. 3 § 8F - Rule of construction of special provisions
- 5 U.S.C. App. 3 § 9 - Transfer of functions
- 5 U.S.C. App. 3 § 10 - Conforming and technical amendments
- 5 U.S.C. App. 3 § 11 - Definitions
- 5 U.S.C. App. 3 § 12 - Effective date

Section 5 describes the semiannual reports the IG is required to file with Congress and the head of the establishment. This section outlines in detail the information to be furnished in this report, including a description of significant problems discovered, a listing and summary of each audit report issued by the Office, and statistical tables.

Section 6 authorizes the IG to have access to all records, reports, etc., that relate to any problems and operations for which the IG is responsible and to request or subpoena information and assistance necessary to carry out the IG's duties and responsibilities from any federal, state, or local governmental agency or unit.

Section 7 permits the IG to receive and investigate complaints or information from employees of the establishment about the possible existence of activities that constitute a violation of law, rules, or regulations, mismanagement, gross waste of funds, or abuse of authority.

Sections 8 - 8E address special provisions for specific Offices of Inspector General in the Department of Defense, the Agency for International Development, the Nuclear Regulatory Commission, the Department of the Treasury, the Department of Justice, and other Federal entities.

Section 9 provides for the transfer of audit and investigative functions from the internal auditing bodies performing these functions for the agencies and departments to the respective Offices of the Inspector General within each entity. All personnel, assets, liabilities, contracts, property, records, and unexpended balances or appropriations, authorizations, allocations, or other funds held by the internal auditing bodies will also be transferred to the Offices of the Inspector General. Section 10 provides for conforming and technical amendments to 5 U.S.C. §§ 5315 and 5316, and 42 U.S.C. § 3522. Section 11 defines the terms "head of the establishment," "establishment," "Inspector General," "Office," and "Federal agency." Finally, section 12 provides that this Act and the amendments made by this Act in section 10 will take effect October 1, 1978.

### **2.3.1.2. Background of the Law**

This Act was passed as part of the Inspector General Act of 1978.<sup>2</sup> The Congressional purpose of the legislation was to "create Offices of Inspector and Auditor General in seven executive departments and six executive agencies, to consolidate existing auditing and investigative resources to more effectively combat fraud, abuse, waste, and mismanagement in the programs and operations of those departments and agencies."<sup>3</sup> These executive entities included the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, the Veterans' Administration, and the Departments of Agriculture, Commerce, Housing and Urban Development, Interior, Labor, and Transportation.<sup>4</sup>

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<sup>2</sup>Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101.

<sup>3</sup>S. REP. NO. 1017, 95th Cong., 2d Sess. 1 (1978), reprinted in 1978 U.S.C.C.A.N. 2676.

<sup>4</sup>*Id.*

Congress noted evidence that "fraud, abuse and waste in the operations of the Federal departments and agencies and in Federally-funded programs are now reaching epidemic proportions."<sup>5</sup> Congress believed that the Government had failed to make sufficient effort to detect and prevent fraud, waste, and mismanagement in Federal programs and expenditures and targeted basic organizational deficiencies in the way the executive agencies have approached their audit and investigative responsibilities as the main reason for this failure.<sup>6</sup> Congress agreed with the General Accounting Office (GAO) that the audit and investigative authority of an agency must be placed in persons who only report to, and are under the supervision of, the head of the agency.<sup>7</sup> In most agencies at that time, the internal auditors and investigators were reporting to and under the supervision of the very officials whose programs they were investigating, making such investigations futile.<sup>8</sup>

The IG concept would provide a central focal point in each major agency for the investigative and audit responsibilities.<sup>9</sup> Congress believed that this concept would remove the inherent conflict of interest that had existed when the investigative and audit functions were under the authority of the official being audited.<sup>10</sup> Congress further provided for the independence of the Inspector and Auditor General "by making him a presidential appointee, subject to Senate confirmation, and by taking the unusual step of requiring the President to report to Congress explaining his reasons for removing an incumbent in office."<sup>11</sup>

Subsequent amendments to the Act established Offices of the Inspector General in the Agency for International Development, the Department of Defense, the State Department, the U.S. Information Agency, and the Foreign Service. The final substantive amendment was in 1988, when Congress added the Departments of Energy, Health and Human Services, Justice and Treasury, Federal Emergency Management Agency, Nuclear Regulatory Commission, Office of Personnel Management, the Government Printing Office, and Railroad Retirement Board to the list of entities to be subject to the Inspector General Act.<sup>12</sup> This amendment also added a provision that was to ensure the uniformity and reliability of reports required under the Act. Congress noted that 21 departments and agencies had established Offices of Inspector General since 1976 with a goal to improve the management of the Federal Government.<sup>13</sup> Congress observed that these offices had greatly improved the operations of their respective departments and agencies and felt that the above agencies should be subject to the provisions of the Act as well.<sup>14</sup>

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<sup>5</sup>*Id.* at 4.

<sup>6</sup>*Id.* at 5.

<sup>7</sup>*Id.* at 5.

<sup>8</sup>*Id.* at 6.

<sup>9</sup>*Id.* at 6.

<sup>10</sup>*Id.* at 7.

<sup>11</sup>*Id.* at 9.

<sup>12</sup>Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515.

<sup>13</sup>H.R. REP. NO. 771, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3154.

<sup>14</sup>*Id.* at 1.

### 2.3.1.3. Law in Practice

Few comments were received on this Act and its impact in practice. The Aerospace Industries Association (AIA) noted that a number of the responsibilities assigned by the Act to the IG duplicate those already assigned to the Defense Contract Audit Agency (DCAA).<sup>15</sup> AIA believes that the IG's "overemphasis on fraud indicators intrudes on the normal functioning of the procurement process."<sup>16</sup> It argued that the introduction of the IG into the procurement process hampers the resolution of legitimate disagreements through normal administrative procedures, thus unduly burdening the buyer/seller relationship.<sup>17</sup> AIA stated that the Act should be repealed.<sup>18</sup> The Department of the Air Force noted that 5 U.S.C. App. 3 § 9(a)(1)(C), which concerns the transfer of certain organizations to the Department of Defense Inspector General (DODIG), has served its purpose and could now be eliminated.<sup>19</sup> The DODIG stated that the Act is serving its intended purpose, does not duplicate or overlap with other laws, and is necessary to protect the best interests of DOD.<sup>20</sup>

### 2.3.1.4. Recommendations and Justification

**Amend to repeal 5 U.S.C. App. 3 § 9 that provides for the transfer of auditing and investigating authority to the Office of the Inspector General.**

The Panel recommends that 5 U.S.C. App. 3 § 9, which transfers the offices conducting auditing and investigating functions within the agencies and departments to the appropriate Office of Inspector General, be repealed. These requirements have been accomplished as the Offices of Inspector General have been established and are in operation. This section is no longer necessary and, in the interest of streamlining the laws applicable to the defense acquisition process, it should be repealed. The Panel believes that the Offices of Inspector General serve a very important function in the acquisition process and are vitally necessary to the continued financial and ethical integrity of the procurement process. The Panel recommends that the remaining provisions of the Inspector General Act should be retained as written but renumbered to reflect the repeal of 5 U.S.C. App. 3 § 9.

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<sup>15</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 13, 1992).

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>Memorandum from Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting) and Assistant Secretary (Acquisition), Office of the Assistant Secretary of the Department of the Air Force to the Office of General Counsel, Defense Logistics Agency (Apr. 24, 1992).

<sup>20</sup>Letter from Derek H. Vander Schaaf, Deputy Inspector General, Department of Defense to Diane Sidebottom, Acquisition Law Task Force (May 19, 1992).



### **2.3.1.5. Relationship to Objectives**

This recommendation satisfies the Panel's statutory mandate of reviewing acquisition laws applicable to the Department of Defense with a view toward streamlining the defense acquisition process. It helps to eliminate authority that has been used within the time intended but is now unnecessary. The retention of the Act promotes financial and ethical integrity in the acquisition process and encourages the exercise of sound judgment on the part of acquisition personnel.

## 2.3.2. 10 U.S.C. § 2313

### Examination of books and records of contractor

#### 2.3.2.1. Summary of the Law

This law permits an agency named in 10 U.S.C. § 2303 (i.e., Department of Defense, Department of the Army, Department of the Air Force, Department of the Navy, the Coast Guard, and the National Aeronautics and Space Administration) to inspect the plant and audit the books and records of a contractor or subcontractor performing a cost or cost-plus-a-fixed-fee contract. Subsection (b) allows the Comptroller General to inspect the books and records of a contractor or subcontractor who is awarded a contract using a procedure other than sealed bid procedures. Subsection (c) of this statute exempts foreign contractors and subcontractors from the audit authority of the agencies, with the concurrence of the Comptroller General. The concurrence of the Comptroller General is unnecessary where the contractor or subcontractor is a foreign Government and is precluded by the laws of the country from making its books and records available, or where the head of the agency determines that the public interest would not be served by exercise of the Comptroller's audit authority. Subsection (d) of this statute permits the Director of the Defense Contract Audit Agency (DCAA) to subpoena the books and records of a contractor, access to which is authorized by this section. The Director must then submit an annual report to the Secretary of Defense on the exercise of the subpoena authority, which is then forwarded to the Committees on Armed Services of the Senate and House of Representatives.

#### 2.3.2.2. Background of the Law

This law was enacted as part of the Armed Services Procurement Act of 1947.<sup>1</sup> In the initial language of the statute, the audit provisions were a very small part of the authority given in the law. The law was primarily passed to permit the head of the agency to enter into any type of contract that would promote the best interests of the Government.<sup>2</sup> Congress stated that the right to use the most suitable type of contract was as important as the right to procure by negotiation; however, the prohibition against using the cost-plus-a-percentage-of-cost contract was continued.<sup>3</sup> While fixed-price contracts were to be used in most negotiated procurements, wartime experience had shown the value in being able to use the proper type of contractual arrangement.<sup>4</sup> In particular, Congress recognized the utility in permitting cost-plus-fixed-fee contracts for research and development.<sup>5</sup> Congress believed it would be unfair to expect a nonprofit educational institution to perform a fixed-price contract when costs are uncertain and subject to daily change.<sup>6</sup> Few nonprofit institutions could afford that risk, and they would have to

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<sup>1</sup> Armed Services Procurement Act of 1947, ch. 65, § 4(b) & (c), 62 Stat. 21, 23 (1948).

<sup>2</sup> *Id.* at 23.

<sup>3</sup> S. REP. NO. 571, 80th Cong., 2d Sess. 17 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1048, 1064-5.

<sup>4</sup> *Id.* at 16.

<sup>5</sup> *Id.* at 17.

<sup>6</sup> *Id.* at 17.

include extremely high contingency cost allowances for their own protection.<sup>7</sup> Included in this law was a provision allowing the agency head to inspect the plant and audit the books and records of the contractor or subcontractor.

This law was amended in 1951 to require insertion, in all contracts negotiated without advertising, a provision permitting the Comptroller General or his representatives to have access to and the right to examine any pertinent books, records, documents, or papers of the contractor or subcontractor engaged in the performance of contracts or subcontracts.<sup>8</sup> Congress felt that negotiated contracts were made under special circumstances and required close supervision and control.<sup>9</sup> At the time of passage, most agencies were in favor of this amendment.<sup>10</sup> The General Services Administration suggested that purchases of less than \$1,000 should be exempt from the amendment; however, Congress felt that since the law merely authorizes the Comptroller General to examine such contracts or records, this exemption was unnecessary.<sup>11</sup>

The next amendment to this law was in 1961,<sup>12</sup> when a provision was added to exempt certain foreign contractors from the requirement of an examination-of-records clause.<sup>13</sup> The requirement for an examination-of-records clause had caused delays and difficulties in placing contracts with foreign contractors, particularly when contracting with a foreign Government or agency, since they often felt this clause impinged on their sovereign rights.<sup>14</sup> When legal or policy reasons prevented a potential contractor from agreeing to the examination-of-records clause, the contracting officer had to try to make the procurement from another source.<sup>15</sup> If the supplies or services could not be obtained elsewhere and the contractor refused the examination clause, the contracting officer was faced with failing to procure the supplies or breaking the law.<sup>16</sup> The Air Force commented that, on many occasions, it was unable to procure needed supplies and services because they were available from only one source of foreign supply (e.g., postal and transportation equipment from Japan, Belgium, the Netherlands, and Germany).<sup>17</sup> This amendment permitted the exclusion of the provision if the agency head determined that the inclusion of the clause would not be in the public interest and the Comptroller General concurred.<sup>18</sup>

The last substantive amendment to this statute was in 1985.<sup>19</sup> Congress added a provision that authorized the Director of DCAA to subpoena any book, paper, statement, record, information, account, writing, or other document of a contractor, if the Director is entitled to

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<sup>7</sup>*Id.* at 17.

<sup>8</sup> Act of October 31, 1951, ch. 652, 65 Stat. 700.

<sup>9</sup> S. REP. NO. 603, 82d Cong., 1st Sess. 2 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2569, 2570.

<sup>10</sup>*Id.* at 2.

<sup>11</sup>*Id.* at 2-3.

<sup>12</sup> Act of September 27, 1966, Pub. L. No. 89-607, § 1(2), 80 Stat. 850.

<sup>13</sup> S. REP. NO. 1548, 89th Cong., 2d Sess. 1 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3063.

<sup>14</sup>*Id.* at 2.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 4.

<sup>17</sup>*Id.* at 2.

<sup>18</sup>*Id.* at 4.

<sup>19</sup> Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 935, 99 Stat. 583, 700 (1985).

access to such documentation.<sup>20</sup> Congress stated that it did not intend this provision to expand DCAA's scope of access to books and records but intended to provide the Director with an enforcement mechanism if examination was not readily permitted.<sup>21</sup> Congress believed that the subpoena power should be used sparingly and only when other investigative methods had failed.<sup>22</sup>

### **2.3.2.3. Law in Practice**

The authority contained in this statute has been implemented in FAR sections 52.215-1,<sup>23</sup> 52.215-2,<sup>24</sup> 15.106-1,<sup>25</sup> and 15.106-2.<sup>26</sup> The Inspector General of the Department of Defense (DODIG) stated that this "statute needs to be amended to provide contract auditors with the authority to review and evaluate contractor internal audit reports."<sup>27</sup>

A recent case in the 4th Circuit held that DCAA's statutory subpoena power extends only to cost information related to Government contracts and that defense contractor internal audit materials were beyond the scope of DCAA's subpoena power.<sup>28</sup> The DODIG noted that access by DCAA to contractor internal audit reports would reduce duplicative audit coverage.<sup>29</sup>

DCAA commented that this statute is limited because it only applies to cost or cost-plus-fixed-fee contracts.<sup>30</sup> It recommended that this provision be broadened to apply to all contracts for which the Government has a need to review contractor books and records, including time and material, fixed-price-incentive, firm-fixed-price, and cost-plus-award-fee contracts.<sup>31</sup> The Air Force Contract Law Center agreed with this recommendation but would expand its application even further to include fixed-price-redeterminable, cost-sharing, cost-plus-award-fee, cost-plus-incentive-fee, labor-hour, cost-reimbursement-term, fixed-price-level-of-effort, and variable quantity contracts.<sup>32</sup>

The Aerospace Industries Association (AIA) stated that the provision that requires contractors to retain books and records for three years following final payment has placed an

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<sup>20</sup>*Id.* at 700.

<sup>21</sup>H.R. CONF. REP. NO. 235, 99th Cong., 1st Sess. 461 (1985), reprinted in 1985 U.S.C.C.A.N. 472, 615.

<sup>22</sup>*Id.* at 461.

<sup>23</sup>48 C.F.R. 52.215

<sup>24</sup>*Id.*

<sup>25</sup>48 C.F.R. 15.106

<sup>26</sup>*Id.*

<sup>27</sup>Letter from Derek H. Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>28</sup>*United States v. Newport News Shipbuilding and Dry Dock Company*, 837 F.2d 162, 164 (4th Cir. 1988).

<sup>29</sup>Letter from Derek H. Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>30</sup>Memorandum from Michael J. Thibault, Assistant Director, Policy and Plans, Defense Contract Audit Agency to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 5, 1992).

<sup>31</sup>*Id.*

<sup>32</sup>Memorandum from Michael J. Mullin, Air Force Contract Law Center to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (Mar. 23, 1992).

undue and expensive burden on the contractor.<sup>33</sup> The result of this requirement is prolonged maintenance of nonproductive storage facilities and large record keeping and storage related costs.<sup>34</sup> AIA recommended that the statute be modified to provide a more reasonable retention provision.<sup>35</sup> It also recommended that the statute allow that photographic or electronic images of original records are suitable for this purpose.<sup>36</sup> AIA noted that the subpoena authority of the Director of DCAA has contributed to an adversarial buyer/seller relationship.<sup>37</sup>

The Council of Defense and Space Industry Associations (CODSIA) stated that this law has created an atmosphere of suspicion between contractors and Government and has generated unnecessary administrative requirements.<sup>38</sup> CODSIA noted that the law contains ambiguous terms that have been the subject of litigation.<sup>39</sup> It recommended the statute be amended to clarify that the scope of the examination should be limited to records that are directly related to the performance of the contract, not irrelevant internal records.<sup>40</sup> CODSIA also recommended that the examination provision should be extended to the growing number of foreign contractors, and the subpoena power should be limited to those situations where a criminal indictment has been issued.<sup>41</sup> CODSIA recommended that this examination authority should exempt businesses and business segments of Government contractors that provide commercial products because of the sensitive nature of the information to be audited.<sup>42</sup> In a supplemental comment, CODSIA expressed a concern about the inclusion of cost-reimbursement, time and materials, labor-hour, or price-redeterminable contracts within the scope of this statute.<sup>43</sup> It contended that such an expansion is inconsistent with the Panel's goal of streamlining.<sup>44</sup> CODSIA stated that the statute does not require the auditing of a significant number of foreign contractors and strongly encouraged strengthening the audit provisions relating to foreign contracts.<sup>45</sup> Finally, CODSIA recommended a specific definition of "records" and exempting fixed price contracts from the audit provisions.<sup>46</sup>

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<sup>33</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 13, 1992).

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (June 8, 1992).

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>Letter from the Council of Defense and Space Industry Associations to Gary Quigley and Jack Harding (Oct. 16, 1992).

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

The Defense Logistics Agency, Defense Plant Representative Office Boeing/Seattle, Washington, stated that the problems it has observed are not with the law, but with its over zealous application.<sup>47</sup>

The Center for Strategic and International Studies (CSIS) noted that subsection (b) of this law allows for audit authority by the General Accounting Office (GAO) through the Comptroller General.<sup>48</sup> This provision predates the creation of DCAA as the chief contract audit arm of the Government and is inconsistent with other laws.<sup>49</sup> The Office of the Assistant Secretary of the Air Force Acquisition (SAF/AQC) recommended combining 10 U.S.C. § 2406, 10 U.S.C. § 2313, and 10 U.S.C. § 2306a(f) into a single comprehensive audit statute.<sup>50</sup>

The GAO commented that it fully supports the Panel's attempt to consolidate statutes in the audit area.<sup>51</sup> GAO stated that it believes it is important for it to retain the ability to audit firm fixed-price, negotiated contracts. As a result, it contends that "to make the audit authority of the Comptroller General coextensive with that of the contracting agencies could limit our ability to perform such reviews."<sup>52</sup> It provided the Panel with proposed statutory language to this end. GAO also supported and offered its assistance in developing some sort of audit accommodation for procurement from commercial vendors.

#### **2.3.2.4. Recommendation and Justification**

**Amend to combine 10 U.S.C. § 2313 and 10 U.S.C. § 2306a(f) and certain regulatory provisions into a single comprehensive audit statute.**

The Panel recommends that 10 U.S.C. § 2313 be amended to merge the audit provision of the Truth in Negotiations Act (10 U.S.C. § 2306a(f)) and the audit coverage in FAR section 52.215-2 into a single comprehensive audit statute. To this end, the Panel has accepted the proposed statutory language provided by GAO with some minor changes. The Panel has included those types of contracts currently listed in FAR section 52.215-2 in its proposed audit statute. The Panel recognizes that industry commentators have noted that this amendment actually expands the statute's authority; however, because these types of contracts are listed in the regulation implementing the statute, they are currently binding on contractors and represent no new authority.

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<sup>47</sup>Letter from Paul J. Madden, Defense Logistics Agency, Defense Plant Representative Office, Boeing/Seattle, Washington to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (Apr. 10, 1992).

<sup>48</sup>Memorandum from Debbie van Opstal to the Flowdown Cost Accounting Task Forces, Center for Strategic and International Studies (May 5, 1992).

<sup>49</sup>*Id.*

<sup>50</sup>Memorandum from Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), to the Office of the General Counsel of the Defense Logistics Agency (Apr. 24, 1992).

<sup>51</sup>Letter from James F. Hichman, General Counsel, General Accounting Office, to Gary Quigley, Deputy General Counsel, Defense Logistics Agency (Sept. 24, 1992).

<sup>52</sup>*Id.*

In subsection (a)(2) of the proposed audit statute, the Panel has included the essence of 10 U.S.C. § 2306a(f), the audit provision of the Truth in Negotiations Act. The Panel believes that this language adequately addresses the audit authority necessary for contracts in which cost and pricing data are necessary.

The Panel recommends retention of the subpoena authority included in subsection (d) of the current language. Although industry commentators have objected to the inclusion of this authority, the Panel believes that the subpoena authority is a necessary enforcement tool in the defense procurement process. While the Panel has chosen not to include in its proposed audit statute an exemption for contracts for commercial items, the Panel has recommended to Congress the adoption of a new statute addressing the purchase of commercial items which contains a new pricing subsection and an audit provision tailored specifically to that pricing provision. The proposed audit clause, if enacted, would be the sole source of audit rights for commercial item acquisition. In addition, one subsection of the new commercial item statute will list certain existing statutes that will be superseded by this new statute when the Government is purchasing a commercial item. 10 U.S.C. § 2313 would be one of these statutes. The Panel has included the provisions in FAR subsection 15.106-1 that exempt small purchases and utility services from the provisions of 10 U.S.C. § 2313.

The Panel recognizes that AIA feels that the three year records retention requirement is overreaching and expensive; however, the ability to audit the books and records of a Government contractor even after the contract has been completed is necessary to maintain the financial and ethical integrity of the acquisition process.

The Panel believes that the proposed audit statute will better target the types of contracts for which the Government believes audit authority is particularly necessary while exempting small purchases and commercial contracts.

#### **2.3.2.5. Relationship to Objectives**

This recommendation satisfies the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It promotes the continued commercialization of the defense procurement process by enabling a company to integrate the production of both commercial and defense unique products in a single business unit without altering its accounting or management procedures. By exempting commercial products from these audit procedures, this recommendation also promotes the purchase of commercial or modified-commercial products and services by DOD at or based on commercial market prices.

### 2.3.2.6. Proposed Statute

#### § 2313. Examination of books and records of contractor

(a) An agency named in section 2303 of this title ~~is entitled, acting through an authorized representative, to inspect the plant and audit the books and records of--~~

(1) is entitled to inspect the plant and audit the books and records of --

(1A) a contractor performing a ~~cost or cost-plus-a-fixed-fee contract cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract, or any combination of these~~ made by that agency under this chapter; and

(2B) a subcontractor performing any subcontract under a ~~cost or cost-plus-a-fixed-fee contract cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contract or any combination of these~~ made by that agency under this chapter.

(2) shall, for the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by section 2306a of this title with respect to a contract or subcontract, have the right to examine all records of the contractor or subcontract related to--

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(b) In subsection (a), the terms "books and records" and "records" include books, documents, accounting procedures and practices, and other data, regardless of form or type.

(c)(1) The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of books and records of a contractor, access to which is provided to the Secretary of Defense by subsection (a)(1) or (a)(2).

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (c)(1) may not be redelegated.

(4) The Director (or any successor official) shall submit an annual report to the Secretary of Defense on the exercise of such authority during the preceding year and the reasons



why such authority was exercised in any instance. The Secretary shall forward a copy of each such report to the Committees on Armed Services of the Senate and House of Representatives.

(bd) Except as provided in subsection (ee), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are entitled, ~~until the expiration of three years after final payment,~~ to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(ee) Subsection (bd) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency named in section 2303 determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required --

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property and services from United States sources, that the public interest would be best served by not applying subsection (bf).

~~(d)(1) The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of books, documents, papers, or records of a contractor, access to which is provided to the Secretary of Defense by subsection (a) or by section 2306a of this title.~~

~~(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.~~

~~(3) The authority provided by paragraph (1) may not be redelegated.~~

~~(4) The Director (or any successor official) shall submit an annual report to the Secretary of Defense on the exercise of such authority during the preceding year and the reasons why such authority was exercised in any instance. The Secretary shall forward a copy of each such report to the Committees on Armed Services of the Senate and House of Representatives.~~

(f) The right of an agency under subsection (a) and the Comptroller General under subsection (d) shall expire three years after final payment under the contract or subcontract.

(g) This section is inapplicable to contracts awarded under simplified acquisition procedures or for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge.

### 2.3.3. 10 U.S.C. § 2406

#### Availability of cost and pricing records

##### 2.3.3.1. Summary of the Law

This section requires a contractor, under a covered contract, to make available to the head of the agency, or his representative, records of the contractor's cost and pricing data in the form and manner maintained by the contractor. The statute also lists the kinds of records that are subject to this audit authority. The Secretary of Defense is required to promulgate regulations to carry out this statute, which shall include the period for which records shall be maintained. Finally, this law also contains a definitional subsection.

##### 2.3.3.2. Background of the Law

This section was enacted as part of the Department of Defense Authorization Act of 1986.<sup>1</sup> Congress indicated that this provision was not intended to require new, additional information from contractors, but that contractors would provide DOD with information they already have available.<sup>2</sup> Congress was extremely concerned about the impact of this provision, because there was a lack of Congressional hearings and considerable controversy regarding its effectiveness.<sup>3</sup> Because of this concern, Congress directed DOD to evaluate all provisions of the legislation and indicate any necessary changes.<sup>4</sup> In 1986,<sup>5</sup> the section was amended to its current form. The requirements of this amendment applied to manufacturing contracts for major weapon systems subject to the requirements of 10 U.S.C. § 2306a (Truth in Negotiations) that are either pending or entered into after the enactment of the act.<sup>6</sup> Congress intended that the regulations governing access under this section would be consistent with the efforts of the Under Secretary of Defense for Acquisition, in order to coordinate audit and oversight of contractor activities.<sup>7</sup> Congress also intended that cost data kept by the contractor should reflect recurring as well as non-recurring costs, and this data should be made available to auditors.<sup>8</sup> Finally, Congress stressed that this section should make clear that the contractor is not required to maintain any additional data or data in a form or manner different from the way the contractor ordinarily maintains data.<sup>9</sup>

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<sup>1</sup>Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 917(a), 99 Stat. 583, 689 (1985).

<sup>2</sup>H.R. CONF. REP. NO. 235, 99th Cong., 1st Sess. 455 (1985), *reprinted in* 1985 U.S.C.C.A.N. 472, 609.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 943(a)(1), 100 Stat. 3816, 3942-3 (1986).

<sup>6</sup>H.R. CONF. REP. NO. 1001, 99th Cong., 2d Sess. 508 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 6567.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

### 2.3.3.3. Law in Practice

The submission of cost and pricing data is addressed in subpart 15.8 of the Federal Acquisition Regulation (FAR). The Inspector General of the Department of Defense (DODIG) commented that this law is serving its intended purpose and is not ambiguous, inefficient, or irrelevant.<sup>10</sup> The Aerospace Industries Association (AIA) stated that this statute duplicates the examination of records provisions in 10 U.S.C. § 2313, "Examination of books and records of contractor," and 10 U.S.C. § 2306, "Kinds of contracts."<sup>11</sup> AIA believes that this statute should not be applied to commercial products and services and should be repealed.<sup>12</sup> The Defense Contract Audit Agency (DCAA) noted that this statute largely duplicates, and is less inclusive than, the access rights provided by 10 U.S.C. § 2306a, "Truth in negotiations."<sup>13</sup> DCAA believes that 10 U.S.C. § 2306a(f) should be reworded to provide a uniform period of record retention for both prime and subcontractors.<sup>14</sup> Such an amendment would render 10 U.S.C. § 2406 unnecessary.<sup>15</sup> The Defense Logistics Agency Defense Plant Representative Office, Boeing/Seattle, Washington, stated that this law is still relevant and is required for the integrity of the procurement system; however, it has created inefficiencies.<sup>16</sup>

### 2.3.3.4. Recommendation and Justification

#### Repeal

The Panel recommends that this law be repealed. The Panel has recommended a comprehensive audit statute at 10 U.S.C. § 2313, "Examination of books and records of contractor," that incorporates provisions of 10 U.S.C. § 2313, 10 U.S.C. § 2306a, and certain FAR provisions. The Panel agrees that the authority contained in this section is important to the continued financial and ethical integrity of the defense procurement process; however, it believes that 10 U.S.C. § 2406 should be repealed in favor of the recommended comprehensive audit statute at 10 U.S.C. § 2313.

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<sup>10</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>11</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 13, 1992).

<sup>12</sup>*Id.*

<sup>13</sup>Letter from Michael J. Thibault, Assistant Director, Policy and Plans, Defense Contract Audit Agency to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 5, 1992).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>Letter from Paul J. Madden, Defense Logistics Agency Defense Plant Representative Office, Boeing/Seattle, Washington to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (Apr. 10, 1992).

#### **2.3.3.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to the Department of Defense with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication of authority currently present in the procurement process by merging similar statutes into one comprehensive and centrally located law and repealing statutes that are substantially similar to laws contained elsewhere in the U.S. Code.

## **2.3.4. 18 U.S.C. § 1516**

### **Obstruction of federal audit**

#### **2.3.4.1. Summary of the Law**

This section prohibits any person with intent to deceive or defraud the United States from influencing, obstructing, or impeding a Federal auditor in performance of official duties. The penalty for such interference is a fine, imprisonment of not more than five years, or both. The section also contains a provision that defines the term "Federal auditor."

#### **2.3.4.2. Background of the Law**

This section was enacted as part of the Anti-Drug Abuse Act of 1988.<sup>1</sup> There is no mention of this provision in the Senate or House Reports or the Congressional Record.

#### **2.3.4.3. Law in Practice**

The Inspector General of the Department of Defense (DODIG) commented that this law is relevant and required for the continued financial and ethical integrity of the procurement process.<sup>2</sup> The DODIG also stated that the law is serving its intended purpose and is necessary to protect the best interests of DOD.<sup>3</sup> The Aerospace Industries Association (AIA) stated that this law duplicates 10 U.S.C. § 2276, "Inspection and audit of plant and books of contractor; criminal provisions."<sup>4</sup> AIA also believes that this statute contains ambiguous terms that have led to interpretation problems and abuse by Government auditors who impose unwarranted demands on contractors.<sup>5</sup> AIA argues that because of the ambiguities, this statute should be repealed or, at least, amended to provide more precise definitions to prevent abuse by Government auditors.<sup>6</sup>

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<sup>1</sup>Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7078, 102 Stat. 4181, 4406.

<sup>2</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>3</sup>*Id.*

<sup>4</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 13, 1992).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

#### **2.3.4.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained. This statute is not limited to DOD but applies to agencies Government-wide. There may be redundancy between this statute and 10 U.S.C. § 2276; however, the Panel has recommended the repeal of 10 U.S.C. § 2276 because it is obsolete. Notwithstanding that the scope of this law may have been misinterpreted by some Government auditors, the Panel believes that 18 U.S.C. § 1516 is required for the continued financial and ethical integrity of the acquisition process and should be retained.

#### **2.3.4.5. Relationship to Objectives**

This recommendation helps to promote the financial and ethical integrity of the defense procurement process while encouraging the exercise of sound judgment on the part of acquisition personnel.

## **2.4. Cost Accounting Standards**

### **2.4.0. Introduction**

In the area of cost accounting standards, the Panel focused its review on 41 U.S.C. § 422, the statute establishing the Cost Accounting Standards (CAS) Board. The Panel recommends that 41 U.S.C. § 422 be retained and that the CAS Board use its existing authority to facilitate purchases of commercial items and services by DOD.

41 U.S.C. § 422 established the CAS Board within the Office of Federal Procurement Policy (OFPP), with the Administrator of OFPP as the chairman and the other four members to be chosen from DOD, the General Services Administration (GSA), and the private sector. The CAS Board currently consists of five members representing both Government and industry. The members include Allan V. Burman, Administrator for Federal Procurement Policy; William Reed, Director of the Defense Contract Audit Agency; Edward Hefferon, Deputy Inspector General, GSA; Donald Hayes and Samuel Self, representatives of the private sector. The Board maintains a staff of four full-time staff members and one part-time consultant.

The Panel recommends that 41 U.S.C. § 422 not be changed because it is an enabling statute that establishes the CAS Board and gives it authority to promulgate cost accounting standards and implementing regulations for all executive agencies, contractors, and subcontractors. The statute currently gives the Board broad authority to exempt classes of contractors and subcontractors, and types of contracts and subcontracts, from the cost accounting standards. In this regard, the Panel recommends that the CAS Board, as a priority matter, use its existing authority to exempt contracts for commercial products, or, as a minimum, to limit the standards that would be applicable to Government contracts for commercial items. The Panel believes that this action would be among the most important steps that could be taken to facilitate the Government's purchase of commercial items and services.

One of the Panel's primary objectives is to promote the ability of the Government, particularly DOD, to purchase commercial items and services without requiring contractors to change their accounting or management practices to comply with unique Government requirements. Contractors entering into contracts for commercial items with the Government should be able to integrate defense and commercial production where economically feasible without being subject to restrictive cost accounting standards. The Panel believes that no legislative changes are necessary to achieve this goal because the Board has sufficient authority to limit the application of the cost accounting standards.

The Panel's recommendation will result in cost savings by allowing businesses to consolidate the production of commercial and defense related products in a single business unit without altering existing accounting or management practices. In addition, the recommendation promotes DOD's purchase of commercial or modified-commercial products and services at or near commercial market prices.

The CAS Board has used its authority to (1) exempt certain categories of contractors from the Board's rules and regulations; (2) grant waivers of its requirements for certain individual contracts; (3) limit requirements for formal disclosure of accounting practices to large Government contractors; and (4) limit application of individual standards either by exempting certain categories of contractors or by establishing a dollar threshold for application of the standard.

The Board has published a Statement of its current objectives, policies and concepts in the Federal Register, Vol. 57, No. 134, July 13, 1992. The Statement is intended to clarify the current views of the Board and to provide an increased awareness of its decision making process. The Board intends that subsequent promulgations be consistent with the objectives and policies described in the Statement. The Statement should give contractors and Federal agencies a better understanding of the complex and difficult issues facing the Board when it promulgates and revises the cost accounting standards. The Panel believes that its goal of promoting increased DOD commercial buying is consistent with the CAS Board's current objectives and policies.

After consideration of public comments, the Board recodified the CAS Rules and Regulations at 48 C.F.R. Chapter 99, previously found at 48 C.F.R. Part 30 and C.F.R. Parts 331 through 420. The final rule was established by the Board and published in the Federal Register on April 17, 1992. The Board took this action to provide a single set of rules and cost accounting standards applicable to Government contractors and subcontractors. The recodification represents an effort by the Board to reconcile the existing sets of cost accounting standards previously promulgated by other bodies. The Panel concluded, especially in view of the Board's recent initiatives, that legislative intervention or changes to the Board's enabling statute are unnecessary.

For convenience, the Panel reviewed several other statutes under the cost accounting standards category, although these statutes are not directly related to the standards. Most notably, the Panel reviewed 10 U.S.C. § 2410b, which directs the Secretary of Defense to promulgate regulations regarding the standards for inventory accounting systems utilized by contractors doing business with DOD.

As directed by the statute, regulations have been promulgated in the DFARS. Accordingly, the Panel recommends that 10 U.S.C. § 2410b be repealed. The Panel believes that the development of standards for contractor inventory accounting systems properly is a function of the regulatory system. Any ambiguities that may exist are in the regulations, not in the statutory language, and the majority have been clarified through joint Government and industry effort. The Secretary of Defense has the authority to promulgate further regulations without this law; thus, in the interest of streamlining Title 10 of the U.S. Code, the Panel concluded that the law is unnecessary and should be repealed.



## 2.4.1. 10 U.S.C. § 2410b

### Contractor inventory accounting systems: standards

#### 2.4.1.1. Summary of the Law

This section directs the Secretary of Defense to promulgate regulations regarding the standards for inventory accounting systems utilized by persons contracting with the DOD. The Secretary of Defense must also include in the regulations any certification and enforcement requirements.

#### 2.4.1.2. Background of the Law

This section was enacted and codified in 1988.<sup>1</sup> In passing this law, Congress directed the Secretary of Defense to use the elements outlined in the Federal Register on December 14, 1987,<sup>2</sup> in promulgating the initial standards. These elements were developed by the Defense Acquisition Regulation Council in an effort to amend the standards for material management and accounting systems in the Defense Federal Acquisition Regulation Supplement (DFARS). Congress went further to require the promulgation of regulations that give contracting officers clear direction when a defense contractor's inventory accounting system is so unreliable that it is impossible for the contracting officer to judge any material detriment to the United States.<sup>3</sup>

#### 2.4.1.3. Law in Practice

The provisions of this statute have been implemented, as required, in subparts 242.72 and 252.242-7004 of the DFARS. The comments received from the Inspector General of the Department of Defense (DODIG) and the University of California agree that regulations regarding contractor inventory accounting standards have been promulgated, as prescribed by this statute.<sup>4</sup> The DODIG recommends that this statute should remain unchanged until the regulatory guidance is updated.<sup>5</sup> The University of California noted that universities are required to conform to standards set by the Office of Management and Budget,<sup>6</sup> so that the additional standards

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<sup>1</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 834 (a)(1), 102 Stat. 1918, 2024 (1988).

<sup>2</sup>Material Requirements Planning System, 52 Fed. Reg. 47,427 (codified at 48 C.F.R. Part 245)

<sup>3</sup>H.R. CONF. REP. NO. 989, 100th Cong., 2d Sess. 433 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2503, 2564.

<sup>4</sup>Memorandum from Michael R. Hill, Assistant Inspector General for Audit Policy and Oversight, Office of the Inspector General of the Department of Defense to the Deputy General Counsel, Defense Logistics Agency (May 27, 1992); Letter from David F. Mears, Director, Research Administration Office, University of California, to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>5</sup>Memorandum from Michael R. Hill, Assistant Inspector General for Audit Policy and Oversight, Office of the Inspector General of the Department of Defense to the Deputy General Counsel, Defense Logistics Agency (May 27, 1992).

<sup>6</sup>See Office of Management and Budget Attachment N to Circular A-110 (Audit procedures are contained in OMB Circular A-133.).

imposed by the DFARS are duplicative and unnecessary.<sup>7</sup> The Defense Contract Audit Agency (DCAA) noted that there has been a significant improvement in all aspects of material management as a result of this law and its implementation in the DFARS.<sup>8</sup> DCAA also commented that there were some problems in interpreting the regulations when they were first promulgated; however, Government and industry worked together to solve these implementation problems.<sup>9</sup> DCAA also believes that the regulations are ambiguous concerning system accuracy and measurement.<sup>10</sup>

The Council of Defense and Space Industry Associations (CODSIA) noted that this statute is redundant with other accounting standard and certification statutes. These multiple statutes "inevitably create confusion and lead to an inability to administer the statutes with straightforward efficiency and understanding."<sup>11</sup>

#### **2.4.1.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that this statute be repealed, because it is merely an enabling statute allowing for the promulgation of regulations. The development of standards for contractor inventory accounting systems properly belongs within the regulatory system and should not be made statutory. Regulations on these standards have already been promulgated and implemented. Any ambiguities that may exist are in the regulations, not in the statutory language, and the majority have been overcome through joint Government and industry effort. While DCAA believes this law is serving its intended purpose, it also notes that it is the guidance in the regulations, not in the law, that has significantly improved contractor material management systems. The Secretary of Defense would retain the authority to promulgate further regulations without this law; thus, in the interest of streamlining the U.S. Code, this law should be repealed as unnecessary.

#### **2.4.1.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of streamlining the defense acquisition process by recommending the repeal of statutes that have been successfully implemented in the applicable regulations.

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<sup>7</sup>Letter from: David F. Mears, Director, Research Administration Office, University of California, to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 19, 1992).

<sup>8</sup>Letter from Michael J. Thibault, Assistant Director of Policy and Plans, Defense Contract Audit Agency to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (June 17, 1992).

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 3, 1992).

## 2.4.2. 41 U.S.C. § 422

### Cost accounting standards board

#### 2.4.2.1. Summary of the Law

This statute established the Cost Accounting Standards (CAS) Board within the Office of Federal Procurement Policy (OFPP), with the Administrator for Federal Procurement Policy as the chairman and the other four members to be chosen from the DOD, the General Services Administration, and the private sector. The statute also outlines, in great detail, the Board's authority to promulgate cost accounting standards to be used by all executive agencies, contractors, and subcontractors in procurement contracts, as well as the regulations necessary to implement those standards. The Board is also required to make an annual report to Congress and permitted to receive appropriations necessary for its operation. The law also describes the term of office, compensation, and staff of each Board member.

#### 2.4.2.2. Background of the Law

The current CAS Board was established as part of the OFPP Act Amendments of 1988.<sup>1</sup> The first CAS Board, with the Comptroller General as chairman, had been established in 1970 in response to a study done by the Comptroller General which determined that "uniform cost accounting standards were both feasible and desirable."<sup>2</sup> Over the next decade, the Board promulgated nineteen cost accounting standards.<sup>3</sup> In 1980, the Congress failed to provide appropriations for the operation of the Board and it ceased operating; however, its standards, rules, and regulations continued to remain in effect.<sup>4</sup> In the interim, "several of the standards which were issued by the Board have become outdated. Examples include the standards related to pension costs, insurance costs, and the accrual of vacation time by employees on government contracts."<sup>5</sup> In 1988, Congress reestablished the Board, with the Administrator for Federal Procurement Policy as chairman. This change from the original Board chairmanship was urged by many witnesses who testified before the Senate to address concerns about the constitutional validity of a Board chaired by the Comptroller General.<sup>6</sup> The function of the second Board is virtually identical to that of the first Board; that is, to determine the measurement, assignment, and allocation of costs. As with the original Board, issues of allowability would be left to the agencies.<sup>7</sup>

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<sup>1</sup>Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 5(a), 102 Stat. 4055, 4058-4063.

<sup>2</sup>S. REP. NO. 424, 100th Congress, 2d Sess. 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5687, 5701.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 9.

<sup>7</sup>*Id.* at 17.

### 2.4.2.3. Law in Practice

The CAS Board currently consists of five members representing both government and civilian interests. These members include Allan V. Burman, Administrator for Federal Procurement Policy; William Reed, Director of the Defense Contract Audit Agency (DCAA); Edward Hefferon, Deputy Inspector General of the General Services Administration; Donald Hayes and Samuel Self of the private sector. For support the Board maintains a staff of four full-time staff members and one part-time consultant. The Board has recently considered the DOD-issued guidelines for CAS 412. 40(c) waiver requests,<sup>8</sup> a report issued by the DOD Inspector General on the application of CAS coverage by DOD on smaller contractors, the request by Congress that GAO review the CAS Board's activities, and a proposal to raise CAS thresholds from \$10 million to \$25 million.<sup>9</sup>

The Air Force noted that there was significant controversy when the DOD attempted to take over the functions of the first Board when it went out of existence in 1980.<sup>10</sup> Although the Board has been re-established in accordance with the new statute, the Air Force believes that it is necessary that this statutory authority remain in the U.S. Code.<sup>11</sup> DCAA commented that the re-establishment of the CAS Board was necessary in order to have an entity with the authority to issue new standards, update existing standards, and grant waivers and exceptions.<sup>12</sup> DCAA maintained that the cost accounting standards are necessary for the continuing financial and ethical integrity of the defense procurement process.<sup>13</sup> Because cost accounting standards apply only when there are no legitimate market forces to establish fair and reasonable prices, and the Board is authorized to exempt classes or categories of contractors, subcontractors, and products from the requirements, DCAA favors retention of this statute.<sup>14</sup>

The Public Contract Law Section of the American Bar Association pointed out a number of problems it perceived with 41 U.S.C. § 422. Because the CAS Board was given authority over issues of allocability and the FAR Council was given authority over issues of allowability, the section contends that there have been several instances in which the cost principles promulgated in the FAR conflict with applicable cost accounting standards.<sup>15</sup> Accordingly, the section recommended that the authority of the CAS Board be extended to include issues of allowability as well as allocability.<sup>16</sup> The section also noted that compliance with the cost accounting standards and the provisions of the Truth in Negotiations Act (TINA) have become a serious impediment to

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<sup>8</sup>CAS 412.40(c) addresses "Pension costs, Composition and Measurement."

<sup>9</sup>New Developments, CAS Guide (CCH) ¶ 20,000 (Aug. 1992).

<sup>10</sup>Letter from Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Office of the Assistant Secretary of the Department of the Air Force to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (May 11, 1992).

<sup>11</sup>*Id.*

<sup>12</sup>Letter from Michael J. Thibault, Assistant Director, Policy and Plans, Defense Contract Audit Agency to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (June 17, 1992).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>Letter from John S. Pachter, Chair, Public Contract Law Section of the American Bar Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (June 18, 1992).

<sup>16</sup>*Id.*

the purchase of commercial products, because many commercial companies do not have the extensive data tracking systems necessary for compliance.<sup>17</sup> It recommended that the statute should be amended to provide "that contracts awarded on the basis of adequate price competition are also exempt from CAS," and "that CAS does not apply to purchases from a company whose business is predominately commercial, where the price is based on: (a) overall value to the government; and/or (b) comparison with the cost of alternatives, if any."<sup>18</sup> The section also recommended that the Board be given more staff and the ability to make interim standards or interpretations when it finds that there are "urgent and compelling circumstances."<sup>19</sup>

The Council of Defense and Space Industry Associations (CODSIA) commented that changing technology has made it necessary to address important cost accounting issues.<sup>20</sup> It stated that industry feels generally favorable about the re-establishment of the CAS Board to accomplish this goal.<sup>21</sup> CODSIA also mentioned the fact that the Board is seriously understaffed. It stated:

This apparent lack of resources necessary to deal with the detailed and technical issues which arise in connection with application of the CAS not only precludes holding enough meaningful Board meetings to allow significant progress, but also results in relating back to the implementing agencies some of the CAS Board functions. This makes the Board highly sensitive to the reaction of those agencies to its positions and, on particular issues, could result in a compromise of the Board's independence.<sup>22</sup>

CODSIA also commented that, because the Board consists of predominantly Government representatives, there could be a predisposition in favor of the Government, which would defeat Congress' intent of having an independent board.<sup>23</sup> CODSIA stated that it believes the statute should be amended to alter the Board's composition to include more industry representatives.<sup>24</sup> CODSIA also noted that the General Accounting Office has recently begun a review of the CAS Board's operations at Congress' request.<sup>25</sup>

The National Security Industrial Association (NSIA) commented separately from CODSIA on this law. NSIA also noted that the Board is seriously understaffed and stated its

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<sup>17</sup>*Id.*

<sup>18</sup>*Id.* (citations omitted).

<sup>19</sup>*Id.*

<sup>20</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding. (Aug. 3, 1992).

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* See also Letter from Frank W. Losey, Council of Defense and Space Industry Associations (CODSIA) Working Group 3 Coordinator to John A. Phillips, Raytheon Company (Oct. 16, 1992).

<sup>24</sup>Letter from Frank W. Losey, Council of Defense and Space Industry Associations (CODSIA) Working Group 3 Coordinator to John A. Phillips, Raytheon Company (Oct. 16, 1992); Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding. (Aug. 3, 1992).

<sup>25</sup>Letter from the United States House of Representatives Committee on Government Operations to the Honorable Charles A. Bowsher, Comptroller General, General Accounting Office. (June 16, 1992).

belief that the Office of Management and Budget has little inclination to see the purpose of the law fulfilled.<sup>26</sup> NSIA contended that the major problem with this law is the overlap and conflict of the standards promulgated by the Board with the regulations promulgated by the FAR Council.<sup>27</sup> This dichotomy has arisen because the Board was given the statutory authority to promulgate standards concerning the allocability of costs while the FAR Council was to draft regulations on allowability of costs. NSIA stated that it believes the FAR Council often goes too far and either promulgates regulations on allocability contrary to this statute or promulgates regulations that ostensibly address allowability but, in reality, govern questions of allocability.<sup>28</sup> NSIA believes that by giving the CAS Board the exclusive authority to promulgate standards on both allocability and allowability, this conflict would be resolved.<sup>29</sup> NSIA agreed that the cost accounting standards and the Board have done much to protect DOD interests and the financial and ethical integrity of the defense procurement process.<sup>30</sup> It also stated that "there is a continuing need for uniformity and consistency in cost accounting for government contracts."<sup>31</sup>

The Aerospace Industries Association (AIA) provided additional comments on this law.<sup>32</sup> AIA contended that this statute is necessary for the financial and ethical integrity of the procurement process.<sup>33</sup> It also stated that certain FAR provisions have overlapped the Board's authority in determining allocability.<sup>34</sup> Even so, AIA voiced strong opposition "to the expansion of the CAS Board's authority to include the determination of cost allowability."<sup>35</sup> According to AIA, the primary objective of the Board is to achieve consistency in cost accounting practices and should not be extended to include issues of allowability.<sup>36</sup>

#### 2.4.2.4. Recommendations and Justification

**Retain 41 U.S.C. § 422 and request that the Cost Accounting Standards Board, using its existing authority, take prompt action to facilitate purchases of commercial items by DOD.**

The Panel recommends that this statute be retained. This is an enabling statute that establishes the CAS Board and gives it the authority to promulgate cost accounting standards. This statute also gives the Board broad authority to exempt classes of contractors and subcontractors, and types of contracts and subcontracts, from the cost accounting standards. One of the Panel's major goals is to promote the ability of the Government, particularly DOD, to

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<sup>26</sup>Letter from the National Security Industrial Association, James R. Hogg, President, to Gary Quigley and Jack Harding (July 25, 1992).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>Letter from Paul J. Cienki, Director, Financial Administration, Procurement and Finance, Aerospace Industries Association to Franklin W. Losey, General Counsel, Shipbuilders Council of America (Sept. 28, 1992).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

purchase commercial products and services without requiring contractors to alter their management and accounting procedures to adhere to Government-unique requirements. Those entities entering into contracts for commercial items with the Government should be able to integrate defense and commercial production where economically feasible without being subject to restrictive cost accounting standards. The Panel believes it is not necessary to make a legislative change to this statute to achieve this goal because the Board has sufficient statutory authority to facilitate this integration of defense and commercial production. The Panel recommends that the CAS Board, as a priority matter, use its existing authority to exempt contracts for commercial products, or, as a minimum, to limit the standards that would be applicable to contracts for commercial items. The Panel believes that prompt action by the CAS Board would be among the most important steps to be taken in facilitating the purchase of commercial items and services by DOD.

The Panel agrees that there may be staffing problems that are impacting on the efficiency of the Board's operation; however, it feels that this issue is more properly addressed in the administrative and budgeting process, not through statutory alteration. The Panel recommends the deletion of subsection (f)(3). Since the rules and procedures required by this subsection have already been promulgated, there is no further need for the statutory provision requiring promulgation by November 17, 1988.

#### **2.4.2.5. Relationship to Objectives**

The recommendation made by the Panel will facilitate business entities in integrating the production of both commercial and defense peculiar products in a single business unit without altering their accounting or management procedures. It promotes the purchase of commercial or modified commercial products and services by DOD at, or based on, commercial market prices. It would reduce cost to contractors and the Government by permitting the use of data that already exists and is already being collected without imposing additional administrative burdens.

### **2.4.3. Public Law Number 91-379, § 103**

#### **Defense Production Act - Amendments - Economic Stabilization**

##### **2.4.3.1. Summary of the Law**

This section of the public law amended the 1950 Defense Production Act and established the first Cost Accounting Standards Board in 1970. Congress stopped funding the Board in 1980 and it ceased functioning.

##### **2.4.3.2. Background of the Law**

This section of Pub. L. No. 91-379 was repealed in 1988, and the current Cost Accounting Standards Board was established by Pub. L. No. 100-679.

##### **2.4.3.3. Recommendation and Justification**

###### **Delete**

This section was repealed by Pub. L. No. 100-679, § 5(b), Nov. 17, 1988, 102 Stat. 4063, codified at 50 U.S.C. App. § 2168.

##### **2.4.3.4. Relationship to Objectives**

Deletion of this section will eliminate an unnecessary law and thereby streamline the body of acquisition laws.



## **2.5. Administration of contract provisions relating to price, delivery, and product quality**

### **2.5.0. Introduction**

During the initial review of the statutes relating to contract administration, the Panel was easily able to divide them into six distinct categories: contract payment, cost principles, contract audit and access to records, cost accounting standards, claims and disputes, and extraordinary contractual relief. Once these categories were established, there were 11 statutes that did not fall into any of the six categories. To accommodate these statutes, the Panel developed a category for statutes addressing the administration of contract provisions relating to price, delivery, and product quality. Many of these laws proved to be historical anomalies that had been adequately addressed in implementing regulations long ago.<sup>1</sup> In keeping with the Panel's goal of deleting statutory authority that has been addressed in the regulations with greater flexibility, the Panel recommends repeal of these statutes. Other statutes were unique laws which had either not been fully implemented in the regulations or which are used or cited on a regular basis by DOD.<sup>2</sup> The Panel recommends retention of these statutes.

During its examination of 41 U.S.C. § 15, "Transfer of contracts; assignments of claims; set-off against assignee," the Panel noted that the statute's authority is limited to times of war or national emergency. The Panel believes that this authority should be applicable at all times and to all contracts that are governed by this statute. In a recent amendment to the Defense Production Act, Congress expanded its applicability to include both times of national emergency and the determination by the President that use of the authority is necessary.<sup>3</sup> The Panel noted that Congress has recognized that some statutory authority, previously reserved for times of war or national emergency, should be available in peacetime as well. The Panel recommends that the authority contained in 41 U.S.C. § 15 follow this trend. The Panel recommends that this statute be otherwise retained. Throughout its long history, this statute has consistently served the purpose Congress intended. This provision has been favorably cited in numerous cases, many of them very recently. The history of the law has shown its positive impact on the small business community.

Of major interest was 10 U.S.C. § 2403, "Major weapon systems; contractor guarantees." After reviewing the comments received and two studies made on the effectiveness of warranty

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<sup>1</sup>These statutes include:

- 10 U.S.C. § 2383 - Procurement of critical aircraft and ship spare parts; quality control
- 10 U.S.C. § 4534 - Subsistence supplies; contract stipulations; place of delivery change and reclamation
- 10 U.S.C. § 9534 - Subsistence supplies; contract stipulations; place of delivery on inspection
- 41 U.S.C. § 20 - Deposit of contracts

<sup>2</sup>These statutes include:

- 10 U.S.C. § 2312 - Remission of liquidated damages
- 31 U.S.C. § 6306 - Authority to vest title in tangible personal property for research
- 41 U.S.C. § 417 - Record requirements

<sup>3</sup>S. 347, 102d Cong., 2d Sess. (1992).

implementation in DOD,<sup>4</sup> the Panel determined that there are significant problems in the administration of warranties in every branch of DOD. The comments and studies also show a reluctance by DOD to issue warranty waivers, which can result in the purchase of warranties without regard to their cost effectiveness.

The Panel believes that warranties would be much more effectively implemented on a case-by-case basis instead of by statutory mandate. In this way, the Services could purchase warranties only for those contracts or products that would be effectively served by them and make other arrangements when warranties would not be cost effective. By this recommendation, the Panel is not suggesting that warranties are unnecessary in all cases, but rather that they should be used only when appropriate. The Panel recommends that clear, specific guidance should be included in the regulations governing purchase of warranties and issuance of waivers.

As an alternative, the Panel recommends that this statute be revised to address some of the problems associated with its implementation. Even though Congress had stated that it intended waivers to be given if the warranties would not be cost effective, virtually no waivers have been issued. The regulatory implementation of the provision should be amended to provide better guidance to the field personnel. It is clear from the comments received that the flexibility Congress attempted to build into the statute has not been effective. The Panel believes that waivers must be more readily available in the acquisition process for those instances where a warranty would not be cost effective. To this end, the Panel recommends vesting the waiver authority in a lower level official to help expedite waiver approval. The Panel also agrees that the Secretary of Defense should promulgate a policy statement supporting the use of waivers when a warranty would not be cost effective and should actively encourage the use of waivers in any further implementation or guidance.

The Panel believes that the warranty program must be improved if it is to be used with any measure of cost effectiveness. Increased use of waivers will also help the warranty administration system by exempting many contracts in which warranties were not effective from the outset. While the Panel still believes that the best course of action would be to repeal this statute in its entirety, the amendments recommended above will at least alleviate some of the more serious problems with the current system.

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<sup>4</sup>These studies include one by MKI, Inc., *Warranty Guidebook Research Summary* (1992) and one by the Office of the Deputy Director for Defense Systems Procurement Strategies, *Report on the Administration of Department of Defense Weapon System Warranties* (1992).

## **2.5.1. 10 U.S.C. § 2312**

### **Remission of liquidated damages**

#### **2.5.1.1. Summary of the Law**

This section allows the Comptroller General, upon the recommendation of the head of an agency, to remit all or part of any liquidated damages assessed for delay in performing a contract, when the contract provides for such damages.

#### **2.5.1.2. Background of the Law**

This section was part of the Armed Services Procurement Act of 1947 (ASPA).<sup>1</sup> Some contracts contain a provision that allows for liquidated damages should the contractor fail to perform on time.<sup>2</sup> Subsection 6 of the ASPA allowed the Comptroller General to waive any or all of the liquidated damages that may accrue on a contract with the Government.<sup>3</sup> Congress noted that "numerous instances arise in which the strict application of liquidated damages provisions results in deduction of amounts which are out of proportion to the contract price of the items involved and to any damage actually suffered by the government."<sup>4</sup> This section was codified at 10 U.S.C. § 2312 in 1956<sup>5</sup> and no further amendments have been made to it.

#### **2.5.1.3. Law in Practice**

The authority contained in this law has been implemented in subpart 12.2 of the Federal Acquisition Regulation (FAR).<sup>6</sup> The language at 12.202(d) of the Policy subsection repeats almost exactly the language contained in the statute. The Office of the Inspector General of the Department of Defense (DODIG) stated that this law is still relevant and is serving its intended purpose in the procurement process.<sup>7</sup> The DODIG did note that there is some overlap between this law and 41 U.S.C. § 256a, "Waiver of liquidated damages." However, the DODIG interpreted the Title 41 provision to be applicable to all contracts, including sales contracts, while the Title 10 provision is limited to DOD procurement contracts.<sup>8</sup> The Council of Defense and Space Industry Associations (CODSIA) commented that this law is serving its intended purpose and is still relevant.<sup>9</sup> The Defense Contract Management District Mid-Atlantic (DCMDM), Defense Logistics Agency, stated that there was some question whether this statute is consistent

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<sup>1</sup> Armed Services Procurement Act of 1947, ch. 65, § 6, 62 Stat. 21, 24.

<sup>2</sup> *Id.* at 19.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Act of August 10, 1956, ch. 1041, 70A Stat. 132.

<sup>6</sup> 48 C.F.R. 12.201-12.204.

<sup>7</sup> Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College ( July 1, 1992).

<sup>8</sup> *Id.*

<sup>9</sup> Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

with the Contract Disputes Act (CDA).<sup>10</sup> DCMDM believes that the imposition and amount of liquidated damages should be left to the discretion of the contracting officers, and any disputes should be handled under the CDA.<sup>11</sup> The Defense Contract Management District North Central (DCMDNC) recommended that this statute be eliminated as the same relief is available under Pub. L. No. 85-804, "Extraordinary Contractual Relief."<sup>12</sup>

#### **2.5.1.4 Recommendation and Justification**

##### **Retain 10 U.S.C. § 2312.**

The Panel recommends that 10 U.S.C. § 2312 be retained. This statute continues to provide a useful and important function in the acquisition process and has been implemented in the appropriate regulations. DCMDM questioned the consistency of this provision with the Contract Disputes Act; however, this authority is consistent with the Comptroller General's basic authority to remit or forgive obligations to the government under certain circumstances. This statute appears to be serving its intended purpose and the Panel believes it should be retained.

#### **2.5.1.5. Relationship to Objectives**

This recommendation promotes the purchase of items produced by small business and commercial or modified-commercial items by DOD by permitting the agencies to be flexible in the remission of liquidated damages. This provision allows the agencies and the Comptroller General to take into account any special circumstances and to make decisions on each contract on an individual basis.

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<sup>10</sup>Letter from Maria Ventresca, Associate Counsel, Contracts, Defense Contract Management District Mid-Atlantic, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 6, 1992).

<sup>11</sup>*Id.*

<sup>12</sup>Letter from Gary McDougall, Defense Contract Management District North Central, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 12, 1992).

## **2.5.2. 10 U.S.C. § 2383**

### **Procurement of critical aircraft and ship spare parts: quality control**

#### **2.5.2.1. Summary of the Law**

This statute provides that the Secretary of Defense shall require any contractor supplying critical aircraft or ship spare parts to provide parts that meet all appropriate qualification and contractual quality requirements as may be specified in the solicitation and made available to prospective offerors. The Secretary of Defense shall use the requirements that were used to qualify the original production part, if available, unless the Secretary determines such requirements are unnecessary.

#### **2.5.2.2. Background of the Law**

A prior version of 10 U.S.C. § 2383<sup>1</sup> (unrelated to the current law), which permitted the Secretary of a military department to make emergency purchases of war material abroad free of duty, was repealed in 1962.<sup>2</sup> The current version of this statute was enacted as part of the National Defense Authorization Act, Fiscal Year 1989.<sup>3</sup> Congress recognized that there may be circumstances in which the same quality and qualifications requirements that were used during the development and production stages of a defense program would not apply to a part supplied to support a fielded system.<sup>4</sup> Technology changes would alter quality and qualification requirements.<sup>5</sup> As a result, Congress intended that the original qualification and quality requirements serve as the baseline, and subsequent modifications should be documented.<sup>6</sup> There was one technical amendment to the statute in 1991.<sup>7</sup>

#### **2.5.2.3. Law in Practice**

This law has not been implemented in Federal regulations. The Office of the Inspector General of the Department of Defense (DODIG) stated that it strongly supports ". . . the statutory requirement for the thorough testing of all new or modified weapon systems and their platforms, especially in today's downsizing environment. We also strongly support the requirement that critical spare parts meet the qualification and contractual requirements of the original production

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<sup>1</sup>Act of August 10, 1956, ch. 1041 § 1, 70A Stat. 137.

<sup>2</sup>Tariff Classification Act of 1962, Pub. L. No. 87-456, § 303(c), 76 Stat. 72, 78.

<sup>3</sup>National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 805, 102 Stat. 1913, 2010 (1988).

<sup>4</sup>H.R. Conf. Rep. 989, 100th Cong., 2d Sess. 426 (1988), reprinted in 1988 U.S.C.C.A.N. 2503, 2556.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1061(a)(13), 105 Stat. 1290, 1473.

parts provided to the Government."<sup>8</sup> It believes that this statute is necessary to protect the best interests of DOD, does not overlap with other statutes, and is still relevant.<sup>9</sup> The Council of Defense and Space Industry Associations (CODSIA) stated that this law is basically serving its purpose of ensuring that spare parts meet the same standards as the original parts.<sup>10</sup> It did note, however, that redundant tests for the requalification of original production parts by the original manufacturer may "increase the cost of parts to the Government without any 'value added.'"<sup>11</sup> Within the Defense Logistics Agency, the Defense Contract Management District West (DCMDW) recommended repeal of this law,<sup>12</sup> but the Defense Contract Management District North Central (DCMDNC) recommended expanding the statute's coverage to all major weapon systems because there appeared to be no compelling reason to limit its application to aircraft and ship spare parts.<sup>13</sup>

This statute was considered by the Defense Acquisition Regulatory Council (DAR Council) for implementation in 1989. The National Security Industrial Association (NSIA) had commented to the DAR Council that DOD had not issued any regulations or attempted to put this statute into effect.<sup>14</sup> NSIA noted that, as a result, DOD continued to buy inferior parts without regard to the provisions of this statute.<sup>15</sup> It contended that "the implementation of the Government's continuing to use this outlawed practice are enormous in terms of personnel safety, mission success and potential third party liability."<sup>16</sup> The DAR Council determined that this authority was "directed more toward program managers than contracting officers," and declined further action.<sup>17</sup>

The Panel discussed the authority contained in this statute and observed that this type of statutory mandate is not necessary in defense procurement contracts. Informal contacts with procurement officials confirmed that this authority is not necessary. Quality assurance procedures already available to DOD are adequate.

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<sup>8</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force (July 1, 1992).

<sup>9</sup>*Id.*

<sup>10</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>11</sup>*Id.*

<sup>12</sup>Letter from Col. Robert D.M. Allen, USAF, District Counsel, Defense Contract Management District West, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 3, 1992).

<sup>13</sup>Letter from Gary McDougall, Defense Contract Management District North Central, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 13, 1992).

<sup>14</sup>Letter from Wallace H. Robinson, Jr., President, National Security Industrial Association to Duncan Holaday, Director, Defense Acquisition Regulatory Council (Aug. 8, 1989).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>Letter from Lt. Col. Nancy L. Ladd, USAF, Acting Director, Defense Acquisition Regulatory Council to Lt. Gen. Wallace H. Robinson, Jr., USMC (Ret.), President, National Security Industrial Association (Nov. 1, 1989).

#### **2.5.2.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that 10 U.S.C. § 2383 be repealed. There is adequate authority in the procurement process without the necessity of a statute. The qualification and quality standards should be a matter for engineering and technical judgment based on current needs, technology, and experience with the use of the item or part.

#### **2.5.2.5. Relationship to Objectives**

This recommendation will establish a balance between an efficient process of obtaining necessary equipment and full and open access to the procurement system and the commercial market.

## **2.5.3. 10 U.S.C. § 2403**

### **Major weapon systems: contractor guarantees**

#### **2.5.3.1. Summary of the Law**

This section requires that the head of an agency may not enter into contracts for weapon systems unless the contractor provides a written guarantee. This guarantee must provide that the item will conform to design and manufacturing requirements, will be free from all defects in materials and workmanship, and will conform to essential performance requirements. If the product fails to conform to the guarantee, the contractor will either take corrective action necessary to correct the failure or pay the costs reasonably incurred by the United States in taking corrective action. The head of an agency cannot require a guarantee from a prime contractor for a weapon system or component that is supplied by the United States. The Secretary of Defense may waive these guarantees, provided that the waiver is necessary in the interest of national defense or if the guarantee would not be cost effective. The Secretary of Defense may not delegate this waiver authority to anyone below the level of Assistant Secretary of Defense or Assistant Secretary of a military department.

Before the Secretary of Defense makes a waiver for a weapon system that is a major defense acquisition program, the Committees on Armed Services and Appropriations of the Senate and House of Representatives must be notified in writing of the Secretary and the reasons therefor. The Secretary of Defense also must submit a report on all waivers made in the preceding calendar year on weapon systems that are not major defense acquisition programs with explanations as to why those waivers were granted.

The guarantee is required only for those weapon systems that are in mature full-scale production; however, the Secretary of Defense is not prohibited from negotiating for a similar guarantee on weapon systems not yet in full-scale production. Notwithstanding the provisions of this statute, the head of an agency is not prohibited from negotiating the specific details of the guarantee, including requiring that a component supplied by the United States be properly installed by the contractor so that the guarantee is not compromised, reducing the price of a contract to take into account a payment for corrective action, exempting the amount of production by a second source contractor equivalent to the first one-tenth of the eventual total production by the second source contractor from these requirements, and using written guarantees to a greater extent than required by this statute. Finally, the section requires the Secretary of Defense to promulgate regulations to carry out this statute and exempts the Coast Guard and the National Aeronautics and Space Administration from its provisions.



### 2.5.3.2. Background of the Law

This statute was passed in 1984 as part of the Department of Defense Authorization Act of 1985.<sup>1</sup> Although Congress had previously passed a warranty provision applicable to the military departments,<sup>2</sup> problems were perceived in its use. In the passage of the previous provision, Congress had anticipated that the warranty situation of each contract would be negotiated on an individual basis.<sup>3</sup> Congress determined, however, that the military departments had not been negotiating the warranty provisions in the manner anticipated.<sup>4</sup> Instead, the general approach of the military departments had been to specify a warranty clause and require that it be included in the contract.<sup>5</sup> The warranty law "was never intended to create this type of simplistic, mechanistic approach to defense contracting."<sup>6</sup>

Congress agreed that there should be enough flexibility to give DOD the authority to craft "specific warranties to consider the formulation of exclusions or limitations to address situations where a contractor has not designed a system."<sup>7</sup> DOD should be able to narrow the scope of the warranty clause if it would be inequitable to apply the full warranty to a contractor with limited design involvement.<sup>8</sup>

Congress noted that virtually no warranty exemptions had been issued in the years since the previous warranty provision had been passed.<sup>9</sup> It stated that the Committees on Armed Services had never intended to require warranties if they were not cost effective.<sup>10</sup> Congress also expressed the concern that there had been a lack of communication between the military departments and their field personnel about "the appropriate implementation of Congressional guarantee language and its inherent flexibility."<sup>11</sup> With the passage of this new warranty provision, Congress believed that the new sections would give the military the inherent flexibility to negotiate guarantees on a case-by-case method, including the authority to negotiate reasonable exclusions, limitations, and time durations.<sup>12</sup>

### 2.5.3.3. Law in Practice

Two recent studies have been done on the effectiveness of weapon system warranty implementation in DOD. The first was done by MKI, Inc. for the Defense Systems Management

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<sup>1</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1234(a), 98 Stat. 2492, 2601-2603 (1984).

<sup>2</sup>Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 794, 97 Stat. 1421, 1454-1455 (1983). This provision was repealed by Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1234(b)(1), 98 Stat. 2492, 2604 (1984).

<sup>3</sup>H.R. Conf. Rep. No. 1080, 98th Cong., 2d Sess. 323, *reprinted in* 1984 U.S.C.C.A.N. 4174,4302.

<sup>4</sup>*Id.* at 323-324.

<sup>5</sup>*Id.* at 323-324.

<sup>6</sup>H.R. Conf. Rep. No. 1080, 98th Cong., 2d Sess 324, *reprinted in* 1984 U.S.C.C.A.N. 4174, 4302-4303.

<sup>7</sup>*Id.* at 4303.

<sup>8</sup>*Id.* at 4303.

<sup>9</sup>*Id.* at 4303.

<sup>10</sup>*Id.* at 4303.

<sup>11</sup>*Id.* at 4303.

<sup>12</sup>*Id.* at 4303.

College.<sup>13</sup> This study stated that the three functions served by a warranty are: to assure DOD that it receives a product free from design, manufacture, or structural defects; to motivate the contractor to produce defect-free products; and to insure DOD against the risks of repair or replacement.<sup>14</sup> It also examined the different kinds of warranties in use today within DOD. The "zero-defects warranty" is the most conventional form of warranty and envisions a failure free product.<sup>15</sup> The "expected failure warranty" is a type of assurance warranty wherein a breach occurs only after a specified number of failures have occurred.<sup>16</sup> The "systemic warranty" is more connected to the basic design of the product than the other two types of warranty. It defines a "systemic defect" in the product as:

one which occurs with a frequency, sameness, or pattern to indicate a logical regularity which exceeds predicted failure rates. When a systemic defect is detected, the Government presumes that all weapon systems produced under like circumstances are similarly defective and require replacement or correction on a fleet-wide basis.<sup>17</sup>

The study noted many problems with the warranty programs in use within DOD today. It stated that "[p]rogram managers tend to view warranties from the perspective of small individual consumers instead of monopsonistic industrial buyers."<sup>18</sup> This is a faulty position, because most consumers believe that a product under warranty will not fail during the warranty period, and most consumer warranties are based upon competitive market consideration.<sup>19</sup> On the other hand, a weapon system warranty is dictated by the customer, the Government, and envisions the ultimate failure of the product.<sup>20</sup> The study also found that the current guidance available to program managers "does not succinctly and specifically enumerate real-world problems which program managers must overcome to successfully structure, implement, and administer warranties."<sup>21</sup> Moreover, warranty programs rely on effective administration and, at the time of passage of this statute, Congress did not provide funding for administration.<sup>22</sup>

The study noted that all warranties are dependent upon their duration, and "many weapon system warranties are too short to be effective."<sup>23</sup> The warranty period should be long enough to allow the field operations to determine the effectiveness of the product.<sup>24</sup> It also stated that "[w]aiver requests are not seriously considered as proposed warranty options by procurement activities. To date, the use of waivers, which should have been extensive, has been virtually

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<sup>13</sup>MKI, Inc., *Warranty Guidebook Research Summary* (1992)

<sup>14</sup>*Id.* at 5-6.

<sup>15</sup>*Id.* at 6.

<sup>16</sup>*Id.* at 6.

<sup>17</sup>*Id.* at 7.

<sup>18</sup>*Id.* at 1.

<sup>19</sup>*Id.* at 1.

<sup>20</sup>*Id.* at 1.

<sup>21</sup>*Id.* at 3.

<sup>22</sup>*Id.* at 3, 9.

<sup>23</sup>*Id.* at 9.

<sup>24</sup>*Id.* at 9.

nil."<sup>25</sup> Although this particular study did not give specific recommendations to combat this problem, the industry representative at the Defense Systems Management College stated that the majority of the sources used in this study argued that the best solution to the warranty problem would be to repeal the statute.<sup>26</sup> If this recommendation is not feasible, the sources recommended that the waiver authority should be used much more often.<sup>27</sup> Instead of trying to justify the use of a waiver, they recommend instead that the Government should have to justify the use of the warranty.<sup>28</sup> In assessing the granting of a waiver, the Government should examine whether the warranty would be cost effective, whether it would have a meaningful performance in the program, and whether the use of the warranty in the field would be justified.<sup>29</sup> If this assessment determines that a warranty should not be used, the burden of proof should then shift to the Office of the Secretary of Defense to prove the usefulness of the warranty.<sup>30</sup> If the recommendation to use waivers more often is not feasible, the sources recommend that affirmative language should be added to the statute to make it easier to obtain a waiver.<sup>31</sup>

The second study was done by the Office of the Deputy Director for Defense Systems Procurement Strategies in the Office of the Under Secretary of Defense for Acquisition.<sup>32</sup> This study was done to review the current administration of warranties within DOD.<sup>33</sup> The study concluded that effective administration was the primary way to ensure effective warranty coverage and noted two General Accounting Office studies in 1987 and 1989 that criticized DOD's ability to effectively administer warranties.<sup>34</sup> The study also looked at the statute's implementation in DFARS subpart 246.7, and in the service regulations for the Army, Air Force, and Navy.<sup>35</sup> The Services were asked to provide current contracts containing warranties for review in this study.<sup>36</sup> Two case studies each were provided by the Army, Air Force, and Navy.<sup>37</sup>

After examining the case studies provided by the Services and the guidance in the regulations, the study reported the following findings:

- "Contractor expenses for warranty repairs were less than the negotiated price for warranty in 4 out of 5 cases."<sup>38</sup>

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<sup>25</sup>*Id.* at 13.

<sup>26</sup>Oral communication with Bill Clark at the Defense Systems Management College (August, 1992).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup> Office of the Deputy Director for Defense Systems Procurement Strategies, *Report on the Administration of Department of Defense Weapon System Warranties* (September, 1992).

<sup>33</sup>*Id.* at 2.

<sup>34</sup>*Id.* at 2.

<sup>35</sup>*Id.* at 4, 6.

<sup>36</sup>*Id.* at 5.

<sup>37</sup>*Id.* at 5.

<sup>38</sup>*Id.* at 24.

- 4 out of 5 cases reported a significant number of warranty claims that were determined to be open or non-valid.<sup>39</sup> One of the case studies seems to suggest that the reasons for the large number of open or non-valid cases is the "administrative problems of the government" and the "inherent difficulties of determining claim coverage."<sup>40</sup>

- Of the seven contracts that contained a threshold requirement that had to be fulfilled before the warranty became effective, only two ever reached the threshold. "The examples highlight the difficulties in establishing warranty thresholds. Warranty claim data bases should be considered when establishing thresholds."<sup>41</sup>

- In contracts with systemic warranties, no claims have been submitted, which makes the Services' ability to monitor systemic defects suspect.<sup>42</sup>

- "Warranty provisions were negotiated that did not consider the data capabilities of the existing supply and maintenance systems."<sup>43</sup>

- Of all the cases studied, the Navy's SM-2 program had the strongest warranty administration system, but claims were made on only approximately 1% of the total missile sections.<sup>44</sup>

- "Fundamental problems exist with the Air Force's warranty tracking system."<sup>45</sup>

- The Service regulations requiring post award reviews of warranty cost effectiveness are not being implemented by the Services.<sup>46</sup>

The study stated that, while individual case studies are not conclusive, they collectively point to a trend of difficulties and deficiencies in the warranty administration systems of the Services.<sup>47</sup> It also noted a clear indication that the warranty benefits negotiated for Government contracts are not being fully realized.<sup>48</sup> It recommends that this statute be repealed.

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<sup>39</sup>*Id.* at 25.

<sup>40</sup>*Id.* at 26.

<sup>41</sup>*Id.* at 26, 27.

<sup>42</sup>*Id.* at 27.

<sup>43</sup>*Id.* at 28.

<sup>44</sup>*Id.* at 28.

<sup>45</sup>*Id.* at 28.

<sup>46</sup>*Id.* at 29.

<sup>47</sup>*Id.* at 29.

<sup>48</sup>*Id.* at 30.

The Office of the Deputy Assistant Secretary of the Air Force (Contracting) supports the conclusions reached in the study performed for the Office of the Under Secretary of Defense for Acquisition.<sup>49</sup> It notes another study performed by the Air Force Logistics Management Center (AFLMC)<sup>50</sup> that confirmed that the Air Force does not have the "data systems designed to track warranted items. Compounding this problem was the lack of necessary manpower resources in the field and in the Program Offices for accomplishing warranty administration."<sup>51</sup> This study suggested alternative warranty administration approaches including using contractor support in establishing a warranty management system and obtaining warranties that can be managed through the use of existing data systems and measured with data obtained through intensive, in-house collection efforts.<sup>52</sup> The Air Force recommends that if the warranty manager cannot use one of these three options and an effective option cannot be developed, then a warranty waiver should be prepared.<sup>53</sup> The Air Force believes that this statute, or at least the portion that mandates a weapon system warranty, should be repealed.<sup>54</sup> In the alternative, it made a number of recommendations designed to make the statute more effective.<sup>55</sup> The law could be amended to make it applicable only to major weapon systems.<sup>56</sup> DOD should promulgate a policy statement that firmly supports the waiver of warranties in cases where the cost benefit analysis clearly shows that the warranty would not be cost effective.<sup>57</sup> In an additional comment, the Office of the Deputy Assistant Secretary of the Air Force (Contracting) suggested that if a cost benefit analysis shows a warranty is not cost effective, and the contracting officer includes sufficient supporting documentation in the contract file, the warranty requirement and Congressional notification requirement should be waived.<sup>58</sup>

In a memorandum, the Headquarters Air Force Materiel Command, Directorate of Program Support, noted that the overall intent and purpose of the warranty statute is working, but problems have been identified.<sup>59</sup> It believes that the requirements for congressional notification and waiver authority have stifled attempts to waive the warranty where it would not be cost effective. The AF Materiel Command Program Support Directorate also noted that the Air Force submits few requests for waivers because of this difficult process. It contends that the

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<sup>49</sup>Memorandum from Brig. Gen. Robert W. Drewes, USAF, Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force to Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition) (Oct. 14, 1992).

<sup>50</sup>Air Force Logistics Management Center (now the Air Force Logistics Management Agency), *Warranty Administration* (1992).

<sup>51</sup>Memorandum from Brig. Gen. Robert W. Drewes, USAF, Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force to Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition) (Oct. 14, 1992).

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>Memorandum from Col. Lloyd T. Watts, Jr., USAF, Chief Systems & Logistics Contracting Division, Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Department of the Air Force (Oct. 4, 1992).

<sup>59</sup>Memorandum by M.E. Smalling, Director, Program Support, Headquarters Air Force Materiel Command, to Stuart Hazlett (Sept. 16, 1992).

approval of waivers at a lower authority level, the Head of the Contracting Activity, for instance, would allow for more waivers where the warranty is not cost effective. An acquisition staff analyst of AF Materiel Command argues that while the intent of the statute is valid, "the implementation is severely lacking." To improve this situation, he recommends improving the guidance for conducting warranty cost benefit analyses.<sup>60</sup> He further contends that the cost of the warranty only provides a marginal benefit, and the relationship of the warranty to the specifications is often unclear.<sup>61</sup> The analyst believes that the "existing FAR warranty clauses and correction of defects clauses, along with latent defects and performance provisions are often adequate to preclude the need for a special weapon systems warranty clause,"<sup>62</sup> and recommends that the law be amended to raise the contractor liability limits so that the contractor bears more of the risk of the warranty.

The Navy also agreed with the conclusions reached by the study performed for the Office of the Under Secretary of Defense for Acquisition.<sup>63</sup> The Navy noted that half of its major buying commands had supported a total repeal of this statute while the other half supported an amendment to permit flexibility in the application of future warranties.<sup>64</sup> The Navy took the position that this statute should be repealed.<sup>65</sup> On the other hand, the Army did not agree with the study's conclusions.<sup>66</sup> It contends that warranties offer tangible and intangible benefits, including promoting "product quality improvements which make costly warranty repairs unnecessary."<sup>67</sup> The Army contends that although there are significant problems with the current administration of warranties, they do serve a valid purpose.<sup>68</sup>

The Inspector General of the Department of Defense (DODIG) commented that it believes that this law is serving its intended purpose, is still relevant, has not created inefficiencies, and is required for the continuing financial and ethical integrity of the DOD procurement process.

#### **2.5.3.4. Recommendation and Justification**

##### **Repeal 10 U.S.C. § 2403 requiring contractor guarantees on major weapons systems.**

The Panel recommends that this section be repealed. Although the DODIG and the Army have commented that this statute is serving its intended purpose, the results of the two studies cited above and the other numerous comments received show significant problems in the

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<sup>60</sup> Paper by S.G. Prather, Headquarters Air Force Materiel Command (Sept. 15, 1992).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Memorandum by E.G. Cammack, Director, Procurement Policy, Department of the Navy to Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition) (Oct. 16, 1992).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Memorandum from George E. Dausman, Deputy Assistant Secretary of the Army (Procurement), Department of the Army to Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition) (Oct. 20, 1992).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

administration and effectiveness of weapon system warranties in every branch of DOD. The problems the Services are experiencing not only cause serious administrative burdens on the Government but can make the warranties of very limited value, because the Government is not always able to make successful warranty claims. Also, the reluctance of DOD to issue warranty waivers fosters the use of warranties without regard to their cost effectiveness.

The Panel believes that warranties would be much more effective if the law permitted more flexible implementation and tailoring to program specific needs. In this way, the Services could purchase effective warranties or make other arrangements when warranties would not be cost effective. By this recommendation, the Panel is not suggesting that warranties unnecessary in all cases, but that they should be used only when appropriate. The Panel recommends that clear, specific guidance should be included in the regulations governing purchase of warranties and issuance of waivers.

As an alternative, the Panel recommends that this section be revised to address problems associated with its implementation.

In 1984, Congress had noted that the military departments were not negotiating warranty provisions but mandating their inclusion in procurement contracts. Even though Congress had stated that it intended waivers to be given if the warranties would not be cost effective, virtually no waivers had been issued. It also found that the regulatory implementation of the provision should provide better guidance to the field personnel. It is clear from the comments received that the problems that Congress noted at the passage of this statute in 1984 appear to still exist today, and the flexibility Congress attempted to build into the statute has not solved these problems. The Panel believes that waivers must be more readily available in the acquisition process for those instances where a warranty would not be cost effective. To this end, the Panel recommends that the approval of waivers be at a much lower level. Vesting the waiver authority in a lower level official will help expedite waiver approval. The Panel also agrees that DOD should promulgate a policy statement supporting the use of waivers when a warranty would not be cost effective and should actively encourage the use of waivers in any further implementation or guidance.

The Panel believes that the warranty program must be improved if it is to be used with any measure of cost effectiveness. The Panel concurs that the measures suggested in the AFLMC study would greatly improve the present warranty administration system. The Panel also agrees with the Office of the Deputy Assistant Secretary of the Air Force for Acquisition that warranties should be limited to major weapon systems. These two suggestions should focus the administration system on those large contracts where warranties would be most effectively employed. While the Panel still believes that the best course of action would be to repeal this statute, the above recommendations, if accepted, can make significant improvements to the statute as drawn.

#### **2.5.3.5. Relationship to Objectives**

This recommendation promotes the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. This

recommendation eliminates a provision of the Code that practice has shown to be cumbersome and not cost effective.



## **2.5.4. 10 U.S.C. § 4534**

### **Subsistence supplies; contract stipulations; place of delivery change and reclamation**

#### **2.5.4.1. Summary of the Law**

Each contract for subsistence supplies for the Army that is made on public notice must provide for complete delivery, on inspection, at a specified place.

#### **2.5.4.2. Background of the Law**

This section was originally passed in 1818<sup>1</sup> and has changed little since that time. There was no specific mention of this section in the history of the law. Subsequent amendments in 1835<sup>2</sup> and 1861<sup>3</sup> were technical. An amendment in 1950 expanded the application of the statute to the newly created Air Force.<sup>4</sup> This amendment did not change the actual language of the statute. The law was codified in 1956<sup>5</sup> and no further amendments have been made. At the time of codification, the statute was placed in two parts of Title 10: 10 U.S.C. § 4534, which applies to the Army, and a duplicate provision at 10 U.S.C. § 9534, which applies to the Air Force.

#### **2.5.4.3. Law in Practice**

The Office of the Inspector General of the Department of Defense (DODIG) notes that it found no relevant recent cases, and neither the Federal Acquisition Regulation (FAR) nor the Defense Federal Acquisition Regulation Supplement (DFARS) cites this provision.<sup>6</sup> The DODIG did mention that this law seems to provide "legal basis for a number of FAR clauses (37 to be exact) dealing with contracting for and inspection of subsistence supplies, e.g. FAR Subpart 5.202(a)(9) providing an exception to synopses and notice for perishable subsistence supplies, and FAR Subpart 46.4, providing for inspection of condition and quality of perishable subsistence supplies at points of embarkation vice destination, etc."<sup>7</sup> The DODIG concludes, therefore, that this law is still relevant and serves an important function in the acquisition process.<sup>8</sup> It did note, however, an overlap in authority between this law and 10 U.S.C. § 9534, which contains the same language, except that section 9534 applies to the Air Force and section 4534 applies to the Army.<sup>9</sup> The DODIG recommends combining these provisions into a single statute.<sup>10</sup>

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<sup>1</sup>Act of April 14, 1818, ch. 61, § 7, 3 Stat. 426, 427.

<sup>2</sup>Act of March 3, 1835, ch. 49, § 1, 4 Stat. 780.

<sup>3</sup>Act of March 2, 1861, ch. 84, § 10, 12 Stat. 214, 220.

<sup>4</sup>Army Organization Act of 1950, ch. 383, § 402(a), 64 Stat. 263, 272.

<sup>5</sup>Act of August 10, 1956, ch. 1041, 70A Stat. 254.

<sup>6</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

The Defense Contract Management Districts Mid-Atlantic (DCMDM), West (DCMDW) and North Central (DCMDNC) all stated that this law is unnecessary and should be repealed.<sup>11</sup> The Defense Personnel Support Center (DPSC) also recommended repeal.<sup>12</sup> DPSC, part of the Defense Logistics Agency, purchases subsistence supplies for the Army as well as the other services. DPSC noted that it commonly uses FAR subpart 52.247-49, which provides for delivery to an unspecified location and, therefore, conflicts with the language of 10 U.S.C. § 4534.<sup>13</sup>

#### **2.5.4.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that this section be repealed. The issue of the place of delivery of subsistence supplies is addressed in the regulations. The DODIG is correct that there are numerous FAR provisions that discuss subsistence supplies and their inspection and delivery; however, none of these regulations appears to be based upon this statute and each would continue to be in effect were this statute repealed. This section appears to be obsolete and has since been supplanted by more useful authority in the regulations.

#### **2.5.4.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. This recommendation also helps to eliminate statutes that have outlived their usefulness and are no longer used within DOD.

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<sup>11</sup>Letter from Maria Ventresca, Associate Counsel, Contracts, Defense Contract Management District Mid-Atlantic, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 6, 1992); Letter from Col. Robert D.M. Allen, USAF, District Counsel, Defense Contract Management District West, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 3, 1992); Letter from Gary McDougall, Defense Contract Management District North Central, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 13, 1992).

<sup>12</sup>Telephone interview between a representative of the Defense Personnel Support Center (DPSC) and David Drabkin, Office of General Counsel, Defense Logistics Agency.

<sup>13</sup>*Id.*

## **2.5.5. 10 U.S.C. § 9534**

### **Subsistence supplies; contract stipulations; place of delivery**

#### **2.5.5.1. Summary of the Law**

Each contract for subsistence supplies for the Air Force that is made on public notice must provide for complete delivery, on inspection, at a specified place.

#### **2.5.5.2. Background of the Law**

This section was originally passed in 1818<sup>1</sup> and has changed little since that time. There was no specific mention of this section in the history of the law. Subsequent amendments in 1835<sup>2</sup> and 1861<sup>3</sup> were technical and amendment in 1950 only amended the statute to include the newly created United States Air Force.<sup>4</sup> The law was codified in 1956<sup>5</sup> and no further amendments have been made.

#### **2.5.5.3. Law in Practice**

The Office of the Inspector General of the Department of Defense (DODIG) notes that it found no relevant recent cases, and neither the Federal Acquisition Regulation (FAR) nor the Defense Federal Acquisition Regulation Supplement (DFARS) cite these provisions. The DODIG did mention that this law seems to provide "legal basis for a number of FAR clauses (37 to be exact) dealing with contracting for and inspection of subsistence supplies, e.g., FAR 5.202(a)(9) providing an exception to synopses and notice for perishable subsistence supplies, and FAR Subpart 46.4, providing for inspection of condition and quality of perishable subsistence supplies at points of embarkation vice destination, etc." The DODIG concludes, therefore, that this law is still relevant and serves an important function in the acquisition process. It did note, however, a duplication of authority between this law and 10 U.S.C. § 4534, which contains the exact language as in 10 U.S.C. § 9534, except that section 9534 applies to the Air Force and section 4534 applies to the Army. The DODIG recommends combining these provisions into a single statute.

The Defense Contract Management District Mid-Atlantic (DCMDM) and West (DCMDW) both stated that this law is unnecessary and should be repealed. The Defense Personnel Support Center (DPSC) also recommended repeal. DPSC commented that it was unaware that this law even existed. It noted that it commonly uses FAR clause 52.247-49 which provides for delivery to an unspecified location and conflicts with the language of 10 U.S.C. § 9534.

<sup>1</sup> Act of April 14, 1818, ch. 61, § 7, 3 Stat. 426, 427.

<sup>2</sup> Act of March 3, 1835, ch. 49, § 1, 4 Stat. 780.

<sup>3</sup> Act of March 2, 1861, ch. 84, § 10, 12 Stat. 214, 220.

<sup>4</sup> Act of June 28, 1950, ch. 383, § 402(a), 64 Stat. 272, 277.

<sup>5</sup> Act of August 10, 1956, ch. 1041, 70A Stat. 254.

#### **2.5.5.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that this section be repealed. The agencies that would be potentially affected by this statute have stated that this statute is unnecessary. The issue of the place of delivery of subsistence supplies is addressed in the regulations. The DODIG is correct that there are numerous FAR provisions which discuss subsistence supplies and their inspection and delivery; however, none of these regulations appears to depend upon this statute and each would continue to be in effect if it were repealed. While the DODIG correctly notes that this statute duplicates authority in 10 U.S.C. § 4534 and recommends their consolidation, the entities that buy these supplies argue that neither of these statutes is currently used, but that they follow the guidance given in the regulations. DPSC stated that it has found the authority in the FAR most useful. This section appears to be obsolete and has since been supplanted by more useful authority in the regulations. The Panel recommends that this section be repealed in favor of the FAR coverage.

#### **2.5.5.5. Relationship to Objectives**

This recommendation satisfies the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication of authority present in the procurement process by repealing statutes, the substance of which has been addressed in the current regulations. This recommendation also helps eliminate statutes that have outlived their usefulness and are no longer used within DOD.

## 2.5.6. 15 U.S.C. §§ 1535 - 1536

### Economy Act<sup>1</sup>

#### 2.5.6.1. Summary of the Law

15 U.S.C. § 1535 permits the head of an agency to purchase goods or services from another agency if the goods or services are available and the head of the agency determines that the purchase is in the best interests of the Government and cannot be obtained as conveniently or cheaply from a commercial source. Payment for these goods and services may be made in advance, on delivery, or on the written request of the agency filling the order. An order made between agencies obligates an appropriation of the ordering agency. This obligation is released if the agency filling the order does not incur obligations in either providing or contracting for the goods and services. This section does not permit the placement of orders for goods or services to be made by convict labor, nor does it affect other statutes addressing working funds.

15 U.S.C. § 1536 requires that an advance payment made on an order under the Economy Act (15 U.S.C. § 1535) be credited to a special working fund that the Secretary of the Treasury considers necessary to be established. Any other payment is credited to the appropriation or fund against which charges were made to fill the order. An amount paid under the Economy Act may be expended in providing goods or services, or for a purpose specified for the appropriation or fund credited. Where goods are provided from stocks on hand, the amount received in payment is credited so as to be available to replace the goods, unless another law authorizes the amount to be credited to some other appropriation or fund or the head of the executive agency filling the order decides that replacement is not necessary, in which case the amount received is deposited in the U.S. Treasury as miscellaneous receipts. This statute does not affect other laws governing agency funds and accounts.

#### 2.5.6.2. Background of the Law

These statutes were originally enacted in 1920<sup>2</sup> and are jointly and more commonly known as the Economy Act. Congress stated that this provision was meant to facilitate the interagency transfer of money to be directly used for interagency work orders.<sup>3</sup> Previously, such transfers could only be made through the reimbursement of appropriations.<sup>4</sup> Technical amendments have been made to these statutes over the years, and they were codified in 1982.<sup>5</sup>

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<sup>1</sup>The Economy Act includes:

15 U.S.C. § 1535 - Agency agreements

15 U.S.C. § 1536 - Crediting payments from purchases between executive agencies

<sup>2</sup>Act of May 21, 1920, ch 194, § 7(a)-(c), 41 Stat. 607, 613.

<sup>3</sup>H.R. REP. NO. 814, 66th Cong., 2d Sess 5 (1920).

<sup>4</sup>*Id.*

<sup>5</sup>Act of September 13, 1982, Pub. L. No. 97-258, 47 Stat. 933-934.

### **2.5.6.3. Law in Practice**

The Economy Act is implemented in subpart 17.5, "Interagency Acquisitions Under the Economy Act,"<sup>6</sup> of the FAR and is referenced in the policy section of FAR subpart 42.1, "Interagency Contract Administration and Audit Services."<sup>7</sup> No comments were received on either of these statutes.

### **2.5.6.4. Recommendation and Justification**

#### **No Action**

The Panel took no action these statutes. The Economy Act does not present a core acquisition issue and only has an indirect relationship to contracting with the civilian sector. The Panel believes that while this statute is tangentially related to DOD acquisition, it is not appropriate for action by the Panel.

### **2.5.6.5. Relationship to Objectives**

Action on these statutes would not specifically promote the objectives of the Panel.

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<sup>6</sup>48 C.F.R. 17.5.

<sup>7</sup>48 C.F.R. 42.1.

## **2.5.7. 31 U.S.C. § 6306**

### **Authority to vest title in tangible personal property for research**

#### **2.5.7.1. Summary of the Law**

This statute permits the head of an agency to vest title in tangible personal property in a nonprofit institution of higher education or a nonprofit organization whose primary purpose is conducting scientific research, provided the property is purchased with funds provided under a cooperative agreement, procurement contract, or grant agreement with the institution or organization. The statute also permits the agency to vest title when doing so will further the objectives of the agency, is under conditions the head of the agency deems appropriate and is without further obligation to the U.S. Government.

#### **2.5.7.2. Background of the Law**

This statute was promulgated as part of the Federal Grant and Cooperative Agreement Act of 1977,<sup>1</sup> which permits the agency head to enter into contracts, grants, or cooperative agreements with nonprofit institutions and organizations and to vest title to tangible personal property purchased with contract, grant, or cooperative funds in those nonprofit institutions or organizations.<sup>2</sup> Congress had found that many agencies were encountering problems if the choice of contractual instrument to be used was limited, by statute, to a particular instrument.<sup>3</sup> Congress intended to give agencies the necessary flexibility in their relationships with non-Federal entities by permitting them to choose one or all three enumerated types of instruments.<sup>4</sup> This statute superseded any existing statutes that required the use of a particular implementation instrument.<sup>5</sup>

Congress also intended to permit the agencies to vest title in tangible personal property purchased under the applicable agreement in the nonprofit institution or organization; however, a limit was placed on this authority.<sup>6</sup> It stated that this provision was not intended "to preclude or inhibit the executive branch from developing Government-wide executive guidance on the use and application of such authority."<sup>7</sup>

#### **2.5.7.3. Law in Practice**

This statute has been partially implemented in the Federal Acquisition Regulation (FAR), sections 35.014<sup>8</sup> and 52.245-15.<sup>9</sup> While much of the authority contained in this statute has been

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<sup>1</sup>Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, § 7, 92 Stat. 1, 5 (1978).

<sup>2</sup>S. REP. NO. 449, 95th Cong., 2d Sess. 11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 11, 20.

<sup>3</sup>*Id.* at 10.

<sup>4</sup>*Id.* at 10.

<sup>5</sup>*Id.* at 11.

<sup>6</sup>*Id.* at 11.

<sup>7</sup>*Id.* at 11.

<sup>8</sup>48 C.F.R. 35.014

included in these two regulations, they do not fully address the provisions of the statute and, in fact, refer the user back to the statute itself. The only comment received on this statute was from the Office of the Inspector General of the Department of Defense (DODIG).<sup>10</sup> The DOD IG stated that this statute provides the necessary statutory authority required to support the policies and procedures found in the Office of Management and Budget (OMB) Circular A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations."<sup>11</sup> The DODIG also noted that it believes this statute is still relevant, has prevented inefficiencies, and promotes financial and ethical integrity.<sup>12</sup>

#### **2.5.7.4. Recommendation and Justification**

##### **Retain 31 U.S.C. § 6306.**

The Panel recommends that this statute be retained. The complete authority is contained only in the statute and has not yet been fully implemented in the regulations. The Panel believes that this statute has a necessary function in the defense acquisition process.

#### **2.5.7.5. Relationship to Objectives**

This recommendation helps to facilitate Government access to commercial technologies and skills available in the commercial marketplace. By giving the agencies flexibility in contracting and discretion in assisting nonprofit research institutions and organizations through the transfer of tangible personal property, this statute enables the Government to maintain open and cordial relationships with these entities and to obtain necessary scientific information.

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<sup>9</sup>48 C.F.R. 52.245-15

<sup>10</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*



## **2.5.8. 41 U.S.C. § 15**

### **Transfers of contracts; assignments of claims; set-off against assignee**

#### **2.5.8.1. Summary of the Law**

This statute prevents the transfer or assignment of a contract or claim by the contractor to anyone. Such a transfer shall cause the contract or claim against the United States to be nullified. The United States, however, retains all rights of action for breach of contract. There is an exemption, however, enabling contractors to assign only the right to payment under the contract in order to obtain contract financing. To qualify for the exemption, the contract must provide for payments aggregating \$1000 or more, which may be assigned only to a bank, trust company, or other bona fide financing institution. The contract cannot be assigned to more than one party and cannot be reassigned thereafter, and the assignee must file written notice of the assignment with a true copy of the assignment instrument with certain specified officials.

The statute also provides that, once assigned, no liability of the assignor to the United States shall create or impose any liability on the assignee to make restitution or repayment. Any agency designated by the President may, in times of war or national emergency, provide in the contract that any payments made to the assignee shall not be subject to set-off or reduction. In contracts containing a clause eliminating set-off or reduction, the assignee is not responsible for any liability of the assignor to the United States that arises as a result of renegotiation, fines, penalties, taxes, social security contributions, or withholding violations.

#### **2.5.8.2. Background of the Law**

This statute was originally enacted in 1862 as a prohibition on the transfer of contracts.<sup>1</sup> It was subsequently amended in 1940 to permit the assignment of claims under specific circumstances.<sup>2</sup> Congress noted that the previous statute addressing the assignment of claims was so strictly worded and interpreted that an assignment had to conform exactly with the requirements of the statute or be held void, even if the assignment conferred no rights to the assignee.<sup>3</sup> As a result, banks and other lending institutions that might have been willing to provide financing for the performance of Government contracts were unable to rely on assignments of claims or payments under the contract as security.<sup>4</sup> Congress felt that many small businesses were unable to bid on Government accounts because of a resulting inability to obtain financing.<sup>5</sup> Congress believed that this statute would enable contractors to obtain financing from private sources.<sup>6</sup>

<sup>1</sup> Act of July 17, 1862, ch. 200, § 14, 12 Stat. 594, 596.

<sup>2</sup> Assignment of Claims Act of 1940, ch. 779, § 1, 54 Stat. 1029, 1030.

<sup>3</sup> H.R. REP. NO. 2925, 76th Cong., 3d Sess. 2 (1940).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

The final amendment to this statute was in 1951.<sup>7</sup> This Act was passed to "encourage the participation of banks and lending institutions in the financing of Government contractors."<sup>8</sup> A number of Comptroller General decisions after World War II had undermined the position of the assignee to collect money due under the contract if there were no other forms of collateral available.<sup>9</sup> These decisions permitted the withholding of payments to the assignee should there be a price revision and allowed set-off by the Government for claims against the assignor for unpaid taxes and social security withholdings.<sup>10</sup> These and other decisions deterred banks from accepting assignments of claims as collateral, seriously undermined the V-loan program in effect at the time, and interfered with the ability of small businesses to bid on Government contracts.<sup>11</sup> Congress extended the protection for set-off to include the types of situations seen in the cases at the time and extended the applicability of the provision to the General Services Administration, the Atomic Energy Commission, and other agencies the President may designate.<sup>12</sup> Originally, this provision had been limited to the military departments.<sup>13</sup> No further amendments have been made to this statute.

This statute is referenced in 50 U.S.C. § 1651, "Other law, powers and authorities conferred thereby, and actions taken thereunder; Congressional studies." This statute, and those preceding it, was enacted as part of the National Emergencies Act of 1976 that provided for the termination of existing national emergencies and for the procedures to be followed in declaring and terminating future national emergencies.<sup>14</sup> Section 1651 exempts certain statutes from the provisions of the National Emergencies Act including 41 U.S.C. § 15.

### 2.5.8.3. Law in Practice

The authority contained in the statute is also fully implemented in the FAR subpart 32.8<sup>15</sup> and in the DFARS 232.803-806.<sup>16</sup> Many recent cases have cited this law with approval. In *Monchamp Corp. v. United States*, 19 Cl. Ct. 797 (1990), the Claims Court succinctly explained the purpose of this law:

[T]he statute is intended for the benefit of the Government and serves two purposes: first, to prevent persons of influence from buying up claims against the United States, which might then be properly urged upon officers of the Government; and second, to

<sup>7</sup>Assignment of Claims Act of 1940 Amendment, ch. 75, 65 Stat. 41, 42 (1951).

<sup>8</sup>S. REP. NO. 217, 82nd Cong., 1st Sess. 1 (1951), reprinted in 1951 U.S.C.C.A.N. 1414.

<sup>9</sup>*Id.* at 2.

<sup>10</sup>*Id.* at 2.

<sup>11</sup>*Id.* at 2.

<sup>12</sup>*Id.* at 8-9.

<sup>13</sup>*Id.* at 9.

<sup>14</sup>National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1258.

<sup>15</sup>48 C.F.R. 32.8.

<sup>16</sup>48 C.F.R. 232.803-806.

enable the United States to deal exclusively with the original claimant instead of several parties.<sup>17</sup>

The Office of the Inspector General of the Department of Defense (DODIG) believes that the authority in this statute is necessary and should be retained.<sup>18</sup> It notes that the law is relevant in the current acquisition environment, does not overlap with other laws, and promotes efficiency in the procurement process.<sup>19</sup> Reaching an opposite conclusion, the Council of Space and Defense Industry Associations (CODSIA) commented that this law has created inefficiencies, is outdated, and overlaps 31 U.S.C. § 3727.<sup>20</sup> 31 U.S.C. § 3727 provides for the assignment of claims against the U.S. Government when the claim has been allowed and a warrant for payment has been issued. This statute also includes provisions protecting the assignee from set-offs. CODSIA also believes that there have been interpretation problems that have led to much litigation.<sup>21</sup>

The Defense Logistics Agency Defense Contract Management District South (DCMDS) also noted that this statute overlaps 31 U.S.C. § 3727 and recommended some coordination between the two.<sup>22</sup> DCMDS also commented that there is no definition of "financing institution" in 41 U.S.C. § 15 and recommended that there should be a definition or some guidelines for determining a financial institution.<sup>23</sup>

#### **2.5.8.4. Recommendations and Justification**

**Amend the Assignment of Claims Act, 41 U.S.C. § 15, to delete the subsection which prohibits set-off against assignees only during times of declared war or national emergency.**

The Panel recommends that that portion of 41 U.S.C. § 15 which limits the prohibition subjecting an assignee of a contract or claim against the Government to a reduction or set-off to times of war and national emergency be deleted. The Panel believes that this prohibition against reduction or set-off should be applicable at all times and to all contracts that are governed by this statute. In the period between the late 1940s and the early 1980s, Congress passed almost yearly declarations of national emergency; thus, this statute was continually in effect; however, in the early 1980s, the declaration was suspended. Congress had included this statute on a list of those applicable only during times of war or national emergency that would remain binding law without

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<sup>17</sup>*Monchamp Corp.* at 801 (citations omitted).

<sup>18</sup>Letter from Derek J. Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>19</sup>*Id.*

<sup>20</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>21</sup>*Id.*

<sup>22</sup>Electronic message from R. Wong, Defense Contract Management District South, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug. 6, 1992).

<sup>23</sup>*Id.*

declaration of either.<sup>24</sup> The Panel believes that this authority should not be dependent on declarations of war or national emergency and recommends that such a contingency be deleted from the statute. In a recent amendment to the Defense Production Act, Congress expanded its applicability to include both times of national emergency and the determination by the President that use of the authority is necessary.<sup>25</sup> The Panel believes that Congress has recognized that some statutory authority, previously reserved for times of war or national emergency, should be available in peacetime as well. The Panel recommends that the authority contained in 41 U.S.C. § 15 follow this trend.

The Panel recommends that this statute be otherwise retained. Throughout its long history, this statute has consistently served the purpose Congress intended. This provision has been favorably cited in numerous cases, many of them recently. Indeed, the history of the law has shown its positive impact on the small business community. 41 U.S.C. § 15 contains authority that is not found elsewhere in the Code. Although there is some overlap between this law and 31 U.S.C. § 3727, 31 U.S.C. § 3727 is limited to contracts and has specific authority. For this reason, and the fact that this statute is not limited in application to DOD, the Panel believes it would be in the Government's best interests to retain the remainder of this statute.

#### **2.5.8.5. Relationship to Objectives**

This recommendation promotes the purchase of commercial or modified-commercial products and services by DOD at or based on commercial market prices by permitting commercial entities to continue to make use of existing relationships and practices with financing institutions. It also promotes the participation of small businesses in the defense acquisition process by retaining the authority they need to obtain necessary financing.

#### **2.5.8.6. Proposed Statute**

##### **§ 15. Transfers of contracts; assignments of claims; set-off against assignee**

(a) No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

(b) The provisions of ~~the preceding paragraph~~ subsection (a) shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating \$1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency. Provided:

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<sup>24</sup>50 U.S.C. § 1651.

<sup>25</sup>Defense Production Act Amendments, Pub. Law No. 102-558, 106 Stat.4198. (1992).

~~(1) That, in the event of any contract entered into prior to October 9, 1940, claims shall be assigned without the consent of the head of the department or agency concerned;~~

(2) That, in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment;

(3) That, unless otherwise expressly permitted by such contract, any such assignment shall cover all amounts payable under such contract and not already paid, shall not be made to more than one party, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing;

(4) That, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of the assignment with

(A) the contracting officer or the head of his department or agency;

(B) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and

(C) the disbursing officer, if any, designated in such contract to make payment.

(c) Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes.

(d) In any case in which moneys due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or hereafter received under the assignment.

(e) Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, ~~in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner,~~ provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off.

(f) If such a provision as is described in subsection (e) of this section or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such

contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, ~~whether during or after such war or emergency~~, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liability of the assignor on account of

(1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract,

(2) fines,

(3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or

(4) taxes, social security contributions, or the withholding or non withholding of taxes or social security contributions, whether arising from or independently of such contract.

(g) Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights of obligations heretofore accrued.

## **2.5.9. 41 U.S.C. § 20**

### **Deposit of Contracts**

#### **2.5.9.1. Summary of the Law**

This law requires that all contracts that require the advance of money or are connected with the settlement of public accounts be deposited in the General Accounting Office. This does not apply to the existing laws in regard to the contingent funds of Congress.

#### **2.5.9.2. Background of the Law**

This law was first passed in 1798 and has been changed little since then.<sup>1</sup> In this initial enactment, Congress required that the contracts be deposited in the offices of the Comptroller of the Treasury.<sup>2</sup> The law was amended in 1894 to change the location of the deposit to the offices of the Auditor of the Treasury.<sup>3</sup> In 1921, Congress created the General Accounting Office (GAO) and transferred all duties of the Auditor of the Treasury to this new office.<sup>4</sup> The statute was codified in its current location in Title 41 in 1966<sup>5</sup> and has not been amended since then.

#### **2.5.9.3. Law in Practice**

This law has not been implemented in the federal regulations. The U.S. Attorney General issued two opinions in the 1930s exempting licenses and insurance policies from the requirements of this statute.<sup>6</sup> The Comptroller General of the United States has issued several decisions citing this statute, the most recent of which was in 1961. In 29 Comp. Gen. 576, it was decided that there were delays in the auditing of the accounts of disbursing officers and auditing the responsibilities of certifying and other accountable officers because contracts were not being forwarded to the GAO for immediate audit reference purposes.<sup>7</sup> The Office of the Inspector General of the Department of Defense (DODIG) stated that it believes that this statute has worked in the past and makes common sense.<sup>8</sup> It also noted that this statute is still relevant, does not overlap or duplicate other statutes, and is necessary to continue financial and ethical integrity.<sup>9</sup> In a preliminary review of this statute, the GAO stated that, years ago, it had delegated the retention authority contained in this statute to the executive agencies.<sup>10</sup> This delegation

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<sup>1</sup>Act of July 16, 1798, ch. 85, § 6, 1 Stat. 610.

<sup>2</sup>*Id.*

<sup>3</sup>Act of July 31, 1894, ch. 174, § 18, 28 Stat. 162, 210.

<sup>4</sup>Budget and Accounting Act of 1921, ch. 18, § 304, 42 Stat. 20, 24.

<sup>5</sup>Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.

<sup>6</sup>36 Op. Atty. Gen. 282 (1930); 37 Op. Atty. Gen. 446 (1934).

<sup>7</sup>29 Comp. Gen. 576 (1950).

<sup>8</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>9</sup>*Id.*

<sup>10</sup>Informal comment via telephone from a senior assistant counsel of the General Accounting Office to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (Aug. 1992).

permitted the agencies to maintain copies of their contracts individually with the understanding that GAO would be able to review the contracts at any time.<sup>11</sup>

#### **2.5.9.4. Recommendation and Justification**

##### **Repeal 41 U.S.C. § 20, requiring contracts to be deposited with GAO.**

The Panel recommends that this statute be repealed. The current system of permitting the executive agencies to maintain their own files, open to GAO inspection, is successful, and GAO does not have the storage space necessary to abide by the exact language of this statute. GAO would retain its contract audit capabilities without this statute through authority elsewhere in the U.S. Code.<sup>12</sup> This outdated authority is, therefore, no longer needed.

#### **2.5.9.5. Relationship to Objectives**

This recommendation satisfies the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. This recommendation also helps to eliminate statutes that have outlived their usefulness and are no longer used within the Federal Government.

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<sup>11</sup>*Id.*

<sup>12</sup>See 31 U.S.C. § 712, "Investigating the use of public money" and 31 U.S.C. § 716, "Availability of information and inspection of records."



## **2.5.10. 41 U.S.C. § 417**

### **Record requirements**

#### **2.5.10.1. Summary of the Law**

This law requires each executive agency to establish and maintain, for a period of five years, a computer file containing unclassified information on all procurement actions by fiscal year. The statute enumerates the necessary inclusions in this computer file and the necessity to keep separate those procurements for which only one responsible source submitted a bid or proposal. The statute also requires the transmission of this information to the General Services Administration for entry into the Federal Procurement Data System.

#### **2.5.10.2. Background of the Law**

This statute was added to the Office of Federal Procurement Policy Act of 1974 by the Deficit Reduction Act of 1984.<sup>1</sup> In 1984, Congress intended to facilitate congressional oversight of contracting activities by requiring all federal agencies to maintain computer records of all procurements, both competitive and noncompetitive.<sup>2</sup> Congress also wanted the computer records to be kept with an index to facilitate access by Congress, other agencies and the public.<sup>3</sup>

#### **2.5.10.3. Law in Practice**

This statute has been implemented in FAR subpart 4.601<sup>4</sup> and DFARS subpart 204.6.<sup>5</sup> These two regulations contain the verbatim language of the statute. The only comment received on this law was from the Office of the Inspector General of the Department of Defense (DODIG).<sup>6</sup> The DODIG stated that "open government, appropriate oversight, and continued financial and ethical integrity probably require such minimal record keeping" to be imposed on the Government.<sup>7</sup>

#### **2.5.10.4. Recommendation and Justification**

##### **Amend 41 U.S.C. § 417.**

The Panel recommends that this statute be amended to reflect the Panel's recommendation to establish a simplified acquisition threshold. As part of the Panel's deliberations on the adoption

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<sup>1</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2732(a), 98 Stat. 494, 1197.

<sup>2</sup>H.R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1433 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 2121.

<sup>3</sup>*Id.*

<sup>4</sup>48 C.F.R. 4.601.

<sup>5</sup>48 C.F.R. 204.6.

<sup>6</sup>Letter from Derek Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>7</sup>*Id.*

of this threshold, representatives of the small business community noted a potential loss of visibility for contract actions below the new threshold, while contract analysts voiced the same reservations over any discontinuity in the reporting of statistics at any range above the \$25,000 level. Senior DOD officials assured the Panel, however, of their desire to monitor management performance by continuing current contract reporting procedures at \$25,000. Given those assurances, there should be no loss of either policy visibility or statistical control by the adoption of the simplified acquisition threshold at the \$100,000 level. No coverage is necessary in the proposed amendment. Reporting procedures for contract actions between \$25,000 and \$100,000 can be addressed in regulations.

#### **2.5.10.5. Relationship to Objectives**

This recommendation would continue to promote financial and ethical integrity without duplicating any statutes or regulations.

#### **2.5.10.6. Proposed Statute**

##### **§ 417. Record requirements**

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements, other than ~~small purchases~~ ~~simplified acquisitions~~, in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include --

(1) with respect to each procurement carried out using competitive procedures --

(A) the date of the contract award;

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

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures --

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under § 253(c) of this title or § 2304(c) of Title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures."

(d) Transmission and data system entry of information.

The information included in the record established and maintained under subsection (a) of this section shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in § 405(d)(4) of this title.

## **2.6. Claims and Disputes**

### **2.6.0. Introduction**

The primary statute governing contract claims and disputes is the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. The Panel gave extensive consideration to the CDA and other statutes that, taken together, comprise the claims and disputes process. After completing its review, the Panel concluded that major changes are not necessary. Congress has established what has proven to be a workable system for asserting claims and resolving disputes.

A central issue in any consideration of claims and disputes is the system of overlapping dispute forums and remedies established by the CDA. After denial of a contract claim by the contracting officer, a contractor may appeal to the agency board of contract appeals or directly to the U.S. Claims Court. In addition, some United States District Courts have permitted a third forum for claims not exceeding \$10,000 by asserting jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346. As for the choice of forums between the Claims Court and the agency boards of contract appeals, the Panel believes it would be unwise to intervene in an intricate system that is already working. Exhaustion of administrative remedies could have been required by the Congress as it is for some other types of noncontractual claims against the Government, and this option might have been equally feasible and perhaps more logical. However, the overlap created by the CDA has not been problematic.

As for the problem of further overlapping jurisdiction in the U.S. District Courts, the Panel recommends that the exemption of contract claims contained in the Little Tucker Act be clarified. The Panel has reviewed the legislative history and the interpretive cases and reaffirmed that the Little Tucker Act confers no jurisdiction over contract claims. Were it not for the fact that some district courts have persisted in erroneously taking jurisdiction over contract disputes, the Panel would not need to consider the Little Tucker Act at all. In view of the confusion, however, the Panel is recommending appropriate clarification of 28 U.S.C. § 1346.

While not in need of major overhaul, the claims and disputes process does need fine tuning in some areas. For example, one anomaly arising out of the duplication of forums is the different time limitation on appeals. The effect of having a longer appeal period for the Claims Court is that appellants that miss the time limitation for an administrative appeal may, for that reason alone, elect to file in the Claims Court. The discrepant appeal periods do not appear to have other necessary or intended consequences, and therefore, the Panel recommends a uniform appeal period of ninety days.

Also, certification issues have consumed extensive resources at both the Claims Court and the agency boards of contract appeal, in part because of the overlap and inconsistency among three separate statutes that pertain to certification. Not only does the CDA have a certification provision at 41 U.S.C. § 605(c), but there are two additional provisions applicable to DOD: 10 U.S.C. § 2410, which governs all claims and other requests exceeding \$100,000 made under DOD contracts; and 10 U.S.C. § 2405, which applies to shipbuilding claims. Congress has very

recently amended all three statutes. In the Federal Courts Administration Act of 1992,<sup>1</sup> Congress amended the CDA to broaden the definition of who is authorized to certify contractor claims and to clarify that defects in certification do not divest the disputes forums of jurisdiction. In the National Defense Authorization Act for Fiscal Year 1993,<sup>2</sup> Congress also amended the claim certification provisions in 10 U.S.C. § 2410 and authorized the Secretary of Defense to develop implementing guidance.

The statutory certification provisions still overlap and have not been completely harmonized by the recent amendments. Congress has made significant improvements in the certification process, and further work in the regulatory arena may resolve any remaining problem areas. Following the regulatory implementation provided for by the 1993 Authorization Act, the final barrier to a uniform and simplified certification standard may be eliminated by repealing 10 U.S.C. § 2410.

10 U.S.C. § 2405 governing shipbuilding claims generated extensive debate. In the final analysis, however, the Panel concluded that little change was needed in this area. In the 1993 Authorization Act, Congress rectified a substantial problem area by allowing for waiver of the time limit for filing shipbuilding claims under certain equitable circumstances. Moreover, most of the problems identified by those who commented on this statute focus on the Navy's implementing regulation, not the statute itself.

Other Panel recommendations relating to claims and disputes include: amending 41 U.S.C. § 605 to raise the threshold for claims certification from \$50,000 to \$100,000; amending 41 U.S.C. § 608(a) to raise the cap for accelerated appeals at the boards of contract appeals from \$10,000 to \$25,000; and amending 41 U.S.C. § 605(a) to impose a six year statute of limitations for the filing of contract claims.

Other statutes that were identified as bearing indirectly on defense acquisition were not considered for action by the Panel: 31 U.S.C. § 1304 and 31 U.S.C. § 3717, governing the judgment fund and interest on claims, respectively, and 5 U.S.C. §§ 581-593, which encourages the use of alternative means of dispute resolution (ADR). ADR is available both at the Claims Court and the boards of contract appeals, but it has no unique application to DOD acquisition and does not present core acquisition issues. Nor do the judgment fund and interest provisions in Title 31 affect DOD uniquely or adversely. Therefore, the Panel chose to take no action on these statutes.

During the course of its review of all acquisition statutes, the Panel noted that there are a variety of statutes throughout the U.S. Code that contain interest rate provisions that are not consistent.<sup>3</sup> In keeping with its congressional mandate to streamline the acquisition process, the Panel believes that there should be one common interest rate applicable to all procurement-related

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<sup>1</sup>Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) &(b), 106 Stat. 4518.

<sup>2</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2452 (1993).

<sup>3</sup>For example, 10 U.S.C. § 2324, Allowable costs under defense contracts; 10 U.S.C. § 2306a, Cost or pricing data: truth in negotiations; and the Contract Disputes Act, 41 U.S.C. §§ 601-613.

statutes. The Panel did not have sufficient opportunity to develop a statutory recommendation to address this issue. However, the Panel recommends that Congress consider enacting a new statute that sets out a common interest rate to be used in the acquisition process.

## **2.6.1. 5 U.S.C. §§ 581 - 593<sup>1</sup>**

### **Alternative Means of Dispute Resolution in the Administrative Process**

#### **2.6.1.1. Summary of the Law**

This statute was enacted to encourage the use of alternate dispute resolution by the executive agencies. Section 581 defines the terms "agency," "administrative process," "alternative means of dispute resolution," "award," "dispute resolution communication," "dispute resolution proceeding," "in confidence," "issue in controversy," "neutral," "party," "person," and "roster." Section 582 permits an agency to use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, provided the parties agree to the proceeding. It also gives guidelines for when the use of dispute resolution proceedings may be inappropriate, including: when resolution of the matter is required for precedential value and the proceeding is not likely to be generally accepted as authoritative precedent; when the matter involves significant questions of Government policy and resolution by the proceeding is not likely to serve to develop recommended policy; when the resolution could result in inconsistent results concerning established policies of special importance; when the matter significantly affects persons or organizations not parties to the proceeding; when a full public record is important and the proceeding will not provide that; or when the proceeding would interfere with the agency's continued jurisdiction. This section also makes clear that dispute resolution proceedings are voluntary and merely supplement other available agency dispute resolution techniques.

Section 583 defines the term "neutral" as a permanent or temporary officer or employee of the Federal Government or any other acceptable individual. A neutral must have no conflicts of interest with the issues in controversy unless such conflict is disclosed to and agreed upon by all parties. A neutral serving as a conciliator, facilitator, or mediator serves at the will of the parties. This section also directs the Administrative Conference of the United States to establish standards for neutrals, maintain a roster of individuals who meet such standards and may serve as neutrals, enter into contracts for the services of neutrals to be used by the agencies, and develop

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<sup>1</sup>This subchapter includes:

- 5 U.S.C. § 581 - Definitions
- 5 U.S.C. § 582 - General authority
- 5 U.S.C. § 583 - Neutrals
- 5 U.S.C. § 584 - Confidentiality
- 5 U.S.C. § 585 - Authorization of arbitration
- 5 U.S.C. § 586 - Enforcement of arbitration agreement
- 5 U.S.C. § 587 - Arbitrators
- 5 U.S.C. § 588 - Authority of arbitrator
- 5 U.S.C. § 589 - Arbitration proceedings
- 5 U.S.C. § 590 - Arbitration awards
- 5 U.S.C. § 591 - Judicial review
- 5 U.S.C. § 592 - Compilation of information
- 5 U.S.C. § 593 - Support services

procedures to assist agencies in obtaining the services of neutrals on an expedited basis. An agency may use the officers or employees of another agency as neutrals and may enter into interagency agreements for the reimbursement of the full or partial cost of the services of the employee. The section permits the agency to enter into a contract with any person on the roster established by the Administrative Conference of the United States or a roster maintained by an organization or individual. The parties may agree on compensation for the neutral that is fair and reasonable to the Government.

Section 584 discusses the confidentiality requirements of the participants in a dispute resolution proceeding. A neutral in a proceeding is prohibited from voluntarily disclosing or being compelled to disclose information or communications provided in confidence unless all parties agree to the disclosure in writing; the communication is already public knowledge; the communication must be made public by statute; or a court determines that disclosure is necessary to prevent injustice, establish a violation of law, or prevent harm to public health and safety. A party in a dispute resolution proceeding is prohibited from disclosing any information or communication, either voluntarily or compulsorily, unless the communication was made by the party seeking disclosure, all parties consent in writing, the communication has already been made public, a statute requires that the communication be made public, a court determines that the communication should be disclosed, the communication is necessary in determining the existence or meaning of an award or agreement, or the communication was provided to or was available to all parties in the proceeding. Any communication or information that is disclosed in violation of this section is inadmissible in any future proceeding relating to the issues in controversy. The parties can agree, before the proceeding begins, to alternative confidential procedures by the neutral. If a neutral receives a request for disclosure through a legal process, the neutral will attempt to notify all parties and any affected nonparty of the demand. If those notified do not offer to defend the disclosure refusal by the neutral, they will have waived their objection to the disclosure. This section does not prevent discovery or admissibility of any evidence otherwise discoverable. The disclosure prohibitions have no effect on information and data necessary to document an agreement or order; nor will they prevent the gathering of information for research or educational purposes. These prohibitions will not prevent the use of communications in a proceeding between the neutral and a party in the same proceeding.

Section 585 permits the use of arbitration as an alternative means of dispute resolution if all parties consent. This consent can be obtained either before or after the issue in controversy has arisen. Under this section, a party may agree to submit only certain issues to arbitration, or only if the award is within a certain range of possible outcomes. Any arbitration agreement setting forth the subject matter shall be in writing. The section prohibits an agency from requiring a person to consent to arbitration as a condition of entering into a contract or receiving a benefit. An officer or employee of an agency may offer to use arbitration if he/she has the authority to enter into a settlement or is authorized to consent to the use of arbitration.

Section 586 states that an agreement to arbitrate is enforceable pursuant to 9 U.S.C. § 4. An action brought to enforce an agreement to arbitrate cannot be dismissed or relief denied on the grounds that it is against the United States or the United States is an indispensable party. Section 587 permits the parties to the arbitration to participate in the selection of the arbitrator. Such



arbitrator will be a neutral as described in previous sections. Section 588 describes the authority of the arbitrator. This authority includes the ability to regulate and conduct the arbitration hearings, to administer oaths and affirmations, to compel the attendance of witnesses and the production of evidence at the hearing, and to make awards.

Section 589 describes the procedures to be followed before, during, and after the arbitration proceedings. The arbitrator is required to set a time and place of the hearing and notify the parties. Any party who wants a record of the hearing shall be responsible for preparing of the record, notifying the other parties and the arbitrator of the record, furnishing copies, and paying all costs of the record. At the arbitration, the parties are permitted to be heard, to present evidence, and to cross-examine witnesses. The arbitrator may conduct the proceeding by telephone, television, computer, or other electronic means if all parties agree and have an opportunity to participate. The hearing shall be conducted expeditiously and informally. The arbitrator may receive any oral or documentary evidence, except that which is irrelevant, immaterial, repetitious, or privileged, and may interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives. No interested person shall make *ex parte* communications to the arbitrator. If such communication is made, the arbitrator will make a memorandum of the communication, enter it as part of the record, and provide an opportunity for rebuttal. Upon receipt of the *ex parte* communication, the arbitrator may require the offending party to show cause why the claim should not be resolved against the party as a result of the communication. The arbitrator shall make an award within 30 days after the close of the hearing or the filing of briefs, if permitted, unless the parties agree to some other time limit or the agency has a rule providing for another time limit.

Section 590 addresses arbitration awards. It provides that, unless there is a rule otherwise, the award in an arbitration proceeding shall include a brief and an informal discussion of the factual and legal basis for the award and shall be filed with the relevant agencies with a proof of service. The award shall become final 30 days after it is served on all parties, unless the agency files an extension. The head of an agency that is a party in the arbitration can terminate the proceeding or vacate the award if he does so before the award becomes final and serves a notice of this intention on all interested parties. An award that is thus vacated shall not be admissible in any proceeding relating to the issues in controversy. After the award is vacated, a party to the arbitration may petition the agency head to be reimbursed for the attorney fees and expenses incurred in connection with the arbitration and will be awarded those fees that would not have been incurred in the absence of the arbitration proceeding. This section makes a final award binding on all parties and enforceable under 9 U.S.C. §§ 9-13. No enforcement action may be dismissed or relief denied because it is against the United States or the United States is an indispensable party. An arbitration award may not serve as estoppel in any other proceeding on the same issues nor can it be used as a precedent or otherwise be considered in any factually unrelated proceeding.

Section 591 permits a person adversely affected or aggrieved by an arbitration award to bring an action for judicial review under 9 U.S.C. §§ 9-13. A decision by the agency to use or not use a dispute resolution proceeding is within the discretion of the agency and not subject to

judicial review. If the agency head decides to terminate an arbitration proceeding or to vacate an arbitration award, that is also within his discretion and not subject to judicial review.

Section 592 provides that the Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. The agencies shall supply such information as is required to enable the Chairman to comply with this section. Section 593 enables an agency to use the services and facilities of other Federal agencies, public and private organizations and agencies and individuals with their consent.

#### 2.6.1.2. Background of the Law

This group of statutes was passed as part of the Administrative Dispute Resolution Act of 1990.<sup>2</sup> The purpose of this bill was to "place government-wide emphasis on the use of innovative ADR [Alternative Dispute Resolution] procedures by agencies and to put in place a statutory framework to force the effective and sound use of these flexible alternatives to litigation."<sup>3</sup> Congress noted that the agencies are currently able to use ADR methods without the express authorization of statute or regulation; however, through these statutes, it decided to send a message to the agencies that the use of ADR is an accepted practice and to provide support for agency efforts to expand or enhance their ADR programs.<sup>4</sup> Congress noted that the private sector has been using ADR as an alternative to litigation and that Federal agencies were authorized to use many ADR techniques, such as mediation, conciliation, and mini trials.<sup>5</sup> Some agencies, such as the Environmental Protection Agency, the Army Corps of Engineers, the Merit Systems Protection Board, and the Department of Justice had individual ADR programs in place and operational.<sup>6</sup> Congress stated that the Administrative Conference of the United States (ACUS) had done a great deal of work regarding Federal agency use of ADR techniques.<sup>7</sup> ACUS had recommended that the agencies begin to use formal rule making in the early 1980s, and once that system had proved successful, it began to explore the use of informal, non adversarial ADR techniques for resolving disputes.<sup>8</sup> Congress noted that ACUS believed that although the "federal agencies already possess the authority to use most ADR procedures, . . . agencies often avoid ADR techniques due to confusion over agency authority to use them and the acceptability of such techniques within the Executive Branch."<sup>9</sup> ACUS recommended the passage of legislation to clarify and expand the agencies' ADR authority.<sup>10</sup>

Hearings were held on the appropriateness of the use of ADR to resolve agencies' disputes and the constitutional questions that it presents.<sup>11</sup> Most of those testifying agreed that there was

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<sup>2</sup>Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 4(b), 104 Stat. 2736, 2738 (1990).

<sup>3</sup>S. REP. NO. 543, 101st Cong., 2d Sess. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3931, 3932.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 3932.

<sup>6</sup>*Id.* at 3933.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* at 3933.

<sup>10</sup>*Id.* at 3934.

<sup>11</sup>*Id.*

a need for the flexibility afforded by ADR; however, the Department of Justice expressed concerns that "the use of binding arbitration by agencies that do not already have specific statutory authorization to do so raises serious constitutional concerns."<sup>12</sup> Further hearings and studies convinced Congress that the statutes enacted would not pose any significant constitutional questions.<sup>13</sup> Congress also included a sunset provision which provided that the authority to use dispute resolution proceedings and the other amendments included in the Act would terminate on October 1, 1995.

#### **2.6.1.3. Law in Practice**

Few comments were received on these laws. The Council of Defense and Space Industry Associations (CODSIA) stated that 5 U.S.C. § 582, "General authority," is not serving its intended purpose since the Federal Acquisition Regulation (FAR) has not been amended to encourage the use of ADR. CODSIA believes that most agencies have not implemented these laws by adopting a policy that addresses the use of ADR. CODSIA also commented that 5 U.S.C. § 591, "Judicial review," precludes judicial review of an agency's determination whether to use ADR or vacate an arbitrator's award. CODSIA argues that this section undercuts the merits of true ADR use. The Inspector General of the Department of Defense (DOD IG) commented that it believes these laws are serving their intended purposes, are still relevant, have not created inefficiencies, and are necessary to protect the best interests of DOD.

#### **2.6.1.4. Recommendation and Justification**

##### **No Action**

The Panel took no action on these statutes. These laws are not unique to contracting or to DOD acquisition. They do not present any core acquisition issues and have only an indirect relationship to contracting. The Panel believes that while these statutes are tangentially related to DOD acquisition, they are not appropriate for action by the Panel.

#### **2.6.1.5. Relationship to Objectives**

Action on these statutes would not specifically promote the objectives of the Panel.

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<sup>12</sup>*Id.* at 3935.

<sup>13</sup>*Id.*

## 2.6.2. 10 U.S.C. § 2405

### Limitation on adjustment of shipbuilding contracts

#### 2.6.2.1. Summary of the Law

This section prohibits the Secretary of a military department from adjusting a price under a shipbuilding contract entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract arising from events that occurred more than 18 months before the submission of the claim, request, or demand. A claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification required by section 6(c)(1) of the Contract Disputes Act (41 U.S.C. § 605(c)(1)) and the required supporting data.

#### 2.6.2.2. Background of the Law

Congress has periodically held hearings to examine the problems involved with shipbuilding claims. In 1980, it commissioned a study to evaluate the Navy's efforts to solve some of the problems associated with shipbuilding claims. The resulting report recommended a six month time limit on the submission of claims. In 1982, the General Accounting Office (GAO) began a study of recommendations for the improvement of the procurement process. As part of that study, GAO noted that the late submission of shipbuilding claims had been a major factor in the Navy's inability to settle claims and recommended a one year time limit. After considering these recommendations, Congress agreed that some limit was necessary and determined that 18 months was a reasonable time period. Congress again examined shipbuilding claims in 1984.<sup>1</sup> It noted that two concerns had arisen since the passage of the statute in 1983.<sup>2</sup> The first concern addressed the meaning of the word "event" in terms of when the 18 month time limit for filing a claim would be triggered.<sup>3</sup> Congress stated that the triggering event for a claim alleging defective Government property would be when a defect is discovered and the Government orders its repair or replacement.<sup>4</sup> The 18 month time limit would begin when the contractor knew or should have known of the triggering event.<sup>5</sup> Congress stated that it considered amending the statute to include a definition of "event" but instead directed the Navy to provide implementing guidance, indicating that it would revisit this statute if the Navy did not fairly implement it.<sup>6</sup> The second area of concern identified by Congress addressed the certification requirement.<sup>7</sup> The initial version of the statute had provided that regulations promulgated by the Secretary of Defense would address the necessary documentation and substantiation of claims.<sup>8</sup> Congress noted that

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<sup>1</sup>S. REP. NO. 500, 98th Cong., 2d Sess. 257 (1984).

<sup>2</sup>*Id.* at 256.

<sup>3</sup>*Id.* at 257.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

there was concern that this provision would be interpreted as amending the Contract Disputes Act.<sup>9</sup> To prevent this unintended interpretation, Congress referenced the certification provision of the Contract Disputes Act and required the submission of necessary supporting data as defined by regulations issued by the Secretary of the Navy.<sup>10</sup>

This statute was codified as part of the Department of Defense Authorization Act of 1985.<sup>11</sup> It was proposed by the Senate, and the House of Representatives receded with a technical amendment.<sup>12</sup>

In the 1993 DOD Authorization Act, Congress amended the certification requirements in 10 U.S.C. § 2405(b) to permit the waiver of the 18 month time limit if the certification submitted is defective solely because of the status of the person who made the original certification.<sup>13</sup>

### 2.6.2.3. Law in Practice

This section contains one of three certification provisions pertaining to contract claims. The Contract Disputes Act at 41 U.S.C. § 605(c)(1) governs certification of contract claims, and 10 U.S.C. § 2410 contains certification requirements applicable to claims and other requests for relief exceeding \$100,000 under DOD contracts. Many industry comments were received on this statute. The Council of Defense and Space Industry Associations (CODSIA) noted that this law is currently being implemented under an interim regulation, and that it took the Navy eight years to begin this implementation.<sup>14</sup> CODSIA believes that the Navy's implementation is unfair because it is applied retroactively and ignores the specific Contract Disputes Act standard established in the statute.<sup>15</sup> CODSIA also argues that the Navy has ignored the Contract Disputes Act certification requirements and standards and has created a "known or should have known" standard "that has never been used by any other government agency in the interpretation of claims statutes or ever been recognized by any judicial body."<sup>16</sup> It states that the term "event" in the regulation is so ambiguous that it has caused costly, unnecessary, and inefficient litigation.<sup>17</sup> CODSIA further contends that this statute is no longer relevant but that its implementation is creating inefficiencies.<sup>18</sup> It also believes that the law conflicts with other statutes of limitation and should be repealed in order to allow the time bar applicable to all other claims to be applicable to shipbuilding claims as well.<sup>19</sup>

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<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1234(a), 98 Stat. 2492, 2604.

<sup>12</sup>H.R. CONF. REP. NO. 1080, 98th Cong., 2d Sess. 325 (1984), *reprinted in* 1984 U.S.C.A.N. 4174, 4304.

<sup>13</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 807, 106 Stat. 2448 (1992).

<sup>14</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

The Shipbuilders Council of America (SCA) provided additional comments on this statute.<sup>20</sup> It noted that the Navy's interim implementing regulation of December 1991 is the subject of four cases "currently being litigated in the Court of Claims and the issue has been raised in yet another case in the Federal Court of Appeals."<sup>21</sup> The SCA surveyed its industry and found that there are at least 16 other potential litigation cases on the issue of when the time bar begins to run.<sup>22</sup> The SCA also argued that the Navy has adopted a subjective "known or should have known" standard that is singularly unique and "imputes incidental knowledge of a subcontractor employee to the prime contractor; that encourages a shipbuilder to submit piecemeal and 'protective claims' with no assurance that the Department of Justice will recognize the 'protective claims;' and that ignores the specific statutory requirements of the Contract Disputes Act that are incorporated by reference in 10 U.S.C. § 2405(b)."<sup>23</sup> The SCA states that a typical shipbuilding contract can have from 2,000 to 10,000 changes over the course of its construction period, and the Navy expects protective claims to be submitted every time a change is made.<sup>24</sup> It believes that this practice is "unduly onerous and nonsensical."<sup>25</sup>

The SCA commented that there were other serious problems with the implementation of this statute. It stated that the Navy regulation has applied this authority retroactively, even though the statute is silent on this issue.<sup>26</sup> Also, it comments that the Navy has refused to adopt a tolling standard that is consistent with all other statutes of limitations.

A reasonable tolling standard would alleviate the need for thousands of "protective claims" to be filed, each of which requires a quantification of dollar amount and a certification even though the contractor may not be able to quantify the dollar amount until after the change is completed or altered by one or more of the subsequent thousands of changes that occur in a typical shipbuilding contract.<sup>27</sup>

The SCA believes that the implementation of this statute violates "all reasonable standards of fairness and ignores the fundamental requirements of the Contract Disputes Act."<sup>28</sup> It recommends that this statute be repealed or modified to include a "known or should have known" standard that is consistent with other statutes of limitation.<sup>29</sup> It also recommends that direction be given that any implementing regulations must contain tolling procedures.<sup>30</sup>

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<sup>20</sup>Letter from John J. Stocker, President, Shipbuilders Council of America, to Gary Quigley and Jack Harding (Aug. 26, 1992).

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

In later comments, the SCA again noted that the Navy has never cited specific parts of the legislative history of the statute to support its "known or should have known" standard, despite repeated requests.<sup>31</sup> It also contends that the statute does not provide any protection to the prime contractor when the subcontractor does not submit a claim until close to or after the 18 month limitation.<sup>32</sup> It notes that it is impossible to certify a claim until one can quantify it, and constructive changes are even more difficult to identify and quantify.<sup>33</sup> It discusses a number of deficiencies in the Navy's interim regulations, including ambiguous guidance to subcontractors on what constitutes correction of a defect and no requirement that the Navy must give timely notice of a deficiency in certification or supporting data.<sup>34</sup> The SCA provided proposed amending language to solve some of the problems it has identified.<sup>35</sup> This amendment would take several steps to relax the strict interpretation of the certification provision of the statute.<sup>36</sup>

The American Bar Association Section of Public Contract Law (the Section) also noted that, although this statute was passed in October 1984, the Navy did not finalize the implementing regulations until 1991.<sup>37</sup> The Section commented that it has a number of concerns with respect to the implementation of this statute in the Navy's interim regulation, including how the definition and application of the "known or should have known" standard is used in the regulation, when and what kind of supporting data is needed, and when the period for submission of the claim, request, or demand begins to run.<sup>38</sup> The Section argues that this statute "will lead to disputes over its application to specific claims, requests, and demands."<sup>39</sup>

The Naval Sea Systems Command noted that this statute was enacted in response to the submission in the 1970s of large, omnibus claims by shipbuilders.<sup>40</sup> The first claims to be affected by the statute were submitted in late 1986.<sup>41</sup> The Navy implemented the statute in the DFARS and, upon industry request, in naval regulations.<sup>42</sup> The Navy contends that this statute is necessary to ensure the timely submission of shipbuilding claims and believes that its implementation fairly interprets and applies the statute.<sup>43</sup> It is the Navy's firm position that the unique nature of shipbuilding has made this statute essential.<sup>44</sup> The Navy responded to some of the SCA's comments on this statute. It noted that the "known or should have known" standard

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<sup>31</sup>Letter from John J. Stocker, President, Shipbuilders Council of America, to RADM W. L. Vincent and Members of the Section 800 Panel (Sept. 28, 1992).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>Letter from the American Bar Association Section of Public Contract Law, signed by John S. Pachter, Chair, to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 10, 1992).

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>Memorandum from RADM E.B. Harshbarger, SC, USN, Deputy Commander for Contracts, Naval Sea Systems Command, Department of the Navy to the DOD Advisory Panel on Streamlining and Codifying Acquisition Laws (Oct. 15, 1992).

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

requires imputation of knowledge of a subcontractor to a prime contractor only in cases of subcontract claims.<sup>45</sup> It also stated that "the Navy has never required or even indicated that the statute applies to routine changes and, for most changes, the statute will have no effect."<sup>46</sup>

Although the Navy noted that tolling is not allowed under the statute, it stated that its interim regulations permit a shipbuilder to supplement its data and revise the amount requested after an initial best estimate of the costs is submitted.<sup>47</sup> The Navy has also "made a binding representation in promulgating the Interim Rule that it will not challenge, and will be estopped from challenging, the adequacy of an otherwise valid certification on the basis that the amount of the claim was revised or supporting data had been supplemented."<sup>48</sup> The Navy stated that it supported the amendment to the certification requirement in the DOD Authorization Act for Fiscal Year 1993.<sup>49</sup> In closing, the Navy stated that this statute is fair and "represents the only presently effective mechanism that ensures the timely submission of claims."<sup>50</sup>

#### **2.6.2.4. Recommendations and Justification**

**Amend 10 U.S.C. § 2405 to remove the specific certification requirement in subsection (b) and include a statement providing for implementation of the certification requirement in regulation. In view of the recent statutory changes made by Congress, no further change is necessary to the certification requirement.**

Although there have been several comments lamenting the way this statute is working in practice, the statute itself is relatively clear. The problems noted by the commentators focus on the regulations implementing this statute, not on the statute itself. Industry representatives have made similar complaints about this statute over the years, and Congress has examined this statute a number of times without significantly amending it. Although Congress did agree to examine this statute if it was not implemented fairly by the Navy, the Navy's interim regulations are so recent that it would be premature to declare the regulations unfair. Because the regulatory implementation process has just begun on the authority contained in this statute, the Panel believes that it would be premature to consider repeal.

However, at some later date, it could be argued that the regulations issued by the Navy governing certification of claims and the required supporting data are more flexible and broader than the authority currently contained in the statute. Therefore, the Panel recommends that the specific requirements currently in the statute be removed in favor of a statement providing for regulatory guidance on this issue. The Panel believes that such a recommendation will protect the best interests of DOD while alleviating the concern expressed by industry.

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<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*



In the Fiscal Year 1993 Department of Defense Authorization Act, Pub. L. No. 102-484, Congress has already added a provision (new subsection (c)) allowing for a waiver of the 18 month time limit if the certification was made by an unauthorized person and found deficient. The Panel agrees with the Navy that this amendment will resolve a potential problem in the shipbuilding claims area. Many of the cases cited by the industry commentators are in court today because there is currently no authority for waiver under such circumstances.

#### **2.6.2.5. Relationship to Objectives**

This recommendation promotes the financial and ethical integrity of the acquisition process while encouraging the exercise of sound judgment on the part of acquisition personnel.

#### **2.6.2.6. Proposed Statute<sup>51</sup>**

##### **Section 2405. Limitation on adjustment of shipbuilding contracts**

(a) The Secretary of a military department may not adjust any price under a shipbuilding contract entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract (or incurred due to the preparation, submission, or adjudication of any such claim, request, or demand) arising out of events occurring more than 18 months before the submission of the claim, request, or demand.

(b) For the purposes of subsection (a), a claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification and supporting data for the claim, request, or demand required by ~~section 6(e)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 605(e)(1)) and the supporting data for the claim, request, or demand regulations promulgated by the Secretary of a military department.~~

(c)(1) If a certification referred to in subsection (b) with respect to a shipbuilding contract is determined to be deficient because of the position, status, or scope of authority of the person executing the certification, the contractor may resubmit the certification. The resubmitted certification shall be based on the knowledge of the contractor and the supporting data that existed when the original certification was submitted. The appropriateness of the person executing the resubmitted certification shall be determined on the basis of applicable law in effect at the time of the resubmission.

(2) If a certification is resubmitted pursuant to paragraph (1) by the date described in paragraph (3), the resubmitted certification shall be deemed to have been submitted for purposes of this section at the time the original certification was submitted.

(3) The date by which a certification may be resubmitted for purposes of paragraph (2) is the date which is the later of --

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<sup>51</sup>Subsection (c) has been added by Congress pursuant to the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 807, 106 Stat. 3134 (1992).

(A) 90 days after the promulgation of regulations under section 2410(e) of this title; or

(B) 30 days after the date which is the earlier of the date on which --

(i) the contractor is notified in writing, by an individual designated to make such notification by the Secretary of Defense, of the deficiency in the previously submitted claim, request, or demand;

(ii) a board of contract appeals issues a decision determining the previously submitted claim, request, or demand to be deficient; or

(iii) a Federal court renders a judgment determining the previously submitted claim, request, or demand to be deficient.

## 2.6.3. 10 U.S.C. § 2410

### Contract claims: certification

#### 2.6.3.1. Summary of the Law

This section prohibits the payment of a contract claim, request for equitable adjustment to contract terms, request for relief under Pub. L. No. 85-804, or similar request from a contractor that exceeds \$100,000 unless one of the contractor's senior officials in charge at the plant or location involved certifies that the claim or request is submitted in good faith and all supporting data are accurate and complete to the best of such official's knowledge and belief.

#### 2.6.3.2. Background of the Law

This section is part of the Codification of Military Laws Act of 1988.<sup>1</sup> The purpose of this Act was to codify in Title 10 of the U.S. Code assorted provisions of law that had been enacted as free-standing permanent provisions of laws since 1970.<sup>2</sup> The certification requirement contained in this statute had been included in the DOD Appropriation Authorization Act of 1979.<sup>3</sup> Congress expressed a grave concern with the problem of contractors submitting inflated or exaggerated claims.<sup>4</sup> Congress believed that since a civil servant must certify the accuracy of any claims submitted against the Government, a company doing business with DOD should be subject to the same certification requirement.<sup>5</sup> The codification of the certification requirement did not make any specific substantive changes and was not specifically mentioned.<sup>6</sup>

#### 2.6.3.3. Law in Practice

This section has been implemented in the Federal Acquisition Regulation (FAR), Subsection 33.207,<sup>7</sup> and DOD Federal Acquisition Regulation Supplement (DFARS), Subsection 233.7000.<sup>8</sup> This section contains one of three certification provisions pertaining to contract claims. The Contract Disputes Act at 41 U.S.C. § 605(c)(1) governs certification of contract claims, and 10 U.S.C. § 2405 contains certification requirements applicable to shipbuilding claims.

Many industry comments were received on the impact of this law. The Council of Defense and Space Industry Associations (CODSIA) stated that this law is not serving its

<sup>1</sup>Codification of Military Laws, Pub. L. No. 100-370, § 1(h)(2), 102 Stat. 840, 847 (1988).

<sup>2</sup>H.R. REP. NO. 696, 100th Cong., 2d Sess. 3, *reprinted in* 1988 U.S.C.C.A.N. 1077.

<sup>3</sup>DOD Appropriation Authorization Act, 1979, Pub. L. No. 95-485, § 813, 92 Stat. 1611, 1624.

<sup>4</sup>H.R. REP. NO. 1118, 95th Cong., 2d Sess. 117 (1979).

<sup>5</sup>*Id.*

<sup>6</sup>Codification of Military Laws, Pub. L. No. 100-370, § 1(h)(2), 102 Stat. 840, 847 (1988).

<sup>7</sup>48 C.F.R. 33.207.

<sup>8</sup>48 C.F.R. 233.7000.

intended purpose but has created chaos about who can certify a claim.<sup>9</sup> It strongly recommends changes similar to those that were enacted in section 816 of the Department of Defense Authorization Act for Fiscal Year 1993.<sup>10</sup>

The American Bar Association Section of Public Contract Law (the Section) notes that this statute requires the certification by "a senior official of the contractor in charge at the plant or location involved" while the Contract Disputes Act does not identify the status or position of an individual eligible to certify a claim.<sup>11</sup> The Section argues that requiring two different standards for claims submitted under the Contract Disputes Act and claims submitted under 10 U.S.C. § 2410 has created needless uncertainty in contractors wishing to assert claims under DOD contracts that are also submitted under the Contract Disputes Act.<sup>12</sup> Last year, one out of every three appeals at the Armed Services Board of Contract Appeals that involved contractor claims in excess of \$50,000 required active board participation on certification issues.<sup>13</sup> The U.S. Claims Court and the other boards of contract appeals reflect similar statistics.<sup>14</sup> The Section recommends amending this statute to reference the certification provision in the Contract Disputes Act (41 U.S.C. § 605(c)(1)).<sup>15</sup> It believes that "if two separate contract claim certification requirements are necessary, those statutes should be consistent and contain clear guidance on who must certify."<sup>16</sup> The Section argues that this amendment would alleviate the troublesome and increasing difficulties in the certification requirement, would reduce waste and inefficiency, and would help to alleviate the adversarial relationship between the Government and the Federal procurement industry.<sup>17</sup>

In 1980, the Office of Federal Procurement Policy (OFPP) issued guidance on the overall area of certification in the Contract Disputes Act (CDA) in Policy Letter 80-3.<sup>18</sup> In response to the extensive litigation in recent years, OFPP has proposed to replace the certification guidance in Policy Letter 80-3 with new language.<sup>19</sup> This revised language would relax the certification requirement of the CDA by allowing the contractor to designate specific people with the authority to certify CDA claims.<sup>20</sup> OFPP intends to publish its revised guidance in late 1992 or early 1993.

OFPP has also expressed the intention to work with DOD to develop legislation to conform the requirements of 10 U.S.C. § 2410 with the CDA and the proposed policy.<sup>21</sup> OFPP's

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<sup>9</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>10</sup>*Id.*

<sup>11</sup>Letter and enclosures from the American Bar Association Section of Public Contract Law, signed by John S. Pachter, Chair, to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 10, 1992).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>57 Fed. Reg. 8495 (Mar. 10, 1992).

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

efforts will be directly impacted, however, by Congress' recent amendments to both the CDA and 10 U.S.C. § 2410. In the Federal Courts Administration Act of 1992,<sup>22</sup> Congress amended the certification requirements of the CDA to broaden the definition of who is authorized to certify contract claims and to clarify that defects in certification do not divest the disputes forum of jurisdiction. In the National Defense Authorization Act for Fiscal Year 1993, Congress authorized the Secretary of Defense to promulgate regulations in the FAR requiring that a contractor claim be certified as required in the CDA and that this certification be made by a person with the authority to bind the contractor and with the requisite knowledge of the claim or request for relief.<sup>23</sup> Once these regulations are published, 10 U.S.C. § 2410 would be repealed.<sup>24</sup> Congress stated that this statute has prevented the adoption of a Government-wide certification standard.<sup>25</sup> The repeal of the statute and publication of regulations were intended to facilitate a single certification.<sup>26</sup>

#### **2.6.3.4. Recommendation and Justification**

##### **Repeal 10 U.S.C. § 2410.**

The Panel notes that the CDA and 10 U.S.C. § 2410 certification requirements have not been completely harmonized by the recent amendments. 10 U.S.C. § 2410 requires that the certifying official have knowledge of the claim, which is not required by the CDA. Regulatory guidance may be able to complete the harmonization process without further congressional action.

Although the two statutes may be able to be harmonized through the regulatory process, the Panel agrees with Congress that a single, Government-wide certification standard would be preferable. As noted above, 10 U.S.C. § 2410 is repealed upon promulgation by DOD of appropriate regulatory guidance that would implement Congressional policies expressed in the 1993 Authorization Act. Direct repeal of 10 U.S.C. § 2410 would rectify the problems caused by having two overlapping but inconsistent statutory provisions governing certification.

In its discussion of 10 U.S.C. § 2405, the Panel has also recommended that the separate certification requirements in 10 U.S.C. § 2405 be eliminated. Both CDA certification requirements at 41 U.S.C. § 605(c)(1) and 10 U.S.C. § 2405 are addressed more fully by separate coverage in this Report.

#### **2.6.3.5. Relationship to Objectives**

This recommendation will further the Panel's statutory mandate of reviewing acquisition laws applicable to DOD with a view toward streamlining the defense acquisition process. It helps to eliminate the duplication and overlap of authority currently present in the procurement process.

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<sup>22</sup> Pub. L. No. 102-572, § 907(a) &(b), 106 Stat. 4518.

<sup>23</sup> National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2452 (1992).

<sup>24</sup> *Id.*

<sup>25</sup> CONF. REP. NO. 966, 102d Cong., 2d Sess. (1992).

<sup>26</sup> *Id.*

This recommendation will also provide the means for expeditious and fair resolution of procurement disputes.

#### **2.6.3.6. Current Statute**

##### **§ 2410. Contract claims: certification**

A contract claim, request for equitable adjustment to contract terms, request for relief under Public Law 85-804 (50 U.S.C. § 1431 *et seq.*), or other similar request by a contractor that exceeds \$100,000 may not be paid unless a senior official of the contractor in charge at the plant or location involved certifies at the time the claim or request is submitted that --

(1) the claim or request is made in good faith; and

(2) All supporting data submitted in connection with the claim or request are accurate and complete to the best of such official's knowledge and belief.

#### **2.6.3.7. Congressional Amendments<sup>27</sup>**

##### **Sec. 813. CERTIFICATION OF CONTRACT CLAIMS**

###### **(a) REGULATIONS ON CERTIFICATION OF CONTRACT CLAIMS**

(1) Chapter 141 of title 10, United States Code, as amended by sections 384 and 808, is further amended by adding at the end the following new section:

##### **§ 2410e. Contract claims: certification regulations**

(a) REGULATIONS. -- The Secretary of Defense may propose, for inclusion in the Federal Acquisition Regulation, regulations relating to certification of contract claims, requests for equitable adjustment to contract terms, and requests for relief under Public Law 85-804 (50 U.S.C. § 1431 *et seq.*) that exceed \$100,000. Such regulations, at a minimum, shall --

(1) provide that a contract claim, request for equitable adjustment to contract terms, or request for relief under Public Law 85-804 (50 U.S.C. § 1431 *et seq.*) may not be paid unless the contractor provides, at the time the claim or request is submitted, the certification required by section 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C. § 605(c)(1)); and

(2) require that the person who certifies such a claim or request be an individual who is authorized to bind the contractor and who has knowledge of the basis of the claim or request, knowledge of the accuracy and completeness of the supporting data, and knowledge of the claim or request.

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<sup>27</sup>These amendments were enacted in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2452 (1993).

**(b) PUBLICATION.** -- The Secretary of Defense shall ensure that, upon promulgation of the regulations, the regulations are published in the Federal Register.

**(c) REPORT.** -- If at any time the Secretary of Defense proposes revisions to the regulations promulgated pursuant to this section, the Secretary shall ensure that the proposed revisions are published in the Federal Register and, at the time of publication of such revisions, shall submit to Congress a report describing the proposed revisions and explaining why the regulations should be revised. The Secretary of Defense may not promulgate regulations containing such proposed revisions until the expiration of the 90-day period beginning on the date of receipt by Congress of such report.

**(2)** The table of sections at the beginning of such chapter, as amended by sections 384 and 808, is further amended by adding at the end the following new item:

"2410e. Contract claims: certification regulations."

**(b) REPEAL.** -- Section 2410 of title 10, United States Code, is repealed, effective upon the promulgation of regulations pursuant to section 2410e of title 10, United States Code, as added by subsection (a).

## 2.6.4. 28 U.S.C. § 1346<sup>1</sup>

### United States as defendant

#### 2.6.4.1. Summary of the Law

This section gives the U.S. District Courts concurrent original jurisdiction with the U.S. Claims Court over particular civil actions. These actions include: (1) any civil action against the United States for the recovery of any tax, penalty, or sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws; or (2) any other civil action against the United States, not exceeding \$10,000, founded on the Constitution, any Act of Congress, any regulation of an executive department, any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract or liquidated or unliquidated damages in cases not sounding in tort, that are subject to sections 8(g)(1) and 10 (a)(1) of the Contract Disputes Act. Express or implied contracts with the United States shall include contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

#### 2.6.4.2. Background of the Law

This section was enacted in 1948 in what became commonly known as the Little Tucker Act.<sup>2</sup> It was amended in 1949 to add a subsection giving the district court exclusive jurisdiction over civil claims for money damages for injury to person or property caused by the negligent or wrongful act or omissions of an employee of the Government.<sup>3</sup> The next substantive amendment to this statute, in 1954, was designed to "permit taxpayers a greater opportunity to sue the United States in the district court of their own residence to recover taxes which they feel have been wrongfully collected."<sup>4</sup> At the time of the amendment, suits to recover wrongfully assessed taxes could be litigated in district court only if the claim was under \$10,000 and Congress could find no reason for this restriction.<sup>5</sup> It noted that the original theory behind this restriction was "the feeling that taxpayers wealthy enough to be assessed taxes in excess of \$10,000 could afford to go to Washington and pursue his (sic) rights in the Court of Claims."<sup>6</sup> Congress believed that a taxpayer should be able to seek his remedy in the jurisdiction where he lives or where the tax accrued, regardless of the amount in controversy.<sup>7</sup>

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<sup>1</sup> The Panel has limited its review of this statute to subsection (a) only.

<sup>2</sup> Act of June 25, 1948, ch. 646, 62 Stat. 933.

<sup>3</sup> Act of April 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

<sup>4</sup> Act of July 30, 1954, ch. 648, 68 Stat. 589; H.R. REP. NO. 659, 83d Cong., 2d Sess. 1, *reprinted in* 1953 U.S.C.C.A.N. 2716.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*



In 1964, Congress again amended this statute<sup>8</sup> to "give U.S. district courts concurrent jurisdiction with the Court of Claims to hear civil actions or claims to recover fees, salary, or compensation for official services of officers or employees of the United States where the claim does not exceed \$10,000 in amount."<sup>9</sup> Congress stated that to ensure that justice would be served efficiently, the district courts should be able to hear claims for compensation as well as improper discharge claims.<sup>10</sup> In 1966, Congress added a subsection conferring jurisdiction on the district courts over wrongful levy actions and actions involving surplus proceeds and substituted sale proceeds.<sup>11</sup> The final substantive amendment to this statute added a subsection that allows "the United States to be made a party to actions in the United States District Courts to quiet title to lands in which the United States claims an interest."<sup>12</sup>

### 2.6.4.3. Law in Practice

There is no Federal Acquisition Regulation (FAR) or Department of Defense Federal Acquisition Regulation Supplement (DFARS) coverage that specifically address this statute, and no industry or Government comments were received on this law. This statute has been the subject of a number of cases in Federal court. These cases have focused on the jurisdiction granted by this statute. In *Mark Dunning Industries, Inc. v. Cheney*, the court explained the jurisdictional limits of this statute:

The Tucker Act, 28 U.S.C. § 1346(a)(2), and the Contract Disputes Act of 1978, 41 U.S.C. §§ 602(a), 607(g)(1), 609(a)(1), provide that the United States District Courts have no jurisdiction over suits against the United States founded on contracts with the United States. Instead, contractors may bring such suits only in the United States Claims Court, 28 U.S.C. § 1491; 41 U.S.C. § 609, or with the agency's board of contract appeals, 41 U.S.C. §§ 606, 607.<sup>13</sup>

An earlier case came to the same conclusion and held that in cases involving the termination of Government defense contracts, the district court had no jurisdiction over any issue other than that of title.<sup>14</sup> Notwithstanding this line of cases, the jurisdiction issue continues.

In 1989, the U.S. Department of Justice (DOJ) Office of Legislative Affairs proposed legislative changes designed to improve resolution of contract disputes.<sup>15</sup> One of these changes

<sup>8</sup>Act of August 30, 1964, Pub. L. No. 88-519, 78 Stat. 699.

<sup>9</sup>S. REP. No. 1390, 88th Cong., 2d Sess. 1 (1964), reprinted in 1964 U.S.C.C.A.N. 3254, 3255.

<sup>10</sup>*Id.* at 2.

<sup>11</sup>Federal Tax Lien Act of 1966, Pub. L. No. 89-179, § 202(a), 80 Stat. 1125, 1148-9; S. REP. No. 1708, 89th Cong., 2d Sess. 35 (1966), reprinted in 1966 U.S.C.C.A.N. 3722, 3756.

<sup>12</sup>Act of October 25, 1972, Pub. L. No. 92-562, § 1, 86 Stat. 1176; H.R. REP. NO. 1559, 92d Cong., 2d Sess. 1 (1972), reprinted in 1972 U.S.C.C.A.N. 4547.

<sup>13</sup>*Mark Dunning Industries, Inc. v. Cheney*, 934 F.2d 266, 269 (11th Cir. 1991) (citations omitted). See also *A.E. Finley & Associates, Inc. v. United States*, 898 F.2d 1165 (6th Cir. 1990); *Cessna Aircraft Company v. Department of the Navy*, 744 F.Supp. 260 (D.Kan. 1990).

<sup>14</sup>*United States v. Digital Products Corporation*, 624 F.2d 690, 691 (5th Cir. 1980).

was "intended to clarify the jurisdiction of the district courts and the United States Claims Court over cases arising under the Contract Disputes Act . . ."16 The intention of Congress was to vest exclusive jurisdiction over Government contract disputes in the Claims Court and the Federal Circuit and to divest district courts of all jurisdiction over such disputes.17 The DOJ Office of Legislative Affairs offered language designed to eliminate "confusion over the appropriate jurisdiction where a Federal statute is alleged by a contractor to affect the terms or even the existence of a Government contract subject to the Contract Disputes Act."18 Some courts had concluded that there was a difference between "statutory claims" and "contract claims" and the district courts had jurisdiction over the former.19 This distinction made little sense and appeared to violate the congressional intent expressed in the Contract Disputes Act and the Little Tucker Act.20 By including specific language divesting the district courts of all jurisdiction over contract claims, the DOJ Office of Legislative Affairs hoped to prevent further adverse decisions.21

#### **2.6.4.4. Recommendation and Justification**

##### **Amend to include language clarifying the exemption provision in 28 U.S.C. § 1346(a)(2).**

The Panel recommends that this law be amended to clarify the exemption of contract disputes in 28 U.S.C. § 1346(a)(2). This statute was enacted to give people with claims under \$10,000 a local forum in the regional district courts in which to have their day in court. This statute specifically exempts any disputes over contracts with the United States subject to the Contract Disputes Act. Some Federal courts have consistently refused to grant district court jurisdiction to contractors suing the Government, while other courts have reasoned that some questions brought under the CDA involve "statutory claims" within the jurisdiction of the district courts. The statute was intended to be used to litigate tax collection and small, non-tort cases. Congress intended this statute to divest the district court of jurisdiction over contract claims. The judicial decisions since the passage of 28 U.S.C. § 1346 show a difference of opinion among the courts who have examined the jurisdiction issue. The Panel believes that the language proposed by the DOJ Office of Legislative Affairs adequately addresses this current jurisdictional confusion and recommends that 28 U.S.C. § 1346(a)(2) be amended to include this clarifying language.

#### **2.6.4.5. Relationship to Objectives**

This recommendation furthers the broad policy objectives and fundamental policy requirements of the Panel.

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15 Letter and enclosures from Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice to Honorable Dan Quayle, President of the Senate, United States Senate.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

#### 2.6.4.6. Proposed Statute

##### § 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ~~except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.~~ except that the district courts shall not have jurisdiction over any civil action or claim against the United States which relates in any manner to a contract subject to the Contract Disputes Act of 1978, including, but not limited to, a claim which seeks to establish the existence or nonexistence of such a contract with the United States, seeks to establish that an existing contract subject to the Contract Disputes Act is void, or seeks to determine and construe the terms of such a contract. This exception bars the district courts from exercising any jurisdiction over the above-described civil actions or claims pursuant to 28 U.S.C. 1331, 1334, or any other provision of law.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district court shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

## 2.6.5. 31 U.S.C. § 1304

### Judgments, awards, and compromise settlements

#### 2.6.5.1. Summary of the Law

This section provides that necessary amounts are appropriated for the payment of final judgments, awards, and compromise settlements, and interest and costs specified in the judgment when the payment is not otherwise provided for, and when the payment is certified by the Comptroller General under a decision of a board of contract appeals. The statute also provides for the payment of interest from the appropriation authorized by this section on a judgment of a district court when the judgment becomes final after review on appeal or petition. Interest is also payable on judgments of the Court of Appeals for the Federal Circuit and the U.S. Claims Court; but only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance. The interest payable in a proceeding reviewed by the U.S. Supreme Court is not allowed after the end of the term in which the judgment is affirmed. This section also provides for the payment of a judgment or compromise settlement against the Government when the judgment or settlement arises out of an express or implied contract made by the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Council of the National Aeronautics and Space Administration. The Exchange making the contract shall reimburse the fund for the amount paid.

#### 2.6.5.2. Background of the Law

This section was originally enacted in 1956 as part of what became known as the Automatic Payment of Judgments Act.<sup>1</sup> It was amended in 1966 to further simplify the payment of certain compromise settlements.<sup>2</sup> Congress stated that the passage of the Automatic Payment of Judgments Act "both reduced the interest charges accruing upon judgments against the United States and the irritations inevitably associated with the delays occasioned by the former method of payment."<sup>3</sup> The 1966 amendment was intended to make final judgments of state and foreign courts payable from the permanent indefinite appropriation established by the Act.<sup>4</sup> Congress stated that it did not intend the permanent indefinite appropriation to be used to satisfy judgments that are otherwise provided for.<sup>5</sup> Further amendments were primarily technical.

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<sup>1</sup>Supplemental Appropriation Act of 1957, Pub. L. No. 84-814, § 1302, 70 Stat. 678, 694-5 (1956).

<sup>2</sup>Act of August 30, 1961, Pub. L. No. 87-187, § 3, 75 Stat. 415, 416; S. REP. NO. 733, 87th Cong., 1st Sess. 1 (1961), reprinted in 1961 U.S.C.C.A.N. 2439.

<sup>3</sup>*Id.* at 2.

<sup>4</sup>*Id.* at 2.

<sup>5</sup>*Id.* at 2.

### **2.6.5.3. Law in Practice**

It is commonly referred to as the "judgment fund" statute. 41 U.S.C. § 612 (a) and (b) of the Contract Disputes Act (CDA) provide that an adverse decision or monetary award against the Government for claims under the CDA will be paid out of the judgment fund established by 31 U.S.C. § 1304.<sup>6</sup> The agencies then reimburse any payments made through the fund from their annual appropriations.<sup>7</sup> There are no formal regulations or guidance governing the payment process, but the General Accounting Office has issued an informal instruction letter.<sup>8</sup> The ASBCA Recorder has indicated that, of the 2400 cases administered by the ASBCA, 1 or 2 per month require payment through the judgment fund.<sup>9</sup> The rest are paid through contract modification.<sup>10</sup> This statute is referenced in FAR section 33.105, "Protests to GSBICA." No comments were received from the Government or industry on this statute.

### **2.6.5.4. Recommendation and Justification**

#### **No action**

The Panel took no action this statute. It does not present a core acquisition issue and only has an indirect relationship to contracting. The Panel believes that while this statute is tangentially related to DOD acquisition, it is not appropriate for action by the Panel.

### **2.6.5.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

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<sup>6</sup>Memorandum for the Record by Jewel Miller, Assistant Counsel, Defense Logistics Agency (Sept. 10, 1992).

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

## **2.6.6. 31 U.S.C. § 3717**

### **Interest and penalty on claims**

#### **2.6.6.1. Summary of the Law**

This section describes the minimum rate of interest the head of an agency shall charge on an outstanding debt on a U.S. Government claim. This rate is equal to the average investment rate obtained on U.S. Treasury tax and loan accounts for the twelve month period ending September 30 of each year, rounded to the nearest whole percentage point. This rate is to be published by the Secretary of the Treasury and shall be effective on the first day of the next calendar quarter. The Secretary of the Treasury may change the rate of interest if the current rate is more or less than the existing published rate by two percentage points. This statute also provides for the events that trigger the accrual of interest. The rate to be charged, once determined, remains fixed throughout the duration of the indebtedness. The head of the agency may waive interest if the amount due on the claim is paid within 30 days after the date from which interest accrues and may extend the 30 day period. The agency head may also assess a charge to cover the cost of processing and handling a delinquent claim and a penalty charge of not more than six percent a year for failure to pay a part of a debt more than 90 days past due. Interest does not accrue on these additional charges.

The provisions of this statute do not apply if a statute, regulation, loan agreement, or contract prohibits the assessment of interest and other costs and the claim is under a contract executed before October 25, 1982. Finally, the statute permits the agency head to promulgate regulations identifying circumstances that would make the waiver of the collection of interest and charges appropriate.

#### **2.6.6.2. Background of the Law**

This statute was enacted as part of the Federal Claims Collection Act of 1966.<sup>1</sup> Congress stated its purpose in enacting this law was:

to authorize heads of agencies or their designees to compromise claims that do not exceed \$20,000, and are claims for money or property arising out of activities of the agency or are referred to it. Collection action may be terminated or suspended where the individual has no present or prospective financial ability to pay any significant amount or where the cost of collection is likely to exceed the amount of recovery.<sup>2</sup>

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<sup>1</sup>Federal Claims Collection Act of 1966, Pub. L. No. 89-508, § 3, 80 Stat. 308, 309.

<sup>2</sup>S. REP. NO. 1331, 89th Cong., 2d Sess. 1 (1966), reprinted in 1966 U.S.C.C.A.N. 2532.

At the time this law was passed, Congress noted that the existing law prevented the agencies from realistically dealing with claims of the United States arising out of their activities.<sup>3</sup> If the agency could not collect the claim, its only recourse was to refer the matter to the General Accounting Office, which would then attempt to collect it.<sup>4</sup> The agency could not compromise, terminate, or suspend a claim if it became apparent that the claim was uncollectable.<sup>5</sup> Congress commented that this inherent inflexibility in the law had resulted in repeated appeals for relief.<sup>6</sup> It stated that this statute would give the agencies the legal authority to deal realistically with the problems of collection.<sup>7</sup>

This law was amended by the Debt Collection Act of 1982.<sup>8</sup> The Debt Collection Act was enacted "to facilitate substantially improved collection procedures in the federal government."<sup>9</sup> This particular provision gave the agencies the authority to assess and collect interest and penalties on debts owed to the Government.<sup>10</sup> Until this point, there was no provision, in most cases, for the assessment of interest and penalties or, when interest could be charged, it was well below market rates.<sup>11</sup> Without the potential assessment of interest and penalties, Congress believed that debtors had no reason to pay on time.<sup>12</sup> It enacted this provision to provide incentives for "the debtor to pay while protecting the debtor and the social objective of the government programs by allowing flexibility in the assessment of the interest and penalty charges."<sup>13</sup> The statute was codified in its current form in 1983.<sup>14</sup>

### 2.6.6.3. Law in Practice

This statute has been implemented in numerous FAR sections, including subsection 33.280<sup>15</sup> and various subsections under section 32.614.<sup>16</sup> No Government or industry comments were received on this statute.

### 2.6.6.4. Recommendation and Justification

#### No action

The Panel took no action on this law. This law is not unique to contracting or DOD acquisition. The Panel believes that this statute is related to DOD acquisition, but is not of primary importance to the Panel at this time.

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<sup>3</sup>*Id.* at 2.

<sup>4</sup>*Id.* at 2.

<sup>5</sup>*Id.* at 2.

<sup>6</sup>*Id.* at 2.

<sup>7</sup>*Id.* at 3.

<sup>8</sup>Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1749, 1755-6.

<sup>9</sup>S. REP. NO. 378, 97th Cong., 2d Sess. 1 (1982), reprinted in 1982 U.S.C.C.A.N. 3377.

<sup>10</sup>*Id.* at 17.

<sup>11</sup>*Id.* at 17.

<sup>12</sup>*Id.* at 17.

<sup>13</sup>*Id.* at 17.

<sup>14</sup>Act of January 12, 1983, Pub. L. No. 97-452, § 1(16)(A), 96 Stat. 2467, 2472-3.

<sup>15</sup>48 C.F.R. 33.280.

<sup>16</sup>48 C.F.R. 32.614.



**2.6.6.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

## **2.6.7. 41 U.S.C. §§ 601 - 613**

### **Contract Disputes Act**

#### **2.6.7.1. Summary of the Law**

The Contract Disputes Act provides a statutory process for the resolution of claims and disputes arising out of the administration of Government contracts.

Section 601 defines the terms "agency head," "executive agency," "contracting officer," "contractor," "Administrator," "agency board," and "misrepresentation of fact." Section 602 applies the authority in this Act to any express or implied contract entered into by an executive agency for the disposal of personal property or the procurement of property, services or construction, alteration, repair, or maintenance of real property. For the contracts of the Tennessee Valley Authority, this authority applies to only those contracts that contain a clause allowing for resolution through an agency administrative process. At the discretion of the agency head, this authority may not apply to contracts with a foreign Government, an agency thereof, or an international organization.

Section 603 states that any appeals of maritime contracts shall be governed by chapters 20 or 22, as applicable, of Title 46. Section 604 makes a contractor liable to the Government if he is unable to support a claim and that inability is determined to be because of a misrepresentation of fact or fraud. This liability will be equal to the amount of the unsupported claim and all costs incurred by the Government in reviewing the claim. This statute also sets a six year statute of limitations on such an action.

Section 605 requires all claims by a contractor against the Government to be submitted in writing to the contracting officer for a decision. Once a decision is made, the contracting officer shall issue it in writing and mail or furnish a copy to the contractor. While the decision must state the reasons and inform the contractor of his rights, specific findings of fact are not necessary and are not binding if made. This authority shall not extend to a claim or dispute for penalties or forfeiture and does not permit the contracting officer to resolve any claim involving fraud. The contracting officer's decision is final and not reviewable except as authorized by this chapter. A decision on claims under \$50,000 shall be made in less than 60 days from receipt of a written request from the contractor. Claims over \$50,000 require certification from the contractor and a decision will be made 60 days after receipt of the certification. In the event of undue delay, the contractor can request the agency board of contract appeals to direct the contracting officer to issue a decision in a specified period of time. Any failure of the contracting officer to issue a decision within the applicable time limits shall be deemed to be a denial and will authorize the commencement of an appeal or suit as provided in this chapter. The contractor and contracting officer can decide to use alternative means of dispute resolution in resolving the claim once the contractor has certified the claim. The statutory basis for the use of alternative means of dispute resolution will terminate after October 1, 1995.

Section 606 permits the contractor to appeal the contracting officer's decision to the agency board of contract appeals within 90 days from receipt of the decision. Section 608 requires the agency board to promulgate rules that establish simplified procedures for the expedited resolution of claims under \$10,000. This small claims procedure shall be applicable at the sole election of the contractor and these appeals shall be resolved within 120 days from the date on which the contractor elects to utilize the procedure. A decision made under the small claims procedure will be final and unappealable and will have no value as precedent for future cases. Every three years, a review will be made to determine the amount that qualifies a claim as a "small claim."

Section 609 permits a contractor to appeal the decision of a contracting officer directly to the U.S. Claims Court<sup>1</sup> without first appealing to the agency board of contract appeals. An appeal on a contract concerning the Tennessee Valley Authority will be taken directly to the U.S. District Court. An appeal under this section shall be filed within 12 months of the receipt of the contracting officer's decision. If the contractor or the Government appeals from the agency board, the board's decision will not be final on a question of law, but will be final on a question of fact unless the decision is fraudulent or so grossly erroneous as to necessarily imply bad faith. If two or more suits arising from one contract are filed with the U.S. Claims Court and one or more of the agency boards, the Claims Court may order the consolidation of the suits or the transfer of the suits to or among the agency boards involved.

Section 610 permits a member of an agency board of contracts appeals to administer oaths to witnesses, authorize depositions and discovery proceedings, and subpoena the attendance of witnesses and production of books and papers. A district court, upon application of the agency board through the Attorney General, may issue an order requiring a person to obey the board's subpoena.

Section 611 requires interest to be assessed on amounts owed to a contractor from the date the contracting officer received the claim until the payment is made. The interest will be paid at the rate established by the Secretary of the Treasury.

Section 612 requires any judgments or monetary awards against the United States to be paid from the permanent indefinite judgment fund established in 31 U.S.C. § 1304. Any payments made from the fund will be reimbursed by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations. Any judgments or monetary awards assessed against the Tennessee Valley Authority shall be paid according to the procedures described in 16 U.S.C. § 831h(b). Section 613 provides that if one of the provisions described above is held invalid, the other provisions will not be affected by that decision.

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<sup>1</sup>During the writing of this report, Congress changed the name of the U.S. Claims Court to the Court of Federal Claims. See Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) & (b), 106 Stat. 4518.

### 2.6.7.2. Background of the Law

The Contract Disputes Act of 1978 was passed to provide:

a fair, balanced and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims. The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and insure fair and equitable treatment to contractors and Government agencies.<sup>2</sup>

At the time of the Act's passage, "the means for resolving disputes for Government contracts was a mixture of contract provisions, agency regulations, judicial decisions and statutory coverage."<sup>3</sup> Direct access to the courts was limited to breach of contract claims, and the agencies limited even these claims as much as possible by contract clauses that were not subject to negotiation.<sup>4</sup> Congress believed that the contract remedies system of the time had developed without direction, and the problems created by the system were made worse by the inappropriate application of the Administrative Procedures Act philosophy to the adjudication of contract disputes.<sup>5</sup> Congress stated further that "the present system is often too expensive and time consuming for the efficient and cost effective resolution of small claims and, on the other hand, often fails to provide the procedural safeguards and other elements of due process [that] should be the right of litigants."<sup>6</sup> The Subcommittees on Federal Spending Practices and Open Government and the Subcommittee on Citizens and Shareholders Rights and Remedies held extensive hearings on the proposed Act.

In the definitional section, Congress specifically excluded subcontractors from the authority of the Act. It stated that by dealing with only prime contractors, the Government's job was made easier and cheaper, and many frivolous claims were eliminated.<sup>7</sup> In the section addressing settlement authority, Congress abolished the distinction between claims "arising under the contract" and claims "brought for breach of contract."<sup>8</sup> It believed that this would eliminate the persistent problems over the types of claims an agency could settle and was essential to make the system more efficient.<sup>9</sup>

In the section establishing the informal administrative conference, Congress stated that its intention was not to undermine the authority of the contracting officer, but to "encourage both

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<sup>2</sup>Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383; S. REP. NO. 1118, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.

<sup>3</sup> S. REP. NO. 1118, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235, 5236.

<sup>4</sup>*Id.* at 3.

<sup>5</sup>*Id.* at 3.

<sup>6</sup>*Id.* at 4.

<sup>7</sup>*Id.* at 16.

<sup>8</sup>*Id.* at 19.

<sup>9</sup>*Id.* at 19.

parties to settle claims at the earliest opportunity."<sup>10</sup> In another provision, Congress gave the agencies the ultimate authority to determine if an agency board of contract appeals was necessary but recommended that the expertise of the Office of Federal Procurement Policy should be consulted in making that determination.<sup>11</sup> A separate provision was included to address the procedures to be followed for small claims.<sup>12</sup> It stated that "[t]he purpose of the expedited small claims procedure with its lack of due process safeguards is to provide simplicity, speed and economy."<sup>13</sup> In the section granting the boards of contract appeals the authority to issue subpoenas and order discovery, Congress stated that this authority was necessary to ensure that the boards' records would be complete and that the boards would have the ability to obtain the information necessary for accurate findings.<sup>14</sup> Congress passed the Act in virtually the same form it exists in the Code today.

Congress recently amended the certification requirements in 41 U.S.C. § 605(c) to broaden the definition of who may certify a contract claim and to clarify that defects in certification do not divest the disputes forum of jurisdiction.<sup>15</sup> Interest may be charged from the time of submission of the original certification, and this provision becomes effective 60 days after implementation of these amendments in the Federal Acquisition Regulation (FAR).

### 2.6.7.3. Law in Practice

The Contract Disputes Act has been referenced or implemented in over 150 sections of the FAR, but the primary section addressing this Act is section 33.202.<sup>16</sup>

The Inspector General of the Department of Defense (DODIG) notes inconsistency among the False Claims Act, the Contract Disputes Act, and 28 U.S.C. § 2514.<sup>17</sup> The DODIG argues that the burden of proof required under the Contract Disputes Act and 28 U.S.C. § 2514 should be consistent with the one contained in the False Claims Act.<sup>18</sup> The DODIG recommends that the definition of "fraud" in 28 U.S.C. § 2514 and the term "misrepresentation of fact" in the Contract Disputes Act should conform with the definition of "knowing" and "knowingly" in the False Claims Act.<sup>19</sup> The DODIG argues that these recommendations will "provide for consistency among the three laws concerning the level of knowledge and the standard of proof necessary to prove a false claim against the Government."<sup>20</sup>

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<sup>10</sup>*Id.* at 22.

<sup>11</sup>*Id.* at 23.

<sup>12</sup>*Id.* at 28.

<sup>13</sup>*Id.* at 28.

<sup>14</sup>*Id.* at 31.

<sup>15</sup>Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) & (b), 106 Stat. 4518.

<sup>16</sup>48 C.F.R. 33.202.

<sup>17</sup>Letter from Derek J. Vander Schaaf, Deputy Inspector General, Office of the Inspector General of the Department of Defense to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 27, 1992).

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

The American Bar Association Section of Public Contract Law (the Section) believes that a statutory change is necessary to eliminate an existing overlap between the Contract Disputes Act (CDA) and the False Claims Act.<sup>21</sup> The Section notes that disputes over the proper interpretation of a contract term can form the basis for both a contract action under the CDA and an action by the Government or a *qui tam* relator under the False Claims Act.<sup>22</sup> The Section argues that allegations of fraud often have the practical effect of transforming a contract dispute into a False Claims Act case, which would then fall within the jurisdiction of the district court.<sup>23</sup> It believes that district court judges and juries do not have the expertise to hear and decide complex statutory and regulatory procurement issues, while the Claims Court and board of contract appeals are more experienced in construing Federal procurement laws.<sup>24</sup> The Section argues that "the inability of a contractor to obtain Claims Court or board review of legal issues relating to contract interpretation undermines the congressional mandate vesting exclusive jurisdiction over contract disputes in a specialized fora."<sup>25</sup> The Section recommends the enactment of a statute clearly establishing that the boards of contract appeals and the Claims Court have jurisdiction over Federal procurement law disputes, regardless of the presence of fraud allegations. It believes that this statute will result in the consistent and workable interpretation of Federal contract issues.<sup>26</sup> The Section also recommends the retention of the claim certification requirement in 41 U.S.C. § 605, as amended by the Federal Courts Administration Act of 1992,<sup>27</sup> while recommending repeal, or in the alternative, amendment of the certification requirement in 10 U.S.C. § 2410.<sup>28</sup>

The Nash and Cibinic Report (the Report) notes that there was considerable discussion about the amount of litigation under the CDA at the Judicial Conference of the U.S. Claims Court in 1987.<sup>29</sup> It reports that the focus of discussion was on jurisdictional and administrative procedures under the CDA. The Report states that there have been many instances when the lack of declaratory judgment jurisdiction has proven to be a bar to the consideration of nonmonetary claims under the CDA.<sup>30</sup> The Report indicates that it was decided that an amendment to the CDA would be the most efficient way to remedy this situation.<sup>31</sup> The discussion of this issue at the Judicial Conference indicated that, while most agreed that a change was needed, "there was almost no consensus on a statutory amendment . . . It was clear that while the judges of the court and private practitioners would like to see some solution which removes this jurisdictional bar, the Department of Justice (DOJ) is very reluctant to agree to an amendment in this area."<sup>32</sup> The Report also noted the discussion on the issue of certification and the problems it has continued to

<sup>21</sup>Letter from John S. Pachter, Chair, Section of Public Contract Law, American Bar Association to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 2, 1992).

<sup>22</sup>Memoranda of the Public Contract Law Section of the American Bar Association (Apr. 8, 1992, and Nov. 1992).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>Pub. L. No. 102-572, § 907(a) & (b), 106 Stat. 4518.

<sup>28</sup>10 U.S.C. § 2410 was recently amended in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2452 (1992).

<sup>29</sup>Ralph C. Nash & John Cibinic, *Disputes & Litigation*, 1 N&CR ¶ 88 (Dec. 1987).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

create, especially in the face of Federal Circuit decisions that the issue is jurisdictional.<sup>33</sup> Congress recently addressed problems with certification requirements.<sup>34</sup>

The last area of major focus at the Conference concerned the applicable statute of limitations. The Report relates that, although there is a general six year statute of limitations on all suits against the Government in the U.S. Claims Court, there have been decisions that determined that this statute of limitations is not applicable to the CDA.<sup>35</sup> "As a result of this confusing situation, the DOJ representatives at the Judicial Conference suggested that the CDA be amended to include an 18 month statute of limitations on the assertion of claims to the contracting officer (CO). In the ensuing discussion there seemed to be agreement that any such statute should cover both claims by contractors and by the Government. There also seemed to be agreement that 18 months was a rather short period of time and that three years might be more appropriate."<sup>36</sup> The Report concluded its discussion of the CDA by commenting that nine years of litigation have shown many areas of controversy that have significantly decreased the efficiency of the Act.<sup>37</sup> It urged the formulation of legislative adjustments to correct these problems.<sup>38</sup>

Also of concern at the Conference were the problems presented by the appeal time differences inherent in the CDA.<sup>39</sup> 41 U.S.C. § 606 allows 90 days for appeals to agency appeals boards, while 41 U.S.C. § 609(a)(3) gives one year for appeals to the Claims Court.<sup>40</sup> There appears to be no reason for this difference in appeals times and has caused some confusion among contracting officers.<sup>41</sup> All participants indicated that an amendment to provide for one consistent appeal period would be welcomed.<sup>42</sup>

In 1980, the Office of Federal Procurement Policy (OFPP) issued guidance on this statute in the form of Policy Letter 80-3.<sup>43</sup> This Policy Letter was intended "to ensure that the procuring agencies adopted uniform and consistent language when amending their regulations to comply with changes required by the Contract Disputes Act."<sup>44</sup> It was also intended to further the congressional goal of providing expedient resolution of contractor claims without expending time litigating the certification issue.<sup>45</sup> In the first nine years, there was little litigation over the language provided in Policy Letter 80-3 and the language was included virtually verbatim into FAR Section 33.207(c).<sup>46</sup> However, in the last few years this has become the major issue

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<sup>33</sup>*Id.*

<sup>34</sup> See Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 907(a) & (b), 106 Stat. 4518.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup> 57 Fed. Reg. 8495 (Mar. 10, 1992).

<sup>44</sup> *Id.* (citing 45 Fed. Reg. 31035 (May 9, 1980)).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

litigated in the contract disputes area.<sup>47</sup> The Court of Appeals for the Federal Circuit has interpreted the language in FAR section 33.207(c), causing a rash of litigation into every aspect of the Court's interpretation, "including what constitutes 'primary responsibility,' what level of physical presence qualifies as being 'at' the plant or location involved, and what constitutes overall responsibility 'in general.'"<sup>48</sup>

In response to this rash of litigation, OFPP proposed to replace the certification guidance in Policy Letter 80-3 with new language.<sup>49</sup> The new language proposes to allow certification by any general partner of a partnership of individuals, an officer appointed by the contractor's governing body, or an employee authorized by specific action to certify CDA claims.<sup>50</sup> OFPP intends this recommendation to deter the submission of unsupported and inflated claims and to promote efficiency at the contractor level by allowing the contractor to designate specific people with the authority to certify.<sup>51</sup> OFPP hopes that this revised language will "help guarantee that the emphasis of dispute resolution moves away from the issue of certification and returns to the merit of the claim."<sup>52</sup> OFPP intends to make these changes in late 1992 or early 1993.

OFPP's efforts will be directly impacted, however, by Congress' recent amendments to both the CDA and 10 U.S.C. § 2410. In the Federal Courts Administration Act of 1992,<sup>53</sup> Congress amended the certification requirements of the CDA to broaden the definition of who is authorized to certify contract claims and to clarify that defects in certification do not divest the disputes forum of jurisdiction. In the National Defense Authorization Act for Fiscal Year 1993, Congress authorized the Secretary of Defense to promulgate regulations in the FAR requiring that a contractor claim be certified as required in the CDA and that this certification be made by a person with the authority to bind the contractor and with the requisite knowledge of the claim or request for relief.<sup>54</sup> Once these regulations are published, 10 U.S.C. § 2410 would be repealed.<sup>55</sup> Congress stated that this statute has prevented the adoption of a Government-wide certification standard.<sup>56</sup> The repeal of the statute and publication of regulations were intended to facilitate a single certification standard.<sup>57</sup>

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<sup>47</sup>*Id.*

<sup>48</sup>*Id.* See also *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), cert. denied 60 U.S.L.W. 3293 (U.S. Oct. 15, 1991)(No. 90-1800).

<sup>49</sup>57 Fed. Reg. 8495 (Mar. 10, 1992).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>Pub. L. No. 102-572, § 907(a) &(b), 106 Stat. 4518.

<sup>54</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 813, 106 Stat. 2452 (1992).

<sup>55</sup>*Id.*

<sup>56</sup>H.R. CONF. REP. NO.966, 102d Cong., 2d Sess. (1992).

<sup>57</sup>*Id.*



#### **2.6.7.4. Recommendations and Justification**

### **I**

#### **Amend the time for appeals to the Claims Court contained in 41 U.S.C. § 609(a)(3).**

The Panel recommends that this statute be amended to change the time in which a contractor may appeal to the Claims Court on a decision by a contracting officer from one year to 90 days. The current one year appeal limitation is in the Contract Disputes Act at 41 U.S.C. § 609(a)(3). There is no sound reason for having two separate periods for appeal to the Claims Court and the boards of contract appeals. Further, the Panel believes that the one year appeal limitation impedes the Government in its resolution of contractor claims because the matters are left open for long periods of time, personnel turnover makes locating witnesses difficult, and documents can be lost, misplaced, or destroyed in that one year time period. The Panel believes that a 90 day period, which is the current time period allowed to appeal to the agency boards under 41 U.S.C. § 606, is reasonable for all contractor appeals. The Panel recommendation to amend this statute will streamline the acquisition process by making the time for all contractor appeals consistent while preserving the financial and ethical integrity of the acquisition process.

### **II**

#### **Amend 41 U.S.C. § 605 to raise the threshold amounts from \$50,000 to \$100,000 and to incorporate Congress' recent amendments regarding certification in subsection (c).**

The Panel recommends that the \$50,000 claims threshold for issuance of a decision by the contracting officer and for certification by the contractor be raised to \$100,000. This larger amount is attributable to the amount of inflation experienced since the passage of the Contract Disputes Act. The Panel is attempting to establish a uniform, simplified acquisition threshold throughout the statutes it is reviewing and believes that a higher threshold of \$100,000 is better suited to the current economic environment. The Panel recommends removing the term "\$50,000" wherever it appears in 41 U.S.C. § 605 (c) and replacing it with the term "\$100,000."

The Panel supports the amendments made by Congress to the certification provisions in 41 U.S.C. § 605(c). This section contains one of three certification provisions pertaining to contract claims. 10 U.S.C. § 2410 governs certification of claims and other requests for relief exceeding \$100,000 under DOD contracts, and 10 U.S.C. § 2405 contains certification requirements applicable to shipbuilding claims. The Panel was considering recommendations to develop a single certification provision for claims on Government contracts and to relax the stringent requirements regarding deficient certifications. The Panel believes that Congress' amendments to 41 U.S.C. § 605(c) and 10 U.S.C. § 2410 go a long way toward achieving these goals and has included the most recent congressional amendments in the proposed statutory language included below. The Panel agrees with Congress that the overlapping requirements at 10 U.S.C. § 2410 should be repealed upon the promulgation of regulatory guidance but notes that the overlapping certification

requirements at 10 U.S.C. § 2405 could continue to be a barrier to a single government-wide certification.

### **III**

**Amend 41 U.S.C. § 605(a) to include a six year statute of limitations for the filing of claims by and against the Government.**

The Panel recommends that a six year statute of limitations be included in the CDA. There is currently a general six year statute of limitations for all suits against the Government in the Claims Court. However, the courts have determined that this statute of limitations does not apply to claims filed under the CDA. In decisions issued by the Claims Court and the Federal Circuit, the courts reasoned that by imposing a one year statute of limitations on all appeals from contracting officer decisions, the CDA overrides the general six year statute of limitations. These decisions have left doubt whether a statute of limitations exists under the CDA and, if so, how much time is given. This situation has caused some confusion and litigation among the participants in the DOD procurement process. The Panel believes that a statute of limitations in the CDA is appropriate and has recommended a six year time length to remain consistent with the general Claims Court statute of limitations.

### **IV**

**Amend 41 U.S.C. § 608(a) to raise the maximum amount from \$10,000 to \$25,000.**

The Panel recommends that the \$10,000 claims maximum amount for the use of the small claims appeals process be raised to \$25,000. The Panel believes that this figure is not only more responsive to the level of inflation experienced since the Contract Disputes Act was passed, but will also serve to enable more contractors to use the expedited appeals process. By having more contractors use this expedited procedure, the agency boards will have more opportunity to concentrate on the larger claims. The Panel recommends that the term "\$10,000" be removed wherever it appears in 41 U.S.C. § 608 and replaced with the term "\$25,000."

#### **2.6.7.5. Relationship to Objectives**

These recommendations will provide the means for expeditious and fair resolution of procurement disputes through uniform interpretation of laws and implementing regulations.

## 2.6.7.6. Proposed Statute

### § 605. Decision by contracting officer<sup>58</sup>

#### (a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. All claims by a contractor against the government relating to a contract and all claims by the government against a contractor relating to a contract must be brought within six years of the occurrence of the events giving rise to the claim. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceedings. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

#### (b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

#### (c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of ~~\$50,000~~ \$100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than ~~\$50,000~~ \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

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<sup>58</sup>Subsections (6) and (7) were added by the Federal Courts Administration Act of 1992; Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102- 572, § 907(a) & (b), 106 Stat. 4518. The Panel has made an additional amendment to subsection (6) by raising the threshold amount from \$50,000 to \$100,000.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over ~~\$50,000~~ \$100,000--

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within a period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than ~~\$50,000~~ \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A decertification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

#### **§ 608. Small claims**

##### **(a) Accelerated disposition of appeals**

The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is ~~\$10,000~~ \$25,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

**(b) Simplified rules of procedure**

The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulations.

**(c) Time of decision**

Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

**(d) Finality of decision**

A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

**(e) Effect of decision**

Administrative determinations and final decisions under this section shall have no value as precedent for future cases under this chapter.

**(f) Review of requisite amount in controversy**

The Administrator is authorized to review at least every three years, beginning with the third year after November 1, 1978, the dollar amount defined in subsection (a) of this section as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

**§ 609. Judicial review of board decisions**

**(a) Actions in United States Claims Court; district court actions; time for filing**

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within ~~twelve months~~ ninety days from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

**(b) Finality of board decisions**

In the event of an appeal by a contractor of the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding an contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

**(c) Remand or retention of case**

In any appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

**(d) Consolidation**

If two or more suits arising from one contract are filed in the United States Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits among the agency boards involved.

**(e) Judgments as to fewer than all claims**

In any suit filed pursuant to this chapter involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

## **2.7. Extraordinary Contractual Relief**

### **2.7.0. Introduction**

The authority contained in 50 U.S.C. §§ 1431-1435, popularly known as Pub. L. No. 85-804, permits the President to authorize any department or agency to enter into or modify contracts and make advance payments without regard to law or regulation when the President determines that such action is in the interest of national defense. This authority is limited to times of national emergency declared by Congress or the President, and up to six months thereafter. Although the authority contained in these statutes is very broad, it has been more defined in practice by a series of Executive Orders dating back to the 1950s. These Executive Orders include most of the language of the statutes and provide more specific guidance on their implementation.

The authority contained in these statutes is important to the proper function of all Federal agencies affected by it and should be retained. DOD and NASA are the primary users of this authority and neither has indicated problems with its implementation. The private sector expressed a concern about the implementation of the indemnification provisions of the Executive Orders; however, the Panel determined that this problem would be better solved by a change in the regulations and the Executive Order than by a statutory amendment. The Panel also decided that an increase of the dollar threshold in 50 U.S.C. § 1431 would have little impact on the operation of the statute but noted that Congress may wish to revisit this issue.

The Panel does recommend one change to broaden the applicability of extraordinary contractual relief. It is currently limited to times of national emergency. In a recent bill reauthorizing the Defense Production Act, Congress included a provision permitting a similar exercise of authority in times of national emergency or by declaration of the President that such exercise is necessary.<sup>1</sup> The Panel believes that these amendments indicate that Congress has recognized that some statutory authority, previously reserved for times of war or national emergency, should be available in peacetime as well. Pub. L. No. 85-804 has been in effect since the 1950s and has been used steadily and effectively in that time by the military departments and other Federal agencies. The authority contained therein has been used widely for indemnification of unusually hazardous risks and is treated as permanent by many in the procurement system. The Panel believes that this very useful authority should be available at all times and recommends the repeal of the section limiting the authority to times of national emergency.

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<sup>1</sup>Defense Production Act Amendments of 1992, Pub.L. No. 102-558, 106 Stat.4198 (1992).

## **2.7.1. 50 U.S.C. §§ 1431-1435 (Pub. L. No. 85-804)**

### **Extraordinary Contractual Relief<sup>1</sup>**

#### **2.7.1.1. Summary of the Law**

This public law has been codified into 50 U.S.C. §§ 1431-1435; however, it is more commonly known by its public law number.

50 U.S.C. § 1431 permits the President to authorize any department or agency to enter into contracts, amend or modify contracts, and make advance payments on contracts without regard to law or regulation when the President determines that such action is in the interest of the national defense. The authority is not granted for obligations of greater than \$50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board or for obligations greater than \$25,000,000 without notification, in writing, to the Senate and House Armed Services Committees.

Section 1432 restricts the broad authority given in the previous section. This law prohibits the use of the cost-plus-a-percentage-of-cost system of contracting, mandates the use of formal advertising and competitive bidding when required, and prohibits the violation of the laws on limitation of profits.

Section 1433 requires the insertion of a contract clause granting the Comptroller General of the United States access to the books and records of all contractors for up to three years after the completion of the contract. The President may promulgate regulations exempting contracts with foreign contractors or Governments from this requirement. A written report to Congress is required when the exemption is used.

Section 1434 requires agencies to make an annual report to Congress whenever they take action under the provisions of this section.

Section 1435 limits the effective period of these sections to the time of a national emergency declared by Congress or the President, and up to six months thereafter.

#### **2.7.1.2. Background of the Law**

<sup>1</sup>This public law has been codified into the following statutes:

50 U.S.C. § 1431 - Authorization; official approval; Congressional action; notification of committees of certain proposed obligations, resolution of disapproval, continuity of session, computation of period

50 U.S.C. § 1432 - Restrictions

50 U.S.C. § 1433 - Public record; examination of records by Comptroller General; exemptions; exceptional conditions; reports to Congress

50 U.S.C. § 1434 - Reports to Congress; publication

50 U.S.C. § 1435 - Effective period



All five sections were passed as part of Pub. L. No. 85-804.<sup>2</sup> This legislation was enacted to make permanent the authority granted in Title II of the First War Powers Act, 1941, with certain exceptions, which expired on June 30, 1958 after two extensions.<sup>3</sup> This authority was originally passed during World War II and was only effective during that war, but was revived by President Truman in 1951 after he declared a national emergency at the outbreak of the Korean conflict.<sup>4</sup> Title II was extended five times by the next four Congresses.<sup>5</sup> In 1958, DOD asked Congress to make this authority permanent to relieve DOD from continually asking for extensions.<sup>6</sup> In view of the country's involvement in the Cold War at that time, this request was granted.

The purpose of this law was to enable the Federal Government to address situations that normally arise in a multibillion dollar procurement program but are not adequately addressed by the normal procurement authority.<sup>7</sup> Congress intended that the agencies of Government be permitted to obtain vital products and services during times of national emergency without the normal delays caused by misunderstandings, mistakes, and ambiguities.<sup>8</sup> Congress found that without this authority or its equivalent "it would be difficult or impossible to employ some of the special procurement techniques which are necessary in times of partial mobilization."<sup>9</sup> The major categories of problems this law would help to alleviate include amendments without consideration, unavoidable mistakes and ambiguities, formalization of informal commitments, and the making of advance payments.<sup>10</sup> In particular, amendments without consideration were retained "to insure the continued availability to the Government of a necessary source of supply. . . ." <sup>11</sup>

Certain restrictions on this authority were included and remain unchanged in 50 U.S.C. § 1432 today. Because Congress felt this authority should not be exercised without oversight, it required that annual reports be made to Congress whenever the authority had been used, as well as requiring dissemination through publication in the Congressional Record.<sup>12</sup> Congress believed this legislation "provides adequate safeguards to the public purse and at the same time allows the flexibility necessary for an efficient and fair procurement program for our national defense."<sup>13</sup> While the basic authority contained in these laws remains much the same as when they were passed in 1958, there have been several additions. The \$25 million limitation on obligations of the United States, contained in 50 U.S.C. § 1431, was added after the enactment of Pub. L. No. 85-

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<sup>2</sup>Act of August 28, 1958, Pub. L. No. 85-804, 72 Stat. 972

<sup>3</sup>H.R. REP. NO. 2232, 85th Cong., 2d Sess. 3 (1958). *See also* First War Powers Act of 1941, ch. 593, § 201, 55 Stat. 838, 839.

<sup>4</sup>H.R. REP. NO. 2232, 85th Cong., 2d Sess. 3 (1958).

<sup>5</sup>*Id.* at 4.

<sup>6</sup>*Id.* at 9.

<sup>7</sup>*Id.* at 2.

<sup>8</sup>*Id.* at 4.

<sup>9</sup>*Id.* at 4.

<sup>10</sup>*Id.* at 4-5.

<sup>11</sup>*Id.* at 5.

<sup>12</sup>*Id.* at 2.

<sup>13</sup>*Id.* at 7.

804, as was the authority to exempt foreign contractors and foreign Governments from the inspection of records requirement contained in 50 U.S.C. § 1433.<sup>14</sup>

These statutes are referenced in 50 U.S.C. § 1651, "Other laws, powers and authorities conferred thereby, and actions taken thereunder; Congressional studies." 50 U.S.C. § 1651 and those statutes preceding it were enacted as part of the National Emergencies Act of 1976, which provided for the termination of all existing national emergencies and the procedures to be followed in declaring and terminating future national emergencies.<sup>15</sup> Section 1651 exempts certain statutes from the provisions of the National Emergencies Act, including 50 U.S.C. §§ 1431 - 1435.

### 2.7.1.3. Law in Practice

The authority given by this public law is very broad and has been more defined in practice by a series of Executive Orders starting in the 1950s.<sup>16</sup> These Executive Orders include most of the language of the statutes and provide more specific guidance on their implementation. Some of that guidance includes:

- The limitation as to amounts appropriated and contract authorization provided does not apply to indemnification provisions for "claims and losses arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature."<sup>17</sup> This limitation applies only to those claims that are not adequately covered by insurance and are not caused by willful misconduct or lack of good faith on the part of the contractor or subcontractor.
- The authority to discharge an obligation by paying a subcontractor or third party obligor directly is available.
- The requirement that DOD maintain records of all actions taken and make an annual report to Congress describing the circumstances of each use.
- Every contract entered into under this authority must contain a clause requiring the contractor to warrant that no person or agency has been employed by the contractor to solicit the contractor in exchange for a commission or contingent fee.
- Socioeconomic provisions such as anti-discrimination, Walsh-Healey Act, Davis-Bacon Act, Copeland Act, and Eight Hour Law shall still apply to contracts made under this authority.

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<sup>14</sup>DOD Appropriation Authorization Act of 1974, Pub. L. No. 93-155, § 807(a), 87 Stat. 605, 615 (1973).

<sup>15</sup>National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1258 (1976).

<sup>16</sup>Exec. Order No. 10,789, 23 Fed. Reg. 8897 (1958), *reprinted in* 50 U.S.C.A. § 1431 at 489-92 (1991), as amended by Exec. Order No. 11,051, 27 Fed. Reg. 9683 (1962), Exec. Order No. 11,382, 32 Fed. Reg. 16,247 (1967), Exec. Order No. 11,610, 36 Fed. Reg. 13,755 (1971), Exec. Order No. 12,148, 44 Fed. Reg. 43,239 (1979).

<sup>17</sup>Exec. Order No. 10,789, 23 Fed. Reg. 8897 (1958), *reprinted in* 50 U.S.C.A. § 1431 at 489 (1991).

• This authority was also extended to the Departments of Treasury, Interior, Agriculture, Commerce, Transportation, the Atomic Energy Commission, the General Services Administration, the National Aeronautics and Space Administration, the Tennessee Valley Authority, Government Printing Office, and the Federal Emergency Management Agency.

Every year, agencies are required to submit a report to Congress describing the circumstances and outcomes of all requests for Pub. L. No. 85-804 relief. These reports are then published in the Congressional Record. In 1991, DOD received 57 requests for Pub. L. No. 85-804 relief, of which 44 were approved and 13 were disapproved.<sup>18</sup> DOD and NASA are the primary users of this authority.

The National Association of Surety Bond Producers (NASBP) expressed concern about the indemnity provisions associated with the public law, primarily in the area of environmental cleanup.<sup>19</sup> It is NASBP's feeling that when a contractor is hired to clean a toxic site, the surety should be responsible solely for the cleanup itself.<sup>20</sup> NASBP contends that there is a lack of liability insurance and Government indemnification in the environmental cleanup area that needs to be addressed.<sup>21</sup>

The Defense Contract Audit Agency (DCAA) stated that the terminology in 50 U.S.C. § 1432 should be consistent with the Competition in Contracting Act.<sup>22</sup> DCAA also stated that it believes that 50 U.S.C. § 1432 should be amended to require the contractor to furnish cost and pricing data pursuant to the Truth in Negotiations Act (TINA).<sup>23</sup> It further noted that 50 U.S.C. § 1433 should be amended to expand the Comptroller General's auditing authority.<sup>24</sup>

The Council of Defense and Space Industry Associations (CODSIA) stated that there is an apparent general reluctance of Government agencies to use the authority given in Pub. L. No. 85-804, and a particular reluctance to approve indemnity clauses for unusually hazardous risks.<sup>25</sup> Even so, CODSIA mentioned that this law provides a basis for "equitable treatment of a contractor which has performed in good faith and has been subjected to anomalies that were not envisioned at the time of the contract award."<sup>26</sup> It also stated that this law protects the best interests of DOD for, without this law, "the government could find itself in the position of not being able to award contracts in highly specialized areas as nuclear or high risk advanced state of

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<sup>18</sup>138 CONG. REC. 1590 (1992).

<sup>19</sup>Letter from John J. Curtin, Jr., Chairman, Environmental Issues Subcommittee, National Association of Surety Bond Producers to Diane Sidebottom, Acquisition Law Task Force, Defense Systems Management College (July 1, 1992).

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>Letter from the Defense Contract Audit Agency, signed by Michael J. Thibault to the Contract Administration Working Group of the Advisory Panel on Streamlining and Codifying Acquisition Laws (July 2, 1992) (stating that the Competition in Contracting Act replaced the term "formal advertising" with the term "sealed bids.").

<sup>23</sup>*Id.*

<sup>24</sup>*Id.*

<sup>25</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>26</sup>*Id.*

the art technology."<sup>27</sup> CODSIA mentioned that there have been some interpretive ambiguities regarding the indemnification of high risk and environmental compliance and remediation. It also recommended that the dollar threshold cited in 50 U.S.C. § 1434 should be increased. Even with these perceived problems, CODSIA stated this law serves a vitally important purpose in the acquisition process and should be retained.<sup>28</sup>

#### **2.7.1.4. Recommendations and Justification**

##### **I**

**Repeal 50 U.S.C. § 1435 to permit use of the authority contained in this statute at all times.**

50 U.S.C. § 1435 limits the application of extraordinary contractual relief to times of national emergency. The Panel believes, however, that the authority contained in these statutes should be available at all times and should not be limited to times of national emergency. In a recent bill reauthorizing the Defense Production Act, Congress included a provision permitting a similar exercise of authority in times of national emergency or by declaration of the President that such exercise is necessary.<sup>29</sup> The Panel believes that these amendments indicate that Congress has recognized that some statutory authority, previously reserved for times of war or national emergency, should be available in peacetime as well. Pub. L. No. 85-804 has been in effect since the 1950s and has been used steadily and effectively in that time by the military departments and other Federal agencies. The authority contained therein has been used widely for indemnification and is treated as permanent by many in the procurement system. The Panel believes that this necessary authority should be available at all times and recommends the repeal of 50 U.S.C. § 1435.

##### **II**

**Retain 50 U.S.C. §§ 1431-1434.**

The authority contained in Pub. L. No. 85-804 and codified in 50 U.S.C. §§ 1431-1434 is important to the proper function of all Federal agencies affected by it. DOD uses this authority more than any other agency and has voiced no complaints about its implementation. The concern expressed by the private sector on the subject of indemnification may be valid but would be better solved by a change in the regulations and the Executive Order in which indemnification is extensively addressed. Raising the dollar threshold to \$100,000 or some similar figure would have little impact on the operation of the statute. However, Congress may wish to revisit this issue when it considers repeal of 50 U.S.C. § 1435. Because these statutes have been implemented and used as Congress intended with adequate results, it is the Panel's recommendation that these statutes be retained in their entirety.

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<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>Defense Production Act Amendments of 1992, Pub. Law No. 102-558, 106 Stat. 4198 (1992).

#### **2.7.1.5. Relationship to Objectives**

These statutes are important to the acquisition process because they are consistent with the development and preservation of an industrial base while encouraging the exercise of sound judgment on the part of acquisition personnel.

**Chapter 3**  
**Service Specific and Major Systems Statutes**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

**DISTRIBUTION STATEMENT A**  
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<b>3. SERVICE SPECIFIC AND MAJOR SYSTEMS STATUTES</b> .....	<b>1</b>
<b>3.0. Introduction</b> .....	<b>1</b>
<b>3.0.1. Major Systems Acquisition</b> .....	<b>2</b>
<b>3.0.2. Testing Statutes</b> .....	<b>3</b>
<b>3.0.3. Service Specific Laws</b> .....	<b>4</b>
<b>3.0.4. The Brooks Act and the Warner Amendment</b> .....	<b>5</b>
<b>3.0.5. DOD Commercial and Industrial Activities</b> .....	<b>5</b>
<b>3.0.6. Industrial Base and Manufacturing Technology Laws</b> .....	<b>7</b>
<b>3.0.7. Fuel and Energy-Related Laws</b> .....	<b>7</b>
<b>3.0.8. Fiscal Statutes</b> .....	<b>8</b>
<b>3.1. Major Systems Statutes</b> .....	<b>9</b>
<b>3.1.0. Introduction</b> .....	<b>9</b>
<b>3.1.1. 10 U.S.C. § 2430</b> .....	<b>11</b>
<b>3.1.2. 10 U.S.C. § 2431</b> .....	<b>15</b>
<b>3.1.3. 10 U.S.C. § 2432</b> .....	<b>19</b>
<b>3.1.4. 10 U.S.C. § 2433</b> .....	<b>33</b>
<b>3.1.5. 10 U.S.C. § 2434</b> .....	<b>45</b>
<b>3.1.6. 10 U.S.C. § 2435</b> .....	<b>51</b>
<b>3.1.7. 10 U.S.C. §§ 2436 and 2437</b> .....	<b>57</b>
<b>3.1.8. 10 U.S.C. § 2438</b> .....	<b>61</b>
<b>3.1.9. 10 U.S.C. § 2439 (recently changed from §2438)</b> .....	<b>65</b>
<b>3.1.10. Public Law Number 101-510 § 809</b> .....	<b>67</b>
<b>3.2. Testing Statutes</b> .....	<b>73</b>
<b>3.2.0. Introduction</b> .....	<b>73</b>
<b>3.2.1. 10 U.S.C. § 2362</b> .....	<b>81</b>
<b>3.2.2. 10 U.S.C. § 2366</b> .....	<b>85</b>
<b>3.2.3. 10 U.S.C. § 2399</b> .....	<b>93</b>
<b>3.2.4. 10 U.S.C. § 2400</b> .....	<b>103</b>
<b>3.3. Service Specific Laws</b> .....	<b>107</b>
<b>3.3.0. Introduction</b> .....	<b>107</b>
<b>3.3.1. 10 U.S.C. §§ 4501 and 9501</b> .....	<b>109</b>
<b>3.3.2. 10 U.S.C. §§ 4502 and 9502</b> .....	<b>113</b>
<b>3.3.3. 10 U.S.C. § 4504 and 9504</b> .....	<b>117</b>
<b>3.3.4. 10 U.S.C. §§ 4505 and 9505</b> .....	<b>119</b>
<b>3.3.5. 10 U.S.C. §§ 4506 and 9506</b> .....	<b>121</b>
<b>3.3.6. 10 U.S.C. §§ 4531 and 9531</b> .....	<b>127</b>
<b>3.3.7. 10 U.S.C. § 4533</b> .....	<b>129</b>
<b>3.3.8. 10 U.S.C. §§ 4535 and 9535</b> .....	<b>131</b>

3.3.9.	10 U.S.C. §§ 4537 and 9537 .....	133
3.3.10.	10 U.S.C. §§ 4538 and 9538 .....	135
3.3.11.	10 U.S.C. § 4540; 10 U.S.C. § 9540; and 10 U.S.C. § 7212 .....	137
3.3.12.	10 U.S.C. §§ 4541 and 9541 .....	149
3.3.13.	10 U.S.C. § 9511; 10 U.S.C. § 9512; 10 U.S.C. § 9513.....	151
3.3.14.	10 U.S.C. § 7201 .....	159
3.3.15.	10 U.S.C. § 7203 .....	161
3.3.16.	10 U.S.C. § 7213 .....	163
3.3.17.	10 U.S.C. § 7229 .....	165
3.3.18.	10 U.S.C. § 7230 .....	169
3.3.19.	10 U.S.C. § 7296 .....	171
3.3.20.	10 U.S.C. § 7298 .....	173
3.3.21.	10 U.S.C. § 7299a.....	175
3.3.22.	10 U.S.C. § 7301 .....	179
3.3.23.	10 U.S.C. § 7302 .....	181
3.3.24.	10 U.S.C. § 7304 .....	183
3.3.25.	10 U.S.C. § 7305 .....	187
3.3.26.	10 U.S.C. § 7306 .....	191
3.3.27.	10 U.S.C. § 7307 .....	195
3.3.28.	10 U.S.C. § 7308 .....	199
3.3.29.	10 U.S.C. § 7310 .....	203
3.3.30.	10 U.S.C. § 7311 .....	205
3.3.31.	10 U.S.C. § 7313 .....	209
3.3.32.	10 U.S.C. §§ 7361 - 7367 .....	211
<b>3.4.</b>	<b>The Brooks Act and the Warner Amendment .....</b>	<b>215</b>
3.4.0.	Introduction .....	215
3.4.1.	40 U.S.C. § 759 and 10 U.S.C. § 2315 .....	219
<b>3.5.</b>	<b>DOD Commercial and Industrial Activities.....</b>	<b>237</b>
3.5.0	Introduction .....	237
3.5.1.	10 U.S.C. § 2461 .....	243
3.5.2.	10 U.S.C. § 2462 .....	251
3.5.3.	10 U.S.C. § 2463 .....	257
3.5.4.	10 U.S.C. § 2464 .....	259
3.5.5.	10 U.S.C. § 2465 .....	265
3.5.6.	10 U.S.C. § 2466 .....	269
3.5.7.	10 U.S.C. § 2467 .....	275
3.5.8.	10 U.S.C. § 2468 .....	279
3.5.9.	10 U.S.C. §§ 4532 and 9532 .....	283
3.5.10.	10 U.S.C. § 2212 .....	289
3.5.11.	10 U.S.C. § 7314 .....	291



3.6. Industrial Base and Manufacturing Technology Laws.....	293
3.6.0. Introduction.....	293
3.7. Fuel and Energy-Related Laws.....	303
3.7.0. Introduction.....	303
3.7.1. 10 U.S.C. § 2388 .....	305
3.7.2. 10 U.S.C. § 2394 .....	309
3.7.3. 10 U.S.C. § 2394a.....	311
3.7.4. 10 U.S.C. § 2398 .....	313
3.7.5. 10 U.S.C. § 2404 .....	315
3.7.6. 10 U.S.C. § 2481 .....	319
3.7.7. 10 U.S.C. § 2483 .....	321
3.7.8. 10 U.S.C. § 2490 .....	323
3.7.9. 10 U.S.C. § 2690 .....	325
3.7.10. Public Law Number 99-661, § 316; Public Law Number 102-484 § 842.....	327
3.8. Fiscal Statutes.....	331
3.8.0. Introduction.....	331
3.8.1. 41 U.S.C. § 11 (Revised Statutes, Sec. 3732).....	333
3.8.2. 41 U.S.C. § 11a.....	335
3.8.3. 10 U.S.C. § 2201(b) and (c).....	337
3.8.4. 10 U.S.C. § 2201(a).....	339
3.8.5. 10 U.S.C. § 2203 .....	343
3.8.6. 10 U.S.C. § 2204 .....	347
3.8.7. 10 U.S.C. § 2205 .....	349
3.8.8. 10 U.S.C. § 2206 .....	351
3.8.9. 10 U.S.C. § 2208 .....	355
3.8.10. 10 U.S.C. § 2209 .....	359
3.8.11. 10 U.S.C. § 2210 .....	361
3.8.12. 10 U.S.C. § 2211 .....	365
3.8.13. 10 U.S.C. § 2217 .....	367
3.8.14. 10 U.S.C. § 2309 .....	369
3.8.15. 10 U.S.C. § 2395 .....	371
3.8.16. 31 U.S.C. § 1552 .....	375
3.9. Miscellaneous .....	379
3.9.0. Introduction.....	379
3.9.1. 10 U.S.C. § 2202 .....	381
3.9.2. 10 U.S.C. Chapter 135, §§ 2271-2279.....	385
3.9.3. 10 U.S.C. 2314 .....	389
3.9.4. 10 U.S.C. § 2369 .....	391

3.9.5.	10 U.S.C. 2384a.....	393
3.9.6.	10 U.S.C. § 2385 .....	395
3.9.7.	10 U.S.C. § 2387 .....	397
3.9.8.	10 U.S.C. § 2389 .....	399
3.9.9.	10 U.S.C. § 2401 .....	401
3.9.10.	10 U.S.C. § 2402 .....	407
3.9.11.	10 U.S.C. § 2421 .....	409
3.9.12.	10 U.S.C. § 2422 .....	411
3.9.13.	10 U.S.C. § 2423 .....	413
3.9.14.	10 U.S.C. § 2424 .....	415
3.9.15.	31 U.S.C. § 712 .....	417
3.9.16.	Public Law Number 101-165 § 9081 .....	419

### **3. SERVICE SPECIFIC AND MAJOR SYSTEMS STATUTES**

#### **3.0. Introduction**

A large number of the sections reviewed by the Panel did not fit into any of the categories of contract formation, contract administration, socioeconomic requirements, standards of conduct or intellectual property. Accordingly, these disparate provisions were grouped together for purposes of analysis. The Panel divided this large collection of statutory provisions into these following categories:

- **Major Systems Statutes**
- **Testing Statutes**
- **Service Specific Laws**
- **The Brooks Act and Warner Amendment**
- **DOD Commercial and Industrial Activities**
- **Industrial Base and Manufacturing Technology Laws**
- **Fuel and Energy-Related Laws**
- **Fiscal Statutes**
- **Miscellaneous Statutes**

This list contained several subjects of great importance to the DOD acquisition process, such as major systems acquisition, testing, the acquisition of automatic data processing equipment, and the industrial base. Areas of lesser overall importance but of significant interest to special constituencies of the DOD acquisition community, such as the service specific provisions, fuel and energy laws, and the miscellaneous sections, are also included.

The Panel examined some 220 provisions in this category. The methodology employed was to group these statutes in the above-listed categories as a package with their legislative histories and to circulate them to each cognizant DOD activity, and where appropriate, to industry. Industry comments were not solicited as to statutes governing the internal workings of the DOD. The panel requested comments as to whether and how the statute was being used and recommendations as to retention, amendment or repeal. Upon receipt of comments, analysis was conducted and proposed statutory changes were provided for further comment by interested parties. In many cases this commenting process consisted of numerous iterations. Coordination consisted of correspondence, visits by the working group to cognizant officials and telephone conferences. In this manner significant consensus was developed. Nevertheless, not all recommendations achieved universal agreement.

The Panel's goals of (1) streamlining and (2) eliminating unnecessary provisions, and the objectives of (1) limiting statutes to broad policy (leaving detailed implementation to regulations), and (2) encouraging the exercise of sound judgment by acquisition personnel, are particularly relevant to the provisions addressed in this chapter. Certain statutes, especially in the area of major systems and testing, are characterized by extensive statutory guidance concerning the completion of reports and other programmatic documentation. The Panel noted, in reviewing the history of such provisions, that some started out as relatively short statutes but became more detailed over the years. In fairness, it must be noted that the increased detail was a result of the actual or perceived management deficiencies of DOD in implementing congressional policies. Where appropriate, the Panel strove to reduce statutory detail, leaving the existing policy in place, providing greater flexibility to the DOD and calling for detailed implementation by regulation.

Several chapters of Title 10 contain service-unique acquisition provisions, many of ancient vintage.<sup>1</sup> The Panel initially noted that many of these provisions were apparently duplicative of more general DOD acquisition provisions in Part IV, Subtitle A of Title 10. Additionally, the Panel suspected on initial review that some of these provisions were not being used. The Panel analyzed these sections with a view toward eliminating unnecessary sections and consolidating where appropriate.

### **3.0.1. Major Systems Acquisition**

Chapter 144 of Title 10, United States Code contains laws which govern major defense acquisition programs. All major defense acquisition programs must meet certain reporting, baselining and acquisition strategy requirements which are described in this chapter. The Panel concluded that these statutory requirements were excessively detailed, in some cases duplicative and in others inconsistent with the reality of reduced defense budgets.

While recognizing the continued necessity of reports to the Congress, the Panel recommended removing the excessive detail from 10 U.S.C. § 2432, Selected Acquisition Reports, but retaining the broad policy that such reports be submitted. In view of concerns that Program Managers (PMs) were inundated with various reporting requirements in differing formats and calling for differing data, the Panel recommended a unified reporting format for all users, including the Congress, in the format which DOD uses to manage its operations. This unified format would greatly reduce the burden on PMs and eliminate the periodic necessity for amendment of the statute to more closely follow DOD practices. The Panel also recommended folding the Unit Cost Report requirement of 10 U.S.C. § 2433 into § 2432.

Other recommendations concerning Chapter 144 are to streamline 10 U.S.C. §§ 2434 and 2435 concerning independent cost estimates, manpower estimates and baseline requirements by eliminating statutory detail but retaining existing policy. The Panel recommended that the legislation governing Defense Enterprise Programs (DEPs), 10 U.S.C. §§ 2436-37, be repealed. DEPs have not been successfully implemented by DOD or supported by Congress. The Panel

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<sup>1</sup>Subtitle B, Part IV of Title 10 (Army); Subtitle C, Part IV of Title 10 (Navy); Subtitle D, Part IV of Title 10 (Air Force).

also recommended repeal of statutory requirements for competitive prototyping and competitive alternative sources, 10 U.S.C. §§ 2438-39. The Panel believes that mandating such strategies is inappropriate in today's reduced budget environment and may be unaffordable. However, the Panel recommended retaining the major defense acquisition pilot program because it has not yet been implemented and some experience with the program is warranted.

### **3.0.2. Testing Statutes**

Various statutes within Title 10 of the U.S. Code establish requirements regarding testing of major weapon systems and munitions programs by DOD. Under the current statutory scheme, all major defense systems, as defined under 10 U.S.C. § 2302(5), must undergo operational test and evaluation before those systems may proceed beyond low-rate initial production. For major defense systems under section 2430 of Title 10, that testing must be set forth in a plan that has been approved by the Director of Operational Test and Evaluation of DOD, who must then evaluate the results of that testing and report on it to the congressional defense committees before low-rate initial production may be exceeded. No system-contractor employees may be involved in this testing unless such employees will also be involved in system deployment. Further, support contractors may not assist operational testing if they have previously been involved in system development, production, or developmental testing unless their impartiality has been assured in writing by the Director of Operational Test and Evaluation or the contractor functioned solely as a representative of the Federal Government. With regard to live-fire testing, major defense acquisition programs with user-protection features and major munitions programs may not proceed beyond low-rate initial production until combat-relevant survivability or lethality testing has been completed. This requirement may be waived by the Secretary of Defense if unreasonably expensive or impracticable and if an alternative is available. A specific requirement for such testing exists for wheeled or tracked vehicles.

Congress rightly is concerned about past abuses where the DOD inappropriately rushed to production without adequate testing. It appropriately gives a high priority to its testing requirements. The testing community is also ever vigilant and protective of its statutory mandates. The PEOs and PMs, on the other hand, in some cases express frustration over the delays and expense imposed on their programs by overzealous testers. Thus, testing is a contentious subject with strong advocates in each camp.

The Panel concluded that a consolidation of the four current testing statutes and elimination of statutory detail would further its statutory streamlining mandate and allow the flexibility desired by the testing and acquisition communities. The Panel developed a dual proposal in the testing area. Initially, the Panel recommends the repeal of the four testing statutes within Title 10 in their entirety and the enactment of a streamlined testing statute. This streamlined statute sets forth the basic rule that both vulnerability/lethality and operational testing must occur before proceeding beyond low-rate initial production. The proposed statute adopts extant definitions of those terms. The statute then vests discretion in the Secretary of Defense to implement the required testing. Broad guidelines in specific areas -- such as contractor involvement and authority to modify operational testing requirements -- are provided. These

guidelines state general principles, but specific implementation of the rule is left to the Secretary of Defense.

The Panel recognized, however, that in view of the sensitivity and concern in the Congress for adequate testing, there may be reluctance to fully adopt such a streamlined approach. Accordingly, at a minimum, the Panel recommends the Congress adopt certain specific statutory amendments that are set forth in the analysis of each individual statute within this subchapter.

Specifically, the Panel recommends repeal of 10 U.S.C. § 2362 as subsumed by the requirements of 10 U.S.C. § 2366. With regard to the live-fire requirements of section 2366, the Panel recommends substitution of the phrase "vulnerability" for "survivability" throughout the statute. The former term more accurately reflects the type of testing mandated by the law. The Panel also recommends elimination of the requirement for "full-up" vulnerability testing. As a mandatory requirement, that testing can add considerable time and expense in certain high value systems.

Recommended amendments to the operational test and evaluation (OT&E) requirements of 10 U.S.C. § 2399 include authority to modify dedicated OT&E requirements for certain types of programs and amendments to permit greater system and support contractor involvement in OT&E. Finally, the Panel recommends that 10 U.S.C. § 2400 be amended to add strategic defense missiles as a low density production base item, and to make the Test and Evaluation Master Plan discretionary for low density items.

### **3.0.3. Service Specific Laws**

The Panel examined the service-specific acquisition sections in the last three subtitles of Title 10. These laws fall into two main groups: (1) the Army/Air Force statutes, that evolved historically out of the same source law, and (2) Navy-peculiar laws. These laws provide various authorities to a secretary of an individual military department and are grouped in that Service's chapter of Title 10. These provisions are of such a disparate nature that summarizing them in an introduction is not warranted.

In instances where a grant of authority is no longer used, or otherwise obsolete, the Panel recommends repeal. In a number of cases, efforts were made to modernize still-meaningful authorities and to consolidate sections that so lend themselves into a single, streamlined section. For example, the authorities at 10 U.S.C. §§ 7361 through 7367 all cover naval salvage operations and all were enacted by the same law. These sections were consolidated, and the language modernized where appropriate. Other examples are as follows :

- the service-specific authorities to contract for architect-engineering services (10 U.S.C. §§ 4540, 9540 and 7212) were recommended for repeal as laws that had clearly outlived their usefulness; the collective analysis for these statutes discusses the problems raised by the 6% fee limit in these laws and their interplay with the Brooks architect-engineering statute.

- the laws at 10 U.S.C. §§ 4506/9506, 4507/9507 and 4508, all involving authority to sell or loan a government item or service, were crafted into a single statute that sets forth specified authorities to sell or loan government material for prescribed purposes. It includes important authority to permit the sale or use of government test facilities by private contractors at specified rates.
- Civil Reserve Air Fleet (CRAF) enhancement authorities at 10 U.S.C. §§ 9512 and 9513 were recommended for amendment to permit private contractors limited commercial use of military airfields. This proposal was based on the crucial role played by CRAF during Operations Desert Storm/Desert Shield.

The Panel notes that those service-specific authorities that are marked for retention might appropriately be collected into a "Service Procurement Generally" chapter.<sup>2</sup>

### **3.0.4. The Brooks Act and the Warner Amendment**

Under the Brooks Act, the acquisition of ADPE by the federal executive agencies is centralized under the General Services Administration (GSA). That agency retains exclusive authority to procure ADPE. While GSA delegates that authority, to varying degrees, to the individual agencies, it still retains extensive managerial oversight of this acquisition process. Under the Warner Amendment, DOD is authorized to purchase directly certain, delineated types of ADPE related to military and intelligence missions. In the exercise of that authority, and in conducting individual procurements when delegated authority by the GSA, the DOD components have developed their own, internal mechanisms for ADPE procurement.

The Panel deliberated extensively over this question, but was unable to achieve a consensus among its members as to a formal, legislative recommendation in this area. At a minimum, however, the Panel agreed that the blanket delegation of procurement authority to DOD should be raised significantly.

The discussion presents the two major alternative recommendations considered with supporting rationale for each. The two primary recommendations considered by the Panel were (1) to amend the Warner Amendment to wholly exempt DOD from the Brooks Act and with it from GSA oversight, or (2) to significantly increase the blanket delegation of procurement authority for DOD.

### **3.0.5. DOD Commercial and Industrial Activities**

Chapter 146 of Title 10 deals with DOD Commercial and Industrial Activities. Specifically, it contains laws regulating DOD contracting for commercial services under OMB Circular A-76. It includes restrictions on the contracting out of core logistics activities by DOD,

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<sup>2</sup>Such a chapter could include those procurement-related authorities that vest in both the Secretary of Defense and the secretaries of the military departments.

and sets forth specific guidance on depot-level maintenance activities by DOD. These statutory provisions present a confusing and contradictory set of rules.

The Panel's goal in this area was to consolidate and streamline these conflicting rules into a coherent statement of basic and essential principles that eliminates, as far as possible, unnecessary detail. The Panel also attempted to balance these competing interests into a set of rules that affords the Department managerial flexibility while preserving meaningful congressional oversight and effective community input. To that end, the Panel proposes a single section, 24XX, governing traditional A-76 contracting procedures for the Department. A second section, 24XY, sets forth the basic principles regarding the contracting of core logistics functions by DOD.

Proposed section 24XX provides that DOD secretaries shall procure from the private sector if such source can provide services or supplies adequate to meet defined performance standards at a cost lower than that of an in-house, government source. The proposed section 24XX adopts the current "realistic and fair" cost comparison standard and delineates the types of costs to be included in that comparison. The proposed section maintains the requirement of federal employee consultation and maintains, in streamlined form, the extant requirement of notice to Congress of intent to study a conversion, as well as notice of the decision itself.

The Panel recommends repeal of sections 2463 (maintenance of cost data), 2465 (prohibition on contracting out fire fighting and security guard functions) and 2468 (installations commanders' contracting out authority).

The proposed section 24XY restates the basic, core logistics standard and adopts the current definition of "core" but permits DOD secretaries to define "core capabilities," and to identify those activities necessary to sustain those capabilities. The proposed section then requires DOD secretaries to perform such core functions in-house. It permits competition among government entities for assignment of such work as a means of encouraging greater economy and efficiency in these activities.

In excess of core requirements, DOD secretaries are permitted, at their discretion, to use competition to acquire additional maintenance and repair of defense supplies. Such competition may be public/public, public/private, or private/private. However, in order to ensure a level playing field in such competitions, the proposed section requires that all bids "shall accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities." This new, cost comparison language attempts to address issues raised by both the private sector and DOD activities regarding inequities in the current, cost comparison process. Finally, competitions under this proposed section are exempted from A-76 requirements.

Based on this modification of the current, core logistics section, the Panel recommends the repeal of 10 U.S.C. § 2466. That section sets forth the 60/40 rule regarding DOD contracting for depot-level maintenance, i.e., that the Department may not contract out more than 40% of its depot-level maintenance.



The Panel considered, but rejected, application of the same "core" concept to Departmental, in-house manufacturing capabilities. Instead, the Panel recommends consolidation and amendment of the Army and Air Force Arsenal Acts to provide DOD secretaries with discretionary authority to workload in-house manufacturing requirements.

Finally, the Panel recommends repeal of 10 U.S.C. § 2212, requiring line-item budgeting of contracted advisory and assistance services. The Panel notes that this same budgeting requirement is present in a recently enacted appropriations bill.

### **3.0.6. Industrial Base and Manufacturing Technology Laws**

The Panel examined those laws within Title 10 concerning DOD Industrial Base and Manufacturing Technology policies. However, this area of defense acquisition policy has been the subject of considerable legislative effort in the National Defense Authorization Act for Fiscal Year 1993. That legislation repealed virtually all of these laws and enacted in their place new, and much more detailed, policies regarding the defense technology and industrial base.

The Panel believes that, because this body of legislation is new and untested, it is not feasible to engage in full-scale analysis of each new statutory section. However, the Panel also believes that it is important to develop a position, albeit a generalized one, in this important area of defense acquisition. Therefore, based on the legislative histories of the repealed statutes, the comments that the Panel received during its survey of those laws, a review of the newly-enacted legislation, and other research, the Panel has developed a comment on the industrial base legislation enacted in the National Defense Authorization Act for Fiscal Year 1993. This comment is guided by the statement of goals and objectives adopted by the Panel.

Essentially, the Panel endorses the overall goal of this legislation, but notes that it contains excessive detail. Also, the Panel recommends that Congress consider an additional policy statement as to the interplay between domestic industrial base issues and international defense trade and cooperation. Finally, the Panel notes that, in this era of downsizing, industrial base issues are increasingly generating antitrust legal and policy issues. While such issues are outside the scope of the Panel's review, they warrant congressional scrutiny.

### **3.0.7. Fuel and Energy-Related Laws**

The Panel considered statutory provisions that relate to fuel or energy system procurement by DOD. They are not currently organized or grouped within Title 10 on that basis.

Some of the sections dealt directly with fuel and petroleum acquisition. For example, the Panel recommends amending the authority to waive contract procedures at 10 U.S.C. § 2404 to add authority to sell excess petroleum stores and credit those proceeds to applicable appropriations. The Panel also recommended a modification in authority to contract for storage of fuels and management of tank farms to accommodate management-only contracts.

The Defense Logistics Agency sought repeal of a prohibition on the purchase of Angolan petroleum products. However, this provision was recently modified in the National Defense Authorization Act for Fiscal Year 1993. Under this modification, the prohibition ceases to become effective upon certification by the President that free and fair elections have been conducted in Angola. As set forth in the individual analysis for this provision, the Panel recognizes that, from an acquisition policy point of view, the prohibition significantly impedes economy and efficiency in petroleum acquisition. However, because of recent congressional action on this issue, the Panel makes no formal recommendation in this area.

Other sections were essentially policy-related enactments, mandating environmentally sound acquisition practices by the DOD. In the absence of any significant burden on acquisition practices, these sections were recommended for retention. Sections 2481, 2483, and 2490 granted authority to sell excess utility services. These sections were also recommended for retention. Finally, the Panel recommends that this body of law should be collected within Title 10 into a single chapter dealing exclusively with fuel and energy-related acquisition.

### **3.0.8. Fiscal Statutes**

The Panel considered numerous statutes, primarily located within Chapter 131 of Title 10, that relate to DOD fiscal authority and budgetary procedures. Of these statutes, those that dealt with exemptions for various DOD expenditures from anti-deficiency requirements were deemed directly related to DOD acquisition and recommended for retention. The consensus of the Panel was that a number of the other fiscal and budgetary Title 10 statutes were not directly related to the DOD acquisition process and hence were outside the scope of the Panel's charter. The Panel formally recommended no action for each of these laws, but notes certain dispositions thereof that the Congress may wish to consider. The Panel did, however, recommend an amendment to the "M" account provisions at 31 U.S.C. 1552(a) to exempt sufficient funds required for existing contracts from the five-year cancellation of funds rule to complete unfinished work, and to pay close-out costs and contract claims.

## **3.1. Major Systems Statutes**

### **3.1.0. Introduction**

Chapter 144 of Title 10, United States Code, contains those laws which govern major defense acquisition programs. A major defense acquisition program is defined as a DOD acquisition program that is not a highly sensitive classified program and that is estimated by the Secretary of Defense to require an eventual total expenditure for RDT&E of more than \$300 million (in FY90 constant dollars) or procurement of more than \$1.8 billion (in FY90 constant dollars). Additionally, the Secretary may designate any acquisition program as a major defense acquisition program.

All major defense acquisition programs must meet certain reporting requirements which are described throughout this chapter. These reporting requirements have been modified many times since their inception. In fact, the National Defense Authorization Act for FY 1993 made certain amendments to the Selected Acquisition Report requirements.<sup>1</sup> Notwithstanding recent changes, the Panel's review has uncovered certain areas in which the statutes can be streamlined to operate more efficiently.

First, the statutory requirements are excessively detailed. While the Panel recognizes the necessity of reporting, as well as the history which has led to such detail in these reporting statutes, the Panel concludes that it would be more effective to eliminate statutorily-mandated descriptions of the reports. Therefore, the Panel recommends deleting much of the detail on each of the statutes and requiring the Secretary of Defense to promulgate regulations describing the contents of each report.

The Panel has also found duplication in some of the reports. In an effort to eliminate such redundancy, the Panel recommends repeal of certain sections of the chapter. Those sections which are recommended for repeal would then be incorporated into one consolidated report. For example, relevant portions of the Unit Cost Reports can be incorporated into the Selected Acquisition Reporting statute.

Consistent with the streamlining charter, many specific changes have been recommended in most of the sections in this chapter. The Panel recommends removal of excessive detail from 10 U.S.C. § 2432 as well as incorporation of 10 U.S.C. § 2433 into § 2432. The policy requirement of 10 U.S.C. § 2434 to prepare manpower and independent cost estimates should be retained; however, the Secretary of Defense should be given the discretion to determine the contents of such reports. Again, in the interest of streamlining, the Panel recommends deletion of details concerning baseline content and procedures for review of the deviation report found in 10 U.S.C. § 2435.

Defense Enterprise Programs (DEPs) have not been implemented successfully and are not totally supported by Congress. Their effectiveness is negligible. Consequently, the Panel

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<sup>1</sup>Pub. L. No. 102-484, § 817, 106 Stat. 2454 (1992).

recommends repeal of the Defense Enterprise Program statutes, 10 U.S.C. §§ 2436 and 2437. However, the Pilot Program created by Pub. L. No. 101-510, § 809, designates all pilot programs as DEPs. Therefore, the Panel recommends repeal of that portion of Pub. L. No. 101-510 which so designates pilot programs. The Panel recommends retention, however, of the Pilot Program itself. As the pilot program has not yet been implemented by OSD, it should be retained until some experience is gained.

Section 2439 requires the Secretary to prepare an acquisition strategy which addresses the use of competitive alternative sources.<sup>2</sup> Many of the more onerous restrictions of the statute, however, have recently been removed. Notwithstanding, considering the status of today's defense budget, the appropriateness of a competitive alternative sources requirement is questionable. The Panel therefore recommends repeal of 10 U.S.C. § 2439. Such a repeal would not preclude the Secretary of Defense from establishing an alternative source where quantities justified such an acquisition strategy.

Finally, in 10 U.S.C. § 2438,<sup>3</sup> the Secretary of Defense is required to prepare an acquisition strategy that provides for competitive prototyping of major weapon systems and subsystems. This section derives from a former Title 10 provision at section 2365. Experience under the former statute has led the Panel to recommend repeal, on the basis that competitive prototyping should not be legislatively mandated, but rather left to the managerial discretion of the Secretary of Defense.

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<sup>2</sup>The National Defense Authorization Act for FY93 redesignates this former section 2438 as 2439 and enacted a new section 2438 regarding competitive prototyping. That new section reenacts a former section 2365.

<sup>3</sup>*Supra* note 2, and accompanying text.

### **3.1.1. 10 U.S.C. § 2430**

#### **Major defense acquisition program defined**

##### **3.1.1.1. Summary of Law**

This section defines a "major defense acquisition program" as a DOD acquisition program that is not a highly sensitive classified program and is either designated by the Secretary of Defense as a major defense acquisition program, or is estimated by the Secretary of Defense to require an eventual total RDT&E expenditure of more than \$300 million in 1990 dollars or an eventual total procurement expenditure of more than \$1.8 billion in 1990 dollars.

##### **3.1.1.2. Background of Law**

This section was codified in Title 10 by the Defense Technical Corrections Act of 1987.<sup>1</sup> There were no substantive legislative reports issued with that public law. However, it appears that the general structure of this definition -- two tiers, one based on total R&D expenditure and the other on total procurement expenditure -- mirrored the major system definition originally set forth in the Defense Procurement Reform Act of 1984.<sup>2</sup>

Prior to 1993, the monetary thresholds were set at \$200 million eventual total expenditure on RDT&E in FY 1980 constant dollars, or eventual total procurement expenditures of more than \$1 billion in FY 1980 constant dollars. These thresholds were raised by the National Defense Authorization Act for Fiscal Year 1993 to their current levels.<sup>3</sup> These changes were part of overall amendments to the major defense acquisition program statutes that were requested by DOD.<sup>4</sup>

##### **3.1.1.3. Law in Practice**

The definition of a major defense acquisition program in this section is currently utilized in DOD Directive 5000.2M, Part 17, which sets forth the Acquisition Categories (ACAT) I and II levels. The ACAT II level parallels the statutory definition of "major system" codified at 10 U.S.C. § 2302(5).<sup>5</sup> The ACAT I level sets forth the current, higher statutory threshold for major

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<sup>1</sup>Pub. L. No. 100-26, § 7(b)(1)(A), 101 Stat. 279 (1986).

<sup>2</sup>Pub. L. No. 98-525, § 1211, 98 Stat. 2492 (1983).

<sup>3</sup>Pub. L. No. 102-484, § 817(c), 106 Stat. 2455 (1992).

<sup>4</sup>H.R. CONF. REP. NO. 966, 102d Cong., 2d Sess. 728 (1992)

<sup>5</sup>Under that section, the term "major system" means a combination of elements that will function together to produce the capabilities required to fulfill a mission need. The total R&D expenditures must be more than \$75 million (in FY80 dollars) or total procurement expenditures of more than \$300 million. The agency head may also designate a system as a "major system." 10 U.S.C. § 2302(5). An identical "major system" definition is set forth at 41 U.S.C. § 403(9). For further discussion of that "major system" definition, see ch. 1.1.2 of this Report. In that subchapter, the Panel recommends amendment of § 2302(3) to utilize the Title 41 definition section consistently, and in lieu of the separate, major system definition currently at § 2302(5). Accordingly, proposed statutory

defense acquisition programs. The two ACAT levels are utilized throughout the DOD Directive 5000 series to establish various reporting and acquisition requirements for either a "major system" or a "major defense acquisition program."

These two statutory definitions are used as thresholds in various other sections within Title 10. By its terms, the "major system" definition at 10 U.S.C. § 2302(5) applies to all relevant subsections within Chapter 137 of Title 10. For example, all the competitive statutes within that Chapter use the section 2302(5) standard.<sup>6</sup> The requirements of Chapter 144 of Title 10, however, rely upon the section 2430 definition for purposes of that chapter.

In the testing area, 10 U.S.C. § 2399 references 10 U.S.C. § 2302(5) to define those major programs that must undergo initial operational test and evaluation before proceeding beyond low-rate initial production.<sup>7</sup> However, that same statute then references 10 U.S.C. § 138(a)(2)(B) for those major defense acquisition programs for which operational testing may not be conducted without prior test plan approval by the Director of Operational Test and Evaluation. The definition at 10 U.S.C. § 138(a)(2)(B) uses the 10 U.S.C. § 2430 threshold.<sup>8</sup> Further, 10 U.S.C. § 2366 uses the 10 U.S.C. § 2302(5) definition to establish in part those systems that must undergo live-fire testing.<sup>9</sup> The testing requirements of 10 U.S.C. § 2362, however, use the "major defense acquisition program" definition of 10 U.S.C. § 2430.<sup>10</sup>

Certain employment prohibitions for DOD procurement officials at 10 U.S.C. §§ 2397b and 2397c use the "major system" definition of section 2302(5).<sup>11</sup> However, while the contract warranty provision at 10 U.S.C. § 2403(a)(1) sets forth its own definition of "weapon system," it relies upon the "major defense acquisition program" of section 2430 for those systems for which the warranty requirement may be waived.<sup>12</sup> Similarly, industrial base analysis is required only for major defense acquisition programs.<sup>13</sup>

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language in this chapter adopts a conforming reference to § 2302(3). However, for ease of reference, these analyses refer to the current 2302(5) citation when discussing that section in narrative text.

<sup>6</sup>These subsections include: 10 U.S.C. §§ 2304(d)(1)(B)(noncompetitive procedure for follow-on major system contract) and 2305(d)(1)(A)(bid requirements for major system development contracts).

<sup>7</sup>10 U.S.C. § 2399(a)(2).

<sup>8</sup>Further discussion of this testing requirement is set forth at ch. 3.2.3 of this Report.

<sup>9</sup>10 U.S.C. § 2366(e)(1)(B) and (e)(2)(B).

<sup>10</sup>The low rate initial production definition of 10 U.S.C. § 2400 uses the phrase "major system" without further definition of the term.

<sup>11</sup>10 U.S.C. § 2397b(f)(5); 10 U.S.C. § 2397c(b)(1)(A)(ii) and (iv)(requirement to identify major systems upon which successful bidder worked within past two years). Those sections are recommended for repeal at ch. 6.7.5 and 6.7.6. of this Report.

<sup>12</sup>Section 2403, Contract Warranties, is recommended for repeal in ch. 2.5.3 of this Report.

<sup>13</sup>The National Defense Authorization Act for FY93 repealed a prior 10 U.S.C. § 2502, where this requirement had initially been set forth, and enacted the same requirement into a new 10 U.S.C. § 2440 within Chapter 144 of Title 10. Pub. L. No. 102-484, § 4216(b), 106 Stat. 2669 (1992).

The legislative histories of these statutory provisions rarely discuss the utilization of a particular, major system definition. Often, the definition in particular legislation adopts a practice or standard then in use within DOD.<sup>14</sup>

Comments received regarding the issue of the dual definition of major system/major defense acquisition program generally supported retention of the dual definition. The Office of the Assistant Secretary of the Air Force (Acquisition) notes that:

A major purpose of the MDAP designation is to determine reporting requirements. Although an MDAP usually has one or more major systems, not every major system is part of an MDAP. We support making definitions consistent where it makes sense. However, due to the different purposes for which these categories have been developed, we do not believe these two definitions can or should be made consistent.<sup>15</sup>

The DOD Inspector General also opposes any change to these two definitions because the statutes are not used synonymously within the U.S. Code.<sup>16</sup> The Department of the Army, however, recommends amendments to make these definitions consistent.<sup>17</sup> The Council of Defense and Space Industry Associations (CODSIA) concurs with that recommendation.<sup>18</sup>

#### **3.1.1.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this statute without change. The Panel believes that the dual major system definition continues to serve a useful purpose, both in Title 10 and in the DOD Directive system. The Panel recognizes that the dual definitions can be confusing.<sup>19</sup> However, there is value to maintaining a two-tier level of oversight. It provides additional flexibility, both to the Congress in establishing its oversight, and to the Department in terms of its internal acquisition management.

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<sup>14</sup>For example, the major system language of 10 U.S.C. § 2403 - per unit cost of more than \$100,000 or eventual total procurement of more than \$10 million - was adopted based on internal DOD implementation of a prior, freestanding public law provision. See S. REP. NO. 500, 98th Cong., 2d Sess. 243 (1984).

<sup>15</sup>Letter from Brig Gen Robert W. Drewes, Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force, to Advisory Panel, dated 11 Mar. 1992.

<sup>16</sup>Letter from Derek J. Vander Schaaf, Deputy Inspector General, Department of Defense, to Mr. Stuart Hazlett, Defense Systems Management College, dated 3 Mar. 1992.

<sup>17</sup>Memorandum from Office of the Assistant Secretary (Research, Development and Acquisition), Department of the Army, to Maj Gen John Slinkard and Mr. Thomas Madden, dated 27 Feb. 1992.

<sup>18</sup>Letter from CODSIA to Maj Gen Slinkard and Mr. Madden, Advisory Panel, dated 12 Mar. 1992.

<sup>19</sup>For example, the Defense Acquisition Workforce legislation, at 10 U.S.C. § 1737(a)(3), defines a "significant nonmajor defense acquisition program" as a threshold that is less than a major defense acquisition program under § 2430 but more than a major system under § 2302(5).

### **3.1.1.5. Relationship to Objectives**

Retention of this statute without change will serve the best interests of DOD while preserving a statutory basis for meaningful congressional oversight of the DOD acquisition process.



### 3.1.2. 10 U.S.C. § 2431

## Weapons Development and Procurement Schedules

### 3.1.2.1. Summary of Law

This law requires the Secretary of Defense to submit to the Congress annually a report on development and procurement schedules for each weapon system for which fund authorization is required under 10 U.S.C. § 114(a). Specifically, the law requires:

- The development schedule, including estimated annual costs until development is completed;
- The planned procurement schedule, including the best estimate of the Secretary of Defense on the annual costs and units to be procured until procurement is completed;
- To the extent required by the statute, the result of all operational testing and evaluation up to the time of the submission of the report, or if operational testing and evaluation has not been conducted, a statement of the reasons and the results of such other testing and evaluation as has been conducted; and
- The most efficient production rate and the most efficient acquisition rate consistent with the program priority established for such weapon system by the Secretary concerned.

### 3.1.2.2. Background of Law

Development and procurement reporting requirements for major weapon systems were first set forth as a freestanding provision of law within the Act Authorizing Appropriations for FY 72 for Military Procurement, Research and Development and For Other Purposes.<sup>1</sup> The Senate Committee Report on that legislation noted that "the committee has continued its surveillance in expanded areas of interest relating to the procurement and management of major weapon system programs."<sup>2</sup> The Committee also noted that it was "particularly interested in the cost performance measurement system that has evolved to better manage and control the cost and performance of these weapon programs. The Committee understands that this system is not a panacea that will prevent cost overruns or improve performance of the weapon system. . . . [H]owever, . . . this system . . . should provide early identification of any problems related to the cost and progress of a program that could enable alternate or corrective action to be taken."<sup>3</sup>

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<sup>1</sup>Pub. L. No. 92-156, § 506, 85 Stat. 429 (1971).

<sup>2</sup>S. REP. NO. 359, 92nd Cong., 1st Sess. 20 (1971).

<sup>3</sup>*Id.*

The House Report on that same legislation discussed the problem of weapon system cost growth at length.<sup>4</sup> That Report noted that "[c]andor with the Congress about such things as the uncertainties associated with cost estimates, technical-risk assessments, and the status of development must be practiced lest surprises undermine the confidence of the Congress and the congressional support for programs."<sup>5</sup>

The DOD Appropriations Authorization Act for 1974 [sic] repealed that provision and enacted virtually the same requirements in this current statutory section.<sup>6</sup> The section was originally codified as section 139 of Title 10, and included a supplemental report requirement at the time of contract award. The purpose of that statutory provision was to facilitate congressional oversight of weapon system development. Moreover, this statute represented a new congressional approach to exercising control over costs of major defense acquisition programs and other weapon systems by requiring the Secretary of Defense to submit an annual written report regarding development and procurement schedules for each system.

Amendments in 1975, 1980, 1981, 1982, and 1984 made technical corrections to the statute. The Goldwater-Nichols Department of Defense Reorganization Act of 1986<sup>7</sup> redesignated the statute as 10 U.S.C. § 2431. As part of that Act, Congress adopted a policy objective to "reduce the administrative burden placed on the Department of Defense by requirements for reports, studies, and notifications to be submitted to Congress through the elimination of outdated, redundant, or otherwise unnecessary reporting requirements."<sup>8</sup> The policy objectives affecting § 2431, however, were not implemented until the enactment of the National Defense Authorization Act for Fiscal Year 1991.<sup>9</sup> This Act repealed the supplemental report on weapons procurement then required by § 2431.

### 3.1.2.3. Law in Practice

The reporting requirement of this section is essentially a budgetary requirement that is implemented by the DOD Budget Guidance Manual.<sup>10</sup> Comparable data is obtained from contractors through the DOD Directive 5000.2M, Part 20, Cost Management Reports.

The Office of the Assistant Secretary of the Army (Research, Development & Acquisition), Deputy Assistant Secretary for Plans, Programs and Policy, notes with respect to this section that:

This section should be repealed and incorporated with the Selected Acquisition Reports (SAR), section 2432. Programmatic information in this report is consistent with that data provided by

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<sup>4</sup>H.R.Rep. No. 232, 92nd Cong., 1st Sess. 831 (1971).

<sup>5</sup>*Id.*

<sup>6</sup>Pub. L. No. 93-155, § 803, 87 Stat. 615 (1973).

<sup>7</sup>Pub. L. No. 99-433, § 101(a)(5), 100 Stat. 995 (1985).

<sup>8</sup>H. R. Rep. No. 499, 101st Cong., 2d Sess. 1 (1990).

<sup>9</sup>Pub. L. No. 101-510, 104 Stat. 1485 (1990).

<sup>10</sup>DOD Budget Guidance Manual, 7110-1-M, Sec. 4, "Procurement."

the SAR. SAR should be tailored to meet content and time requirements of the President's Budget to Congress under section 1105 of Title 31. Consolidating operational test and evaluation data found in section 2431 as part of the SAR will provide a single and comprehensive report to Congress.<sup>11</sup>

#### **3.1.2.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this reporting requirement be retained. It is not overly onerous or burdensome, and the statute has not created any significant problems. The Panel believes that it would be inappropriate to incorporate this reporting requirement into the SAR because it is more broadly applied than the SAR. While the SAR applies only to major defense acquisition programs, weapons development and procurement schedules reports apply to each weapon system that must meet certain fund authorization requirements under 10 U.S.C. § 114(a). In addition, this section is essentially a budgetary reporting requirement. The SAR is essentially a program status reporting requirement.

#### **3.1.2.5. Relationship to Objectives**

Retention of this statute will maintain an effective congressional oversight provision that does not unduly hamper sound DOD procurement practices. Retention of this statute will also promote the Panel objective that acquisition laws should, when generating reporting requirements, permit as much as possible, the use of data that already exists and is already collected without imposing additional administrative burdens.

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<sup>11</sup>Memorandum from Mr. Keith Charles, Deputy Assistant Secretary for Plans, Programs and Policy, to Deputy for Program Assessment and International Cooperation, dated 10 Sep. 1992.

### **3.1.3. 10 U.S.C. § 2432**

#### **Selected Acquisition Reports**

##### **3.1.3.1. Summary of Law**

This section requires the Secretary of Defense to submit to Congress periodic status reports on major defense acquisition programs. Specifically, the section requires the Secretary of Defense to submit to the Congress quarterly reports on current major defense acquisition programs.

The reports are required to contain an abundance of information. For example, the statute dictates that weapons development and procurement schedules, unit cost, full life cycle cost analysis production information (baseline, maximum, current and future production rates) be included. The reports must also include an estimation of cost and schedule variances between the program acquisition unit cost at the current production rate and at the baseline rate. This information must be included in either an Annual or a Quarterly Selected Acquisition Report (SAR). The report submitted for the first quarter of a fiscal year is known as the comprehensive annual SAR. Reports submitted for the remaining three quarters are known as the Quarterly SARs. Quarterly SARs are required to be submitted only if a program for which a prior Annual SAR report was submitted experienced a 15% or more increase in program acquisition unit costs and current procurement unit cost, or a 6 month or more delay in any program schedule milestone. A report need not be submitted upon the approval of the Armed Services Committees of the Congress.

##### **3.1.3.2. Background of Law**

The SAR was originally developed by DOD in 1969 as an internal reporting system to summarize information on major defense acquisition programs managed by DOD components.<sup>1</sup> The first formal SAR was submitted to the Congress in response to a request by the chairman of the Senate Armed Services Committee to the Secretary of Defense for periodic status reports on major weapon systems. In 1971, the Senate Armed Services Committee noted that:

[A]nalyzes of the quarterly reports received by the committee on selected major weapon programs . . . have proved extremely beneficial in assisting the committee to maintain an oversight of the programs throughout the year and in deliberation on the fiscal year 1972 budget request. Refinements to these reports have done much to improve the data and additional refinements are expected.<sup>2</sup>

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<sup>1</sup>DOD Policy Directive "Performance Measurement for Selected Acquisitions," in effect in 1971.  
<sup>2</sup>S. REP. NO. 359, 92d Cong., 1st Sess. 20 (1971).

In 1982, this section was codified into Title 10 by the DOD Authorization Act for FY83.<sup>3</sup> The Senate version of that bill had contained a requirement for unit cost reporting. The House version contained a provision that required SARs on programs that exceeded \$200 million in RDT&E or \$1 billion in procurement funds.<sup>4</sup> Comprehensive SARs were required annually with abbreviated SARs quarterly only when there were changes in cost, performance or schedule. In conference, the Senate receded with an amendment that incorporated the House SAR requirement into the Senate provision requiring Unit Cost Reports.<sup>5</sup> The SAR was intended to improve congressional oversight of cost growth in major defense acquisition programs.<sup>6</sup>

Although this section has been changed many times, it has been significantly amended only three times. In 1984, the format of the SAR was amended to require additional information as well as bring the reporting requirements in line with internal DOD acquisition policy.<sup>7</sup> This amendment was based on proposed modifications submitted by the DOD.<sup>8</sup> The Congress expressly rejected the proposal, however, that the SAR not be required until full-scale development was scheduled to commence.<sup>9</sup>

In 1985, the SAR requirement was again amended to require the Secretary of Defense to submit a full life cycle cost estimate for each acquisition program in the SAR after the first quarter of Fiscal Year 1985.<sup>10</sup> This amendment was the result of congressional dissatisfaction with the December 1984 SAR. The Senate Armed Services Committee had noted that key cost and schedule data had been omitted from that SAR without formal consultation with Congress, thereby rendering the report useless for the purpose of congressional oversight.<sup>11</sup>

Most recently, the National Defense Authorization Act for Fiscal Year 1993 amended this section once again to bring it in line with DOD acquisition policy.<sup>12</sup> Specifically, the changes redefined the term "major contract," changed references to the time frame within which certain production rates are applicable and changed the term "more than" to "at least" when it appears in sections 2432 and 2433, Unit Cost Reports. Other changes relevant to the SAR process include increasing thresholds for qualification as a major defense acquisition program, allowing the Secretary to adjust those thresholds, and allowing the Secretary to waive the SAR requirement.<sup>13</sup>

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<sup>3</sup>Pub. L. No. 97-252, § 1107, 96 Stat. 739-46 (1982).

<sup>4</sup>That House provision would also have required the program manager to submit reports to the Service Secretaries upon belief that there would be a 15% increase in contract cost or 15% slip in contract schedule. The Secretary would then be required to so report to the Congress. This provision was deleted in conference.

<sup>5</sup>H. CONF. REP. No. 749, 97th Cong., 2d Sess. 171 (1982). The two provisions were codified into Chapter 139 of Title 10 as two related sections, §§ 139a and 139b.

<sup>6</sup>*Id.*

<sup>7</sup>DOD Authorization Act for FY 1986, Pub. L. No 99-145, § 1201, 99 Stat. 715-161 (1985).

<sup>8</sup>H. R. Rep. 691, 98th Cong., 2d Sess. 271 (1984).

<sup>9</sup>*Id.*

<sup>10</sup>Department of Defense Appropriations Act for FY 1987, Pub. L. No. 99-500, § 101(c), 100 Stat. 1783 (Identical legislation omitted).

<sup>11</sup>H.R. REP. No. 145, 99th Cong., 2d Sess. 468 (1985).

<sup>12</sup>Pub. L. No. 102-484, § 817(c), 106 Stat. 2455 (1992).

<sup>13</sup>*Id.* H. R. Rep. No. 966, 102nd Cong., 2nd Sess. 728 (1992).

One Air Force commenter also notes that it "currently submit[s] duplicative information in the SAR, the DAES, and the Acquisition Program Baseline (APB), with enough format and timing differences to require each report be prepared and submitted separately. In addition, because of the timing differences, often the data differs from one report to another on the same program."<sup>17</sup>

However, the Office of Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition) states that there is not much to be gained by additional, minor modification of reporting requirements. That Office indicates that some consolidation already has been accomplished through modification of internal procedures.<sup>18</sup>

Overall, however, certain issues have arisen based on the structure and implementation of this section. Such issues include: Whether the current statutory detail of the SAR is necessary for Congress to effectively oversee major defense acquisition programs? Whether the reporting requirements of this and related statutes can be streamlined and made more consistent with DOD internal reporting procedures? Whether related reports required by this chapter can be consolidated into one meaningful report?

#### **3.1.3.4. Recommendation and Justification**

##### **Amend to remove detail and to incorporate Unit Cost Report requirement currently in 10 U.S.C. § 2433.**

The Panel recognizes that the Congress clearly needs to receive cost and program status information on major defense acquisition programs. This data is necessary for effective, meaningful oversight. However, the processing of this required information can, and should be, streamlined. Therefore, the Panel recommends revising this section to make the information contained in the SAR consistent with that which is used by the DOD to internally manage major defense acquisition programs.

In essence, the Panel's objectives are in many ways the same as those propounded in the Center for Naval Analysis Report.<sup>19</sup> The Panel proposes to:

- Provide a single, authoritative, credible, easily understood source of status information on weapon systems for program managers, Service Acquisition Executives, OSD, the Congress, and related agencies (i.e., OMB, GAO).
- Minimize the burden on PMs and their staffs of preparing and updating the report.

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<sup>17</sup>Memorandum from Col. Blaise Durante, Assistant Deputy Assistant Secretary (Management Policy and Program Integration), Assistant Secretary (Acquisition), Department of the Air Force, to Maj Gen John Slinkard, HQ AFSC, dated 19 Feb. 1992.

<sup>18</sup>Letter from Mr. John D. Christie, Director, Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), to Ms. Theresa Squillacote, dated 10 Sep. 1992.

<sup>19</sup>Redesigning the Selected Acquisition Report, *supra* note 14 at 4-5.

### 3.1.3.3. Law in Practice

The requirements of the SAR are implemented by DOD Manual 5000.2M, Part 17, Selected Acquisition Reports, and DOD Directive 7000.3-G, Preparation and Review of Selected Acquisition Reports. Additionally, the DOD has developed software, called the Consolidated Acquisition Reporting System (CARS) with different modules for the SAR, the Defense Acquisition Executive Summary (DAES) and for acquisition program baselines.

Although DOD has learned to manage SAR reporting, and, indeed, itself initiated this reporting as an internal oversight procedure, the current statutory framework is characterized by complexity and excessive detail. In a study conducted by the Center for Naval Analysis, it was found that "the median effort required for preparation of a SAR is 80 man-hours and the median elapsed time for preparation is about 3.5 weeks, with about 8 weeks required for the review and approval process after the SAR leaves the PMO."<sup>14</sup> It has also been noted that it takes users about three and one-half hours to review the SARs. Further, Program Managers are faced with the burdensome requirement to prepare a large number of reports for the various levels of the Department and Congress. A survey of Army Program Executive Officers indicated that Army Program Managers spent between 300 and 600 man-hours of effort annually in preparing all of their SARs and quarterly UCRs.<sup>15</sup> These numbers do not include the time preparing the DAES and other reporting requirements facing PMs.

In addition, there is considerable duplication in the various internal and congressional reporting requirements. As one Army Program Executive Officer noted:

[Duplication] exists among the Selected Acquisition Report (SAR), Defense Acquisition Executive Summary (DAES), Unit Cost Report (UCR), Program Baseline and Annex, and the Army Acquisition Management System (AAMS). Cost and funding data, program schedules, and milestones are contained in four of the five reports. Program Acquisition/Unit and Unit Flyaway Costs, as well as procurement and delivery information and contract status, are contained in three of the five. . . . In spite of this redundancy, data must be entered separately into each report data collection system to generate output. Duplication of effort is a major contributor to confusion and controversy among program reports.<sup>16</sup>

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<sup>14</sup>Center for Naval Analyses, "Redesigning the Selected Acquisition Report," CRM 89-204, 4-5 (September 1989).

<sup>15</sup>Memoranda from the following Department of the Army Program Executive Offices to the Deputy General Counsel (Acquisition), Department of the Army: Maj Gen Dewitt T. Irby, Jr., Aviation, dated 20 Apr. 1992; Mr. Dale G. Adams, Armaments, 10 Apr. 1992; Brig Gen. Robert A. Drolet, Air Defense, dated 8 Apr. 1992; Ms. Mary D. Kelly, Plans and Programs, STAMIS, dated 23 Mar. 1992; Brig Gen Otto Guenther, Communications Systems, dated 20 Apr. 1992; Maj Gen William Harmon, Command and Control Systems, dated 10 Apr. 1992; and Lt. Gen Robert Hammond, Strategic Defense, dated 13 Apr. 1992.

<sup>16</sup>Memorandum from Brig Gen Robert A. Drolet, Air Defense, to Deputy General Counsel (Acquisition), Department of the Army, dated 8 Apr. 1992.

- Subsume, to the greatest extent possible, relevant parts of all similar documents or reports which are not currently included in the SAR.
- Standardize definitions and terminology.
- Eliminate redundant items of information.
- Give the Secretary of Defense discretion and latitude to properly and effectively manage these programs.
- Remove the excessive detail from the statute.

To accomplish this, the statutory definitions and itemized description of the information to be contained in a SAR would be deleted. The Secretary of Defense would be given the authority to promulgate guidelines to describe the information to be included in the SAR. The information would be consistent with that which is currently required by the internal reporting system.<sup>20</sup> In this manner, repeated amendment of this requirement to conform it to internal DOD procedures, as has occurred in the past, would no longer be necessary. This framework would also increase the flexibility of DOD. In exercising this flexibility, however, the Department will have to be cognizant of the past problems which led Congress to enact such statutory detail.

The Panel recommends that the Unit Cost Report section at 10 U.S.C § 2433 be similarly streamlined and that the requirement for a unit cost report appear in this section and not in a separate statute.<sup>21</sup> To that end, the proposed statute requires, at subsection (f)(1), that the Secretary of Defense shall require the program manager to submit to the service acquisition executive a written report on the unit costs of the program. Subsections (f)(2)(3) and (3) contain the congressional reporting requirement currently set forth in the UCR statute, § 2433. Although the definitional sections have been deleted, the Secretary of Defense may define pertinent terms through implementing regulations.

Specifically, the proposed statutory language adding the UCR requirement to the SAR statute would delete the separate 25% breach standard currently set forth in the UCR statute. This deletion would remove the onerous penalties incurred by a 25% breach currently set forth in the UCR statute, 10 U.S.C. § 2433. This change is discussed in greater detail at chapter 3.1.4.

This new SAR will serve the purpose which Congress and the Department originally intended but will greatly reduce the administrative burden of the reporting agency. It will allow for a consistent, streamlined reporting process utilizing the same data base and the same information. The Panel notes in support of this recommendation that these two sections were originally enacted as two related sections, and that the legislative history of these sections indicates that the Congress viewed these reports as analytically related to each other. It was only as the amount of detail set forth in the sections increased that the two reporting requirements

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<sup>20</sup>In addition, the requirement for the submission of preliminary SARs would be deleted as redundant.

<sup>21</sup>See Ch. 3.1.4. of this Report



were clearly split into two separate, statutory provisions. If the legislative detail is decreased, as the Panel proposes herein, the rationale for separate provisions is eliminated.

The Offices of the Assistant Secretary of the Army (Research, Development and Acquisition), Assistant Secretary of the Navy (Research, Development & Acquisition) and the Assistant Secretary of the Air Force (Financial Management) have concurred with these recommendations.<sup>22</sup>

The Office of the Under Secretary of Defense for Acquisition recommends that sections 2432 and 2433 remain separate.<sup>23</sup> That Office is concerned that consolidation of the statutes would lead to confusion because the SAR is a report for Congress and the UCR is internal. Additionally, that Office is concerned that the combination would result in a mandatory requirement for quarterly SARs in order to accommodate the quarterly UCR.<sup>24</sup> However, in the interest of streamlining, the Panel believes that the two sections can be effectively combined. The addition of the UCR requirement to this statute does not alter the quarterly SAR provisions. The Panel clarifies that its intent is not to generate a quarterly SAR. Rather, the purpose is to streamline and to significantly reduce the administrative burden of redundant reporting requirements.

Finally, as noted above, Congress recently made changes to this section. The changes recommended here are consistent with and a follow-on to those recently made. However, if this proposed consolidation is not accepted, the SAR should remain as it exists. The personnel responsible for preparing it have established additional procedures and can accomplish the task, however cumbersome.

### 3.1.3.5. Relationship to Objectives

Amendment of this statute will further the goal of streamlining DOD acquisition practices while maintaining effective congressional oversight. Retention of this statute will also specifically promote the Panel objective that acquisition laws should, when generating reporting requirements, permit as much as possible, the use of data that already exists and is already collected without imposing additional administrative burdens.

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<sup>22</sup>Memorandum from Mr. Stephen Burdt, Director for Program Evaluation, Office of the Assistant Secretary of the Army, to DOD Advisory Panel, dated 21 Sep. 1992. The other two offices listed above have orally confirmed their endorsement of this proposal. Assistant Deputy Assistant Secretary (Management Policy and Program Integration), Assistant Secretary (Acquisition), Department of the Air Force, notes that "if the SECDEF actually reduces the program office reporting workload and increases the use of a common data base, then we would be in agreement with the recommended change . . . [However,] our experience with [such] involvement is that attempts to change the reports, e.g., the DAES, actually result in additional workload for the Services." See Memorandum from Col. Blaise Durante, Assistant Deputy Assistant Secretary (Management Policy and Program Integration), Assistant Secretary (Acquisition), Department of the Air Force, to Maj Gen John Slinkard, HQ AFSC, dated 19 Feb. 1992.

<sup>23</sup>Memorandum from Mr. Gene Porter, Principal Deputy Director, Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), to DOD Panel, dated 9 Nov. 1992.

<sup>24</sup>*Id.* As currently written, this statute requires a quarterly SAR unless an identified breach has not occurred. This language is interpreted as not setting forth a mandatory requirement for a quarterly SAR.

### 3.1.3.6. Proposed Statute

#### § 2432. Selected Acquisition Reports; Unit Cost Reports

~~(a) In this section:~~

~~(1) The term "program acquisition unit cost", with respect to a major defense acquisition program, means the amount equal to (A) the total cost for development and procurement of, and system-specific military construction for, the acquisition program, divided by (B) the number of fully configured end items to be produced for the acquisition program.~~

~~(2) The term "procurement unit cost", with respect to a major defense acquisition program, means the amount equal to (A) the total of all funds programmed to be available for obligation for procurement for the program for a fiscal year, reduced by the amount of funds programmed to be available for obligation for such fiscal year for advanced procurement for such program in any subsequent year and increased by any amount appropriated in years before such fiscal year for advanced procurement for such program in such fiscal year, divided by (B) the number of fully configured end items to be procured with such funds during such fiscal year. If for any fiscal year the funds appropriated, or the number of fully configured end items to be purchased, differ from those programmed, the procurement unit cost shall be revised to reflect the appropriated amounts and quantities.~~

~~(3) The term "major contract", with respect to a major defense acquisition program, means each of the six largest prime, associate or Government furnished equipment contracts under the program that is in excess of \$40,000,000~~

~~(4) The term "full life-cycle cost", with respect to a major defense acquisition program, has the meaning given the term "cost of the program" in section 2434(b)(2) of this title.~~

~~(b)(a)(1) The Secretary of Defense shall submit to Congress at the end of each fiscal-year quarter a report on current major defense acquisition programs. Except as provided in paragraphs (2) and (3), each such report shall include a status report on each defense acquisition program that at the end of such quarter is a major defense acquisition program. Reports under this section shall be known as Selected Acquisition Reports.~~

~~(2) A status report on a major defense acquisition program need not be included in the Selected Acquisition Report for the second, third, or fourth quarter of a fiscal year if such a report was included in a previous Selected Acquisition Report for that fiscal year and during the period since that report there has been--~~

~~(A) less than a 15 percent increase in program acquisition unit cost and current procurement unit cost; and~~

~~(B) less than a six-month delay in any program schedule milestone shown in the Selected Acquisition Report.~~

(3)(A) The Secretary of Defense may waive the requirement for submission of Selected Acquisition Reports for a program for a fiscal year if-

(i) the program has not entered full scale development or engineering and manufacturing development;

(ii) a reasonable cost estimate has not been established for such program;

and

(iii) the system configuration for such program is not well defined.

(B) The Secretary shall submit to the Committees on Armed Services of the Senate and House of Representatives a written notification of each waiver under subparagraph (A) for a program for a fiscal year not later than 60 days before the President submits the budget to Congress pursuant to section 1105 of title 31 in that fiscal year.

~~(e)(1) Each Selected Acquisition Report for the first quarter for a fiscal year shall include-~~

~~(A) the same information, in detailed and summarized form, as is provided in reports submitted under section 2431 of this title;~~

~~(B) the current program acquisition unit cost for each major defense acquisition program included in the report and the history of that cost from the date the program was first included in a Selected Acquisition Report to the end of the quarter for which the current report is submitted; and~~

~~(C) such other information as the Secretary of Defense considers appropriate.~~

~~(2) Each Selected Acquisition Report for the first quarter of a fiscal year shall be designed to provide to the Committees on Armed Services of the Senate and House of Representatives the information such Committees need to perform their oversight functions. The Secretary of Defense may approve changes in the content of the Selected Acquisition Report if the Secretary provides such Committees with written notification of such changes at least 60 days before the date of the report that incorporates the changes.~~

~~(3) In addition to the material required by paragraphs (1) and (2), each Selected Acquisition Report for the first quarter of a fiscal year shall include the following:~~

~~(A) A full life cycle cost analysis for each major defense acquisition program included in the report that is in the full scale engineering development stage or has completed that stage.~~

~~(B) If the system that is included in that major defense acquisition program has an antecedent system, a full life cycle cost analysis for that system.~~

~~(C) Production information for each major defense acquisition program included in the report that is produced at a rate of six units or more per year, including (with respect to each such program) the following:~~

~~(i) specification of the baseline production rate for each year of production of the program, defined as the rate or rates to be achieved at full rate production as assumed in the decision to proceed with production (commonly referred to as the "Milestone III" decision).~~

~~(ii) Specification, for each of the two budget years of production under the program, of the minimum sustaining production rate, defined as the production rate for each budget year that is necessary to keep production lines open while maintaining a base of responsive vendors and suppliers.~~

~~(iii) Specification, for each of the two budget years of production under the program, of the maximum production rate, defined as the production rate for each budget year that is attainable with the facilities and tooling programmed to be available for procurement under the program or otherwise to be provided with Government funds.~~

~~(iv) Specification, for each of the two budget years of production, of the current production rate, defined as the production rate for each budget year for which the report is submitted, based on the budget submitted to Congress pursuant to section 1105 of title 31;~~

~~(v) Estimation of any cost variance--~~

~~(I) between the budget year procurement unit cost at the production rate specified pursuant to clause (iv) and the and the budget year procurement unit costs at the minimum sustaining production rate specified pursuant to clause (ii); and~~

~~(II) between the total remaining procurement cost at the current production rate specified pursuant to clause (iv) and the total remaining procurement cost at the maximum production rate specified pursuant to clause (iii)~~

~~(vi) Estimation of any cost variance--~~

~~(I) between the budget year procurement unit costs at the current production rate specified pursuant to clause (iv) and the budget year procurement unit costs at the maximum production rate specified pursuant to clause (iii) and;~~

~~(II) between the total remaining procurement cost at the current production rate specified under clause (iv) and the total remaining cost at the maximum production rate specified under clause (iii)~~

~~(vii) Estimation of any quantity variance--~~

~~(I) between the budget year quantities assumed in the minimum sustaining production rate specified under clause (i) and the current production rate specified under clause (iv); and~~

~~(II) between the budget year total quantities assumed in the maximum production rate specified under clause (iii) and the current production rate specified under clause (iv).~~

~~(4) Selected Acquisition Reports for the first quarter of a fiscal year shall be known as comprehensive annual Selected Acquisition Reports--~~

~~(5) The Secretary of Defense shall ensure that paragraph (4) of subsection (a) is implemented in a uniform manner, to the extent practicable, throughout the Department of Defense.~~

(b)(1) Selected Acquisition Reports for the first quarter of a fiscal year shall be known as comprehensive annual Selected Acquisition Reports.

(2) Selected Acquisition Reports for the second, third, and fourth quarters of a fiscal year shall be known as quarterly Selected Acquisition Reports.

(3) Each Selected Acquisition Report for the first quarter of a fiscal year shall be designed to provide to the Committees on Armed Services of the Senate and House of Representatives the information such Committees need to perform their oversight functions. In the interests of consistency and streamlining of reporting, the Secretary of Defense shall include in the Selected Acquisition Reports, such information as is used by the Department of Defense to manage major defense acquisition programs. The Secretary of Defense shall determine the scope and form of the items to be included in both the Comprehensive Annual and Quarterly Selected Acquisition Report and issue guidelines to ensure consistent reporting procedures. The Secretary of Defense may approve changes in the content of the Selected Acquisition Report if the Secretary provides such Committees with written notification of such changes at least 60 days before the date of the report that incorporates the changes.

(4) Each Quarterly SAR shall contain a notification of any Program Acquisition Unit Cost or Current Procurement Unit Cost increase of at least 15%.

~~(d)(1) Each Selected Acquisition Report for the second, third, and fourth quarters of a fiscal year shall include—~~

~~(A) with respect to each major defense acquisition program that was included in the most recent comprehensive annual Selected Acquisition Report, the information described in subsection (e); and~~

~~(B) with respect to each major defense acquisition program that was not included in the most recent comprehensive annual Selected Acquisition Report, the information described in subsection (e).~~

~~(2) Selected Acquisition Reports for the second, third, and fourth quarters of a fiscal year shall be known as Quarterly Selected Acquisition Reports.~~

~~(e) Information to be included under this subsection in a Quarterly Selected Acquisition Report with respect to a major defense acquisition program is as follows:~~

~~(1) The quantity of items to be purchased under the program.~~

~~(2) The program acquisition cost.~~

~~(3) The program acquisition unit cost.~~

~~(4) The current procurement cost for the program.~~

~~(5) The current procurement unit cost for the program.~~

~~(6) The reasons for any change in program acquisition cost, program acquisition unit cost, procurement cost, or procurement unit cost or in program schedule from the previous Selected Acquisition Report.~~

~~(7) The major contracts under the program and the reasons for any cost or schedule variances under those contracts since the last Selected Acquisition Report.~~

~~(8) The completion status of the program (A) expressed as the percentage that the number of years for which funds have been appropriated for the program is of the number of years for which it is planned that funds will be appropriated for the program, and (B) expressed as the percentage that the amount of funds that have been appropriated for the program is of the total amount of funds which it is planned will be appropriated for the program.~~

~~(9) Program highlights since the last Selected Acquisition Report.~~

~~(f) (c) Each comprehensive annual Selected Acquisition Report shall be submitted within 60 days after the date on which the President transmits the Budget to Congress for the following fiscal year, and each Quarterly Selected Acquisition Report shall be submitted within 45 days after the end of the fiscal-year quarter. A preliminary report shall be submitted for each annual Selected Acquisition Report within 30 days of the date on which the President submits the Budget to Congress.~~

~~(g) (d) The requirements of this section with respect to a major defense acquisition program shall cease to apply after 90 percent of the items to be delivered to the United States under the program (shown as the total quantity of items to be purchased under the program in the most recent Selected Acquisition Report) have been delivered or 90 percent of planned expenditures under the program have been made.~~

~~(h)(1) (e) Total program reporting under this section shall apply to a major defense acquisition program when funds have been appropriated for such and the Secretary of Defense has decided to proceed to full-scale engineering and manufacturing development of such program. Reporting may be limited to the development program as provided by the Secretary of Defense's guidelines promulgated pursuant to subsection (b)(3) in paragraph (2) before a decision is made by the Secretary of Defense to proceed to full-scale engineering and manufacturing development if the Secretary notifies the Committees on Armed Services of the Senate and House of Representatives of the intention to submit a limited report under this subsection not less than 15 days before a report is due under this section.~~

~~(2) A limited report under this subsection shall include the following:~~

~~(A) The same information, in detail and summarized form, as is provided in reports submitted under subsections (b)(1) and (b)(3) of section 2431 of this title.~~

~~(B) Reasons for any change in the development cost and schedule.~~

~~(C) The major contracts under the development program and the reasons for any cost or schedule variances under those contracts since the last Selected Acquisition Report.~~

~~(D) The completion status of the development program expressed--~~

~~(i) as the percentage that the number of years for which funds have been appropriated for the development program is of the number of years for which it is planned that funds will be appropriated for the program; and~~

~~(ii) as the percentage that the amount of funds that have been appropriated for the development program is of the total amount of funds which it is planned will be appropriated for the program.~~

~~(E) Program highlights since the last Selected Acquisition Report.~~

~~(F) Other information as the Secretary of Defense considers appropriate.~~

~~(3) The submission requirements for a limited report under this subsection shall be the same as for quarterly Selected Acquisition Reports for total program reporting.~~

(f)(1) Unit Cost Reports-- The Secretary of Defense shall require the program manager for a major defense acquisition program, on a quarterly basis, to submit to the service acquisition executive designated by the Secretary concerned a written report on the unit costs of the program. This report shall be known as the Unit Cost Report. It shall be submitted not more than 30 calendar days after the end of the quarter. The Secretary of Defense shall issue regulations implementing this requirement.

(2) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program, the service acquisition executive shall determine whether the current program acquisition unit cost for the program has increased by at least 15 percent over the program acquisition unit cost for the program as shown in the Baseline Report.

(3) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program that is a procurement program, the service acquisition executive, in addition to the determination under paragraph (2), shall determine whether the current procurement unit cost for the program has increased by at least 15 percent over the procurement unit cost for the program as set forth in the Baseline Report.

(4) If, based upon the service acquisition executive's determination, the Secretary concerned determines (for the first time since the beginning of the current fiscal year) that the current program acquisition unit cost has increased by at least 15 percent as determined under paragraph (2), or that the current procurement unit cost has increased by at least 15 percent as determined under paragraph (3), the Secretary shall notify Congress in writing of such determination and of the increase with respect to such program within 30 days after the date on which the service acquisition executive reports his determination of such increase in such unit cost to the Secretary and shall include in such notification the date on which the determination was made.<sup>25</sup>

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<sup>25</sup>Sections (f)(2), (3) and (4) which appear in this revised SAR statute were taken directly from 10 U.S.C. § 2433.



### **3.1.4. 10 U.S.C. § 2433**

#### **Unit Cost Reports**

##### **3.1.4.1. Summary of Law**

This statute requires the program manager for a major defense acquisition program to submit a quarterly written report on the unit costs of a program to the service acquisition executive when certain thresholds are met. Moreover, it dictates that such reports contain program acquisition unit cost, procurement unit cost, any cost variance or schedule variance since the Baseline Report was submitted, any changes from program schedule milestones and various additional information.

Such reports must be filed if the program acquisition (or procurement, if it is a procurement program) unit cost has increased by 15% or more over that shown in the baseline, or the total cost variances or schedule variances have resulted in a 15% increase in the cost of the contract since signed and if such a report had not been previously filed during the current fiscal year. If it is discovered, after such report that the current program acquisition (or procurement, if it is a procurement program) unit cost has increased by 5% or more over the current cost as shown in the most recent report or the cost variances have resulted in a 5% increase, an additional report must be submitted.

Subsequently, the service acquisition executive is charged with determining whether the current cost has increased by at least 15% or by at least 25% over the cost as set out in the baseline. If the Secretary agrees with such determination, he must notify Congress and include all information previously described as required. This information is included in the Annual SAR.

If the increase is at least 25%, the Secretary of Defense must certify that the program is essential to the national defense, there are no alternatives, the new estimates are reasonable, and the management structure is adequate.

##### **3.1.4.2. Background of Law**

The requirement for unit cost reporting first appeared as a freestanding provision in the DOD Authorization Act for FY82.<sup>1</sup> In 1983, the Congress enacted this section as a permanent requirement.<sup>2</sup> The language originated in the Senate version of the bill. The Senate Report noted:

The committee remains seriously concerned about the continued escalation in the unit costs of some of our major defense systems.

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<sup>1</sup>Pub. L. No. 96-86, § 817, 95 Stat. 1129 (1981).

<sup>2</sup>DOD Authorization Act for FY 1983, Pub. L. No. 97-252, § 1107, 96 Stat. 746 (1983).

. . . The Committee believes that the cost tracking mechanism approved by the Congress last year is a reasonable and workable method of giving excessive unit cost growth the level of visibility and accountability that it deserves. Therefore, the committee recommends placing the requirement for the unit cost report system approved last year in permanent law.<sup>3</sup>

In 1984, the provision was amended to add the requirement that the program manager submit reports to the service secretary upon reason to believe that a 15% increase in contract cost or 15% slip in contract schedule. The secretary would then be required to so report to the Congress.<sup>4</sup> It was also amended to add the current Baseline Report definition. Overall, the requirement was designed to control unit cost growth by identifying at an early stage major defense systems experiencing cost growth problems.<sup>5</sup>

In 1986, this section was redesignated to its current section. In 1989, the section was amended to eliminate separate quarterly internal unit cost reports by consolidating those reports into the internal Defense Acquisition Executive Summary Reports. It also consolidated the external unit cost exception reports by consolidating them with the SARs, and standardized certain cost and baseline reporting criteria.<sup>6</sup> The conferees noted that further streamlining was warranted not only for congressional reports but also for reports required of program managers by the Secretary of Defense and by the services.<sup>7</sup>

Most recently, the National Defense Authorization Act for FY 1993 amended this section to extend the internal report deadline, to substitute "at least" for "more than" when describing the triggering unit cost increase, to alter the date of the Secretary's congressional reporting requirement, and to alter the circumstances when a unit cost breach triggers a SAR.<sup>8</sup>

### 3.1.4.3. Law in Practice

The reporting requirements are implemented by DOD Manual 5000.2M, Part 18, Unit Cost Reports.

Commenters noted that unit cost reports generally serve a useful purpose. One Army Program Executive Office stated that "the UCR as presently used provides feeder information to the SAR and as such would be very difficult to eliminate as it provides the necessary in depth data to substantiate the SAR. It also serves as the documentation provided to the Cost Analysis

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<sup>3</sup>S. REP. NO. 330, 97th Cong., 1st Sess. 147 (1983).

<sup>4</sup>This requirement was initially proposed by the 1983 House DOD Authorization bill as an amendment to the SAR statute but had been deleted in conference. It was repropoed the following year as an amendment to this section.

<sup>5</sup>H.R. REP. NO. 691, 98th Cong., 2d Sess. 271 (1984).

<sup>6</sup>National Defense Authorization Act for FYs 90 and 91, Pub. L. No. 101-189, 103 Stat. 1352 (1989).

<sup>7</sup>H.R. REP. NO. 331, 101st Cong., 1st Sess. 603 (1989).

<sup>8</sup>Pub. L. No. 102-484, § 817(d), 106 Stat. 2456-57 (1992).

Improvement Group for their use in validating the cost for the program involved."<sup>9</sup> One Air Force commenter also opposes outright elimination of the unit cost report.<sup>10</sup>

However, an increase in unit cost may be a false indicator of a problematic program. An increase in unit cost may be the result of many things not related to program health. For example, if Congress or OSD alters program funding or quantity, unit cost may be adversely affected. Often, unit cost breaches may result from these funding or quantity perturbations.

Moreover, it is sometimes difficult to determine exactly how a unit will be measured. In an armored vehicle or aircraft program, there is usually no problem identifying the unit. However, in a missile, rocket, or communication program the task is more difficult because numerous components may be necessary for the system to operate and they are not all self-contained. Units may be artificially designated, raising further questions as to the relevance of a breach to the health of the program.

Failure to submit required reports or certifications in the statutorily-required time will trigger the suspension of the obligation of funds. This penalty, if imposed, may result in program delays with greater costs than savings. Fortunately, action is usually taken in time to avoid suspension of obligations.

Additionally, DOD does not solely manage its programs in terms of unit cost, but in terms of cost, performance and schedule. Decisions to terminate programs are generally not made because unit costs are exceeded but for affordability considerations and for failure of program performance or inability to counter the relevant threat.

As one commenter noted,

program termination should not be made solely on the increase in unit costs. Under APB procedures, OSD has created separate cost reporting requirements for R&D, procurement, and MILCON, and this information should be used in conjunction with the unit cost reports to determine program health. Granted, when programs reach the media and congressional floor, much is made of increase in unit costs, playing on public ignorance of all the factors that enter into increase in unit costs.<sup>11</sup>

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<sup>9</sup>Memorandum from Lt. Gen. Robert Hammond, PEO, Strategic Defense, to General Counsel, HQ Department of the Army, dated 13 Apr. 1992.

<sup>10</sup>Memorandum from Col. Blaise Durante, Assistant Deputy Assistant Secretary (Management Policy and Program Integration), Assistant Secretary (Acquisition), Department of the Air Force, to Maj Gen John Slinkard, HQ AFSC, dated 19 Feb. 1992.

<sup>11</sup>*Id.*

#### **3.1.4.4. Recommendation and Justification**

##### **Repeal; incorporate Unit Cost Report requirement into 10 U.S.C. § 2432.**

The Panel recommends repeal of the unit cost reporting statute. Sufficient information necessary for effective congressional oversight, and to track cost growth of a major defense acquisition program, will be included in the SAR as proposed to be amended. Further, unit cost reports are in many cases not relevant barometers of program health. The Panel acknowledges, however, that unit cost can sometimes serve a useful purpose, and that the requirement should be incorporated into the SAR statute.

The Panel specifically recommends deletion of the dual 15% and 25% breach thresholds. The Panel proposes retention of the 15% breach threshold, as it would generally encompass the 25% breach. In the current language of the section, the 25% breach also triggers a number of potentially onerous consequences for the program, e.g., suspension of the obligation of funds. Under the proposed statute, the 15% breach triggers solely a notification to the Congress. The Panel believes that this notification should be the only statutorily mandated consequence of a unit cost breach. Upon notification, the Congress may take whatever oversight action it deems appropriate, including suspension of funds.

As noted in the analysis for 10 U.S.C. § 2432, this consolidation is supported by the relevant military departments. The Office of the Under Secretary of Defense for Acquisition recommended that this statute remain separate from the SAR statute. However, as discussed in the rationale for amending 10 U.S.C. § 2432, the Panel would combine them in the interest of streamlining and to ease the administrative burden of duplicative reporting requirements.

#### **3.1.4.5. Relationship to Objectives**

Repeal of this statute, and consolidation of its broad reporting requirements into 10 U.S.C. § 2432, will further the goal of streamlining the DOD acquisition process while maintaining effective congressional oversight. Repeal of this statute will specifically promote the Panel objective that acquisition laws should, when generating reporting requirements, permit as much as possible the use of data that already exists and is already collected without imposing additional administrative burdens.

#### **3.1.4.6 Proposed Statute**

Subsection (f)(1), (2), (3) and (4) of proposed statute for 10 U.S.C. § 2432 provides as follows:<sup>12</sup>

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<sup>12</sup>The standard format of this Report is to present proposed statutory changes in a "line-in, line-out" format. However, this recommended consolidation, and other consolidations proposed within this chapter (chs. 3.3.5, 3.3.24 through 3.3.28; 3.3.32; and 3.5.1 through 3.5.8) do not readily lend themselves to this format. Frequently, a number of separate sections are being subsumed within the proposed statute. Therefore, to permit a direct comparison between the proposed and the current statutory language, the relevant portion of the proposed,

(f)(1) Unit Cost Reports-- The Secretary of Defense shall require the program manager for a major defense acquisition program, on a quarterly basis, to submit to the service acquisition executive designated by the Secretary concerned a written report on the unit costs of the program. This report shall be known as the Unit Cost Report. It shall be submitted not more than 30 calendar days after the end of the quarter. The Secretary of Defense shall issue regulations implementing this requirement.

(2) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program, the service acquisition executive shall determine whether the current program acquisition unit cost for the program has increased by at least 15 percent over the program acquisition unit cost for the program as shown in the Baseline Report.

(3) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program that is a procurement program, the service acquisition executive, in addition to the determination under paragraph (2), shall determine whether the current procurement unit cost for the program has increased by at least 15 percent over the procurement unit cost for the program as set forth in the Baseline Report.

(4) If, based upon the service acquisition executive's determination, the Secretary concerned determines (for the first time since the beginning of the current fiscal year) that the current program acquisition unit cost has increased by at least 15 percent as determined under paragraph (2), or that the current procurement unit cost has increased by at least 15 percent as determined under paragraph (3), the Secretary shall notify Congress in writing of such determination and of the increase with respect to such program within 30 days after the date on which the service acquisition executive reports his determination of such increase in such unit cost to the Secretary and shall include in such notification the date on which the determination was made.<sup>13</sup>

#### **Current Statute.**

The text of the current section 2433, to be repealed and replaced in part by proposed subsections (f)(1), (2), (3) and (4) of section 2432, provides as follows:

10 U.S.C. § 2433. Unit cost reports

(a) In this section:

(1) The terms "program acquisition unit cost", "procurement unit cost", and "major contract" have the same meanings as provided in section 2432(a) of this title.

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consolidated statute is reiterated in the individual analysis, together with the text of the current law -- neither one using the "strike-out" format.

<sup>13</sup>Subsections (f)(2), (3) and (4) which appear in this revised SAR statute were taken directly from 10 U.S.C. § 2433.

(2) The term "Baseline Selected Acquisition Report", with respect to a unit cost report that is submitted under this section to the service acquisition executive designated by the Secretary concerned on a major defense acquisition program, means the Selected Acquisition Report in which information on the program is first included or the comprehensive annual Selected Acquisition Report for the fiscal year immediately before the fiscal year containing the quarter with respect to which the unit cost report is submitted, whichever is later.

(3) The term "procurement program" means a program for which funds for procurement are authorized to be appropriated in a fiscal year.

(4) The term "Baseline Report", with respect to a unit cost report that is submitted under this section to the service acquisition executive designated by the Secretary concerned on a major defense acquisition program, means--

(A) the most recent Selected Acquisition Report submitted under subsection (e)(2)(B) that includes information on the program, if that report was submitted for the second, third, or fourth quarter of the preceding fiscal year;

(B) if no report was submitted under subsection (e)(2)(B) with respect to the program during that three-quarter period, the most recent Selected Acquisition Report submitted under subsection (e)(1) that includes information on the program, if that report was submitted during that three-quarter period; and

(C) if no report was submitted with respect to the program under subsection (e)(1) or (e)(2)(B)(ii) during that three-quarter period, the baseline Selected Acquisition Report.

(b) The program manager for a major defense acquisition program (other than a program not required to be included in the Selected Acquisition Report for that quarter under section 2432(b)(3) of this title) shall, on a quarterly basis, submit to the service acquisition executive designated by the Secretary concerned a written report on the unit costs of the program. Each report shall be submitted not more than 7 days (excluding Saturdays, Sundays, and legal public holidays) after the end of that quarter. The program manager shall include in each such unit cost report the following information with respect to the program (as of the last day of the quarter for which the report is made):

(1) The program acquisition unit cost.

(2) In the case of a procurement program, the procurement unit cost.

(3) Any cost variance or schedule variance in a major contract under the program since the Baseline Report was submitted.

(4) Any changes from program schedule milestones or program performances reflected in the baseline description established under section 2435 of this title that are known, expected, or anticipated by the program manager.

(c)(1) If the program manager of a major defense acquisition program for which a unit cost report has previously been submitted under subsection (b) determines at any time during a quarter that there is reasonable cause to believe--

(A) that the program acquisition unit cost for the program has increased by more than 15 percent over the program acquisition unit cost for the program as shown in the Baseline Report;

(B) in the case of a major defense acquisition program that is a procurement program, that the current procurement unit cost for the program has increased by more than 15 percent over the procurement unit cost for the program as reflected in the Baseline Report; or

(C) that cost variances or schedule variances of a major contract under the program have resulted in an increase in the cost of the contract of at least 15 percent over the cost of the contract as of the time the contract was made; and if a unit cost report indicating an increase of such percentage or more has not previously been submitted to the service acquisition executive designated by the Secretary concerned during the current fiscal year (other than the last quarterly unit cost report under subsection (b) for the preceding fiscal year), then the program manager shall immediately submit to such service acquisition executive a unit cost report containing the information, determined as of the date of the report, required under subsection (b).

(2) If in any fiscal year the program manager for a major defense acquisition program has submitted to the service acquisition executive designated by the Secretary concerned a unit cost report (other than the last quarterly unit cost report under subsection (b) for the preceding fiscal year) indicating an increase of 15 percent or more in a category described in clauses (A) through (C) of paragraph (1) and subsequently determines that there is reasonable cause to believe--

(A) that the current program acquisition unit cost of the program has increased by more than 5 percent over the current program acquisition unit cost as shown in the most recent report under this subsection or subsection (b) submitted to such service acquisition executive with respect to that program;

(B) in the case of a major defense acquisition program that is a procurement program, that the current procurement unit cost for the program has increased by more than 5 percent over the current procurement unit cost as shown in the most recent report under this subsection or subsection (b) submitted to such service acquisition executive with respect to that program; or

(C) that cost variances or schedule variances of a major contract under the program have resulted in an increase in the cost of the contract of at least 5 percent over the cost of the contract as shown in the most recent report under this subsection or subsection (b) submitted to such service acquisition representative with respect to that program;

the program manager shall immediately submit to [the] such service acquisition executive a unit cost report containing the information, determined as of the date of the report, required by subsection (b).

(d)(1) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program, the service acquisition executive shall determine whether the current program acquisition unit cost for the program has increased by more than 15 percent, or by more than 25 percent, over the program acquisition unit cost for the program as shown in the Baseline Report.

(2) When a unit cost report is submitted to the service acquisition executive designated by the Secretary concerned under this section with respect to a major defense acquisition program that is a procurement program, the service acquisition executive, in addition to the determination under paragraph (1), shall determine whether the current procurement unit cost for the program has increased by more than 15 percent, or by more than 25 percent, over the procurement unit cost for the program as reflected in the Baseline Report.

(3) If, based upon the service acquisition executive's determination, the Secretary concerned determines (for the first time since the beginning of the current fiscal year) that the current program acquisition unit cost has increased by more than 15 percent, or by more than 25 percent, as determined under paragraph (1) or that the current procurement unit cost has increased by more than 15 percent, or by more than 25 percent, as determined under paragraph (2), the Secretary shall notify Congress in writing of such determination and of the increase with respect to such program within 30 days after the date on which the service acquisition executive reports his determination of such increase in such unit cost to the Secretary and shall include in such notification the date on which the determination was made.

(e)(1)(A) Except as provided in subparagraph (B), whenever the Secretary concerned determines under subsection (d) that the current program acquisition cost of a major defense acquisition program has increased by more than 15 percent, a Selected Acquisition Report shall be submitted to Congress for the first fiscal-year quarter ending on or after the date of the determination and such report shall include the information described in section 2432(e) of this title. The report shall be submitted within 45 days after the end of that quarter.

(B) Whenever the Secretary makes a determination referred to in subparagraph (A) in the case of a major defense acquisition program during the second quarter of a fiscal year and before the date on which the President transmits the budget for the following fiscal year to Congress pursuant to section 1105 of title 31, the Secretary is not required to file a Selected Acquisition Report under subparagraph (A) but shall include the information described in subsection (g) regarding that program in the comprehensive annual Selected Acquisition Report submitted in that quarter.

(2) If the percentage increase in the current program acquisition cost of a major defense acquisition program (as determined by the Secretary under subsection (d)) exceeds 25 percent, the Secretary of Defense shall submit to Congress, before the end of the 30-day period beginning



on the day the Selected Acquisition Report containing the information described in subsection (g) is required to be submitted under section 2432(f) of this title--

(A) a written certification, stating that--

(i) such acquisition program is essential to the national security;

(ii) there are no alternatives to such acquisition program which will provide equal or greater military capability at less cost;

(iii) the new estimates of the program acquisition unit cost or procurement unit cost are reasonable; and

(iv) the management structure for the acquisition program is adequate to manage and control program acquisition unit cost or procurement unit cost; and

(B) if a report under paragraph (1) has been previously submitted to Congress with respect to such program for the current fiscal year but was based upon a different unit cost report from the program manager to the service acquisition executive designated by the Secretary concerned, a further report containing the information described in subsection (g), determined from the time of the previous report to the time of the current report.

(3) If a determination of a more than 15 percent increase is made by the Secretary under subsection (d) and a Selected Acquisition Report containing the information described in subsection (g) is not submitted to Congress under paragraph (1), or if a determination of a more than 25 percent increase is made by the Secretary under subsection (d) and the certification of the Secretary of Defense is not submitted to Congress under paragraph (2), funds appropriated for military construction, for research, development, test, and evaluation, and for procurement may not be obligated for a major contract under the program. The prohibition on the obligation of funds for a major defense acquisition program shall cease to apply at the end of a period of 30 days of continuous session of Congress (as determined under section 7307(b)(2) of this title ) beginning on the date--

(A) on which Congress receives the Selected Acquisition Report under paragraph (1) or (2)(B) with respect to that program, in the case of a determination of a more than 15 percent increase (as determined in subsection (d)); or

(B) on which Congress has received both the Selected Acquisition Report under paragraph (1) or (2)(B) and the certification of the Secretary of Defense under paragraph (2)(A) with respect to that program, in the case of a more than 25 percent increase (as determined under subsection (d)).

(f) Any determination of a percentage increase under this section shall include expected inflation.

(g)(1) Except as provided in paragraph (2), each report under subsection (e) with respect to a major defense acquisition program shall include the following:

(A) The name of the major defense acquisition program.

(B) The date of the preparation of the report.

(C) The program phase as of the date of the preparation of the report.

(D) The estimate of the program acquisition cost for the program as shown in the Selected Acquisition Report in which the program was first included, expressed in constant base-year dollars and in current dollars.

(E) The current program acquisition cost in constant base-year dollars and in current dollars.

(F) A statement of the reasons for any increase in program acquisition unit cost or procurement unit cost.

(G) The completion status of the program (i) expressed as the percentage that the number of years for which funds have been appropriated for the program is of the number of years for which it is planned that funds will be appropriated for the program, and (ii) expressed as the percentage that the amount of funds that have been appropriated for the program is of the total amount of funds which it is planned will be appropriated for the program.

(H) The fiscal year in which information on the program was first included in a Selected Acquisition Report (referred to in this paragraph as the 'base year') and the date of that Selected Acquisition Report in which information on the program was first included.

(I) The type of the Baseline Report (under subsection (a)(4)) and the date of the Baseline Report.

(J) The current change and the total change, in dollars and expressed as a percentage, in the program acquisition unit cost, stated both in constant base-year dollars and in current dollars.

(K) The current change and the total change, in dollars and expressed as a percentage, in the procurement unit cost, stated both in constant base-year dollars and in current dollars and the procurement unit cost for the succeeding fiscal year expressed in constant base-year dollars and in current year dollars.

(L) The quantity of end items to be acquired under the program and the current change and total change, if any, in that quantity.

(M) The identities of the military and civilian officers responsible for program management and cost control of the program.

(N) The action taken and proposed to be taken to control future cost growth of the program.

(O) Any changes made in the performance or schedule milestones of the program and the extent to which such changes have contributed to the increase in program acquisition unit cost or procurement unit cost.

(P) The following contract performance assessment information with respect to each major contract under the program:

(i) The name of the contractor.

(ii) The phase that the contract is in at the time of the preparation of the report.

(iii) The percentage of work under the contract that has been completed.

(iv) Any current change and the total change, in dollars and expressed as a percentage, in the contract cost.

(v) The percentage by which the contract is currently ahead of or behind schedule.

(vi) A narrative providing a summary explanation of the most significant occurrences, including cost and schedule variances under major contracts of the program, contributing to the changes identified and a discussion of the effect these occurrences will have on future program costs and the program schedule.

(2) If a program acquisition unit cost increase or a procurement unit cost increase for a major defense acquisition program that results in a report under this subsection is due to termination or cancellation of the entire program, only the information specified in clauses (A) through (F) of paragraph (1) and the percentage change in program acquisition unit cost or procurement unit cost that resulted in the report need be included in the report. The certification of the Secretary of Defense under subsection (e) is not required to be submitted for termination or cancellation of a program.

(h) Reporting under this section shall not apply if a program has received a limited reporting waiver under section 2432(h) of this title.

### **3.1.5. 10 U.S.C. § 2434**

## **Independent cost estimates, operational manpower requirements**

### **3.1.5.1. Summary of Law**

Currently, an independent cost estimate, together with a manpower estimate, must be considered by the Secretary of Defense prior to approval of full-scale engineering development or production and deployment of a major defense acquisition program. Additionally, this statute defines the scope and material to be included in both the independent estimate and the manpower estimate. Essentially, it requires that the Secretary be aware of the cost and total manpower estimate of a program.

### **3.1.5.2. Background of Law**

Prior to the enactment of this section, the Secretary of Defense had established a process for independent review and evaluation of service cost estimates for major defense acquisition programs. Specifically, by regulation, the Secretary of Defense had established a Cost Analysis Improvement Group to advise the Defense System Acquisition Review Council on matters related to cost. That Group provided an independent review and evaluation for the Council of service cost estimates for major weapon systems.

This section was enacted by the DOD Authorization Act for FY 1984.<sup>1</sup> The language originated in the Senate version of the bill. The section originally prohibited the Secretary of Defense from approving the full-scale engineering development or the production and deployment of a major defense program until an independent estimate of the cost of the program was submitted and considered by the Secretary and a manpower estimate was submitted to the House and Senate Armed Services Committees. The Senate Committee stated that it was encouraged by the extent to which the Department was utilizing independent cost estimates to better manage and oversee major defense acquisition programs. However, it noted that the cost estimate must be prepared by an office which is not under the supervision, direction or control of the military department, defense agency or other component of DOD that is directly responsible for carrying out the development or acquisition of the program. Also, the independent cost estimates were to include all elements of the life-cycle costs of the program.<sup>2</sup>

The section was redesignated to its current section in 1985.<sup>3</sup> Subsequently, the statute was amended to define and require manpower estimates as additional submissions to the Senate and House Armed Services Committees by the Secretary of Defense.<sup>4</sup> When enacting the manpower requirement, the Senate Committee noted its concern:

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<sup>1</sup>Pub. L. No. 98-94, § 831, 97 Stat. 682 (1983).

<sup>2</sup>See S. REP. NO. 174, 98th Cong., 1st Sess. 244 (1983).

<sup>3</sup>Pub. L. No. 99-433, §§ 101(a)(5) in part, 110(d)(15), (g)(9), 100 Stat. 995, 1003, 1004 (1985).

<sup>4</sup>Pub. L. No. 99-661, § 1208(a)-(c)(1), 100 Stat. 3975 (1985).

... with an inability to properly consider the manpower requirements associated with major defense acquisition programs during the development and procurement decision stages of these programs. This has resulted with the Congress being confronted with unexpected manpower requirements to permit the proper operation, maintenance and support of new weapons systems only after the systems have been fully developed, procured and fielded.<sup>5</sup>

The National Defense Authorization Act for Fiscal Years 1992 and 93 repealed the requirement to submit manpower reports to the House and Senate Armed Services Committees.<sup>6</sup> It merely required that the Secretary "consider" the independent cost estimate and manpower estimate prior to approving full-scale engineering development or production and deployment. In so amending, Congress had recognized that the bulk of reports received to date imposed no net change on the civilian or military personnel end-strengths of the Military Departments. Hence, in an effort to eliminate unnecessary reporting requirements, the manpower estimate reporting requirement was repealed.<sup>7</sup>

### **3.1.5.3. Law in Practice**

This section is implemented by DOD Directive 5000.2M, Part 6, Manpower Estimate Report, and by Part 15, Program Office and Independent Life-Cycle Cost Estimates. Cost estimating methodology is also discussed in Part 8 to that Manual, Cost and Operational Effectiveness Analysis, at paragraph 2(b)(11).

Currently, because of the 1991 amendment, the statute is not as demanding as it had been initially.

### **3.1.5.4. Recommendation and Justification**

**Amend to delete manpower and independent cost estimate report content and definition of manpower estimate; Amend definitions of independent cost estimate and manpower estimates to recast as policy guidance.**

Although Congress determined that it could do without manpower reports, it left in place the detailed descriptions of the report, as well as the contents of the independent cost estimates. Consistent with the Panel's objective to eliminate unnecessary statutory detail, the Panel recommends an amendment to allow the Secretary of Defense the discretion to prescribe regulations governing the contents of manpower estimates and independent cost estimates. This approach would leave intact the policy requirement to prepare such reports, but give to the Secretary the discretion to determine the details of the contents of such reports.

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<sup>5</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 218 (1985).

<sup>6</sup>Pub. L. No. 102-190, § 801, 105 Stat. 1412 (1992).

<sup>7</sup>H.R. REP. No. 311, 102d Cong., 1st Sess. 567 (1991).

One Army commenter noted that the definition of "independent estimate" is critical because it is essential that this function be performed outside the acquisition community.<sup>8</sup> While an Air Force commenter noted that "if [Congress] no longer require[s] the manpower requirements level of detail, they should eliminate the words in law describing exactly what the Services should 'consider'," he supported some statutory detail concerning the independent cost estimate.<sup>9</sup>

Consequently, the Panel recommends retention of the requirement that the independent cost estimate be prepared by an independent, outside entity. However, the Panel would modify the language to cast it as a policy requirement rather than as a definition. Similarly, the Panel would retain some policy guidance as to the nature and purpose of the manpower estimate, to assist, but not dictate, regulatory implementation.

The Office of Acquisition Policy and Program Integration, Under Secretary of Defense for Acquisition, notes that the recommended amendment does not conform with DOD acquisition policy, which requires independent cost estimates for all major programs beginning at Milestone I. In addition, that Office notes that the current retention of a separate manpower estimate report will inhibit DOD flexibility in combining the manpower and cost estimate reports into one document. That Office recommends that the term full scale engineering development be changed to engineering and manufacturing development to comport with current DOD policy. This change should be made to all applicable acquisition statutes.<sup>10</sup>

The Panel notes that, under the proposed statute, the DOD is able to require independent cost estimates at appropriate points through regulations and is not inhibited by the proposed statute. Also, the proposed statute solely requires the submission of an independent cost estimate and manpower estimate; it does not require that these estimates be submitted in separate reports.

### **3.1.5.5. Relationship to Objectives**

Amendment of this statute will promote the best interests of DOD by affording it greater managerial flexibility. Amendment will generally promote the Panel's stated objective of setting forth in statute broad guidelines, with details left to regulatory implementation.

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<sup>8</sup>Memorandum from Mr. Robert W. Young, Deputy for Cost Analysis, Office of the Assistant Secretary of the Army (Financial Management), to Director, Program Evaluation, Office of the Assistant Secretary of the Army (Research, Development and Acquisition), dated 17 Sep. 1992.

<sup>9</sup>Memorandum from Col. Blaise Durante, Assistant Deputy Assistant Secretary (Management Policy and Program Integration), Assistant Secretary (Acquisition), Department of the Air Force, to Maj Gen John Slinkard, HQ AFSC, dated 19 Feb. 1992.

<sup>10</sup>Memorandum from Mr. Gene Porter, Principal Deputy Director, Acquisition Policy & Program Integration, Under Secretary of Defense for Acquisition, to DOD Panel, dated 9 Nov. 1992.

### 3.1.5.6. Proposed Statute

#### 10 U.S.C. § 2434. Independent Cost Estimates: Operational Manpower Requirements

(a) Requirement for approval. The Secretary of Defense may not approve the full-scale engineering and manufacturing development, or the production and deployment, of a major defense acquisition program unless an independent estimate of the cost of the program, together with a manpower estimate, has been considered by the Secretary.

~~(b) The Secretary of Defense shall promulgate regulations governing the content and submission of an independent estimate of the cost of the program and a manpower estimate; provided, --~~  
~~Definitions: In this section:~~

~~(1) The term "independent estimate" means, with respect to a major defense acquisition program, an estimate of the cost of such program shall--~~

~~(A) be prepared by an office or other entity that is not under the supervision, direction, or control of the military department, defense agency, or other component of the Department of Defense that is directly responsible for carrying out the development or acquisition of the program, and~~

~~(B) include all costs of development, procurement, and operations and support, without regard to funding source or management control, and~~

~~(2) The manpower estimate shall properly consider, during the development and production stage of the program, the total personnel required to operate, maintain and support the program upon full operational deployment.~~

~~(2) The term "cost of the program" means, with respect to a major defense acquisition program, all elements of the life cycle costs of the program, including-~~

~~(A) the cost of all research and development efforts, without regard to the funding source or management control;~~

~~(B) the cost of the prime hardware and its major sub-components, support costs (including training, peculiar support, and data), initial spares, military construction costs, and the cost of all related procurements (including, where applicable, modifications to existing aircraft or ship platforms), without regard to the funding source or management control of the program; and~~

~~(C) all elements of operating and support costs.~~

~~(3) The term "manpower estimate" means, with respect to a major defense acquisition program, an estimate of-~~

~~(A) the total number of personnel (including military, civilian, and contractor personnel), expressed in total personnel or in man years, that will be required to operate, maintain, and support the program upon full operational deployment and to train personnel to operate, maintain, and support the program upon full operational deployment;~~

~~(B) the increases in military and civilian personnel end strengths that will be required for full operational deployment of the program above the end strengths authorized in the fiscal year in which such an estimate is submitted and the fiscal year or years in which such increases will be required; and~~

~~(C) the manner in which such a program would be operationally deployed if no increases in military and civilian end strengths were authorized above the strengths authorized for the fiscal year in which such estimate is submitted.~~



### **Enhanced Program Stability**

#### **3.1.6.1. Summary of Law**

This section requires the Secretary of a military department to establish a baseline description for a major defense acquisition program. It also requires Program Managers to provide reports to the Secretary if a reasonable possibility of a baseline breach is imminent. Moreover, the Secretary must review the program and submit a report to the Under Secretary of Defense for Acquisition if the cost exceeds a certain percentage or a program milestone slips more than 180 days. Finally, baseline descriptions must be forwarded to Congress for those programs designated as Defense Enterprise Programs.

#### **3.1.6.2. Background of Law**

This section was originally enacted in 1986 by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> The Senate bill contained a provision that would require the DOD to establish a cost, performance and schedule baseline for all programs designated as defense enterprise programs. The House amendment contained a similar provision requiring a baseline for all major defense acquisition programs. That bill also specified the cost, performance characteristics and specifications, scheduled milestones, testing parameters and initial provisioning plans to be included in the baseline. Finally, it required transmittal of the baselines to the Congress before full-scale development or full-rate production approval. In conference, the DOD was directed to prepare baselines for all major defense acquisition programs, but transmit only those for programs designated as defense enterprise programs.<sup>2</sup>

The Senate Committee Report on that legislation drew heavily upon the recommendations of the then-recently released Packard Commission report.<sup>3</sup> In an effort to implement private sector management tools in the defense acquisition process, the Senate proposed this provision to require the Secretaries of military departments to establish baseline descriptions for major defense acquisition programs. The Senate Committee Report noted that:

Under current practice, Congress evaluates and authorizes funding for annual increments of activity in each defense program. This current process of annual reviews reinforces a tendency to focus on accounting considerations rather than policy issues. It tends also to prolong contentiousness over a program, thus undermining stable program management.

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<sup>1</sup>Pub.L. No. 99-500, § 101(c), 100 Stat. 3341 (1986)(Identical legislation omitted).

<sup>2</sup>H. CONF. REP. No. 1001, 99th Cong., 2d Sess. 495 (1986).

<sup>3</sup>R. Formula For Action. Final Report by the President's Commission of Defense Management. (Packard Commission, Apr. 1986).

By contrast in the Department of Defense, systems are reviewed in detail by senior decision-makers only at key milestones in the acquisition cycle of the program. If approved to proceed, the Services establish a baseline for the program which is sufficient to support the program until the next acquisition milestone. The Packard Commission recommended extending this baselining and milestone review process to Congress. . . .<sup>4</sup>

The House Committee Report noted that, by baselining the program, buy-ins would be discouraged and that gold-plating and unnecessary changes would be minimized.<sup>5</sup>

The section was amended in 1987 to modify a requirement that program deviations be reviewed by a panel.<sup>6</sup> A limitation on program manager tours was added in 1988 but repealed in 1991.<sup>7</sup>

### **3.1.6.3. Law in Practice**

This section is implemented by DOD Directive 5000.2M, Part 14, Acquisition Program Baselines.

The use of baselines has proven beneficial in the management of major defense acquisition programs. While no comments were received regarding the underlying utility of baseline reports, one Army PEO noted that this section contains excessive detail.<sup>8</sup>

### **3.1.6.4. Recommendation and Justification**

#### **Amend to delete Baseline Description and review procedures.**

The Panel recommends that the basic requirement for baseline establishment be retained. The establishment of a baseline provides an effective means both for internal DOD program management and for congressional program review. Indeed, the legislative intent underlying the enactment of this statute remains fully relevant today.

However, in the interest of streamlining excessive statutory detail and providing the Secretary authority to prescribe internal management procedures of DOD, the Panel recommends deletion of details concerning baseline content and procedures for review of the deviation report. Numerous baseline breaches occur throughout the year and all do not necessitate the establishment of a review panel. Also, the Panel recommends that the statute be amended to

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<sup>4</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 259 (1986).

<sup>5</sup>H.R. REP. No. 718, 99th Cong., 2d Sess. 254 (1986).

<sup>6</sup>Pub.L. No. 100-180, § 803(a), 101 Stat. 1125 (1987).

<sup>7</sup>Pub.L. No. 100-370, § 1(i)(1), 102 Stat. 848 (1990); Pub. L. No. 101-510, § 1484(k)(11), 104 Stat. 1665 (1990).

<sup>8</sup>Memorandum from Brig Gen. Robert Drolet, Air Defense, to Mr. Anthony Gamboa, Deputy General Counsel (Acquisition), Department of the Army, dated 8 Apr. 1992.

charge the Secretary of Defense with the responsibility of providing regulations to govern baselines, deviation reports, and recommendations for approval of revised baselines.

The Office of Acquisition Policy and Program Integration, Under Secretary of Defense (Acquisition), recommends that the contents of the baseline description appear in the statute, noting that the proposed revision deprives the statute of essential content.<sup>9</sup> However, the Panel believes that, in the interest of streamlining, such detail should be set out in regulation. The essential content of the section is the requirement that baselining be established, and not detailed descriptions of what appropriate baselining must encompass.

### **3.1.6.5. Relationship to Objectives**

Amendment of this statute would promote the best interests of the DOD. It would afford the Department greater managerial flexibility while maintaining an effective tool for meaningful congressional oversight. Specifically, amendment of this statute as proposed will promote the Panel objective that acquisition laws should, when generating reporting requirements, permit as much as possible, the use of data that already exists and is already collected without imposing additional administrative burdens. Amendment will also promote the Panel's stated objective of setting forth in statute broad guidelines, with details left to implementing regulations.

### **3.1.6.6. Proposed Statute**

#### **§ 2435. Enhanced Program Stability**

##### **(a) Baseline description requirement.**

(1) The Secretary of a military department shall establish a baseline description for a major defense acquisition program under the jurisdiction of such Secretary--

(A) before such program enters full-scale engineering manufacturing and development; and

(B) before such program enters full-rate production.

~~(2) A baseline description required under paragraph (1) shall include the following:~~

~~(A) In the case of the full-scale development stage--~~

~~(i) a description of the performance goals for the weapons system to be acquired under the program;~~

~~(ii) a description of the technical characteristics and configuration of such system;~~

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<sup>9</sup>Memorandum from Mr. Gene Porter, Principal Deputy Director, Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), to DOD Panel, dated 9 Nov. 1992.

~~(iii) total development costs for such stage by fiscal year; and~~

~~(iv) the schedule of development milestones.~~

~~(B) In the case of the production stage--~~

~~(i) a description of the performance of the weapons system to be acquired under the program;~~

~~(ii) a description of the technical characteristics and configuration of such system;~~

~~(iii) number of end items by fiscal year;~~

~~(iv) the schedule of production milestones;~~

~~(v) testing;~~

~~(vi) initial training;~~

~~(vii) initial provisioning; and~~

~~(viii) total procurement costs for such stage (including the cost of all elements included in the baseline description) by fiscal year, which may not exceed the amount of the independent cost estimate for that program submitted to the Secretary of Defense under section 2434 of this title.~~

(b) The Secretary of Defense shall promulgate regulations governing --

(1) the content of baselines;

(2) the submission of deviation reports by program managers to the Secretary of the military department concerned, and the Under Secretary of Defense for Acquisition; and.

(3) procedures for departmental review of deviation reports and submission and approval of a revised baseline.

(b) Program deviation reports:

~~(1) The program manager of a major defense acquisition program shall immediately submit a program deviation report for such program to the Secretary of the military department concerned and to the service acquisition executive designated by such Secretary if such manager determines at any time during the full-scale engineering development stage or the production stage that there is reasonable cause to believe that--~~

~~(A) the total cost of completion of the program will be more than the amount specified in the baseline description established under subsection (a) for such stage;~~

~~(B) any milestone specified in such baseline description will not be completed as scheduled; or~~

~~(C) the system to be acquired under the program will not fulfill the description of performance, technical characteristics, or configuration specified in such baseline description.~~

~~(2) The Secretary of the military department concerned shall, with respect to any major defense acquisition program for which a program deviation report is received under paragraph~~

~~(1), and for which the total cost of completion of the stage will exceed by 15 percent or more, in the case of a development stage, or by 5 percent or more, in the case of a production stage, the amount specified in the baseline description established under subsection (a) for such stage; or any milestone specified in such baseline description will be missed by more than 180 days--~~

~~(A) establish a review panel to review such program; and~~

~~(B) submit a report containing the program deviation report and the results of such review to the Under Secretary of Defense for Acquisition before the end of the 45-day period beginning on the date that the program deviation report is submitted under paragraph (1).~~

### **3.1.7. 10 U.S.C. §§ 2436 and 2437**

#### **Defense Enterprise Programs; Defense Enterprise Programs: milestone authorization**

##### **3.1.7.1. Summary of Laws**

Section 2436 provides that the Secretary of Defense shall conduct, through the military departments, a program to increase the efficiency of defense acquisition management structures. Under the program, certain acquisition programs may be designated as defense enterprise programs, (DEPs). Except as specified by the senior procurement executive of the cognizant military department, DEPs are exempt from all regulation except for the FAR and DFARS.

Section 2437 provides that the Secretary of Defense may designate a DEP for milestone authorization if the program is ready for full-scale engineering development or full-rate production. Baseline reports must be submitted for such programs. Congress must authorize funds for up to a five year period if the program is approved to proceed into either of those stages. Program deviations for such programs must be submitted to the defense committees, and funding may thereafter be blocked unless a formal program review is scheduled. These statutes attempt to institute a program to increase the efficiency of defense acquisition programs. They allow for a streamlined management structure and an exemption from certain regulations, policies, directives, or administrative rules or guidelines. Finally, they allow the Secretary to issue guidelines governing the management of defense enterprise programs.

##### **3.1.7.2. Background of Laws**

These sections were originally enacted in 1986 by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> Both versions of the bill had contained comparable provisions, although the House bill would have limited DEPs to major defense acquisition programs. The legislation drew heavily upon the recommendations of the then-recently released Packard Commission report that private sector management tools should be implemented into the defense acquisition process.<sup>2</sup> The Senate Committee Report noted:

The current framework for acquisition management in the Department of Defense runs counter to the private industry model. The authority and responsibility for the management of specific programs have been diluted by the growth of large bureaucratic oversight and review organizations. The growth of this bureaucracy has resulted in the insertion of unnecessary layers between program managers and the Secretaries of the Services, as

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<sup>1</sup>Pub.L. No. 99-500, § 101(c), 100 Stat. 3341 (1986).

<sup>2</sup>A Formula For Action. Final Report by the President's Commission on Defense Management. (Packard Commission, Apr. 1986).

well as the proliferation of functional organizations which often make conflicting claims on the management priorities of a defense program.

Concurrent with the growth of this bureaucratic structure has been the increase in the numbers of detailed directives, specification and regulations, which further limit the program manager's flexibility. Finally, the annual authorization and appropriations process frequently denies the program manager in the Department of Defense the funding stability required for effective long-term planning. As a result, the acquisition cycle for major defense systems averages ten to fifteen years, or about twice the length of time required to develop and manufacture systems of similar complexity in private industry.<sup>3</sup>

Thus, the DEP programs were crafted to enhance the authority of the program manager to manage a program with minimum reliance on outside review. DEPs were designed to increase the efficiency of the management structure of major and non-major defense acquisition programs. Congress intended that all major acquisition programs eventually become DEPs.<sup>4</sup>

### 3.1.7.3. Laws in Practice

These sections are implemented in part by DOD Directive 5000.2M, Part 19, Program Deviation Reports. However, the Department never fully implemented these sections. A draft directive implementing the DEP authorities is still under consideration by DOD. In a recent review of DEPs, DOD noted that problems had developed regarding Congressional support in appropriating multiyear funds for the DEPs.<sup>5</sup> Specifically, while the Armed Services Committees were willing to provide multiyear program authorizations, the Appropriations Committees were unwilling to entertain multiyear appropriations. The Report also noted that certain Defense Management Review initiatives had reduced the regulatory burden, thereby achieving at least in part the goal that DEPs were intended to accomplish. Finally, that Report noted that defense budgets cuts and force restructuring limited the potential benefits of DEPs, and that overall, there was no advantaged to be gained from DEPs.<sup>6</sup>

It should be noted, however, that Army Program Managers of DEP programs were enthusiastic about DEPs because it gave them authority to waive internal Army requirements.<sup>7</sup>

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<sup>3</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 256 (1986).

<sup>4</sup>*Id.*

<sup>5</sup>Final Report Defense Enterprise Program Working Group (undated). The full content of this report is classified. However, an unclassified executive summary has been released.

<sup>6</sup>*Id.*

<sup>7</sup>Memoranda from the following Department of the Army Program Executive Offices to the Deputy General Counsel (Acquisition), Department of the Army: Maj Gen Dewitt T. Irby, Jr., Aviation, dated 20 Apr. 1992; Mr. Dale G. Adams, Armaments, dated 10 Apr. 1992; Brig Gen Robert A. Drolet, Air Defense, dated 8 Apr. 1992; Ms. Mary D. Kelly, Plans and Programs, STAMIS, dated 23 Mar. 1992; Brig Gen Otto Guenther, Communications

However, the Army could do this by regulation and does not need statutory authority to waive its own requirements.

#### **3.1.7.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of the sections authorizing Defense Enterprise Programs. The Office of the Under Secretary of Defense for Acquisition concurs with the assessment that DEPs have not been successfully implemented and supports the recommendation to repeal.<sup>8</sup>

The concept of DEPs still exists in the current DOD emphasis on the Major Defense Acquisition Pilot Program enacted in 1990.<sup>9</sup> Under that section, up to six major defense acquisition programs designated by the Secretary of Defense for participation in the program may have the applicability of many laws waived. These waivers could be given in order to increase the efficiency and effectiveness of the acquisition process in major defense acquisition programs. If granted, they could exempt the programs from statutory requirements, including those applicable to price, cost, schedule, performance, management, oversight, and other relevant statutes. However, each participating major defense acquisition program will be designated as a defense enterprise program. With the streamlined approach of the Pilot Program, designation of such programs as DEPs is no longer necessary.

Moreover, burdensome additional review and reporting requirements are imposed on DEPs nominated for milestone authorization that are not applicable to other major defense acquisition programs. The additional requirements of an OSD level review board, a revised baseline to Congress and suspension of obligation authority add little value over the structure for other major defense acquisition programs.

In making this recommendation, it should be noted that section 809(d) of Pub. L. No. 101-510 designates Pilot Programs as DEPs. If sections 2436 and 2437 are repealed, section 809(d) of Pub. L. No. 101-510 will also have to be repealed.

#### **3.1.7.5. Relationship to Objectives**

Repeal of these sections would significantly promote the goal of streamlining the DOD acquisition process. Specifically, repeal will eliminate statutory provisions that have not been effectively implemented within the DOD and, in any event, have been superseded by other initiatives.

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Systems, dated 20 Apr. 1992; Maj Gen William Harmon, Command and Control Systems, dated 10 Apr. 1992; and Lt Gen Robert Hammond, Strategic Defense, dated 13 Apr. 1992.

<sup>8</sup>Memorandum from Mr. Gene Porter, Principal Deputy Director, Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), to DOD Panel, dated 9 Nov. 1992.

<sup>9</sup>DOD Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 809 (1990).



### **3.1.8. 10 U.S.C. § 2438**

#### **Major Programs: competitive prototyping**

##### **3.1.8.1. Summary of Law**

This new section requires the Secretary of Defense to prepare an acquisition strategy which provides for the competitive prototyping of major weapon systems and any major subsystems under a major defense acquisition program prior to the commencement of development. This acquisition strategy must (1) require that contracts be entered into with not less than two contractors; (2) require that all systems or subsystems be tested in comparative side-by-side test; and (3) require that each contractor that develops a prototype system or subsystem before submitting cost and production estimates. This requirement may be waived, however, if a written justification is submitted to the Under Secretary of Defense for Acquisition explaining why the use of competitive prototyping is not practicable.

##### **3.1.8.2. Background of Law**

This section derives from a prior section, 10 U.S.C. § 2365, "Competitive prototype strategy requirement: major defense acquisition programs," that had expired on September 30, 1991 and that was repealed by the passage of this section in 1992. The House Armed Services Committee noted that,

"[10 U.S.C. § 2438] would have the effect of reinstating a requirement that the Secretary use competitive prototyping in developing major weapons systems or subsystems . . . [I]t includes exceptions that give the Secretary broad latitude in the application of the requirement to specific development programs. [I]t changes 2365 by: (1) eliminating the termination date; and (2) removing a subparagraph that had the effect of automatically exempting all special access programs . . . The Secretary would nevertheless have the authority to exempt special access programs under the exception clause."<sup>1</sup>

10 U.S.C. § 2365 was first introduced in the National Defense Authorization Act for Fiscal Year 1987.<sup>2</sup> The provision originated in the House version of the bill. The House Committee Report stated that competitive prototyping "is critically important for knowing the strengths and weaknesses of a weapons system before entering full-scale development; gives the troops higher quality, better designed weapons; and helps the industry maintain and have more and better design teams."<sup>3</sup>

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<sup>1</sup>H. R. REP. NO. 527, 102nd Cong., 2d Sess. 294 (1992).

<sup>2</sup>Pub. L. No. 99-661, § 909, 100 Stat. 3816 (1986).

<sup>3</sup>H.R. REP. NO. 527, 102d Cong., 2d Sess. 295 (1992).

Nonetheless, while the importance and utility of competitive prototyping was well established, the statute was amended in 1988 to include a sunset provision which caused it to expire on September 30, 1991.<sup>4</sup> The Armed Services conferees believed that three years would provide a base of experience that would permit the Department of Defense, after the legislation expires, to develop appropriate regulatory guidance for the use of competitive prototype strategies.<sup>5</sup>

The initiative to reinstate competitive prototyping was introduced in the House by Representative Ireland of Florida. It was prompted by the success of competitive prototyping in the F-16 fighter program and the lack of competitive prototyping as one of the problems with the A-12 program and a potential problem with the AX program.<sup>6</sup>

### **3.1.8.3. Law in Practice**

This section is currently implemented in DOD Directive 5000.2-M, Part 17, "Competitive Prototyping." Because it is recently enacted, 10 U.S.C. § 2438 does not have an independent practice history. However, section 2365 was followed as well as waived throughout the course of its five-year history.

### **3.1.8.4. Recommendation and Justification**

#### **Repeal**

The Panel recommends repeal of this section. Congressional proponents of reinstating the law stated that, "Competitive prototyping makes eminently good sense [and] it is consistent with the DOD's new acquisition strategy that places heavier emphasis on R&D and stresses prototype over production . . ." <sup>7</sup> While the Panel agrees in principle with these concepts, competitive prototyping should not be statutorily-prescribed.

When the Panel initially analyzed § 2365, "Competitive prototype strategy requirement: major defense programs," the section was no longer in effect because its sunset date of September 30, 1991 had passed. The Panel's clear consensus was that it should be deleted from the U.S. Code and not reinstated, even though the Panel was aware that Congress was considering reinstating or amending the statute. The Panel reasoned that the specific requirement for competitive prototyping, with exceptions requiring written Congressional notification, duplicated normal congressional oversight and constituted a requirement for a single preferred approach outside the planning context of the overall acquisition strategy of a major weapons system program. The Panel believed, and still believes, that in an environment of reduced budgets, fewer

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<sup>4</sup>Pub. L. No. 100-456, § 801, 102 Stat. 1918 (1988).

<sup>5</sup>H.R. CONF. REP. No. 446, 100th Cong., 2d Sess. 707 (1988).

<sup>6</sup>H.R. REP. No. 966, 102d Cong., 2d Sess. 802 (1992).

<sup>7</sup>Continued Need for Competitive Prototyping, 1992: Hearings on H.R. 4303 Before the Committee on Armed Services, 102d Cong., 2d Sess. 408 (1992) (statement of Rep. Andy Ireland).

new start programs, and greater reliance on modifications and upgrades of existing systems, it is unlikely that competitive prototyping will be affordable as the legislated norm.

The retention of this statute will also frequently require additional unnecessary paperwork to be generated justifying waivers. The better approach is to allow the Secretary of Defense to address this issue by internal regulation and ensure that competitive prototyping is considered as part of the overall acquisition strategy. Indeed, DOD has regulations which encourage, if not require, competitive prototyping in certain circumstances.<sup>8</sup>

#### **3.1.8.5. Relationship to Objectives**

Repeal of this statute would further the best interests of DOD by affording it greater managerial flexibility in developing its acquisition strategies.

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<sup>8</sup>See, e.g., DOD Directive 5000.2M, Part 12, § 2, para. (b); DOD Directive 5000.2, Part 3 (acquisition strategies must include provisions for competitive prototyping, unless the milestone decision authority approves a waiver and submits a written notification to Congress that competitive prototyping is not practicable).

### **3.1.9. 10 U.S.C. § 2439 (recently changed from §2438)**

#### **Major Programs: Competitive Alternative Sources**

##### **3.1.9.1. Summary of Law**

The current statute requires the Secretary of Defense to prepare an acquisition strategy which addresses the use of competitive alternative sources for the primary system and major subsystems of each major defense acquisition program before the program enters full scale development. The strategy must address the use of competitive alternate sources for the primary system and major subsystems from the beginning of full-scale development through the end of procurement. The requirement for competitive alternative sources is satisfied even though alternative sources do not provide identical system or subsystems, if the systems or subsystems serve similar functions and compete effectively with each other.

##### **3.1.9.2. Background of Law**

Initially, the section had required dual-sources at least from the beginning of full-scale development until the completion of production unless waived by the Secretary. Moreover, it required the Secretary to submit the strategy to Congress. Congress, in passing the statute, desired to ensure alternative sourcing was considered sufficiently early in the acquisition cycle.<sup>1</sup>

Congress replaced the text of the prior statute by Pub. L. No. 101-510.<sup>2</sup> In Pub. L. No. 101-510, Congress removed the preference for dual-sources unless alternative sources reduces technical risk, reduces cost, enables timely system procurement or is otherwise in the national security interest. The intent of the statute is not to mandate that programs justify a dual-source decision before full-scale development, but rather to ensure alternative sourcing was considered sufficiently early in the acquisition cycle when strategy options could be developed. Additionally, the modification eliminated a requirement that the Secretary submit the acquisition strategy to Congress.

In the National Defense Authorization Act for Fiscal Year 1993, this section was redesignated as section 2439 in order to add a section entitled "Major programs: competitive prototyping" as section 2438.<sup>3</sup>

##### **3.1.9.3. Law in Practice**

The latest change eliminates the reporting burden created by the earlier version. However, considering the status of today's defense budget, the appropriateness of legislating Competitive Alternative Sources as a preference is questionable. It is no longer a viable or affordable

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<sup>1</sup>DOD Authorization Act for FY 1986, Pub. L. No. 99-145, § 912 (a)(1), 99 Stat. 685 (1985).

<sup>2</sup>National Defense Authorization Act for FY91, Pub. L. No. 101-510 §, 104 Stat. 1485 (1990).

<sup>3</sup>National Defense Authorization Act for FY93, Pub. L. No. 102-484, § 821(a), 106 Stat. 2459 (1992).

program. The Services, for affordability considerations, have eliminated most of their second sources. Moreover, the money and quantities needed to fund and justify using competitive alternative sources are generally not available now and are not likely to be available in the foreseeable future. Finally, as the Deputy Director, Acquisition Policy and Program Integration, has stated, DOD policy already calls for the consideration of competitive alternative sources sufficiently early in the acquisition cycle.<sup>4</sup> Accordingly, this provision is not necessary.

#### **3.1.9.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this competitive alternative sources requirement. Acquisition strategies are more appropriately left to implementation by regulation.

#### **3.1.9.5. Relationship to Objectives**

Repeal of this statute will promote the best interests of DOD by affording the Department greater managerial flexibility in developing its acquisition strategies.

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<sup>4</sup>Memorandum from Mr. Gene H. Porter, Principal Deputy Director, Acquisition Policy & Program Integration, DOD, to Advisory Panel, dated 9 Nov. 1992.

### **3.1.10. Public Law Number 101-510 § 809**

#### **Major Defense Acquisition Pilot Program**

##### **3.1.10.1. Summary of Law**

This statute permits the Secretary of Defense to conduct a pilot program for the purpose of determining the potential for increasing the efficiency and effectiveness of the acquisition process in major defense acquisition programs. Certain programs are to be designated as part of the pilot program in authorizing legislation.

The statute requires the Secretary to conduct the program in accordance with standard commercial, industrial practices and to notify Congress of proposed pilot programs. Additionally, and most importantly, it allows the Secretary, with certain limitations, to waive many provisions of law and regulations which may tend to impede the progress of a program. Finally, it requires that these pilots be designated Defense Enterprise Programs.

##### **3.1.10.2. Background of Law**

This section was originally enacted by the National Defense Authorization Act For Fiscal Year 1991.<sup>1</sup> The language originated in the Senate version of the bill. The Senate Committee Report indicated that the provision was included in response to a Department of Defense request for authority to establish a pilot program for six major programs that could be exempted from any statutory requirements. The Senate Committee rejected the blanket authority sought by the Department and instead permitted such waivers only after the selection of the program, and the list of laws from which exemption is sought, had been previously approved by the Congress.<sup>2</sup> In conference, the House receded with an amendment that the Congress must expressly approve the list of procurement laws from which exemption is sought.<sup>3</sup>

As originally enacted, the Secretary's authority to waive statutory requirements was scheduled to expire September 30, 1992. This expiration would have essentially removed the effectiveness of the Pilot Program. Under the National Defense Authorization Act for Fiscal Year 1993, this authority has been extended through September 30, 1995.<sup>4</sup> In addition, eligibility under the pilot program was extended to non-major acquisition programs.<sup>5</sup>

##### **3.1.10.3. Law in Practice**

The changes noted above to the pilot program were necessary because the Department of Defense has yet to formally submit a list of candidate programs for consideration. However, the

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<sup>1</sup>Pub. L. No. 101-510 § 809, 104 Stat. 1485 (1990).

<sup>2</sup>S. REP. NO. 384, 101st Cong., 2d Sess. 193-194 (1990).

<sup>3</sup>H.R. CONF. REP. NO. 923, 101st Cong., 2d Sess 623 (1990).

<sup>4</sup>National Defense Authorization Act for FY93, Pub. L. No. 102-484, § 811, 106 Stat. 2450 (1992).

<sup>5</sup>*Id.*

Department anticipates submission of the Strategic Sealift, Joint Primary Aircraft Training System, and Close Range Unmanned Aerial Vehicle as potential participants in the pilot program <sup>6</sup>

Additionally, DOD intends to amend DOD Directive 5000.1 by adding a section governing Defense Acquisition Pilot Programs. It is the intent of Office of the Secretary of Defense, however, to limit qualifying programs to those with limited risk and limited development.<sup>7</sup>

#### **3.1.10.4. Recommendation and Justification**

##### **Amend to reflect repeal of § 2436.**

As the pilot program has yet to be implemented by DOD, retention of the statute is recommended until some experience is gained with the program. However, insofar as section (d) of this statute requires the designation of participating programs as Defense Enterprise Programs (under 10 U.S.C. § 2436), that subsection should be repealed. At chapter 3.1.7 of this Report, the Panel recommends the repeal of the Defense Enterprise Program statute. Consequently, this statute should be revised to reflect that change.

#### **3.1.10.5. Relationship to Objectives**

Amendment of this statute will streamline the DOD acquisition process and ensure that related statutes are consistent.

#### **3.1.10.6 Proposed Statute**

##### **Defense Acquisition Pilot Program**

(a) Authority to conduct pilot program. The Secretary of Defense may conduct a pilot program for the purpose of determining the potential for increasing the efficiency and effectiveness of the acquisition process in defense acquisition programs.

(b) Designation of participating programs.

(1) Subject to paragraph (2), the Secretary may designate not more than six defense acquisition programs for participation in the pilot program.

(2) The Secretary may designate for participation in the pilot program only those defense acquisition programs specifically authorized to be so designated in a law authorizing appropriations for such program enacted after the date of the enactment of this Act.

(c) Conduct of pilot program.

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<sup>6</sup>This proposed submission is currently in draft and pending in the Office of the Under Secretary of Defense (Acquisition), Acquisition Policy and Program Integration.

<sup>7</sup>*Id.*

(1) In the case of each defense acquisition program designated for participation in the pilot program, the Secretary--

(A) shall conduct the program in accordance with standard commercial, industrial practices; and

(B) may waive or limit the applicability of any provision of law that is specifically authorized to be waived in the law authorizing appropriations referred to in subsection (b)(2) and that prescribes--

(i) procedures for the procurement of supplies or services;

(ii) a preference or requirement for acquisition from any source or class of sources;

(iii) any requirement related to contractor performance;

(iv) any cost allowability, cost accounting, or auditing requirements; or

(v) any requirement for the management of, testing to be performed under, evaluation of, or reporting on a defense acquisition program.

(2) The waiver authority provided in paragraph (1)(B) does not apply to a provision of law if, as determined by the Secretary--

(A) a purpose of the provision is to ensure the financial integrity of the conduct of a Federal Government program; or

(B) the provision relates to the authority of the Inspector General of the Department of Defense.

~~(d) Designation as defense enterprise program. The Secretary shall designate each participating defense acquisition program as a defense enterprise program under section 2436 of title 10, United States Code. The Secretary may waive the applicability of the requirement of this subsection or any provision of such section 2436 to any such acquisition program if he determines that such a waiver is necessary for the purpose of the pilot program.~~

~~(e) (d) Regulations. (1) Not later than 270 days after the date of the enactment of this Act, the Secretary shall publish proposed regulations to implement this section and an invitation for public comment on the proposed regulations. Not later than one year after such date, the Secretary shall promulgate final regulations to implement this section.~~

(2)(A) The Secretary may not waive or limit the applicability of a law to a defense acquisition program under subsection (c)(1)(B) unless the Secretary first prescribes regulations specifying the waiver or limitation.



**(B) In the case of a waiver or limitation of the applicability of a requirement imposed by a statute, including a regulation prescribed to implement such statutory requirement, the following procedures shall apply:**

**(i) The Secretary shall publish the proposed waiver or limiting regulations and provide an opportunity for public comment on the proposed regulations for a period of not less than 60 days.**

**(ii) If a Federal Government official outside the Department of Defense has the responsibility for implementation of the statute, the Secretary shall consult with such official regarding the proposed waiver or limitation before publishing the proposed waiver or limiting regulations under clause (i).**

**(3) The Secretary may prescribe separate regulations for one or more defense acquisition programs designated by the Secretary for participation in the pilot program.**

**(f) (e) Notification and implementation. (1) The Secretary shall transmit to the congressional defense committees a written notification of each defense acquisition program proposed to be designated by the Secretary for participation in the pilot program.**

**(2) If the Secretary proposes to waive or limit the applicability of any provision of law to a defense acquisition program under the pilot program in accordance with this section, the Secretary shall include in the notification regarding that acquisition program--**

**(A) the provision of law proposed to be waived or limited;**

**(B) the effects of such provision of law on the acquisition, including specific examples;**

**(C) the actions taken to ensure that the waiver or limitation will not reduce the efficiency, integrity, and effectiveness of the acquisition process used for the defense acquisition program; and**

**(D) specific budgetary and personnel savings, if any, that will result from the waiver or limitation.**

**(g) (f) Limitation on waiver authority. The applicability of the following requirements of law may not be waived or limited under subsection (c)(1)(B) with respect to a defense acquisition program:**

**(1) The requirements of this section.**

**(2) The requirements contained in any law enacted on or after the date of the enactment of this Act if that law designates such defense acquisition program as a participant in the pilot**

program, except to the extent that a waiver of such requirement is specifically authorized for such defense acquisition program in a law enacted on or after such date.

~~(h)~~ (g) Termination of authority. The authority to waive or limit the applicability of any law under this section may not be exercised after September 30, 1995.

## **3.2. Testing Statutes**

### **3.2.0. Introduction**

The Panel considered those statutes within Title 10 of the U.S. Code that establish requirements regarding testing of major weapon systems and munitions programs by the DOD. Originally enacted in the mid-1980s, some of these laws, such as those applicable to wheeled or tracked vehicles, were passed by the Congress in response to unique problems involving specific programs. Others, such as the operational test and evaluation requirements, were initiated not only in response to program-specific issues but also as part of a broader effort by the Congress to set forth concrete guidance on testing policy. For example, in 1986, the Armed Services Committee conferees set forth a clear policy statement that "developmental testing and initial operational testing are separate, yet complementary, elements in the acquisition process."<sup>1</sup> Thus, Congress mandated a clear standard on the segregation of operational and developmental testing. That standard has been stringently implemented in laws enacted prohibiting system contractor involvement in operational testing.

Under the current statutory scheme, all major systems, as defined under 10 U.S.C. § 2302(5), must undergo operational test and evaluation before they may proceed beyond low-rate initial production. For major defense acquisition programs under section 2430 of Title 10, that testing must be set forth in a plan that has been approved by the Director of Operational Test and Evaluation of the DOD, who must then evaluate the results of that testing and report on it to the congressional defense committees before low-rate initial production may be exceeded. No system contractor employees may be involved in this testing unless such employees will be involved in system deployment. Further, support contractors may not assist in operational testing if they have previously been involved in system development, production, or developmental testing unless their impartiality has been assured in writing by the Director of Operational Test and Evaluation, or when the contractor functioned solely as a representative of the Federal Government. Finally, operational test and evaluation is defined as field testing, under realistic combat conditions, of weapons, equipment, or munitions or their components to determine their combat effectiveness. Such testing may not be based exclusively on computer modeling or simulation.

With regard to live-fire testing, major defense acquisition programs with user-protection features and major munitions programs may not proceed beyond low-rate initial production until combat-relevant survivability or lethality testing has been completed. This requirement may be waived by the Secretary of Defense if unreasonably expensive or impracticable and if an alternative is available. A specific requirement for such testing exists for wheeled or tracked vehicles. All of these requirements evolved out of the Army's experience with the Bradley Fighting Vehicle in the early 1980s.

All of the above requirements are intended to ensure best-value for the defense procurement dollar, and in particular that no system is fielded without operational effectiveness. Within that process, the highest ethical standards must be maintained.

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<sup>1</sup>H.R. REP. No. 1001, 99th Cong., 2d Sess. 489-99 (1986).

Congress rightly is concerned about past abuses where the Department inappropriately rushed to production without adequate testing. It gives a high priority to its testing requirements, and the testing community is ever vigilant and protective of its statutory mandates. The Program Executive Officers (PEOs) and Program Managers (PMs), on the other hand, in some cases express frustration over the delays and expense imposed on their programs by overzealous testers. Thus, testing is a contentious subject with strong advocates in each camp.

The Panel's analyses and recommendations in this area included extensive comments by and discussion with the testing community within the DOD.<sup>2</sup> In addition, the Panel received a survey of comments from PEOs and PMs within the Department of the Army. These latter comments were especially useful in obtaining a balance between the concerns of the testing community for thoroughness and the concerns of the field for flexibility in program management. The Panel was asked to consider the following:

- The need for greater contractor involvement in initial operational test and evaluation, from both the system and support contractor.
- The need to modify the requirement for full-up vulnerability testing to permit component, subsystem and subassembly testing.
- The need to extend the authority to waive vulnerability/lethality testing past Milestone II.
- The desirability of greater flexibility in the application of the operational test and evaluation requirement; the need to balance the benefits of such testing against its cost and time impact on the acquisition process; and the desire to include program risk or urgency in that balancing process.
- The benefits of combined developmental and operational testing, including greater reliance on technical test data where appropriate.
- The allowability of test costs.
- The need for greater PM/PEO involvement in decisions such as Operational Testing and low-rate initial production quantities, ultimate test scenarios and failure determination timing and analysis.
- The need for greater use of computer simulation and modeling.

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<sup>2</sup>The individual analyses that follow include comments from the following offices: Office of the Secretary of Defense (Operational Test and Evaluation); Office of the Under Secretary of Defense for Acquisition (Developmental Test and Evaluation); Department of the Air Force (Test and Evaluation); Deputy Under Secretary of the Army (Operations Research); Department of the Navy (Test, Evaluation and Technology Requirements) and Aerospace Industries Association (Flight Test Group).

- The need for greater clarity as to what types of systems are covered programs for both vulnerability/lethality and operational testing; and greater clarity as to when interim systems require testing independent of testing of subsequent programs into which those systems are integrated.

The Panel concluded that a consolidation of the four current testing statutes and elimination of statutory detail would further its statutory streamlining mandate and allow the flexibility desired by the testing and acquisition communities. The Panel developed a dual proposal in the testing area. Initially, the Panel recommends the repeal of the four testing statutes within Title 10 in their entirety and the enactment of a streamlined testing statute. That statute is set forth immediately following this introduction. This streamlined statute sets forth the basic rule that both vulnerability/lethality and operational testing must occur before proceeding beyond low-rate initial production. The proposed statute adopts extant definitions of those terms. The statute then vests discretion in the Secretary of Defense to implement the required testing. Broad guidelines in specific areas -- such as contractor involvement and authority to modify Operational Testing requirements -- are provided. These guidelines state general principles, but specific implementation is left to the Secretary of Defense.

The Panel recommends enactment of such a statute because it would genuinely promote various of the goals and objectives of the Panel. It would eliminate duplicative, unnecessary, oversight in these four testing statutes, such as excessive definitional and reporting detail. It would afford the Department greater flexibility to exercise sound managerial discretion in testing application and implementation. It would allow greater flexibility for participation of system contractors in Operational Testing where such involvement is necessary and prudent. The Panel achieved a high level of consensus within the DOD testing community in support of the proposed, streamlined statute.<sup>3</sup>

The increased flexibility provided by the streamlined testing statute addresses many of the issues raised by the PM/PEO community. Authority to modify full Operational Testing requirements would provide management discretion to both the tester and the PM/PEO to craft a test plan that can more accurately reflect individual program risk, resources, schedule and needs.

The Panel recognized, however, that in view of the sensitivity and concern in the Congress for adequate testing, there may be reluctance to fully adopt such a streamlined approach. Accordingly, at a minimum, the Panel recommends the Congress adopt certain specific, statutory amendments that are set forth in the analysis for each individual statute within this subchapter.

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<sup>3</sup>Memorandum from Howard W. Leaf, Lt. Gen, USAF (Ret.), Director, Test and Evaluation, Department of the Air Force to DOD Advisory Panel, dated 11 Dec. 1992, ("agree in principle with the Advisory Panel's work.... The proposed draft [streamlined statute] does a credible job remedying some of the hard issues that hamper effective execution of test and evaluation"); datafax transmission from Col. Chip Ferguson, for Mr. Charles E. Adolph, Director, Test and Evaluation, Office of the Under Secretary of Defense for Acquisition, to Ms. Theresa Squillacote, dated 30 Oct. 1992; Mr. Walter Hollis, Deputy Under Secretary of the Army (Operation Research), to DOD Advisory Panel, dated 30 Oct. 1992, ("agree in principle that objective of the Advisory Panel is best served by developing a single, streamlined statute....")

Specifically, the Panel recommends repeal of 10 U.S.C. § 2362 as subsumed by the requirements of 10 U.S.C. § 2366. With regard to the live-fire requirements of section 2366, the Panel recommends substitution of the phrase "vulnerability" for "survivability" throughout the statute. The former term more accurately reflects the type of testing mandated by the law. The Panel also recommends elimination of the requirement for "full-up" vulnerability testing. As a mandatory requirement, that testing can add considerable time and expense to certain, high-value systems.

The Panel recommends amendments to the operational test and evaluation (OT&E) requirements of 10 U.S.C. § 2399, including authority to modify dedicated OT&E requirements for certain types of programs and amendment to permit greater system and support contractor involvement in OT&E logistic support. Finally, the Panel recommends that 10 U.S.C. § 2400 be amended to add strategic defense missiles as a low density production base item, and to make the Test and Evaluation Master Plan discretionary for low density items. The supporting rationale for each of these proposed amendments is set forth within the individual analyses.

### **3.2.0.1. Draft Streamlined Testing Statute**

(a) Policy-- Production of a major system under section 2302(3) of this title that is designed for use in combat may not proceed beyond low-rate initial production until the Secretary of Defense has conducted operational test and evaluation and realistic vulnerability or lethality testing and the requirements set forth below have been met.

#### **(b) Definitions--**

(1) Low-rate initial production is the minimum quantity necessary to provide production-configured or representative articles for operational tests, to establish an initial production base, and that will permit an orderly increase in the production rate to full-rate production of the system after successful completion of operational testing. The Secretary of Defense shall issue regulations formulating specific low-rate initial production standards for those programs with low density production bases, such as naval vessels, military satellites and strategic defense missiles.

(2) Operational test and evaluation as used herein has the meaning given that term in section 138(a)(2)(A) of this title. For purposes of this section, operational evaluation may be based in part, but not exclusively, on:

- A) computer modeling;
- B) simulation;
- C) an analysis of system requirements, engineering proposals, design specifications, or any other information contained in program documents.

#### **(3) Realistic vulnerability testing--**

A) Realistic vulnerability testing means testing for vulnerability of the system in combat by firing munitions likely to be encountered in combat, or munitions similar thereto, at the system configured for combat, including all hazardous or dangerous materials that would normally be on board in combat.

B) Such testing shall focus on potential user casualties as well as combat performance given the susceptibility to attack.

C) In the case of a high value system, in lieu of a complete system configured for combat, vulnerability testing may be conducted on components, subsystems and subassemblies or realistic replicas or surrogates, and through the design analyses, modeling and simulation, and analysis of combat data.

(4) Realistic lethality testing means testing for lethality by firing the munition or missile concerned at appropriate targets configured for combat.

(c) Regulations--The Secretary of Defense shall promulgate regulations governing vulnerability and lethality testing, operational test and evaluation and low-rate initial production. The Director

of Operational Test and Evaluation of the DOD shall approve the adequacy of plans for operational test and evaluation as required by such regulations.

**(d) Impartial contractor support of testing--**

(1) No person employed by a contractor for the system being tested, or entity affiliated with such contractor, may be involved in operational test and evaluation for that system except as authorized by the Secretary of Defense pursuant to paragraph (2), below.

(2) The Secretary of Defense shall establish regulations regarding involvement by employees of system contractors, or of any entities affiliated with such contractors, in operational test and evaluation analytic and logistic support. Such regulations shall ensure the impartiality of that contractor and the integrity of the testing and evaluation process. In such cases, the operational test and evaluation plan must identify the specific involvement of the system contractor or affiliated entity in the operational test and evaluation process and the steps taken to ensure that contractor's impartiality and confidentiality.

(3) With respect to service contractors that are not entities affiliated with system contractors and that are otherwise supporting operational test and evaluation, the Secretary of Defense shall require such contractors to establish procedures to ensure that test and evaluation data made available to them is treated as government sensitive information. Access to this information by contractor employees shall be limited and available only under such approved procedures.

**(e) Vulnerability and Lethality Testing--**

(1) Realistic vulnerability testing shall be conducted for those major systems as defined in 2302(3) of this title, or major product improvements thereto, that include features designed to protect users in combat. Modifications or upgrades not significantly affecting the vulnerability of a system need not be tested for vulnerability.

(2) Lethality testing shall be conducted on munition or missile programs that are major systems as defined in 2302(3) of this title. Modifications or upgrades not significantly affecting the lethality of a system need not be tested for lethality.

**(f) Authority to Modify--** The Secretary of Defense may modify the requirements for vulnerability and lethality testing, or for initial operational test and evaluation, where the Secretary,

(1) determines that such testing would be unreasonably expensive or impractical, cause unwarranted delay or be unnecessary because of the acquisition strategy for that system, and,

(2) reports to Congress on the actions taken to ensure that the system will be operationally effective and suitable when it is introduced into the field.

**(g) Reporting--**



(1) After completion of operational test and evaluation for a major defense acquisition program as defined in section 2430 of this title, the Director of Operational Test and Evaluation shall analyze all test results and report thereon to the Secretary of Defense, the Under Secretary of Defense for Acquisition and the Armed Services Committees of Congress. Production may not proceed beyond low-rate initial production until such reports have been submitted by the Director of Operational Test and Evaluation.

(2) After completion of required vulnerability and lethality testing for a major defense acquisition program, the Secretary of Defense shall submit a report on such testing to the Armed Services Committees of Congress describing the results of the vulnerability or lethality testing and assessing the testing overall.

### 3.2.1. 10 U.S.C. § 2362

#### **Testing Requirements: wheeled or tracked vehicles**

##### **3.2.1.1. Summary of the Law**

This section provides that the Secretary of Defense may not contract for a major vehicle program until testing the vulnerability of the vehicle through a Joint Live Fire Testing Program has occurred. The results of that test, including a description of the firing parameters used, the pass/fail results and the potential shortcoming revealed by the test and specified cost analysis, shall be submitted to the Congress. A report on the estimated cost and schedule of the testing shall also be submitted to Congress in the Test and Evaluation Master Plan.

The section applies to any major defense acquisition program for the acquisition of any newly developed combat wheeled or tracked armored vehicles or existing such vehicles with significant new survivability modifications.

##### **3.2.1.2. Background of the Law**

This law was enacted by the DOD Authorization Act for Fiscal Year 1986.<sup>1</sup> It was introduced into the House version of that bill by an amendment made to the House bill during floor debates.<sup>2</sup> It was intended that such testing would be comparable to the Joint Live Fire Testing Program then underway on the Bradley Fighting Vehicle. The amendment sponsor, when introducing the amendment, asserted that current testing of armored vehicles was based on computer analysis that was costly, time-consuming, and often inaccurate. In comparison, combat-relevant testing was deemed not only less expensive but also more likely to produce test results reflective of actual combat performance. The amendment sponsor also expressly stated that: "A primary requirement of this amendment is that testing must be completed prior to or simultaneously with the first request for production funds."<sup>3</sup>

##### **3.2.1.3. Law in Practice**

This statute is implemented by DOD Instruction 5000.2M Part 8, Test and Evaluation at paragraph 3(b) (February 23, 1991). The regulation essentially reiterates the pertinent requirements of the statute.

Generally, there was consensus among all those surveyed that realistic survivability analysis and vulnerability testing remained a valid requirement.<sup>4</sup> With the exception of the Army,

<sup>1</sup>Pub. L. No. 99-145, §1239(a)(1), 99 Stat. 599 (1985).

<sup>2</sup>131 Cong. Rec. 5351 (March 19, 1985) (remarks of Rep. Levine).

<sup>3</sup>*Id.*

<sup>4</sup>Comments were obtained from the following offices: Office of the Secretary of Defense (Operational Test and Evaluation); Office of the Under Secretary of Defense for Acquisition (Developmental Test and Evaluation); Department of the Air Force (Test and Evaluation), Deputy Under Secretary of the Army (Operations Research);

however, comments received in this area were directed specifically at the broader requirements of 10 U.S.C. § 2366.

With respect to this statute, the Army noted:

This statute should be combined with 10 U.S.C. § 2366 into a single statute since both of these existing statutes mandate system live-fire testing prior to the production authorization and expenditure of procurement funds. The basic intent of both statutes is to assure proof of realistic system survivability under combat conditions prior to extensive procurement commitments.<sup>5</sup>

#### **3.2.1.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that 10 U.S.C. § 2362 be repealed in its entirety. That recommendation is based on the conclusion that all of the essential requirements of this statute are covered in 10 U.S.C. § 2366. Specifically, the Panel notes as follows:

- **Covered Programs:**

- There is no program subject to live-fire testing under this statute that would not also be subject to the testing requirements of 10 U.S.C. § 2366. This statute applies to major vehicle programs, and is defined to mean a major defense acquisition program for new combat wheeled or tracked armored vehicles or modifications thereto. "Major defense acquisition program" is defined as a program which is subject to the SAR reporting requirements in 10 U.S.C. § 2432. Therefore, the term as used in this statute applies to major defense acquisition programs as defined at 10 U.S.C. § 2430.
- Under 10 U.S.C. § 2366, covered systems includes vehicles or weapon platforms with features designed to protect users in combat that are also major systems under 10 U.S.C. § 2302(5). All combat wheeled or tracked armored vehicles are vehicles with features designed to protect users in combat. In addition, the lesser dollar thresholds in 10 U.S.C. § 2302(5) would clearly encompass those 10 U.S.C. § 2430 major programs subject to testing under the instant statute.

- **Required Testing:**

- There does not appear to be any type of testing required under this statute that would not also be required under 10 U.S.C. § 2366. This statute defines testing to include

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Department of the Navy (Test, Evaluation and Technology Requirements) and Aerospace Industries Association (Flight Test Group)

<sup>5</sup>Letter from Mr. Walter Hollis, Deputy Under Secretary of the Army, (Operations Research), to Mr. Anthony Gamboa, Deputy General Counsel (Acquisition), Department of the Army, dated 5 June 1992.

testing the vulnerability of the vehicle against the most capable weapon that is likely to be a combat threat to the vehicle and against which the vehicle is designed to survive. Survivability testing as currently described in 10 U.S.C. § 2366 means testing for vulnerability of the system in combat by firing munitions likely to be encountered in combat at the system configured for combat, with the primary emphasis on testing vulnerability with respect to potential user casualties and taking into equal consideration the susceptibility to attack and combat performance of the system. The Panel concludes that these testing definitions are functionally equivalent.<sup>6</sup>

- **Differences:**

- The two statutes differ in the reporting requirements and in waiver authority. The instant statute sets forth detailed information required to be submitted to the defense committees with regard to each program tested. The report required by 10 U.S.C. § 2366 requires that the Secretary of Defense describe the test results and assess the overall testing. The latter version adequately states the reporting requirement and avoids the burden present in the more detailed reporting requirement of the instant statute.
- The Secretary of Defense waiver authority in 10 U.S.C. § 2366 is not present in this statute. However, the same considerations that led to enactment of this authority in 10 U.S.C. § 2366: that in some cases vulnerability testing is overly expensive or otherwise not practical -- warrant applying the same waiver authority to the test requirements of this statute.

Based on the above, the Panel concludes that this statute is subsumed by the requirements of 10 U.S.C. § 2366 and recommends that it be repealed in its entirety.

### **3.2.1.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process by removing duplicative legislation.

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<sup>6</sup>In the analysis for Section 2366, the Panel proposes to insert the phrase "vulnerability" for "survivability" where it appears in the text in order to more accurately define the type of testing mandated by the statute. See Ch. 3.2.2 of this Report.

## **3.2.2. 10 U.S.C. § 2366**

### **Major Systems and Munitions Programs; Survivability and Lethality Testing Required Before Full-Scale Production**

#### **3.2.2.1. Summary of the Law**

This section provides that major defense acquisition programs with user protection features, and major munitions programs, may not proceed beyond low-rate initial production until combat-relevant survivability or lethality testing has been completed. Such tests must be carried out sufficiently early in the developmental phase to permit any design deficiency to be corrected before proceeding beyond low-rate initial production. The testing costs are to be covered by program funds. However, the Secretary of Defense may waive the testing requirement upon certification to Congress that live-fire testing would be unreasonably expensive and impracticable and upon offering an alternative to live-fire testing.

#### **3.2.2.2. Background of the Law**

This section was enacted by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> The language originated in the House version of the bill and was largely incorporated in the final version of the bill. The Conference Report stated that survivability and lethality testing should be carried out early enough to allow design deficiencies to be corrected prior to full-scale production.<sup>2</sup> The conferees also directed DOD to conduct a full-scale review of DOD testing policy, including a review of the relationship between developmental and operational testing.<sup>3</sup>

The National Defense Authorization Act for Fiscal Years 1988 and 1989 added the limitation on low-rate initial production; modified the limitation on contractor involvement in operational testing to permit such involvement if the contractor will operate the system during combat deployment; and modified the definition of realistic survivability testing.<sup>4</sup> The House version of the bill specifically required the Secretary of Defense to designate a civilian official in DOD to be responsible for vulnerability and lethality testing. The Senate version had proposed repealing this section in its entirety. The Senate ultimately receded to the House version with modifications. The conferees stated their belief that:

Live-fire testing is a valuable tool for determining the inherent strengths and weaknesses of adversary, U.S. and allied weapon systems. The conferees intend that the Secretary of Defense implement this section in a manner which encourages the conduct of full-up vulnerability and lethality tests under realistic combat

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<sup>1</sup>Pub. L. No. 99-500, § 101(c), 100 Stat. 3341 (1986)(Identical legislation omitted).

<sup>2</sup>H.R. CONF. REP No. 1001, 99th Cong., 2d Sess. 498-99 (1986).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 100-180, § 802, 101 Stat. 1123 (1987).

conditions, first at the sub-scale level as sub-scale systems are developed, and later at the full-scale level mandated in this legislation. . . . The conferees intend this type of developmental testing to be performed as part of the responsibilities of the Under Secretary of Defense for Acquisition.<sup>5</sup>

The same bill also included a provision permitting the Secretary of Defense to reprogram up to one third of one percent of total program procurement funds for the purpose of conducting necessary vulnerability/lethality live fire tests and evaluations.

### 3.2.2.3. Law in Practice

This section is implemented in part 8 of DOD Instruction 5000.2, Defense Acquisition Management Policies and Procedures, and parts 7, 10 and 11 of DOD 5000.2M, Defense Acquisition Management Documentation and Reports. Part 7 of DOD 5000.2M sets forth the live-fire testing elements required to be present in the overall testing plan. Part 10 of that Instruction sets forth the requirements of the separate Live Fire Test Report, and essentially reiterates the pertinent requirements of the statute. Part 11 of the same Instruction implements the authority to waive Live Fire testing requirements, but, other than to repeat the statutory waiver standard (unreasonably expensive and impractical) does not provide additional guidance on what types of systems may warrant waiver.

Virtually all of the parties surveyed concurred that the type of testing required by this statute remained relevant.<sup>6</sup> The Army noted that with increasingly sophisticated threats and with the increased accuracy expected from our weaponry, that survivability and lethality testing is more relevant than ever before.<sup>7</sup> The Navy noted that this type of testing would generally be conducted regardless of whether a such statutory requirement existed.<sup>8</sup>

However, the services and OSD offices also agreed that the statute should be amended to: (1) speak in terms of "vulnerability" testing, instead of "survivability" testing; (2) permit waiver authority after Milestone II, and (3) permit vulnerability testing on components, subsystems or subassemblies.<sup>9</sup>

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<sup>5</sup>H. R. CONF. REP No. 58, 100th Cong., 1st Sess. 655 (1987).

<sup>6</sup>Comments were obtained from the following offices: Office of the Secretary of Defense (Operational Test and Evaluation); Office of the Under Secretary of Defense for Acquisition (Developmental Test and Evaluation); Department of the Air Force (Test and Evaluation); Deputy Under Secretary of the Army (Operations Research); Department of the Navy (Test, Evaluation and Technology Requirements) and Aerospace Industries Association (Flight Test Group).

<sup>7</sup>Letter from Mr. Walter W. Hollis, Deputy Under Secretary of the Army, Department of the Army (Operations Research), to Mr. Anthony Gamboa, Deputy General Counsel (Acquisition), Department of the Army, dated 14 Aug. 1992.

<sup>8</sup>Letter from RADM W. P. Houley, Director of Test and Evaluation and Technical Requirements, Department of the Navy, to DOD Advisory Panel, dated 21 Aug. 1992.

<sup>9</sup>Memorandum from Mr. Charles E. Adolph, Director, Test and Evaluation, Office of the Under Secretary of Defense, to Acquisition Law Task Force, (undated), and Memorandum from Mr. Walter Hollis, Deputy Undersecretary of the Army (Operations Research), RADM W.P. Houley, Deputy Director, Test & Evaluation and

### 3.2.2.4. Recommendation and Justification

**Repeal, or amend to eliminate full-up testing requirements, to change 'Survivability' to 'Vulnerability,' and to extend Waiver Authority.**

The Panel's primary recommendation is to repeal this statute in its entirety, and enact the streamlined statute. In the alternative, the Panel recommends that this statute be retained but amended as follows:

#### I.

#### **Eliminate Full-Up Testing Requirement**

This statute should be amended at subsection (e)(3) to read:

The term '~~realistic survivability~~ vulnerability testing' means, in the case of a covered system (or a covered product improvement program for a covered system), testing for vulnerability of the system in combat by firing munitions likely to be encountered in combat (or munitions with a capability similar to such munitions) at the system configured for combat, or in the case of high value systems, at components, subsystems, and subassemblies or realistic replicas or surrogates, and through the design analyses, modeling and simulation, and analysis of combat data, with the primary emphasis on testing vulnerability with respect to potential user casualties and taking into equal consideration the susceptibility to attack and combat performance of the system.

All of the parties surveyed - the services, OSD, the PEOs/PMs and industry associations -- were unanimous in the belief that full-up testing, as currently required by the statute, can add considerable time and expense to the program and product improvements. It was noted that testing system components would permit design changes to be made early in the development process at minimum cost before the system design is complete. As one Army PEO stated:

When survivability testing is justified, it is not reasonable to require vehicles/weapon systems to be fully combat equipped. There should be some trade-off, supported by simulation or analysis, between the cost . . . and the benefits to be gained from live fire testing. Considering the cost and complexity of many of today's electronics/computer subsystems it would appear that damage assessment could be logically made without actually requiring these subsystems to be destroyed, especially in the early stages of

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Technology, Department of the Navy, and Mr. Howard W. Leaf, Lt Gen, USAF (Ret), Director, Test and Evaluation, to Director, Test and Evaluation, Office of the Secretary of Defense, dated 6 Aug. 1992.

program development when assets for training and performance, RAM and environmental testing are at a minimum. Again, greater use of computer simulation should be used to supplement operational test data to provide comprehensive assessments. The current waiver authority is too high and the process too time intensive, leading organizations to 'cave-in' to unreasonable requirements, rather than attempting to defend why testing is unreasonably expensive and impractical.<sup>10</sup>

Vulnerability at the subsystem level was deemed particularly appropriate for high-value systems, including those with long lead issues.

The Panel concurs in the position that full-up testing can add unnecessary time and expense. While component testing could arguably be achieved through the waiver authority set forth in this section, that authority does not appear adequate to meet the needs described herein. The process of obtaining such a waiver is cumbersome and waivers are rarely requested. Indeed, the OSD Live-Fire Office has recommended such a waiver on only two occasions since the law was enacted.<sup>11</sup> In any event, the Panel believes that it is preferable to state explicitly in the statute the viability of component testing in this area.

The Panel would make component testing applicable to "high value" systems without attempting to further define that term. The Panel believes that, rather than adopting a statutory standard, the phrase should be defined through implementing regulations. This would preserve the flexibility to, for example, maintain differing standards depending on the type of system and costs involved.

In so recommending, the Panel acknowledges the recent report of the National Research Council's Committee on Weapon Effects on Airborne Systems.<sup>12</sup> That Report concluded that a waiver should be required to omit any full-scale, full-up tests. However, the National Research Council Report was issued near the completion of the Panel's Report. Therefore, the Panel has not had the opportunity to fully consider the National Research Council's Report.<sup>13</sup>

## II.

### Extend Waiver Authority

The Panel would amend subsection (c)(1) to read:

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<sup>10</sup>Letter from Brig Gen Robert A. Drolet, Air Defense, Department of the Army, to Mr. Anthony Gamboa, Deputy General Counsel (Acquisition), Department of the Army, dated 8 Apr. 1992.

<sup>11</sup>Memorandum from Mr. Jim O'Bryon, Deputy Director, Test and Evaluation/Live-Fire Testing, Office of the Under Secretary of Defense (Acquisition), to Ms. Theresa Squillacote, dated 10 July 1992.

<sup>12</sup>National Research Council, Vulnerability Assessment of Aircraft (National Academy Press, Washington, D.C. 1993).

<sup>13</sup>*Id.*



(1) the Secretary of Defense may waive the application of the ~~survivability~~ vulnerability and lethality tests of this section to a covered system, munitions program, missile program or covered product improvement program if the Secretary, ~~before the system enters full-scale development~~ certifies to Congress that live-fire testing of such system or program would be unreasonably expensive and impractical. The Secretary shall include with any such certification a report explaining how the Secretary plans to evaluate the vulnerability or the lethality of the system or program and assess possible alternatives to realistic ~~survivability~~ vulnerability testing of the system or program.

This proposed amendment is based on the fact that the cost and complexity of vulnerability testing may not be known until after some systems enter engineering and manufacturing development.

### III.

#### Substitute the term "Vulnerability" for "Survivability"

The Panel recommends that the statute be amended to insert "vulnerability" instead of "survivability" at each point in the statute that the latter phrase appears. In the testing community, the phrase "survivability" encompasses the entire spectrum of considerations from target acquisition, maneuver, jamming and tactics (gained from operational testing generally) to warhead lethality and target vulnerability (gained from live-fire testing specifically). The proposed change makes clear the live fire testing is intended to address specifically the probability of kill given a hit, including both platform and crew vulnerability.

#### 3.2.2.5. Relationship to Objectives

Amendment of this statute as set forth would promote the best interests of DOD while maintaining essential congressional oversight of lethality/vulnerability testing. Amendment would also promote the objectives that acquisition laws should promote the exercise of sound judgement on the part of acquisition personnel.

#### 3.2.2.6. Proposed Statute

**§ 2366. Major systems and munitions programs: survivability and lethality testing required before full-scale production**

##### (a) Requirements--

(1) The Secretary of Defense shall provide that

(A) a covered system may not proceed beyond low-rate initial production until realistic ~~survivability~~ vulnerability testing of the system is completed in accordance with this

section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection; and

(B) a major munitions program or a missile program may not proceed beyond low-rate initial production until realistic lethality testing of the program is completed in accordance with this section and the report required by subsection (d) with respect to that testing is submitted in accordance with that subsection.

(2) The Secretary of Defense shall provide that a covered product improvement program may not proceed beyond low-rate initial production until

(A) in the case of a product improvement to a covered system, realistic ~~survivability- vulnerability~~ testing is completed in accordance with this section; and

(B) in the case of a product improvement to a major munitions program or a missile program, realistic lethality testing is completed in accordance with this section.

(b) Test Guidelines--

(1) ~~Survivability-Vulnerability~~ and lethality tests required under subsection (a) shall be carried out sufficiently early in the development phase of the system or program (including a covered product improvement program) to allow any design deficiency demonstrated by the testing to be corrected in the design of the system, munition, or missile (or in the product modification or upgrade to the system, munition, or missile) before proceeding beyond low-rate initial production.

(2) The costs of all tests required under that subsection shall be paid from funds available for the system being tested.

(c) Waiver Authority--

(1) The Secretary of Defense may waive the application of the ~~survivability-vulnerability~~ and lethality tests of this section to a covered system, munitions program, missile program, or covered product improvement program if the Secretary, ~~before the system enters full-scale development~~, certifies to Congress that live-fire testing of such system or program would be unreasonably expensive and impractical. The Secretary shall include with any such certification a report explaining how the Secretary plans to evaluate the ~~survivability- vulnerability~~ or the lethality of the system or program and assessing possible alternatives to realistic ~~survivability vulnerability~~ testing of the system or program.

(2) In time of war or mobilization, the President may suspend the operation of any provision of this section.

(d) Reporting to Congress-- At the conclusion of ~~survivability vulnerability~~ or lethality testing under subsection (a), the Secretary of Defense shall submit a report on the testing to the defense

~~committees of Congress Committees on Armed Services and on Appropriations of the Senate and the House of Representatives (as defined in section 2362(e)(3) of this title).~~ Each such report shall describe the results of the survivability vulnerability or lethality testing and shall give the Secretary overall assessment of the testing.

(e) Definitions --In this section:

(1) The term "covered system" means a vehicle, weapon platform, or conventional weapon system-

(A) that includes features designed to provide some degree of protection to users in combat; and

(B) that is a major system within the meaning of that term in section 2302(3) of this title.

(2) The term "major munitions program" means-

(A) a munitions program for which more than 1,000,000 rounds are planned to be acquired; or

(B) a conventional munitions program: that is a major system within the meaning of that term in section 2302(3) of this title.

(3) The term "realistic survivability vulnerability testing" means, in the case of a covered system (or a covered product improvement program for a covered system), testing for vulnerability of the system in combat by firing munitions likely to be encountered in combat (or munitions with a capability similar to such munitions) at the system configured for combat, or in the case of high value systems, at components, subsystems, and subassemblies or realistic replicas or surrogates, and through the design analyses, modeling and simulation, and analysis of combat data, with the primary emphasis on testing vulnerability with respect to potential user casualties and taking into equal consideration the susceptibility to attack and combat performance of the system.

(4) The term "realistic lethality testing" means, in the case of a major munitions program or a missile program (or a covered product improvement program for such a program), testing for lethality by firing the munition or missile concerned at appropriate targets configured for combat.

(5) The term "configured for combat," with respect to a weapon, system, platform, or vehicle, means loaded or equipped with all dangerous materials (including all flammables and explosives) that would normally be on board in combat.

(6) The term "covered product improvement program" mean a program under which

(A) a modification or upgrade will be made to a covered system which (as determined by the Secretary of Defense) is likely to affect significantly the survivability vulnerability of such system; or

(B) a modification or upgrade will be made to a major munitions program or a missile program which (as determined by the Secretary of Defense) is likely to affect significantly the lethality of the munition or missile produced under the program.

### **3.2.3. 10 U.S.C. § 2399**

## **Operational test and evaluation of defense acquisition programs**

### **3.2.3.1. Summary of Law**

This section provides that a major defense acquisition program may not proceed beyond low-rate initial production until initial operational test and evaluation is completed. The Office of Operational Test and Evaluation (OT&E) must approve the adequacy of all testing plans, shall analyze testing results, and report thereon to Congress before proceeding with full scale production. The section also provides that the Office of OT&E shall determine the quantity of articles to be procured for major defense acquisition program testing, and the departments may make the same determination for non-major systems. The section further provides that no system contractor employee may be involved in major defense acquisition program operational testing unless such employees will be involved in actual system deployment. Also, no person who participates in system development, production or testing may provide test consulting services unless that person's impartiality is ensured in writing by the Director of OT&E. No contractor involved in development, production or testing may participate in operational testing, data collection, performance assessment or evaluation unless the contractor functioned solely as a Federal government representative. Finally, the section requires an annual report on the status of test activities and provides that operational testing may not be based exclusively on computer analysis.

### **3.2.3.2. Background of Law**

Initial operational test and evaluation requirements were set forth in the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> Those requirements were included in a single section with live fire test requirements. The National Defense Authorization Act for Fiscal Years 1990 and 1991 split off operational test and evaluation requirements into a separate statutory section.<sup>2</sup> The Conference Report stated the conferees' concern was that:

... too many weapon systems are entering full production status before they have successfully completed operational test and evaluation and have their identified design deficiencies corrected. The conference agreement would permit establishment of a single production source, and recognizes the advantages of maintaining this source once started. This recognition is not intended to condone a continuing reapproval of 'low-rate initial production' quantities that eventually may total to a significant percentage of the total planned procurement.<sup>3</sup>

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<sup>1</sup>Pub. L. No. 99-500, § 101(c), 100 Stat. 3341 (1986) (Identical legislation omitted).

<sup>2</sup>Pub. L. No. 101-189, § 802(a)(1), 103 Stat. 1484 (1989).

<sup>3</sup>H.R. CONF. REP. No. 331, 101st Cong., 1st Sess. 601 (1989).

The Conference Report further indicated that the prohibition on contractors who had been involved in developmental testing or involvement in operational testing was intended to avoid any compromise of the integrity of the operational test and evaluation. The conferees stated, however, that "some flexibility in the use of contractor support is required. For instance, operational tests may require contractor support in areas such as instrumentation, data collection and data processing."<sup>4</sup> Therefore, an exception was permitted where the OT&E Director is able to demonstrate support contractor impartiality. No exception, however, was intended that would permit a support contractor to participate in development of criteria for data collection, performance assessment or evaluation where the contractor has been involved in system development.<sup>5</sup>

The National Defense Authorization Act for FY 1993 amended the contractor bar provision at subsection (e) to exempt from that bar contractors that have participated in development, production or testing solely as a representative of the Federal government.<sup>6</sup>

### 3.2.3.3. Law in Practice

This statute is implemented by DOD Instruction 5000.2M, Part 8, Test and Evaluation (February 23, 1991). By the terms of that Instruction, the statute applies to Acquisition Categories I and II. Paragraphs 4 and 5 of part 8 of that Instruction set forth operational testing policies and procedures. The regulation essentially reiterates the pertinent requirements of the statute.

In practice, the most controversial issue regarding this statute is the limitation on contractor involvement in operational testing. The parties surveyed were unanimous in the desire for a more expansive statement of the circumstances in which contractor involvement in operational testing will be permitted.<sup>7</sup> Specifically, all commenters believed that greater system contractor support is necessary in the area of analytical and logistic support. A synopsis of the comments received identified the following types of concerns:

- System contractor support in initial operational testing is beneficial in providing logistic support, test failure analyses and software and instrumentation support that would increase the value of operational testing data generated while maintaining the integrity of test results.

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<sup>4</sup>*Id.* at 600.

<sup>5</sup>*Id.*

<sup>6</sup> Pub. L. No. 102-484, § 819, 106 Stat. 2458 (1992).

<sup>7</sup> Comments were obtained from the following offices: Office of the Secretary of Defense (Operational Test and Evaluation); Office of the Under Secretary of Defense for Acquisition (Developmental Test and Evaluation); Department of the Air Force (Test and Evaluation); Deputy Under Secretary of the Army (Operations Research); Department of the Navy (Test, Evaluation and Technology Requirements) and Aerospace Industries Association (Flight Test Group). In addition, comments were received from a survey of Department of the Army Program Managers and Program Executive Officers.

- As the services down-size and DOD shifts more to a technology strategy, wherein fieldable prototype and advanced technology demonstrators are stressed, system support by the contractor will become even more critical.
- Private sector testing support is cost effective and often not available elsewhere.
- The limitation adds time and cost when outside technical support has to be hired and brought up to speed for data analysis and corrective action.
- The experience level of user personnel in operational testing is low or non-existent and therefore not representative of a normal operational unit where a broad range of experience with a weapon system is commonly found. Thus, judicious use of contractor personnel to broaden the personnel experience base during operational testing would provide a more realistic assessment of the operability of the system.

The Army PEOs and PMs surveyed also raised substantial issues regarding the validity of an absolute requirement for dedicated, sequential initial OT&E for all major systems under section 2302(5) that are designated for use in combat.

- Such testing requires more assets than are necessarily required for reasonable evaluation, adding significantly to overall program costs.
- Operational testing is often conducted on interim systems that are components of major programs. Then operational testing is repeated unnecessarily when such systems are integrated into the major program, where no significant change in subsystem functioning occurs after integration.
- Flexibility should exist for those programs or systems that are clearly low risk. For example, the PEO for Army Combat Support indicated that in the Non-Developmental Item (NDI) area, the Government is competing for contractor interest with many commercial ventures that do not have similar restrictions. In such cases, the OT/LRIP restrictions require a stretch out of monthly production deliveries, resulting in an artificial ramp-up that significantly increases unit costs.

- Operational testing, in some programs, accumulates too little data to be statistically relevant.<sup>8</sup>

Finally, the Panel notes that the Departments of the Army, Navy and Air Force had jointly proposed that the statute be modified to permit system contractors to be involved in OT&E in the five following instances:<sup>9</sup>

- Maintenance and support actions of the same type that the system contractor would be expected to perform as part of interim contractor support or contractor logistics support when the system is deployed in combat.
- Conducting and reporting analyses of test failures to assist in isolating causes of failure (but excluding participation in data scoring and assessment conferences).
- Providing and operating system-unique test equipment, test beds, and test facilities which may include software, software support packages, instrumentation and instrumentation support.
- Providing logistics support and training as required in the event that such services have not yet been developed and are not available from the military department or Defense Agency having responsibility for conducting or supporting the operational test and evaluation.
- Providing data generated prior to the conduct of the operational test, if deemed appropriate and validated by the independent operational test agency in order to ensure that critical issues are sufficiently and adequately addressed.

#### **3.2.3.4. Recommendation and Justification**

##### **Repeal**

The Panel's primary recommendation is to repeal this statute in its entirety and enact the streamlined statute. In the alternative, the Panel recommends that this statute be retained but amended as follows:

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<sup>8</sup>These issues are synopsized from all of the comments received. See Memoranda from the following Department of the Army Program Executive Offices to the Deputy General Counsel (Acquisition), Department of the Army: Maj Gen Dewitt T. Irby, Jr., Aviation, dated 20 Apr. 1992; Mr. Dale G. Adams, Armaments, dated 10 Apr. 1992; Brig Gen Robert A. Drolet, Air Defense, dated 8 Apr. 1992; Ms. Mary D. Kelly, Plans and Programs, STAMIS, dated 23 Mar. 1992; Brig Gen Otto Guenther, Communications Systems, dated 20 Apr. 1992; Maj Gen William Harmon, Command and Control Systems, dated 10 Apr. 1992; and Lt Gen Robert Hammond, Strategic Defense, dated 13 Apr. 1992.

<sup>9</sup>Memorandum from Howard W Leaf, Lt Gen, USAF (Ret), Director, Test and Evaluation, Department of the Air Force, to DOD Advisory Panel, dated 25 Sep. 1992.



## I

### **Amend Statute to Permit Modification of Mandatory Operational Testing Requirement.**

The Panel recommends that this statute be amended at subsection (b) to add the following language:

(6) The Secretary of Defense may modify the requirements for initial operational test and evaluation, set forth above, where the Secretary:

(A) certifies to Congress that such testing would be unreasonably expensive and impractical, cause unwarranted delay or be unnecessary because of the acquisition strategy for that system; and

(B) describes the actions taken to ensure that the system will be operationally effective and suitable when it is introduced into the field.

The Panel bases this recommendation on extensive comments received from the field that an absolute requirement for dedicated, sequential operational testing can, in certain cases, significantly hinder the acquisition process. In those cases that can be legitimately identified as low risk, such as some NDI purchases, operational testing may add significant cost to the program. Similarly, in programs for which there is an urgency of need and/or limited quantities, such as the Army Special Operations aircraft program, full-scale operational testing may be unwarranted. The Panel believes that the statute should at least provide some flexibility for a cost-risk analysis of the benefits of operational testing in some cases. For programs where operational testing would interrupt an ongoing production process (where, for instance, the covered program is a modification), the increase in unit cost may simply outweigh the relative benefit of full-scale operational testing.

In addition, the proposed language, at subsection (b)(6), would also ensure that the credibility of the process is maintained along with accountability to the Congress. Thus, authority to modify would not result in a total absence of congressional oversight, but rather in a more tailored oversight system.

## II

### **Amend to Permit Greater System Contractor Involvement in Operational Testing Logistic and Other Support Functions**

The Panel recommends that this statute be amended at subsection (d) as follows:

(d) IMPARTIALITY OF CONTRACTOR TESTING PERSONNEL-- In the case of a major defense acquisition program (as defined in subsection (a)(2), no person employed by the contractor for the system being tested may be involved in the conduct of the operational test and evaluation required under subsection (a)(1). The limitation in the preceding sentence does not apply

(1) to the extent that the Secretary of Defense plans for persons employed by that contractor to be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat or

(2) to the extent that the Secretary of Defense has authorized by regulation involvement by system contractor employees in operational test and evaluation analytic and logistic support. Such regulations must ensure the impartiality of that contractor and the integrity of the testing and evaluation process. In such cases, the operational test and evaluation plan must identify the specific involvement of that contractor in the operational test and evaluation process and the steps taken to ensure contractor impartiality.

The Panel recommends the above change in order to permit greater system contractor involvement in operational testing to address the concerns raised by the acquisition and testing communities as set forth above, and specifically the need for greater system contractor involvement in test analytic and logistic support. The Panel believes the amendment adequately addresses the original congressional concerns underlying this statute regarding instances of contractor involvement in operational testing that clearly compromised the testing process. The proposed amendment requires the Secretary of Defense to specifically authorize the types of circumstances when system contractor involvement will be permitted and to ensure that it will not compromise the integrity of the testing process. Such involvement must also be set forth with specificity in the operational test plan.

Rather than make the law too specific, the Panel elected instead to provide in the statute for the Secretary of Defense to promulgate via regulation any specific provisions for system contractor involvement in OT&E while placing adequate controls on their involvement. The Panel believes this can be effectively accomplished while preserving the current intent of the law.

### III

#### **Amend Statute to Permit Greater Support/Nonsystem Contractor Involvement in Operational Testing.**

The Panel further recommends that subsection (e) be amended as follows:

(e) IMPARTIAL CONTRACTED ADVISORY AND ASSISTANCE SERVICES.-

(1) The Director may not contract with any person for advisory and assistance services with regard to the test and evaluation of a system if that person participated in (or is participating in) the development, or production, or testing of such system for a military department or Defense Agency (or for another contractor of the Department of Defense).

\*\*\*\*\*

(3)(A) A contractor that has participated in (or is participating in) the development, or production, or testing of a system for a military department or Defense Agency (or for another contractor of the Department of Defense) may not be involved (in any way) in the establishment of criteria for data collection, performance assessment, or evaluation activities for the operational test and evaluation.

(B) The limitation in subparagraph (A) does not apply to a contractor that has participated in such development, or production, or testing solely as a representative of the Federal Government.

This amendment preserves the general limitation on support contractor involvement in operational testing activities where that contractor has previously supported system development or production and the contractor was not acting solely as a representative of the Federal Government. Thus, the congressional goal that contractors who supported system development and production be barred from subsequent operational testing because they may not have the requisite objectivity is maintained by this proposed amendment. Elimination of the phrase "testing" will, however, permit support contractor involvement in operational testing even where that contractor has previously supported developmental testing. In such a situation, the potential conflict of interest is not present. And, as the above comments demonstrate, greater support contractor involvement in operational testing data collection and other types of testing support can provide much greater efficiency in the overall testing process.

With respect to both of these proposed contractor involvement amendments, the Panel notes that when this legislation was enacted, Congress itself recognized that "some flexibility in the use of contractor support is required. For instance, operational tests may require contractor support in areas such as instrumentation, data collection and data processing."<sup>10</sup> Thus, these proposed amendments do not undermine the congressional intent underlying this statute.

### **3.2.3.5. Relationship to Objectives**

If repeal is not accepted, amendment of this statute as proposed will promote the best interests of DOD while preserving valid congressional oversight provisions.

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<sup>10</sup>H.R. CONF. REP. No. 331, 101st Cong., 2d Sess. 600 (1989).

### **3.2.3.6. Proposed Statute**

#### **§ 2399. Operational test and evaluation of defense acquisition programs.**

##### **(a) Condition for Proceeding Beyond Low-Rate Initial Production--**

(1) The Secretary of Defense shall provide that a major defense acquisition program may not proceed beyond low-rate initial production until initial operational test and evaluation of the program is completed.

(2) In this subsection, the term "major defense acquisition program" means

(A) a conventional weapons system that is a major system within the meaning of that term in section 2302(5)(3) of this title; and

(B) is designed for use in combat.

##### **(b) Operational Test and Evaluation--**

(1) Operational testing of a major defense acquisition program may not be conducted until the Director of Operational Test and Evaluation of the Department of Defense approves (in writing) the adequacy of the plans (including the projected level of funding) for operational test and evaluation to be conducted in connection with that program.

(2) The Director shall analyze the results of the operational test and evaluation conducted for each major defense acquisition program. At the conclusion of such testing, the Director shall prepare a report stating the opinion of the Director as to

(A) whether the test and evaluation performed were adequate; and

(B) whether the results of such test and evaluation confirm that the items or components actually tested are effective and suitable for combat.

(3) The Director shall submit each report under paragraph (2) to the Secretary of Defense, the Under Secretary of Defense for Acquisition, and the congressional defense committees. Each such report shall be submitted to those committees in precisely the same form and with precisely the same content as the report originally was submitted to the Secretary and Under Secretary and shall be accompanied by such comments as the Secretary may wish to make on the report.

(4) A final decision within the Department of Defense to proceed with a major defense acquisition program beyond low-rate initial production may not be made until the Director has submitted to the Secretary of Defense the report with respect to that program under paragraph (2) and the congressional defense committees have received that report.

(5) In this subsection, the term "major defense acquisition program" has the meaning given that term in section 138(a)(2)(B) of this title.

(6) The Secretary of Defense may modify the requirements for initial operational test and evaluation, set forth above, where the Secretary

(A) certifies to Congress that such testing would be unreasonably expensive and impractical, cause unwarranted delay or be unnecessary because of the acquisition strategy for that system; and

(B) describes the actions taken to ensure that the system will be operationally effective and suitable when it is introduced into the field.

(c) Determination of Quantity of Articles Required for Operational Testing.-- The quantity of articles of a new system that are to be procured for operational testing shall be determined by-

(1) the Director of Operational Test and Evaluation of the Department of Defense, in the case of a new system that is a major defense acquisition program (as defined in section 138(a)(2)(B) of this title); or

(2) the operational test and evaluation agency of the military department concerned, in the case of a new system that is not a major defense acquisition program.

(d) Impartiality of Contractor Testing Personnel-- In the case of a major defense acquisition program (as defined in subsection (a)(2)), no person employed by the contractor for the system being tested may be involved in the conduct of the operational test and evaluation required under subsection (a)(1). ~~The limitation in the preceding sentence does not apply to the extent that the Secretary of Defense plans for persons employed by that contractor to be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat.~~ The limitation in the preceding sentence does not apply

(1) to the extent that the Secretary of Defense plans for persons employed by that contractor to be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat, or,

(2) to the extent that the Secretary of Defense has authorized by regulation involvement by system contractor employees in operational test and evaluation analytic and logistic support. Such regulations must ensure the impartiality of that contractor and the integrity of the testing and evaluation process. In such cases, the operational test and evaluation plan must identify the specific involvement of that contractor in the operational test and evaluation process and the steps taken to ensure contractor impartiality.

(e) Impartial Contracted Advisory and Assistance Services--

(1) The Director may not contract with any person for advisory and assistance services with regard to the test and evaluation of a system if that person participated in (or is participating in) the development, or production, ~~or testing~~ of such system for a military department or Defense Agency (or for another contractor of the Department of Defense).

(2) The Director may waive the limitation under paragraph (1) in any case if the Director determines in writing that sufficient steps have been taken to ensure the impartiality of the contractor in providing the services. The Inspector General of the Department of Defense shall review each such waiver and shall include in the Inspector General's semiannual report an assessment of those waivers made since the last such report.

(3)(A) A contractor that has participated in (or is participating in) the development or production, ~~or testing~~ of a system for a military department or Defense Agency (or for another contractor of the Department of Defense) may not be involved (in any way) in the establishment of criteria for data collection, performance assessment, or evaluation activities for the operational test and evaluation.

(B) The limitation in subparagraph (A) does not apply to a contractor that has participated in such development, or production, ~~or testing~~ solely as a representative of the Federal Government.

(f) Source of Funds for Testing--The costs for all tests required under subsection (a) shall be paid from funds available for the system being tested.

(g) Director's Annual Report--As part of the annual report of the Director under section 138 of this title, the Director shall describe for each program covered in the report the status of test and evaluation activities in comparison with the test and evaluation master plan for that program, as approved by the Director. The Director shall include in such annual report a description of each waiver granted under subsection (e)(2) since the last such report.

(h) Definitions--In this section:

(1) The term "operational test and evaluation" has the meaning given that term in section 138(a)(2)(A) of this title. For purposes of subsection (a), that term does not include an operational assessment based exclusively on-

(A) computer modeling;

(B) simulation; or

(C) an analysis of system requirements, engineering proposals, design specifications, or any other information contained in program documents.

(2) The term "congressional defense committees" means the Committees on Armed Services and the Committees on Appropriations of the Senate and House of Representatives.

### **3.2.4. 10 U.S.C. § 2400**

#### **Low-rate initial production of new systems**

##### **3.2.4.1. Summary of Law**

This section provides that, for major systems, the decision on the quantity to be procured for low-rate initial production shall be made when the milestone II (engineering and manufacturing development decision) is made and by that same deciding official. Any decision for production increases must also be made by that deciding official, and the quantity amounts reported in the initial Selected Acquisition Report, (SAR) on that system. Except for naval vessel and satellite programs, low-rate initial production is defined as the minimum quantity necessary to provide production-configured or representative articles for operational tests, the quantity necessary to establish an initial production base, and the quantity necessary to permit an orderly increase in production sufficient to lead to full-rate production.

##### **3.2.4.2. Background of Law**

This section was enacted by the National Defense Authorization Act for Fiscal Year 1990- and 1991.<sup>1</sup> Introduced by the House version of the bill, the House Committee Report indicated concern that in some cases DOD had been purchasing a large share of the total procurement program before completing operational testing under the guise of low-rate initial production.<sup>2</sup> Nonetheless, in conference, the conferees stated their agreement that this definition could still permit the establishment of a single production source, and maintain the advantages of a source once started, provided that full-scale production was not incrementally achieved through initial low-rate production quantities.<sup>3</sup>

##### **3.2.4.3. Law in Practice**

This statute is implemented by DOD Instruction 5000.2, part 8 (Test and Evaluation) (February 23, 1991).

The comments received raised no major issues with respect to this statute. The parties surveyed indicated that the statute continues to serve a valid purpose by ensuring that appropriate operational and vulnerability/lethality testing is completed before production proceeds beyond low-rate initial production. No indication was given that the statutory definition of low-rate initial production was inadequate or otherwise hindered the testing process or development of an adequate production base.<sup>4</sup>

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<sup>1</sup>Pub. L. No. 101-189, § 803(a), 103 Stat. 1487 (1989).

<sup>2</sup>H. R. REP. NO. 121, 101st Cong., 1st Sess. 17 (1989).

<sup>3</sup>H.R. CONF. REP. NO. 331, 101st Cong., 1st Sess. 601 (1989).

<sup>4</sup>Comments were obtained from the following offices: Office of the Secretary of Defense (Operational Test and Evaluation); Office of the Under Secretary of Defense for Acquisition (Developmental Test and Evaluation); Department of the Air Force (Test and Evaluation); Deputy Under Secretary of the Army (Operations Research);

The Army Program Executive Officer for Strategic Defense did recommend that, in order to preserve a mobilization production base, strategic defense missiles should be added to the statute as one of the low density production items listed at subsection (c).<sup>5</sup> Those listed items (naval vessels and satellite programs) are exempt from the standard low-rate initial production definition. The Office of Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), does not agree with the proposed addition of strategic defense missiles to those systems requiring a different definition of low-rate initial production. That Office cites Upper Tier Theater Missile Defense Systems, Ground Based Interceptors, CORPS Surface-to-Air Missiles, and PATRIOT Upgrades as systems where the total production quantities and production rates are substantially larger than those of naval vessels and satellite programs.<sup>6</sup>

#### **3.2.4.4. Recommendation and Justification**

##### **Amend to add strategic defense missiles at (c) and to make TEMP discretionary.**

The Panel recommends that this statute be retained but amended at subsection (c)(1) and (2) to include strategic defense missiles as a category of system with a low-density production rate similar to those already listed and therefore exempt from the standard low-rate initial production definition. While theater missile systems may have production quantities that exceed naval vessels and satellite programs, strategic defense missile systems generally have lower production quantities. Thus, this type of system warrants consideration by the Congress as a type of system that is exempt from the standard, low-rate initial production definition.

Additionally, the Panel recommends that (c)(3) be amended to make the Test and Evaluation Master Plan (TEMP) discretionary for these exempted systems.

Prior to enactment of this language, the Navy had not developed TEMPs for about half of its ship programs because many of those programs were repetitive procurements of auxiliary and amphibious support ship programs, built to commercial specifications and without developmental risk and operational testing. This amendment proposes to enact in the statute this prior, Navy policy.<sup>7</sup>

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Department of the Navy (Test, Evaluation and Technology Requirements) and Aerospace Industries Association (Flight Test Group).

<sup>5</sup>Memorandum from Lt. Gen. Robert Hammond, PEO, Strategic Defense to General Counsel HQ Department of the Army, dated 13 April 1992. See also Letter from Mr. Walter Hollis, Deputy Under Secretary of the Army, (Operations Research), to Mr. Anthony Gamboa, Deputy General Counsel (Acquisition), Department of the Army, dated 5 June 1992.

<sup>6</sup>Memorandum from Mr. Gene Porter, Principal Deputy Director, Acquisition Policy & Program Integration, Under Secretary of Defense (Acquisition), to DOD Advisory Panel, dated 9 Nov. 1992.

<sup>7</sup>Letter from RADM Houley, Director, Test and Evaluation & Technology Requirements, Department of the Navy, to Ms. Theresa Squillacote, dated 28 Aug. 1992.



### **3.2.4.5. Relationship to Objectives**

Amendment of this statute will promote the best interests of DOD while maintaining the underlying utility of the statutory definition.

### **3.2.4.6. Proposed Statute**

#### **§ 2400. Low-rate initial production of new systems**

##### **(a) Determination of Quantities To Be Procured for Low-Rate Initial Production.**

(1) In the course of the development of a major system, the determination of what quantity of articles of that system should be procured for low-rate initial production (including the quantity to be procured for reproduction verification articles) shall be made-

(A) when the milestone II decision with respect to that system is made; and

(B) by the official of the Department of Defense who makes that decision.

(2) In paragraph (1), the term "milestone II decision" means the decision to approve the full-scale engineering development of a major system by the official of the Department of Defense designated to have the authority to make that decision.

(3) Any increase from a quantity determined under paragraph (1) may only be made with the approval of the official making the determination.

(4) The Secretary of Defense shall include a statement of the quantity determined under paragraph (1) in the first SAR submitted with respect to the program concerned after that quantity is determined. For purposes of the preceding sentence, the term "SAR" means a Selected Acquisition Report submitted under section 2432 of this title.

(b) Low-Rate Initial Production of Weapon Systems. Except as provided in subsection (c), low-rate initial production with respect to a new system is production of the system in the minimum quantity necessary-

(1) to provide production-configured or representative articles for operational tests pursuant to section 2399 of this title;

(2) to establish an initial production base for the system; and

(3) to permit an orderly increase in the production rate for the system sufficient to lead to full-rate production upon the successful completion of operational testing.

(c) Low-rate Initial Production of Naval Vessel, Satellite and Strategic Defense Missile Programs.

(1) With respect to naval vessel ~~programs and~~, military satellite and strategic defense missile programs, low-rate initial production is production of items at the minimum quantity and rate that (A) preserves the mobilization production base for that system, and (B) is feasible, as determined pursuant to regulations prescribed by the Secretary of Defense.

(2) For each naval vessel ~~program and~~, military satellite and strategic defense missile program, the Secretary of Defense shall submit to Congress a report providing-

(A) an explanation of the rate and quantity prescribed for low-rate initial production and the considerations in establishing that rate and quantity;

(B) a test and evaluation master plan for that program, if the Secretary of Defense has required that one be developed; and

(C) an acquisition strategy for that program that has been approved by the Secretary, to include the procurement objectives in terms of total quantity of articles to be procured and annual production rates.

### **3.3. Service Specific Laws**

#### **3.3.0. Introduction**

This subchapter examines the service-specific acquisition sections in the last three subtitles of Title 10. These laws fall into two main groups: (1) the Army/Air Force statutes, that evolve historically out of the same source law, and (2) Navy-peculiar laws. These laws provide various authorities to a secretary of an individual military department and are grouped in that Service's chapter of title 10. These many provisions are of such a disparate nature that they will not be summarized in this introduction.

Generally, the Panel's approach to these statutes was as follows. If a law constituted a grant of authority to the service, the service was surveyed to determine whether the authority was still used and still relevant to modern procurement practices. An analysis was also made as to whether the service-specific authority was also contained in authority elsewhere provided to the DOD as a whole. Any issues raised with regard to still-relevant statutes were considered, and in some instances, amendments are recommended to address these issues. In many cases where a grant of authority is recommended for retention, the authority is rewritten to vest with the "Secretary of Defense and secretaries of the military departments" rather than with the secretary of a particular service.

In instances where a grant of authority is no longer used, or otherwise obsolete, the Panel recommends repeal. Quite frequently, older statutes originating as emergency wartime provisions have been overtaken by modern acquisition practices and are no longer relevant.

In a number of cases, efforts were made to modernize still-meaningful authorities. Often, the body of laws within a single chapter originated from the same source. These sections lend themselves to consolidation into a single, streamlined section. For example, the authorities at 10 U.S.C. §§ 7361 through 7367 all cover naval salvage operations and all were enacted by the same law. These sections were consolidated, and the language modernized where appropriate.

Of the laws examined within this subchapter, a number stand out as highlights:

- The service-specific authorities to contract for architect-engineering (A-E) services (10 U.S.C. §§ 4540 and 9540, and 10 U.S.C. § 7212) were recommended for repeal as laws that have clearly outlived their usefulness; the collective analysis for these statutes discusses the problems raised by the 6% fee limit in these laws and their interplay with the Brooks A-E statute.
- The laws at 10 U.S.C. §§ 4506/9506, §§ 4507/9507 and § 4508, all involving authority to sell or loan a government item or service, were crafted into a single statute that sets forth specified authorities to sell or loan government material for prescribed purposes. It includes an important authority to permit sales or the use of government test facility services to private contractors at specified rates.

- Civil Reserve Air Fleet (CRAF) enhancement authorities at 10 U.S.C. §§ 9512 and 9513 were recommended for amendment to permit private contractors limited commercial use of military airfields. This proposal was based on the crucial role played by CRAF during Operation Desert Storm/Desert Shield.

The individual analyses for all of these sections are set forth in this subchapter. The Panel notes that those service-specific authorities that are marked for retention might appropriately be collected into a "Service Procurement Generally" chapter.

### **3.3.1. 10 U.S.C. §§ 4501 and 9501**

#### **Industrial mobilization: orders; priorities; possession of manufacturing plants; violations (Army and Air Force)**

##### **3.3.1.1. Summary of Law**

These sections provide that the President, acting through a military department and for war preparation, may order from any person or industry products that they typically produce. That person or industry must comply with that order. If the person or industry refuses to comply or provide a reasonable price, the President may take possession of and utilize such facilities when the military department secretary determines that it is necessary for war preparation. The person or industry must then receive compensation. A fine may be imposed for failure to comply.

##### **3.3.1.2. Background of Law**

These sections were originally enacted in 1916 by the Act for Making Further Provision for the National Defense.<sup>1</sup> No report language discussing these provisions is available. They were retained by the Army and Air Force Organization Act of 1950 and codified in 1956.

##### **3.3.1.3. Law in Practice**

Executive Order 12742, "National Security Industrial Responsiveness," dated Jan. 8, 1991, delegated certain authorities of the President under this section and provided for implementation of the authority delegated.

The Office of the Judge Advocate General, Department of the Army, reports that this Army provision is critical because, during lapses of the Defense Production Act, this statute is the only one that provides authority to establish priorities for defense production orders.<sup>2</sup> It further notes that this statute and the Defense Production Act were the bases for all priority orders issued during Desert Shield/Desert Storm.<sup>3</sup>

The Operational Contract Division, Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force (Acquisition), reports that the Air Force statute is still needed because it provides the President authority to direct production of critical material in times of war and no other such permanent authority exists.<sup>4</sup> That Office also notes that this authority may become increasingly vital, given the current defense strategy of reconstitution.<sup>5</sup>

<sup>1</sup>Pub. L. No. 64-85, ch. 134, § 120, 39 Stat. 213 (1916).

<sup>2</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 1 May 1992.

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force, to Ms. Theresa Squillacote, DOD Advisory Panel, dated 20 Nov. 1992.

<sup>5</sup>*Id.*

### 3.3.1.4. Recommendation and Justification

#### Retain and Consolidate

The Panel recommends that these sections be retained as they continue adequately to serve a valid purpose within the DOD. While authority to prioritize war or national emergency orders is also available through Title I of the Defense Production Act,<sup>6</sup> such authority is not available during periodic lapses of that legislation. Hence, these permanent law provisions are still necessary. The Panel does recommend, however, that these two statutes be consolidated into a single statute with authorities vested in the Secretary of Defense and in the secretaries of the military departments.

### 3.3.1.5. Relationship to Objectives

Retention and consolidation of these statutes promotes the best interests of DOD by providing an authority that is essential for national defense.

### 3.3.1.6. Proposed Statute

#### Industrial mobilization: orders; priorities; possession of manufacturing plants; violations

(a) In time of war or when war is imminent, the President, ~~through the head of any department, through the Secretary of Defense or secretary of the military department concerned,~~ may order from any person or organized manufacturing industry necessary products or materials of the type usually produced or capable of being produced by that person or industry.

(b) A person or industry with whom an order is placed under subsection (a), or the responsible head thereof, shall comply with that order and give it precedence over all orders not placed under that subsection.

(c) In time of war or when war is imminent, the President, ~~through the head of any department, the Secretary of Defense or secretary of the military department concerned,~~ may take immediate possession of any plant that is equipped to manufacture, or that in the opinion of the ~~Secretary of the Army~~ Secretary of Defense or secretary of a military department concerned, is capable of being readily transformed into a plant for manufacturing, arms or ammunition, parts thereof, or necessary supplies for ~~the Army, armed forces~~ if the person or industry owning or operating the plant, or the responsible head thereof, refuses-

(1) to give precedence to the order as prescribed in subsection (b);

(2) to manufacture the kind, quantity, or quality of arms or ammunition, parts thereof, or necessary supplies, as ordered by the Secretary; or

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<sup>6</sup>See ch. 7 of this Report.

(3) to furnish them at a reasonable price as determined by the Secretary.

(d) The President, through the Secretary of Defense or the secretary of a military department concerned, may manufacture products that are needed in time of war or when war is imminent, in any plant that is seized under subsection (c).

(e) Each person or industry from whom products or materials are ordered under subsection (a) is entitled to fair and just compensation. Each person or industry whose plant is seized under subsection (c) is entitled to a fair and just rental.

(f) Whoever fails to comply with this section shall be imprisoned for not more than three years and fined not more than \$50,000.

### **3.3.2. 10 U.S.C. §§ 4502 and 9502**

#### **Industrial mobilization: plants; lists; Board on Mobilization of Industries Essential for Military Preparedness**

##### **3.3.2.1. Summary of Law**

These sections provide that the Secretaries of the Army and Air Force shall maintain a list of and track the manufacturing abilities of all private facilities equipped to or capable of being equipped to manufacture service arms or ammunition. The secretaries are required to prepare plans for such conversion. The President is authorized to appoint and support a Mobilization Board of Military Preparedness Industries.

##### **3.3.2.2. Background of Law**

These sections were originally enacted in 1916 by the Act for Making Further Provision for the National Defense.<sup>1</sup> No report language discussing these provisions is available. They were retained by the Army and Air Force Organization Act of 1950 and codified in 1956.

##### **3.3.2.3. Law in Practice**

These sections are implemented by DOD Instruction on 4005.3 Industrial Preparedness Planning (Apr. 18, 1985) and DOD Directive 4005.1, Industrial Preparedness Program (Nov. 26, 1985).

The Department of the Army, Office of the Judge Advocate General submitted no comments with regard to this statute. The Department of the Army, Office of the Assistant Secretary (Research, Development and Acquisition), Acquisition and Industrial Base Policy, states that it believes the law provides a needed authority for maintaining data on contractors which have useful productive capacity.<sup>2</sup> That Office further notes that, while the emergency response from the industrial base is currently more limited than when this law was originally passed, the Army still requires certain data on manufacturers of sustainment type commodities.<sup>3</sup>

The Operational Contract Division, Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force (Acquisition), reports that this Air Force statute is still needed because it provides authority for the Department to engage in the production base analyses required for effective, industrial base management.<sup>4</sup> Specifically, that Office notes that it

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<sup>1</sup>Pub. L. No. 64-85, ch. 134, § 120, 39 Stat. 213 (1916).

<sup>2</sup>Memorandum from Mr. Bruce H. Waldsch, Office of the Assistant Secretary (Research, Development and Acquisition), Acquisition and Industrial Base Policy, Department of the Army, to Ms. Theresa Squillacote, Acquisition Law Task Force, dated 23 Nov. 1992.

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force, to Advisory Panel, dated 20 Nov. 1992.



does collect the data specified in this statute and that this statute is the sole authority to collect such data.<sup>5</sup>

#### 3.3.2.4. Recommendation and Justification

##### Retain and Consolidate

The Panel recommends that these sections be retained as they continue adequately to serve a valid purpose within the Department. In particular, these authorities enable the cognizant military departments to engage in the industrial base analyses required under other sections of Title 10. The Panel does recommend, however, that these two sections be consolidated into a single section with authorities vested in the Secretary of Defense and in the secretaries of the military departments. Further, the word "all" can be deleted without detracting from the Secretary's authority to maintain a list of privately owned plants.

#### 3.3.2.5. Relationship to Objectives

Retention and consolidation of these sections will further the goals of maintaining acquisition statutes that further the best interests of DOD while streamlining the acquisition process.

#### 3.3.2.6. Proposed Statute

##### Industrial mobilization: plants; lists; Board on Mobilization of Industries Essential for Military Preparedness

(a) ~~The Secretary of the Air Force~~ Secretary of Defense and secretaries of the military departments are authorized to maintain a list of all privately owned plants in the United States, and the Territories, Commonwealths, and possessions, that are equipped to manufacture for the ~~Air Force~~ armed forces arms or ammunition, or parts thereof, and may, when they deem it necessary, obtain complete information of the kinds of those products manufactured or capable of being manufactured by each of those plants, and of the equipment and capacity of each of those plants.

(b) ~~The Secretary of Defense and secretaries of the military departments are authorized to~~ maintain a list of privately owned plants in the United States, and the Territories, Commonwealths, and possessions, that are capable of being readily transformed into factories for the manufacture of ammunition for the ~~Air Force,~~ armed forces and that have a capacity sufficient to warrant conversion into ammunition plants in time of war or when war is imminent, and may, when they deem it necessary, ~~shall~~ obtain complete information as to the equipment of each of those plants.

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<sup>5</sup>*Id.*

(c) The ~~Secretary~~ secretaries may prepare comprehensive plans for converting each plant listed pursuant to subsection (b) into a factory for the manufacture of ammunition or parts thereof.

(d) The President may appoint a nonpartisan Board on Mobilization of Industries Essential for Military Preparedness, and may provide necessary clerical assistance to organize and coordinate operations under this section and ~~section 9501~~ under section XXYY of this title.<sup>6</sup>

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<sup>6</sup>An appropriately conforming amendment must be made, deleting the reference to § 9501.

### **3.3.3. 10 U.S.C. § 4504 and 9504**

#### **Procurement for Experimental Purposes**

##### **3.3.3.1. Summary of Laws**

These statutes provide that the Secretaries of the Army and Air Force may purchase noncompetitively, for experimental purposes, ordnance, signal and chemical warfare supplies, parts and designs necessary for the national defense. The competition requirements still apply to purchases in quantity.

##### **3.3.3.2. Background of Laws**

These sections were enacted in 1939 by the Act to Authorize the Purchase of Equipment and Supplies for Experimental and Test Purposes.<sup>1</sup> The Senate Report indicated that the purpose of the bill was to extend the Secretary of War's authority under the Air Corps Act of 1926 (now codified at 10 U.S.C. § 2271-79).<sup>2</sup> That is, Congress intended to broaden procurement authority for those developing services -- Air Corps, Ordnance, Signal Corps and Chemical Warfare Service -- that develop and use largely noncommercial equipment and supplies. The provision was intended to overcome then-existing Comptroller General limitations on the purchase of development and experimental items. Under extant case law, procurement was limited to single items, which was insufficient for service testing, prevented comparative analysis among manufacturers and was expensive.<sup>3</sup> The House Report indicated that the limitation on the competition exemption was intended to ensure that the authority was strictly limited to procurement for experimental and test purposes.<sup>4</sup>

The sections were codified in 1956 with minor language changes.

##### **3.3.3.3. Laws in Practice**

The Army Office of the Judge Advocate General advises that this authority is not currently utilized by any of the offices that it surveyed.<sup>5</sup> The US Army Corps of Engineers similarly

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<sup>1</sup>Pub. L. No. 76-178, § 9504, 53 Stat. 1042 (1939).

<sup>2</sup>S. REP. NO. 246, 76th Cong., 1st Sess. 1, 2 (1939).

<sup>3</sup>*Id.*

<sup>4</sup>H.R. REP. NO. 845, 76th Cong., 1st Sess. 1, 2 (1939).

<sup>5</sup>The Office of the Judge Advocate General, Department of the Army, solicited comments from the following offices: the staff judge advocates, Forces Command, Training and Doctrine Command, US Army Japan, US Forces Korea/Eighth US Army, Southern Command and Western Command, the Community and Family Support Center (CFSC), the Judge Advocate, US Army Europe, the Army Judge Advocate General's School, and the General Counsel, Army and Air Force Exchange Service. See memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 1 May 1992.

advises.<sup>6</sup> HQ, US Army Materiel Command posits that this authority is not necessary, since comparable legal authority exists under the CICA.<sup>7</sup> The Air Force states that authority to buy experimental supplies is covered by 10 U.S.C. § 2358, and that authority to buy competitively or noncompetitively is currently provided by the CICA.<sup>8</sup> The Air Force states that it is unaware of any current use of this authority within that service.<sup>9</sup>

However, a survey of special operations offices indicates that this authority is utilized by them in connection with some highly classified special access programs.

#### **3.3.3.4. Recommendation and Justification**

##### **Retain and Consolidate**

Based on the continued utility of these sections for highly classified special access programs, the Panel recommends that they be retained and consolidated as set forth below.

#### **3.3.3.5. Relationship to Objectives**

Retention of these statutes will promote the best interests of DOD by affording procurement flexibility for special operations purposes.

#### **3.3.3.6. Proposed Statute**

##### **Procurement for experimental purposes**

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

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<sup>6</sup>Memorandum from Mr. Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992.

<sup>7</sup>Memorandum from Mr. Robert Macfarlane, Chief Counsel, U.S. Army Materiel Command, to Deputy General Counsel (Acquisition), Department of the Army, dated 24 April 1992.

<sup>8</sup>Memorandum from Mr. Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force, to DOD Advisory Panel, dated 20 Nov. 1992.

<sup>9</sup>*Id.*

### **3.3.4. 10 U.S.C. §§ 4505 and 9505**

#### **Procurement of production equipment**

##### **3.3.4.1. Summary of Laws**

These sections provide that the Secretaries of the Army and Air Force may make or procure gauges, dies, jigs, tools, fixtures, and other special aids, and specifications and drawings necessary for the immediate manufacture of arms, ammunition, or other special equipment needed in time of war. When in the national interest, the Secretaries may procure these items noncompetitively.

##### **3.3.4.2. Background of Laws**

These laws were originally enacted in 1916 by the Act for Making Further Provision for the National Defense.<sup>1</sup> No report language is available on this provision.

##### **3.3.4.3. Laws in Practice**

The Office of the Judge Advocate General, Department of the Army, advises that none of the offices it surveyed currently use this authority.<sup>2</sup> The Office of Counsel, US Army Corps of Engineers also advises that it does not use this authority.<sup>3</sup> The Office of Counsel, US Army Materiel Command states that legal authority for such purchases is currently available under the Competition in Contracting Act (CICA).<sup>4</sup> The Office of the Assistant Secretary (Acquisition), Department of the Air Force states it does not currently use this authority and believes it is superseded by 10 U.S.C. § 2304.<sup>5</sup>

##### **3.3.4.4. Recommendation and Justification**

#### **Repeal**

The Panel recommends repeal of these statutes as obsolete laws that are no longer used by the Department. In addition, authorization for the Army and Air Force Secretaries to purchase such items is already provided by general authorization provisions (10 U.S.C. § 3013(b)(3) and 10

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<sup>1</sup>Pub. L. No. 64-85, ch. 134, § 122, 39 Stat. 215 (1916).

<sup>2</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 1 May 1992

<sup>3</sup>Memorandum from Mr. Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992.

<sup>4</sup>Memorandum from Mr. Robert B. Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 22 May 1992.

<sup>5</sup>Memorandum from Mr. Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary (Acquisition), Department of the Air Force, to DOD Advisory Panel, dated 20 Nov. 1992.

U.S.C. § 8013(b)(3)) and by annual appropriation and authorization legislation. The emergency noncompetitive procurement procedure is also currently provided by the CICA.

#### **3.3.4.5 Relationship to Objectives**

Repeal of these statutes promotes the goal of streamlining the DOD acquisition process by deleting an obsolete provision.

**3.3.5. 10 U.S.C. §§ 4506 and 9506**

**Sale, loan or gift samples, drawings and information to contractors**

**10 U.S.C. §§ 4507 and 9507;**

**Sale of ordnance and ordnance stores to designers**

**10 U.S.C. § 4508**

**Tests of iron, steel and other materials**

**3.3.5.1. Summary of Laws**

- 10 U.S.C. §§ 4506/9506: These sections authorize the Secretaries of the Army and Air Force, respectively, to sell or give samples, drawings and manufacturing information to any service or supply contractor or person likely to manufacture Army or Air Force supplies under approved production plans;
- 10 U.S.C. §§ 4507/9507: These sections provide that the Secretaries of the Army and Air Force, respectively, may sell to designers who are U.S. nationals, ordnance and ordnance stores as necessary for design development.
- 10 U.S.C. § 4508: This section provides that the Secretary of the Army may authorize the use of the Army's machine for testing iron, steel and other industrial materials. A fee payment is required. Test results are to be furnished to the Army for evaluation.

**3.3.5.2. Background of Laws**

- 10 U.S.C. §§ 4506/9506: These sections were originally enacted in 1937 by the Act Authorizing the Secretary of War to Sell, Loan or Give Samples to Prospective Manufacturers.<sup>1</sup> The Senate Report indicated that the bill had been recommended by the War Department because samples that were provided to manufacturers to facilitate production were disassembled and thus lost their original identity and usefulness. The military departments lacked authority, however to drop such items from requisite property accountability of the departments. Hence, the War Department sought this authority.<sup>2</sup>

<sup>1</sup>Pub. L. No. 75-215, ch. 525, 50 Stat. 535 (1937).

<sup>2</sup>S. REP. NO. 310, 75th Cong., 1st Sess. 1-2, (1937).

- 10 U.S.C. §§ 4507/9507: These sections were originally enacted by the 1904 Army Appropriations Act.<sup>3</sup> The legislative history does not contain any relevant discussion of these provisions. The provisions were codified in 1956 with minor language changes.
- 10 U.S.C. § 4508: This statute was originally enacted in 1878 by the Act Making Appropriations for Sundry Civil Expenses for 1879.<sup>4</sup> No legislative history discussing this provision is available. A congressional report requirement was added in 1885 and deleted in 1928. The provision was codified in 1956. A technical amendment was made in 1965 transferring to the Secretary of the Army the Chief of Ordnance functions originally present in this section.

### 3.3.5.3. Laws in Practice

- 10 U.S.C. §§ 4506/9506: 10 U.S.C. § 4506 is implemented at Army Federal Acquisition Regulation Supplement (AFARS) 45.190. Under that regulation, heads of contracting activities are authorized sell, lend or give the delineated information to any likely Army supplier. It generally limits distribution of classified material and also directs the decision-maker to consider the value of the property to the government, handling and storage charges and the probable cost of procurement. AFARS 45.191 permits the loan of government equipment to private firms or educational institutions for use in R&D provided that the research is of interest to the government and that the results will be furnished to the government without cost.

The Department of the Air Force, Office of General Counsel, reports that 10 U.S.C. § 9506 is not currently relied upon by the Department.<sup>5</sup> The Department of the Army, Office of the Judge Advocate General, reports that this section is relied upon by that Department, and in particular by the US Army Strategic Defense Command (SDC).<sup>6</sup>

SDC states that the limitation that samples and drawings may be supplied only under "approved production plans", frequently hampers its ability to facilitate manufacture by providing samples and drawings to contractors or prospective contractors.<sup>7</sup> This problem arises because it is often necessary to provide samples or drawings initially in order to develop approved production plans. The SDC therefore recommends deletion of this language to permit potential contractors the opportunity of demonstrating greater responsiveness to government requirements. It also recommends that authority in this section be expanded to permit the military departments to provide similar items or information to educational or non-profit institutions.<sup>8</sup>

<sup>3</sup>Act of Apr. 23, 1904, ch. 1485, 33 Stat. 276 (1904).

<sup>4</sup>Act of Jun. 20, 1878, ch. 359, 20 Stat. 223 (1878).

<sup>5</sup>Memorandum from Mr. John P. Janeczek, Assistant General Counsel (Procurement), Department of the Air Force, to Mr. Donald Freedman, Acquisition Law Task Force, dated 27 Mar. 1992.

<sup>6</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 1 May 1992.

<sup>7</sup>Datafax transmission from Col. Robert Hamilton, Legal Office, US Army Strategic Defense Command, to Ms. Theresa Squillacote, dated 20 Apr. 1992.

<sup>8</sup>*Id.*



SDC believes that this authority should be extended with the goals of promoting independent research and development in the private sector and of promoting technology transfer between the government and the private sector. SDC cites the following as an example of the type of situation in which it has made and would make greater use of this authority:

A contractor wanted to use some computer chips to study a generic problem through IR&D. Since the product is one for which the yield rate is low, we were able to declare some existing clips as scrap material. Had it been necessary to use 'spec' items, we would have had some difficulty under existing regulations because the transaction would not have involved an 'approved production plan' nor would we have been able to say that the items would not have been consumed in the process of their use.<sup>9</sup>

-- 10 U.S.C. §§ 4507/9507: 10 U.S.C. § 4507 has been implemented by the Army at 32 C.F.R. § 621.2. Those regulations provide in part that sales under this section are limited to quantities of an item which authorized purchasers can put to their own use.

The Department of the Air Force, Office of General Counsel, reports that 10 U.S.C. § 9507 is not currently relied upon by that Department.<sup>10</sup> The Department of the Army, Office of the Judge Advocate General, reports that it does rely upon this provision to support its ordnance contractors.<sup>11</sup> The US Army Corps of Engineers does not utilize this authority.<sup>12</sup> The Office of Counsel, US Army Materiel Command reports extensive use of this authority by its subordinate commands to support contractor independent research and development efforts.<sup>13</sup>

c) 10 U.S.C. § 4508: The Office of Judge Advocate General, Department of the Army, advises that this authority is currently utilized extensively by US Army, Europe (USAEUR) and by SDC as a vehicle for giving contractors access to government laboratories and for strengthening the nation's industrial base.<sup>14</sup> The Office of Chief Counsel, US Army Materiel Command (AMC) similarly states that its subordinate commands and installations make use of this authority.<sup>15</sup> AMC states that "providing test services benefits the private sector because no duplicate facilities exist which can provide the services. The Government is benefited because it can retain the test data generated. As private industry reimburses the costs of tests, the programs provide a no-cost source of valuable data. AMC has a continuing interest in use of this statute

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<sup>9</sup>*Id.*

<sup>10</sup>Memorandum from Mr. John P. Janecek, Assistant General Counsel (Procurement), Department of the Air Force, to Mr. Donald Freedman, Acquisition Law Task Force, dated 27 Mar. 1992.

<sup>11</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army to Acquisition Law Advisory Panel, dated 25 Feb. 1992.

<sup>12</sup>Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 April 1992.

<sup>13</sup>Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 24 Apr. 1992.

<sup>14</sup>*Supra* note 11.

<sup>15</sup>*Supra* note 13.

and strongly recommends that it be retained."<sup>16</sup> The Office of Chief Counsel, US Army Corps of Engineers reports no current usage.<sup>17</sup>

#### **3.3.5.4. Recommendation and Justification**

##### **Amend to clarify and consolidate statutes and to provide additional authority to sell**

The Panel recommends that these three authorities be consolidated into a single statute as set forth below.

All of these authorities, as they exist in the individual sections, are currently relied upon by the military services and thus continue to serve a relevant purpose. The Panel recommends consolidating these authorities into a single, "sales" statute, with authority vested in the Secretary of Defense and the secretaries of the military departments.<sup>18</sup>

With respect to 10 U.S.C. §§ 4506/9506 and §§ 4507/9507, the proposed amendments have the overall goal of promoting greater private sector independent research and development by permitting greater flexibility in the exchange of information or items between the government and private sectors. Thus, the authority to sell, lend or give technical information is amended to remove the current "approved production plan" limitation. The proposed statute also broadens the parties who may receive such items or information to any person or entity. It thus incorporates educational and nonprofit institutions and removes the "likely DOD supplier" limitation. The proposed statute also expressly sanctions the sale of equipment or materials for IR&D purposes when the item will be used exclusively for such purposes and has no other commercial value to the purchaser. The Panel would not add a limitation providing that the research results must be furnished to the government without restriction or cost, as such a provision would undercut the IR&D value of the authority.

The statute also specifically permits such sales for use in demonstrations to friendly foreign governments. Currently, there is no authority permitting, for example, the sales of ordnance to U.S. firms for demonstration of equipment by them to foreign governments.

With respect to 10 U.S.C. § 4508, the use of test facilities is treated as the sale of test facilities' services and therefore appropriately consolidated into such a statute. The Panel leaves the issue of what constitutes appropriate fees for regulatory implementation.

Finally, the Panel notes that the proposed amendments to these statutes must also be accompanied by an amendment to 10 U.S.C. § 2314. That statute exempts procurement by the DOD military departments, NASA, and the Coast Guard from the provisions of the advertising

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<sup>16</sup>Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 22 May 1992.

<sup>17</sup>*Supra* note 12.

<sup>18</sup>The Congress may wish to consider whether the limited sales authority at 10 U.S.C. § 2208(i) should be consolidated as well.

requirements of Revised Statute 3709 (codified at 41 U.S.C. § 5). However, sales by these agencies are not exempted from that statute. And 41 U.S.C. § 5 provides that, with limited exceptions, "sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising." The Panel would therefore amend the blanket exemption of 10 U.S.C. § 2314 to state that the "procurement or sale of" property or services by DOD are exempt from the Revised Statute advertising requirements.

### **3.3.5.5. Relationship to Objectives**

This proposed consolidated statute serves the best interests of the Department by facilitating the goal of greater technology transfer between the government and private sectors. It also streamlines the acquisition process by eliminating duplicative authorities.

### **3.3.5.6. Proposed Statute**

1. The text of the Proposed Consolidated Sales Statute is as follows:

(a) The Secretary of Defense and secretaries of the military departments, under regulations to be prescribed by the Secretary of Defense and when determined to be in the interest of national defense, may,

(1) sell, lend or give samples, drawings and manufacturing or other information (subject to the rights of third parties) to any person or entity;

(2) sell or lend government equipment or materials to any person or entity:

(A) for use in independent research and development programs, provided that the equipment or material will be used exclusively for such research and development; or

(B) for use in demonstrations to a friendly foreign government.

(3) make available to any person or entity, for appropriate fees, the services of any government laboratory, center, range or other testing facility for the testing of materials, equipment, models, computer software and other items.

(A) fees for such services shall be established by regulations issued pursuant to subsection (a). Such fees may not be less than the direct costs such as utilities, contractor support, and salaries of personnel incurred by the U.S. to provide such testing.

(B) the results of tests performed are confidential and may not be divulged outside the government without the consent of the persons for whom they are performed.

(b) Funds received from sales authorized at subsection (A) may be credited to the appropriations or funds of the selling activity.

## **Current Statutes**

The text of the current laws is as follows:

10 U.S.C. §§ 4506 and 9506:

The Secretary of the Army [Air Force], under regulations to be prescribed by him, may sell, lend or give such samples, drawings, and manufacturing or other information as he considers best for the national defense-

- (1) to any contractor for Army [Air Force] supplies under approved production plans; and
- (2) to any person likely to manufacture or supply Army [Air Force] supplies under such plans.

10 U.S.C. §§ 4507 and 9507:

The Secretary of the Army [Air Force] may sell to designers who are nationals of the United States serviceable ordnance and ordnance stores necessary in the development of designs for the armed forces.

10 U.S.C. § 4503:

(a) The Secretary of the Army may authorize the use of the Army's machine for testing iron, steel, and other materials for industrial purposes, by any person upon payment of a suitable fee. The officer in charge of the test--

- (1) shall require payment of fees for the tests authorized by this section in accordance with a table of fees approved by the Secretary;
- (2) may require payment in advance;
- (3) may spend the fees to received in making such tests; and
- (4) shall fully report the tests and the expenditure of the fees to the Secretary.

The table of fees shall be adjusted from time to time so as to defray the cost of the tests as fully as possible.

(b) The Secretary shall consider any program of tests submitted by the American Society of Civil Engineers, and a record of the tests shall be furnished the Society for publication at its expense.

2. 10 U.S.C. § 2314

Sections 3709 and 3735 of the Revised Statutes (41 U.S.C. 5 and 13) do not apply to the procurement or sale of property or services by the agencies named in section 2303 of this title.

### **3.3.6. 10 U.S.C. §§ 4531 and 9531**

#### **Authorization**

##### **3.3.6.1. Summary of Laws**

These sections authorize the Secretaries of the Army and Air Force to purchase materials and facilities in support of the military departments, including five listed types of equipment, but excluding prototype commercial aircraft. The five types of equipment are guided missiles, standard equipment, equipment to replace obsolete or unserviceable equipment, necessary spare equipment and supply reserves as needed.

##### **3.3.6.2. Background of Laws**

These laws were originally enacted by the 1949 Army and Air Force Authorization Act.<sup>1</sup> The Senate Report indicated that the provisions were intended to provide the respective Secretaries with broad authority to procure all necessary materials and facilities for the maintenance and support of those departments.<sup>2</sup> The limitation on prototype commercial aircraft was inserted in the Senate version of the bill because of a concern that the authorization language could be interpreted to permit the development of such aircraft.<sup>3</sup>

##### **3.3.6.3. Laws in Practice**

The Air Force General Counsel's Office, the Army Judge Advocate General's Office, the Army Corps of Engineers, and the Army Materiel Command all report that these provisions are not currently relied upon by their departments as contracting authority.<sup>4</sup>

##### **3.3.6.4. Recommendation and Justification**

#### **Repeal**

These sections should be repealed as obsolete laws. They are no longer relied upon by the affected departments and serve no useful purpose. In addition, authorization for the Army and Air Force Secretaries to purchase such items is already provided by general authorization

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<sup>1</sup>Pub. L. No. 81-604, § 112, 64 Stat. 322 (1950).

<sup>2</sup>S. REP. NO. 933, 84th Cong., 2d Sess. 8,9 (1950).

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. John P. Janeczek, Assistant General Counsel (Procurement), Department of the Air Force, to Mr. Donald Freedman, Acquisition Law Task Force, dated 27 Mar. 1992; Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army to Acquisition Law Advisory Panel, dated 25 Feb. 1992; Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 March 1992; Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, Army Materiel Command, to Advisory Panel, dated 24 Apr. 1992.

provisions [10 U.S.C. § 3013(b)(3) and 10 U.S.C. § 8013(b)(3)] as well as by annual appropriation and authorization legislation.

### **3.3.6.5 Relationship to Objectives**

Repeal of these statutes promotes the objective of streamlining the DOD acquisition process by removing obsolete provisions.

### **3.3.7. 10 U.S.C. § 4533**

#### **Army rations**

##### **3.3.7.1. Summary of Law**

This section provides that any branch, office, or designee of the Secretary of the Army shall buy components of Army rations.

##### **3.3.7.2. Background of Law**

This section was first enacted in 1818 by the "Act Regulating the Staff of the Army."<sup>1</sup> The Army Organization Act of 1950 expressly retained this authority and vested it in the Secretary of the Army.<sup>2</sup> The legislative histories to these Acts do not discuss this specific provision.

##### **3.3.7.3. Law in Practice**

The Office of the Judge Advocate General, Department of the Army, the Office of Counsel, US Army Materiel Command, and the Office of Counsel, US Army Corps of Engineers report that this provision is not currently relied upon by the Army as authority for its ration procurement.<sup>3</sup>

##### **3.3.7.4. Recommendation and Justification**

###### **Repeal**

This section should be repealed in its entirety as obsolete law. The law no longer serves any relevant purpose and the same purchasing authority is provided by other legislation, including annual appropriation and authorization acts.

##### **3.3.7.5. Relationship to Objectives**

Repeal of this statute promotes the goal of streamlining the DOD acquisition process by removing an obsolete provision.

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<sup>1</sup>Revised Statutes § 1141, Apr. 14, 1818.

<sup>2</sup>Pub. L. No. 81-581, § 101, 64 Stat. 272 (1950).

<sup>3</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 25 Feb. 1992; Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, Army Materiel Command, to Advisory Panel, dated 2 Apr. 1992; Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992.

### **3.3.8. 10 U.S.C. §§ 4535 and 9535**

#### **Exceptional subsistence supplies: purchase without advertising**

##### **3.3.8.1. Summary of Laws**

These sections provide that exceptional articles of supplies for members of the Army and Air Force that will be accepted regardless of condition may be purchased without advertising.

##### **3.3.8.2. Background of Laws**

These sections were originally enacted by the Army Appropriation Act of 1895.<sup>1</sup> The sections were based on a letter from the Secretary of War to the Congress requesting this amending language.<sup>2</sup> "Exceptional" articles of supply were those that were furnished upon written guarantee of acceptance regardless of condition. These types of supplies were often needed on short notice. Therefore, the Secretary desired authority to procure such items without regard to advertising requirements.

The great bulk of these exceptional articles consists of special brands, fine varieties, or special trade packages, on which no reduction in price can be expected for the small quantities desired from time to time. No competition, therefore, is practicable.<sup>3</sup>

The provisions were codified in 1956 with minor language changes and technical corrections.<sup>4</sup>

##### **3.3.8.3 Laws in Practice**

The Department of the Air Force, Office of General Counsel, states that this provision of law is not relied upon by the Air Force.<sup>5</sup> The Department of the Army, Office of Judge Advocate General, reports that this provision of law appears inconsistent with the Competition in Contracting Act (CICA) and, in any event, is not required by the Department because the CICA permits waiver of publication requirements for procurements of subsistence supplies under exigent

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<sup>1</sup>Act of Feb. 12, 1895, ch. 79, 28 Stat. 658 (1895).

<sup>2</sup>S. REP. NO. 750, 53d Cong. 3d Sess. Ex. Doc. No. 17 (1894).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 84-1028, ch. 1041, 70A Stat. 254 (1956). The authority was then devolved to the Secretaries of the Army and Air Force, respectively.

<sup>5</sup>Memorandum from Mr. John Janeczek, Assistant General Counsel (Procurement), Department of the Air Force, to Mr. Donald Freedman, Acquisition Law Task Force, dated 27 Mar. 1992.



circumstances.<sup>6</sup> The Offices of Counsel, US Army Corps of Engineers and US Army Materiel Command, also report that those offices do not currently rely upon this provision.<sup>7</sup>

#### **3.3.8.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of these sections. The same purchasing authority is already provided by general authorization provisions (10 U.S.C. § 3013(b)(3) and 10 U.S.C. § 9013(b)(3)) and by annual appropriation and authorization legislation. The unusual and compelling urgency exception to the competition requirement set forth at 10 U.S.C. § 2304(c)(2) provides the emergency advertising exception apparently intended by these sections.

#### **3.3.8.5. Relationship to Objectives**

Repeal of these statutes promotes the goal of streamlining the DOD acquisition process by deleting an obsolete provision.

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<sup>6</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army, to Acquisition Law Advisory Panel, dated 25 Feb. 1992.

<sup>7</sup>Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992; Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 2 Apr. 1992.

### **3.3.9. 10 U.S.C. §§ 4537 and 9537**

#### **Military surveys and maps: assistance of U.S. mapping agencies**

##### **3.3.9.1. Summary of Laws**

These sections provide that the Secretaries of the Army and Air Force may obtain the assistance of the listed U.S. mapping agencies for various mapping services.

##### **3.3.9.2. Background of Laws**

These sections were originally enacted by the 1928 Act Authorizing Mapping Agencies of the Government to Assist in Preparing Military Maps.<sup>1</sup> The House Report noted that the authority to secure assistance of U.S. mapping agencies had been carried in annual War Department appropriations for many years, and that it was now being enacted into permanent law.<sup>2</sup>

##### **3.3.9.3. Laws in Practice**

The Department of the Air Force, Office of General Counsel, reports that this provision is not relied upon by the Air Force to obtain mapping services.<sup>3</sup> The US Army Corps of Engineers, Office of Counsel, and HQ Army Materiel Command Chief Counsel state that, since the establishment of the Defense Mapping Agency (DMA) in 1982, the individual services obtain mapping support from DMA pursuant to 10 U.S.C. §§ 2791-2795.<sup>4</sup> DMA apparently utilizes Economy Act procedures set forth at 31 U.S.C. § 1535 both to provide interagency mapping services and to obtain such services from the agencies listed in these sections.<sup>5</sup>

##### **3.3.9.4. Recommendation and Justification**

#### **Repeal**

These sections should be repealed in their entirety. While the purpose of these sections remains valid, the military departments are able to obtain the same services through other statutory authority.

<sup>1</sup>Pub. L. No. 70-379, ch. 544, 45 Stat. 509 (1928).

<sup>2</sup>H.P. REP. No. 124, 70th Cong., 1st Sess. 1-2 (1928).

<sup>3</sup>Memorandum from Mr. John Janeczek, Assistant General Counsel (Procurement), Department of the Air Force, to Mr. Donald Freedman, Acquisition Law Task Force, dated 27 Mar. 1992.

<sup>4</sup>Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992; Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 2 Apr. 1992.

<sup>5</sup>*Id.*

### **3.3.9.5. Relationship to Objectives**

Repeal of these statutes promotes the goal of streamlining the DOD acquisition process by removing obsolete provisions that have been superseded by more recent legislation.

### **3.3.10. 10 U.S.C. §§ 4538 and 9538**

#### **Unserviceable ammunition: exchange and reclamation**

##### **3.3.10.1. Summary of Laws**

These sections provide that the Secretaries of the Army and Air Force, respectively, may contract to reclaim by conversion to usable form unserviceable or deteriorated ammunition. These sections further provide that the Secretaries may exchange unserviceable ammunition for serviceable ammunition subject to certain statutory limitations on exchange authority.

##### **3.3.10.2. Background of Laws**

These sections were originally enacted by the 1926 Act Authorizing the Secretary of War to Exchange Unserviceable Ammunition.<sup>1</sup> The Chief of Army Ordnance, in proposing the legislation, explained that it would facilitate the removal of post-war stockpiles of ammunition that would otherwise deteriorate and pose a significant danger by permitting the military to incur the costs involved in such conversion.<sup>2</sup>

##### **3.3.10.3. Laws in Practice**

The Department of the Air Force, Office of General Counsel, the Department of the Army, Office of the Judge Advocate General, and the Offices of Chief Counsel, US Army Materiel Command and US Army Corps of Engineers, report that this authority is no longer relied upon by the relevant military departments.<sup>3</sup>

##### **3.3.10.4. Recommendation and Justification**

###### **Repeal**

These sections should be repealed as obsolete authorities no longer serving any need within the relevant military departments.

##### **3.3.10.5. Relationship to Objectives**

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<sup>1</sup>Pub. L. No. 69-318, ch. 435, 65 Stat. 707 (1926).

<sup>2</sup>H.R. REP. No. 757, 69th Cong., 1st Sess. 1-2 (1926)

<sup>3</sup>Memorandum from John P. Janecek, Assistant General Counsel, Department of the Air Force, to Donald Freedman, Executive Secretary, Acquisition Law Task Force, dated 27 Mar. 1992; Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army to Acquisition Law Advisory Panel, dated 25 Feb. 1992; Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, Army Materiel Command, to Advisory Panel, dated 22 May 1992; Memorandum from Mr. Lester Edelman, Chief Counsel, US Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992.

Repeal of these statutes promotes the goal of streamlining the DOD acquisition process by removing an obsolete provision.

### **3.3.11. 10 U.S.C. § 4540; 10 U.S.C. § 9540; and 10 U.S.C. § 7212**

#### **Architectural and engineering services**

#### **10 U.S.C. § 2855**

#### **Law applicable to contracts for architectural and engineering services and construction design**

##### **3.3.11.1. Summary of Laws**

Sections 4540 and 9540 provide that the Secretaries of the Army and Air Force, respectively, may employ, by contract or otherwise, the architectural and engineering (A-E) services of any person outside the Department for producing and delivering designs, plans, drawings, and specifications needed for any defense public works or utilities project. The Secretaries may make these contracts when in-house services are inadequate and when otherwise advantageous to the national defense. These statutes limit the fee for such services to 6% of the estimated construction cost, while also stipulating that certain enumerated civil service requirements do not apply to the employment of architectural and engineering services.

Section 7212 provides the same authority for the Secretary of the Navy, but also expressly permits these contracts to be entered into without advertising.

##### **3.3.11.2. Background of Laws**

The oldest of these authorities, section 7212, was originally enacted by Pub. L. No. 76-43, as approved April 25, 1939. The legislation was based on congressional studies conducted prior to W.W.II that recommended increased expenditures for improvements to existing military bases and construction of new ones. In addition to providing authority for private sector contracting to expedite the preparation of plans and specification for shipbuilding and engineering services, the statute also eliminated formal advertising for A-E services. As the Committee Report to this naval authorization act stated:

It is desired to eliminate advertising for engineering and architectural services, as is required by section 3709 of the Revised Statutes, for two reasons: (1) because such advertising would delay the initiation of the work and, (2) because responding to advertising for professional services of this character is considered to be unethical. Furthermore, it is as illogical to advertise for the services of a shipbuilding or other engineering specialist as it would be to advertise for the services of a medical specialist. Standard fees have been established by reputable professional societies for various kinds of engineering works, so that the question of the magnitude

of the fee does not enter into the selection of an engineering or architectural firm. The question in each case should be decided upon the special qualifications of the firms under consideration.<sup>1</sup>

The House and Senate Reports on this bill did not otherwise expressly refer to the establishment of the 6% fee limitation.

Sections 4540 and 9540 were enacted shortly thereafter by Pub. L. No. 76-309, approved August 7, 1939, that granted comparable authority to the Secretary of War. The original language of this legislation included the same exemption from advertising requirements for such contracts as had the naval authorization.<sup>2</sup>

The reports to this War Department legislation also do not contain express reference to the imposition of the 6% fee limitation. However, in the hearings before the Senate Committee on Military Affairs on the bill,<sup>3</sup> Colonel Hartman, on behalf of the War Department, made the following statement:

It will be noted that in the bill the maximum fee is set at 6 percent of the estimated cost of the project. This would be an absolute maximum and is not intended to set a standard. The fees paid for architectural and engineering services on works similar to those contemplated by the War Department vary from 4 to 6 percent. There is no danger that the War Department will pay exorbitant fees for this work as definite standards have been established by the American Institute of Architects, the American Society of Civil Engineers, and other reputable professional societies.<sup>4</sup>

In wartime decisions interpreting these statutes, the Comptroller General concluded that the 6% fee limit applied solely to those costs associated with producing and delivering designs, plans, drawings, and specifications, and did not apply to contract costs arising from other types of architect-engineering services, such as technical supervision.<sup>5</sup>

In 1947, the Armed Services Procurement Act (ASPA) set limitations on fees to be paid for various types of contracts. That Act maintained the same 6% fee limitation on cost-plus-fixed-fee contracts for architectural or engineering services for a public work or utility. This provision is currently codified at 10 U.S.C. § 2306(d).<sup>6</sup> In 1949, the Federal Property and

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<sup>1</sup>S. REP. NO. 263, 76th Cong., 1st Sess. 61-66 (1939).

<sup>2</sup>Although this exemption from advertising was not included when the law was codified, the Comptroller General has held that this omission was inadvertent and that the Army and Air Force authority do contain implicit authority to exempt such contracts from advertising requirements. See Comp. Gen. B-152306, Unpublished Opinion dated Dec. 12, 1966, p. 13.

<sup>3</sup>See S. REP. NO. 2562, 76th Cong., 1st Sess. 13 (1939).

<sup>4</sup>*Id.*

<sup>5</sup>21 Comp. Gen. 580 (Dec. 18, 1941); 22 Comp. Gen. 464 (Nov. 14, 1942).

<sup>6</sup>The Armed Services Procurement Act was codified into Title 10 by Pub. L. No. 84-1028, 70A Stat. 1-685 (1956).

Administrative Services Act (FPASA) applied the same limitation to cost-plus-fixed-fee architect-engineering contracts for civilian agencies. That provision is codified at 41 U.S.C. § 254(b).

During the decades following the war, most Federal agencies interpreted the term "architectural or engineering services," as used in the ASPA and FPASA, as having comparable application as the limitation contained in the three earlier service-specific statutes. Therefore, the 6% fee limitation was deemed not applicable to the costs of any architect-engineering services other than those associated with the production of designs, plans, drawings, and specifications.<sup>7</sup> Most Federal agencies also utilized a qualifications-based selection process in contracting for architect-engineering services in which technical ability, rather than price, was the predominant source selection factor.<sup>8</sup>

In 1967, in response to issues arising from proposals to exempt certain Federal agencies from the 6% fee limitation, the GAO conducted a comprehensive review of these five statutes and of the Federal procurement of architect-engineering services.<sup>9</sup> In that report, the GAO made the following findings:

(1) that the 6% fee limitation in the ASPA and FPASA applied to costs associated with all architect-engineering services and not just those delineated in the Title 10 service-specific statutes;<sup>10</sup>

(2) that architect-engineering contracts were subject to the cost and pricing data requirements of Pub. L. No. 87-653 (the Truth in Negotiations Act);

(3) that the technical ability source selection procedures utilized by many Federal agencies in the procurement of architect-engineering services did not comport with the competitive negotiations requirements of Pub. L. No. 87-653; and,

(4) that the 6% fee limitation was impractical, unsound, and should be repealed.

Representative Jack Brooks, Chairman of the House Government Operations Committee, responded to the GAO study by letter dated November 16, 1967. In that letter, Chairman Brooks set forth the Committee's position with respect to the GAO report. Specifically, the Committee disagreed with the GAO position that the ASPA and FPASA 6% fee limitation applied to all architectural and engineering services. Rather, the Committee maintained that the limitation set forth in those statutes was a simplification and incorporation of the more detailed language in the earlier, service-specific statutes.

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<sup>7</sup>Armed Services Procurement Regulation (ASPR)(superseded by FAR, 48 C.F.R. § 18.306.2(b)).

<sup>8</sup>ASPR,(superseded by FAR 48 C.F.R. §§ 18-402.2 and 18-306.2(a)(1)).

<sup>9</sup>"Government-wide Review of the Administration of Certain Statutory and Regulatory Requirements Relating to Architect-Engineer Fees," Report to the Congress dated Apr. 20, 1967.

<sup>10</sup>This finding reaffirmed an earlier Comptroller General decision reported at B-152306 (Dec. 12, 1966). That decision also held that, despite their facial limitation to cost-plus-a-fixed-fee contracts, these ASPA and FPASA statutes applied to all types of contracts.



The Committee also disagreed with the GAO's conclusion that a technical ability based source selection procedure was not compatible with extant competitive negotiation requirements. With respect to the GAO's recommendation for clarifying legislative action, including repeal of the 6% fee limitation, the Committee stated:

This leads us to the final question of what legislative action, if any, is necessary based upon the findings in this report. As far as the repeal of the statutory limitation is concerned, we have serious doubts as to the advisability of this course of action -- at least at this time. Nor are we of the opinion that they are either useless or unworkable. The A-E services as described in the 1939 Navy statute...are the predominant services provided the Government by members of this profession . . . . [I]f these limitations on A-E fees are to be repealed, arguments of equal persuasion might be levied against other fee limitation provisions in our procurement statutes .

Also, if we were to repeal the limitations on A-E contracts, no practical and acceptable substitute is available for the overall protection of the public against ill-advised action on the part of executive officials. The extension of 'competitive negotiation' . . . to this type contract would not only be an unacceptable substitute, but could seriously compromise the quality of A-E services the Government receives.<sup>11</sup>

Thereafter, in 1972, Congress enacted the Brooks Architect-Engineering Act,<sup>12</sup> currently codified at 40 U.S.C. § 541-544. That legislation amended the FPASA by adding provision for the selection of federal architect-engineering services under a specified, qualifications-based source selection procedure. The stated purpose of the legislation was "to cast in statutory form the traditional system Government agencies have used for more than 30 years in the procurement of architect-engineer services."<sup>13</sup> The Senate Report noted the 1967 GAO recommendations, especially repeal of the 6% fee limitations. With respect to that recommendation, the Senate Report stated:

The bill does not affect existing statutes that limit architect-engineer fees to 6 percent of the estimated construction cost. The 6 percent limitation, when applied to the preparation of designs, plans, drawings, and specifications as Congress intended, is a valuable safeguard to the public. While the limitation may pose some difficulty in negotiating fair compensation for small projects,

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<sup>11</sup>Letter to the Honorable Elmer B. Staats, from the House of Representatives Committee on Government Operations, dated Nov. 16, 1967.

<sup>12</sup>Pub. L. No. 92-585, 86 Stat. 1278 (1972).

<sup>13</sup>S. REP. NO. 1219, 92d Cong., 2d Sess. 6 (1972). The Report expressly stated that the procedures set forth therein were applicable to both military and civilian federal agencies. *Id.* at 8-9.

renovation work and projects requiring exceptional design effort, the 6 percent fee limitation is deemed to be an equitable ceiling.

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[T]he committee feels that the Government's interest . . . is best served by placing the emphasis on obtaining the highest qualified architectural and engineering services available. The bill makes ample provision for keeping costs under control by requiring negotiation for a fee that is fair and reasonable to the Government under the circumstances and by retaining the statutory 6 percent limitation on architect-engineer fees.<sup>14</sup>

In 1980, the Comptroller General ruled that, because the Brooks Act amended the FPASA and not the ASPA, DOD was not authorized to use Brooks Act procedures.<sup>15</sup> However, such procedures were deemed applicable to DOD military construction A-E procurement because statutory authorization for application of "established procedures" in A-E procurement was contained in yearly military construction authorization acts. Thereafter, the Comptroller General reversed its decision and ruled that Brooks Act procedures were applicable to all A-E procurement by DOD.<sup>16</sup>

In 1982, Congress permanently enacted for DOD a requirement to follow Brooks Act procedures in military construction-related procurements. That provision, codified at 10 U.S.C. § 2855, states:

Contracts for architectural and engineering services and construction design in connection with a military construction project or a military family housing project shall be awarded in accordance with Title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 541 et seq.)

In 1988, the FPASA was amended to state that the definition of architectural and engineering services for Brooks Act purposes included: research, planning, development, design, construction, alteration, or repair of real property, and other services justifiably performed, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.<sup>17</sup>

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<sup>14</sup>*Id.* at 3-4.

<sup>15</sup> Association of Soil and Foundation Engineers, B-199548, Sep. 15, 1980, 80-2 CPD 196.

<sup>16</sup> Association of Soil and Foundation Engineers, B-199548.2, Aug. 13, 1982, 82-2 CPD 128.

<sup>17</sup> Pub. L. No. 100-679, § 8, 102 Stat. 4069 (1988).

No change to the 6% fee limitation was made by that legislation. However, a bill that would amend the FPASA to raise the 6% architect-engineering fee limit applicable to civilian agencies to 8% was recently introduced in the Congress.<sup>18</sup>

### 3.3.11.3. Laws in Practice

The scope of architect-engineering services to which Brooks Act procedures apply is set forth at FAR section 36.102.<sup>19</sup> The DFARS, at section 236.606-70, implements the 6% fee limit and expressly states:

[T]he six percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the six percent limit.<sup>20</sup>

The Army Corps of Engineers FAR Supplement (EFARS) identifies the following costs as not subject to the 6% fee limitation: initial site visits, field and topographic surveys; feasibility studies, economic studies and other investigations; consultant services not related to the production and delivery of working drawings or specifications; preparation of environmental impact assessments and statements; and construction supervision.<sup>21</sup> The Air Force fee limit is implemented by Air Force Regulation 88-31. That regulation applies the 6% limit to costs for visual inspections of the site or facilities, familiarization with the scope and conditions of construction, and coordination with the using organization's needs. It does not apply the limit to technical field investigations such as topographical surveys, soil analyses, subsurface exploration, or similar fact finding surveys.

Many other Federal agencies, such as the Departments of Energy, Transportation, Veterans Administration, and NASA maintain their own definitions of the scope of services to which the 6% fee limit does or does not apply.

With regard to the practical effects of these statutes, comments were solicited from the military departments as well as from private, architect-engineering associations.

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<sup>18</sup>S. 1095, the Excellence in Public Architecture Act, passed the Senate on Jan. 24, 1992. However, it was not reported out of Committee in the House.

<sup>19</sup>That section was recently rewritten to state, in relevant part, that covered architect-engineer services include:

(2) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(3) Such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions...may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. Amendment to FAR 36.102, 56 Federal Register 122 (June 15, 1991).

<sup>20</sup>DFARS, 48 C.F.R. 236.606-70(c).

<sup>21</sup>EFARS, § 36.605(101).

The Air Force, through the Operational Contracting Division of the Deputy Assistant Secretary (Contracting) for the Assistant Secretary of the Air Force (Acquisition), noted the regulatory implementation of section 9540 and stated "this law has application to the current acquisition process."<sup>22</sup> The U.S. Army Corps of Engineers, Office of Chief Counsel, recommends that the 6% fee limitation be deleted, stating:

A fee limitation is inherently contrary to the objective of negotiating a fair and reasonable fee. For small projects requiring a variety of A-E disciplines such as building renovations, . . . 6% is inadequate to prepare thorough plans and specifications. For large projects, a fee limitation can work against the government negotiator. A-Es often expect the maximum 6%, although the Government estimate of a fair and reasonable price may be considerably less. The 6% limit is outdated; the cost of design has increased relative to the cost of construction.<sup>23</sup>

That Office also notes that the regulatory implementation of this authority substantially diminishes the fee-limiting effect because it provides so many exemptions from the limit.<sup>24</sup> Finally, that Office also recommends that, if these three statutes are repealed in their entirety, an amendment should be made to 10 U.S.C. § 2855 that permanently authorizes A-E procurement. That section currently requires the use of Brooks Act procedures in military construction procurements. The Army Corps of Engineers is concerned that, absent these statutes, no authority would exist authorizing the procurement of A-E services for non-military construction related projects.<sup>25</sup>

The Naval Facilities Engineering Command (NAVFAC) recommends repeal of 10 U.S.C. § 7212 as it has been supplanted by the Brooks Act. NAVFAC cites for example:

The provision in 10 U.S.C. § 7212 stating that the secretary may contract ". . . without advertising . . .," probably alluded to the pre-CICA name for the sealed bid procedures that was called "formal advertising." This portion of the statute has also become unnecessary since the passage of the Brooks Act which codifies the "slate and selection" process used by the military services since the passage of the Public Works Act of 1939.<sup>26</sup>

NAVFAC notes further:

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<sup>22</sup>Letter from Mr. Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), to Ms. Theresa Squillacote, DOD Advisory Panel, dated 20 Nov. 1992.

<sup>23</sup>Letter from Mr. Lester Edelman, Chief Counsel, DOD Advisory Panel, U.S. Army Corps of Engineers, to Deputy General Counsel (Acquisition), Department of the Army, dated 18 Mar. 1992.

<sup>24</sup>*Id.*

<sup>25</sup>Datafax transmission from U.S. Army Corps of Engineers Acquisition Law Task Force dated 19 Aug. 1992.

<sup>26</sup>Memorandum from Mr. Harvey Wilcox, Deputy General Counsel (Logistics), Department of the Navy, Office of the General Counsel, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

The 6% limitation in subsection (b) is not imposed on non-military federal agencies, except in the case of a cost reimbursable contract for A-E services, See, 10 U.S.C. § 2306 and 41 U.S.C. § 254.<sup>27</sup>

Comments were also solicited from the American Consulting Engineers Council, the National Society of Professional Engineers, the American Institute of Architects and the Committee on Federal Procurement of Architect-Engineer Services (COFPAES). Several of these organizations solicited inputs from their memberships, with the result that comments were received from over 150 private, architect-engineer firms nationwide.<sup>28</sup>

They overwhelmingly recommended repeal of the 6% fee limit in these statutes, and also provided a wealth of anecdotal and other data to support that position. Their comments raised the following issues:

**(1) Administrative Burden**

(a) the 6% fee limit is applied differently by each Federal agency and even by different sections of the same agency;

(b) requires extensive documentation of those A-E services covered by the fee limit and those that are not; and

(c) adds to contract negotiation time.

**(2) Reduces Quality of Federal A-E Services**

(a) allows no variation for project complexity or size, which is particularly relevant for those projects for which a high level of technological skill is required;

(b) clearly penalizes the smaller project, for which overhead is proportionately greater;

(c) encourages A-Es to shortcut design time, leading to greater pursuit of claims against A-Es for alleged A-E errors;

(d) encourages A-Es to utilize less skilled, less expensive staff on Federal contracts; and

(e) A-Es will use standard designs, thereby not always considering a variety of project design alternatives.

**(3) Raises Cost of A-E Services**

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<sup>27</sup>*Id.*

<sup>28</sup>Those comments are too numerous to be cited individually herein. They are compiled and on file with the Defense Systems Management College.

- (a) poorer quality design leads to greater need for repair and renovation;
- (b) reduces pool of A-E firms willing to contract with the Government;
- (c) less effort is expended to fully investigate existing conditions; changed conditions are therefore commonplace;
- (d) contract schedules are often extended to accommodate supplemental design efforts midterm; and
- (e) limits competitors for Federal A-E business; increases use of in-house staff.

#### **3.3.11.4. Recommendations and Justification**

##### **I**

#### **Repeal sections 4540, 9540 and 7212 as obsolete laws**

The Panel recommends these three sections be repealed as obsolete.

Professional architect-engineering services are a unique product in which the professionalism and technical quality of the services being rendered are extremely important. The legislative history of these statutes, as well as that of the Brooks Act, clearly indicates that Congress understood this fact. In 1972, Congress expressly sanctioned a specific A-E contracting process in which source selection could be based on qualification criteria as opposed to price.

Congress recognized the same fact in 1939 when it enacted the naval authority at 10 U.S.C. § 7212. Indeed, it was this fact upon which Congress relied when it provided for an advertising exemption for such contracts, adopting the initial 6% fee limit not only as a maximum cap but also to emulate the standard fee then applied by professional societies. Thus, Congress stated in the report to that legislation that "[s]tandard fees have been established by reputable professional societies for various kinds of engineering works, so that the question of the magnitude of the fee does not enter into the selection of an engineering or architectural firm. The question in each case should be decided upon the special qualifications of the firms under consideration."<sup>29</sup>

When Congress enacted the Brooks Architect-Engineering Act in 1972, it unequivocally endorsed the qualifications-based source selection procedures then being used by most Federal agencies in A-E procurements. Congress retained the 6% fee limit as "cost safeguard," while at the same time acknowledging such a limit hindered negotiation of fair compensation for small projects, renovation work, and projects requiring exceptional design effort. This legislative background, and the interplay between the GAO and Congress that culminated in the enactment

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<sup>29</sup>*Supra* note 1.

of the Brooks Act, suggests Congress retained the fee limit in 1972 to moderate arguments that its adoption of the qualification-based selection procedure would lead to unrestrained costs.

However, retention of the fee limit no longer serves that purpose. The qualification-based selection procedure has not resulted in exorbitant A-E fees. In fact, the profit rate for the private sector on such defense contracts averages significantly below that available on other commercial contracts.<sup>30</sup> Since 1967 when the GAO conducted its initial survey, Government officials have consistently maintained that the negotiation process in qualifications-based selection is sufficient to ensure a fair and reasonable price is established. In essence, since its formal adoption in 1972, qualifications-based selection has been validated, allaying the cost concerns that were present when it was first enacted.

In addition, in the era of modern Federal A-E procurement, the fee limit demonstrably adds cost and diminishes quality. Private A-E entities have expressly stated that, on Federal projects, design is often short-circuited, leading to more substantial contract modifications, protests, repairs, and maintenance costs. Many of those flaws are attributed to the greater reliance placed on standard plans and designs used by A-E firms willing to accept fee limitations. The pool of A-E entities willing to do business with the Government is also clearly restricted by the fee limitation, a barrier to competition which indirectly raises the negotiated price.

Finally, the administrative burden to both the Government and private sector is significant. Individual agencies have enacted their own standards delineating those costs that are subject to the fee limit and those that are not. Great effort is typically expended by the contracting parties attempting to apply those standards. This effort is particularly difficult given the extremely broad ranges of technical services now routinely required in modern A-E procurements. This entire regulatory web will be eliminated by repeal of these statutes.

## II

### **Amend 10 U.S.C. § 2306(d) and 41 U.S.C. § 254(b) to delete 6% fee limit**

The Panel recommends that the above statutes be amended to delete the 6% fee limitation as well. While 41 U.S.C. § 254(b) applies to civilian agencies and is not within the purview of this Panel, the Panel recommends that Congress consider deleting it as well.<sup>31</sup>

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<sup>30</sup>"Federal Compensation for A/E Services," A Report by the Committee on Federal Procurement of A/E Services, Feb. 1992, pp. 32-33.

<sup>31</sup>See ch. 1.2.3. for an analysis of § 2356 and implementation of this recommendation.

### III

#### **Amend 10 U.S.C. § 2855 to Permanently Authorize A-E Procurement**

The Panel recommends that 10 U.S.C. § 2855 be amended to clarify that authority in that section to purchase A-E services extends to the U.S. Army Corps of Engineers' Civil Works program as well as to all military construction.

##### **3.3.11.5. Relationship to Objectives**

Repeal of these service-specific, A-E statutes would promote the goal of streamlining the DOD acquisition process by removing obsolete laws that affirmatively hinder effective procurement of A-E services.

##### **3.3.11.6. Proposed Statute**

#### **10 U.S.C. § 2855 Law applicable to contracts for architectural and engineering services and construction design**

(a) The Secretary of Defense and the Secretaries of the military departments may contract for architectural and engineering services in connection with a military construction or family housing project or for other Department of Defense purposes.

(b) Contracts for such architectural and engineering services shall be awarded in accordance with Title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 541 et seq.), without regard to sections 305, 3324 and 7204, chapter 51 and subchapters III, IV and VI of chapter 53 of title 5.



### **3.3.12. 10 U.S.C. §§ 4541 and 9541**

#### **Gratuitous services of officers of the Army/Air Force Reserve**

##### **3.3.12.1. Summary of Laws**

These sections permit the Secretaries of the Army and Air Force to accept the gratuitous services of Reserve officers in enrolling, organizing, and training members of the Reserves or the Reserve Officers' Training Corps (ROTC), or in consulting on matters related to the armed forces.

##### **3.3.12.2. Background of Laws**

These sections were originally enacted in 1917 as a proviso to the Army Appropriations Act of 1918.<sup>1</sup> The legislative history of that bill does not contain any discussion of this specific provision. The provision was made permanent law by the Defense Authorization Act of 1947, and was codified into Title 10 in 1982.<sup>2</sup>

##### **3.3.12.3. Laws in Practice**

The Air Force Office of General Counsel reports this authority is not currently used by the Air Force.<sup>3</sup> The Department of the Army, Office of the Judge Advocate General, reports this authority remains useful to that department.<sup>4</sup> Although the Anti-Deficiency law prohibits the military departments from accepting gratuitous services, the General Accounting Office (GAO) has determined that the Government may accept gratuitous services when provided pursuant to a written agreement.<sup>5</sup> This authority permits the departments to accept such services without a written agreement. This authority also permits the Army to utilize Army Reservist services in support of the Junior ROTC program. The Army Materiel Command and Army Corps of Engineers do not report any utilization of this statute.<sup>6</sup>

##### **3.3.12.4. Recommendation and Justification**

###### **Retain and Consolidate**

These sections should be retained and consolidated into a single authority for the Secretary of Defense and for the secretaries of the military departments. The authority remains

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<sup>1</sup>Pub. L. No. 65-11, ch. 12, 40 Stat. 72 (1917)

<sup>2</sup>Pub. L. No. 97-258, § 2(b)(9)(B), 96 Stat. 1056 (1982).

<sup>3</sup>Memorandum from John P. Jancek, Assistant General Counsel, Department of the Air Force, to Donald Freedman, Executive Secretary, Acquisition Law Task Force, dated 27 Mar. 1992.

<sup>4</sup>Memorandum from Col. Maurice J. O'Brien, Chief, Contract Law Division, Office of the Judge Advocate General, Department of the Army to Acquisition Law Advisory Panel, dated 25 Feb. 1992.

<sup>5</sup>Matter of Romey, USAR, B-216466, (Nov. 14, 1984).

<sup>6</sup>Memorandum from Mr. Robert Macfarlane, Deputy Command Counsel, US Army Materiel Command, to Advisory Panel, dated 2 Apr. 1992.

useful to the Army, particularly for training purposes, and is not superseded by other statutory provisions. Accordingly, the Panel recommends these sections be consolidated as specified below.

#### **3.3.12.5. Relationship to Objectives**

Retention and consolidation of these statutes promote the goals of streamlining the acquisition process while protecting the best interests of DOD.

#### **3.3.12.6. Proposed Statute**

##### **Gratuitous services of officers of the armed forces reserves**

The Secretary of Defense, or Secretaries of the military departments, may accept the gratuitous services of officers of their Reserve forces in enrolling, organizing, and training members of their Reserve or the Reserve Officers' Training Corps, or in consulting on matters related to the Armed Forces.

### **3.3.13. 10 U.S.C. § 9511; 10 U.S.C. § 9512; 10 U.S.C. § 9513**

#### **Definitions; Contracts for the inclusion or incorporation of defense features; Commitment of aircraft to the Civil Reserve Air Fleet**

##### **3.3.13.1. Summary of Laws**

Section 9511 contains definitions of terms used in Sections 9512 and 9513. Section 9512 provides that, subject to Chapter 137 of Title 10 and to the availability of funds, the Secretary of Defense may contract with any U.S. citizen for the incorporation of defense features in any new or existing aircraft owned by the citizen. Such contracts shall include terms required under section 9513 of this title and provide that the contractor shall repay to the U.S. a percentage of any amount the U.S. is contractually required to pay upon destruction or damage to the aircraft, or other loss of use.

Section 9513 provides that each contract entered into under section 9512 shall provide that any aircraft covered under the contract shall be committed to the Civil Reserve Air Fleet (CRAF), and that, as long as the aircraft remains privately owned, it shall be operated for DOD as needed during any Civil Reserve Air Fleet activation, notwithstanding any other commitment. The section further provides that the contractor operating such aircraft shall be paid at fair and reasonable rates. Finally, section 101 of the Defense Production Act does not apply to such covered aircraft during any Civil Reserve Air Fleet activation.<sup>1</sup>

##### **3.3.13.2. Background of Laws**

Section 9512 was originally enacted by the DOD Authorization Act for Fiscal Year 1982.<sup>2</sup> The language originated in the House version of the bill. The Secretary of the Air Force was authorized to modify existing and newly manufactured civil aircraft to configurations capable of carrying outsize and bulk military cargo, and provide financial incentives for civilian participation in the CRAF program. The section was amended in its entirety by the National Defense Authorization Act for Fiscal Year 1990 and 1991.<sup>3</sup> The current language originated in the Senate version of that bill. The Senate Committee Report indicated that the proposed amendment permitting defense features to be incorporated in commercial aircraft at the time of their construction was intended to provide needed authority to enhance the Civil Reserve Air Fleet (CRAF).<sup>4</sup> The House receded in conference.<sup>5</sup>

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<sup>1</sup>That section of the Defense Production Act authorizes the President to prioritize defense contracts.

<sup>2</sup>Pub. L. No. 97-86, § 915(2), 95 Stat. 1126 (1981).

<sup>3</sup>Pub. L. No. 101-189, § 1636(b), 103 Stat. 1610 (1989).

<sup>4</sup>S. REP. NO. 81 101st Cong., 1st Sess. 71 (1989).

<sup>5</sup>H. CONF. REP. No. 331, 101st Cong., 1st Sess. 672 (1989).

As with § 9512, § 9513 was also originally enacted by the DOD Authorization Act for Fiscal Year 1982.<sup>6</sup> The legislative history to that bill indicates that the section was intended to establish a greater commitment to the CRAF by DOD.

### 3.3.13.3. Laws in Practice

These sections are implemented by Air Mobility Command Regulation 55-8 (August 13, 1992).<sup>7</sup>

These sections are administered by the Civil Air Directorate, Air Mobility Command, which is overseen by the U.S. Transportation Command (USTRANSCOM).<sup>8</sup> Air Mobility Command, with the approval of USTRANSCOM, has proposed amendment and reorganization of these sections that would authorize the use for specified purposes of military airfields by commercial aircraft that maintain a CRAF commitment.

In a recent White Paper on Incentives for the Civil Reserve Air Fleet, dated 11 August 1992, the Air Mobility Command noted that activation of the CRAF during Operation Desert Shield/Desert Storm resulted in significant air carrier contributions to DOD. The paper examines the need for preservation and enhancement of voluntary participation in the CRAF as key to building an effective commercial/DOD partnership. In support of that partnership in the air carrier field, the Air Mobility Command posits the need to enhance the mobilization base of the US commercial air carrier industry and to recognize the interdependence of military and civilian airlift capabilities. As an added inducement to voluntary CRAF commitment, the proposed amendment would afford the Secretary of the Air Force authority to authorize limited use of military airfields by commercial carriers.

The cognizant Offices of Counsel of the USTRANSCOM commands support these proposed amendments.<sup>9</sup> The Associate Deputy Assistant Secretary for Transportation, Department of the Air Force, has indicated that Office's support for the proposed revisions.<sup>10</sup>

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<sup>6</sup>Pub. L. No. 97-86, § 1636(c)(1), 95 Stat. 1126 (1981).

<sup>7</sup>The underlying authority to enter into CRAF agreements is set forth at Executive Order 11490, Oct. 28, 1969, 24 F.R. 17567, as amended by Executive Order 11921, June 11, 1976, 41 F.R. 2494, as amended by Executive Order 12656, Nov. 18, 1988, 53 F.R. 47491.

<sup>8</sup>USTRANSCOM is a unified command established in April, 1987 and is comprised of Air Mobility Command, Military Sealift Command, and Military Traffic Management Command. By Memorandum dated 14 February 1992, the Secretary of Defense assigned to USCINTRANS the mission of providing air, land and sea transportation for DOD, both in time of peace and time of war.

<sup>9</sup>Letter from Brig Gen Thomas L. Hemingway, USAF, Chief Counsel, USTRANSCOM, to Ms. Theresa Squillacote, dated 10 December 1992. See also datafax transmission from Mr. Charles H. Joergenson, Office of Chief Counsel, USTRANSCOM, to Ms. Theresa Squillacote, Counsel, Acquisition Law Task Force, dated 22 Dec. 1992.

<sup>10</sup>Datafax transmission from Mr. Frank Colson, Associate Deputy Assistant Secretary of the Air Force (Transportation), to DOD Advisory Panel, dated 30 Dec. 1992.

#### **3.3.13.4. Recommendation and Justification**

##### **Amend and consolidate to grant authority to contract with CRAF contractors for limited use of military airfields**

The Panel recommends that these statutes be amended as set forth below. The provisions regarding CRAF enhancement contracts -- that is, contracts for modifications to aircraft owned by those commercial carriers that have made a CRAF commitment -- are currently set forth both at 10 U.S.C. §§ 9512 and 9513. Each of these two sections, therefore, currently cross-reference each other. For clarity and streamlining purposes, the CRAF enhancement provisions would be consolidated into a single section, the proposed § 9512.

Section 9513 would then be amended in its entirety to grant the Secretary of the Air Force discretionary authority to authorize the limited use of military installations to air carriers as an inducement to commit aircraft to the CRAF. Increased use of CRAF capabilities can be of significant value in this era of defense drawdown. Similarly, greater utilization of CRAF would be a significant part of an overall commitment towards the goal of increased civil/military integration.

Finally, a conforming amendment to the definition section at 10 U.S.C. § 9511, to set forth a new definition of "contractor," would be required. Currently, the definition of "contractor" is limited to a contractor with a CRAF enhancement obligation. The new definition proposed at § 9511(c) would broaden that to definition to include any contractor with a CRAF commitment, thus making the definition section co-extensive with the new authority proposed at 10 U.S.C. § 9513.

#### **3.3.13.5. Relationship to Objectives**

Amendment of these sections will further the best interests of the DOD by affording it greater opportunities to contract for CRAF commitment.

#### **3.3.13.6. Proposed Statutes**

##### **§ 9511. Definitions**

In this subchapter:

- (1) The terms "aircraft", "citizen of the United States", "person", and "public aircraft" have the meaning given those terms by section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301)
- (2) The term "passenger-cargo combined aircraft" means a civil aircraft equipped so that its main deck can be used to carry both passengers and property (including mail) simultaneously.
- (3) The term "cargo-capable aircraft" means a civil aircraft equipped so that all or substantially all of the aircraft's capacity can be used for the carriage of property or mail.

(4) The term "passenger aircraft" means a civil aircraft equipped so that its main deck can be used for the carriage of individuals and cannot be used principally, without major modification, for the carriage of property or mail.

(5) The term "cargo-convertible aircraft" means a passenger aircraft equipped or designed so that all or substantially all of the main deck of the aircraft can be readily converted for the carriage of property or mail.

(6) The term "civil aircraft" means an aircraft other than a public aircraft.

(7) The term "Civil Reserve Air Fleet" means those aircraft allocated, or identified for allocation, to the Department of Defense under section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071), or made available (or agreed to be made available) for use by the Department of Defense under a contract made under this title, as part of the program developed by the Department of Defense through which the Department of Defense augments its airlift capability by use of civil aircraft.

(8) The term "contractor" means a citizen of the United States (A) who owns or controls, or who will own or control, a new or existing aircraft and who contracts with the Secretary to modify that aircraft by including or incorporating specified defense features in that aircraft and to commit that aircraft to the Civil Reserve Air Fleet, or (B) who subsequently obtains ownership or control of a civil aircraft covered by such a contract and assumes all existing obligations under that contract, or (C) who owns or controls, or will own or control, new or existing aircraft and who contractually commits all or some of said aircraft to the Civil Reserve Air Fleet.

(9) The term "existing aircraft" means a civil aircraft other than a new aircraft.

(10) The term "new aircraft" means a civil aircraft that a manufacturer has not begun to assemble before the aircraft is covered by a contract under section 9512 of this title.

(11) The term "Secretary" means the Secretary of the Air Force.

(12) The term "defense feature" means equipment or design features included or incorporated in a civil aircraft which ensures the interoperability of such aircraft with the Department of Defense airlift system. Such term includes any equipment or design feature which enables such aircraft to be readily modified for use as a cargo-convertible, cargo-capable, or passenger-cargo combined aircraft.

#### **§ 9512. Contracts for the inclusion or incorporation of defense features**

(a) Subject to the provisions of chapter 137 of this title, and to the extent that funds are otherwise available for obligation, the Secretary-

(1) may contract with any citizen of the United States for the inclusion or incorporation of defense features in any new or existing aircraft to be owned or controlled by that citizen; and

(2) may contract with United States aircraft manufacturers for the inclusion or incorporation of defense features in new aircraft to be operated by a United States air carrier.

(b) Each contract entered into under subsection (a) shall provide include

(1) that any aircraft covered by the contract shall be committed to the Civil Reserve Air Fleet;

(2) that, so long as the aircraft is owned or controlled by a contractor, the contractor shall operate the aircraft for the Department of Defense as needed during any activation of the Civil Reserve Air Fleet, notwithstanding any other contract or commitment of that contractor; and

(3) that the contractor operating the aircraft for the Department of Defense shall be paid for that operation at fair and reasonable rates.

(c) Each contract entered into under subsection (a) shall include ~~(1) the terms required by section 9513 of this title and~~ a provision that requires the contractor to repay to the United States a percentage (to be established in the contract) of any amount paid by the United States to the contractor under the contract with respect to any aircraft if-

(1) the aircraft is destroyed or becomes unusable, as defined in the contract;

(2) the defense features specified in the contract are rendered unusable or are removed from the aircraft;

(3) control over the aircraft is transferred to any person that is unable or unwilling to assume the contractor's obligations under the contract; or

(4) the registration of the aircraft under section 501 of the Federal Aviation Act of 1958 (49 U.S.C. App. 1401) is terminated for any reason not beyond the control of the contractor.

(d)(1) A contract under subsection (a) for the inclusion or incorporation of defense features in an aircraft may include a provision authorizing the Secretary-

(A) to contract, with the concurrence of the contractor, directly with another person for the performance of the work necessary for the inclusion or incorporation of defense features in such aircraft; and

(B) to pay such other person directly for such work.

(2) A contract entered into pursuant to subsection (d) may include such specifications for work and equipment as the Secretary considers necessary to meet the needs of the United States.

(e) Notwithstanding section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071), each aircraft covered by a contract under section 9512 of this title shall be committed exclusively

to the Civil Reserve Air Fleet for use by the Department of Defense as needed during any activation of the full Civil Reserve Air Fleet unless the aircraft is released from that use by the Secretary of Defense.

**§ 9513 Use of Military Installations by Civil Reserve Air Fleet Contractors**

(a) The Secretary of the Air Force may contract for the use by CRAF contractors of Air Force installations designated by the Secretary. With the consent of the Secretary concerned, such a contract may provide for the use of installations under the jurisdiction of armed forces other than the Air Force, designated by the Secretary. The use of military installations authorized of this section may be upon such terms as the Secretary believes will promote the national defense or be in the public interest.

(b) A contract entered into under paragraph (1) may authorize the use of the designated installation as a weather alternate, a technical stop not involving the enplaning or deplaning of passengers or cargo, or, for installations within the United States, for other commercial purposes. The Secretary may, notwithstanding any other provision of the law, establish different levels and types of uses for different installations, and discriminate among contractors with respect to levels and types of uses.

(c) Notwithstanding the provisions of Section 1107 of the Federal Aviation Act of 1958, or any other provision of the law, amounts collected from the contractor for landing fees, services, supplies, or other charges authorized to be collected under the contract shall be credited to the appropriation of the parent service of the military installation to which the contract pertains.

(d) A contract entered into under subsection (a) shall provide that the contractor agrees to indemnify and hold harmless the Air Force (and the armed forces exercising jurisdiction over the installation, in the case of an installation under the jurisdiction of an armed force other than the Air Force), from all actions, suits, or claims of any sort resulting from, relating to, or arising out of any activities conducted, or services or supplies furnished, in connection with the contract.

(e) A contract entered into under subsection (a) shall provide that the Secretary or the Secretary concerned (in the case of an installation under the jurisdiction of an armed force other than the Air Force), may at any time and without prior notice deny access to an installation designated under a contract if military exigencies require it.

~~(a) Each contract under section 9512 of this title shall provide--~~

~~(1) that any aircraft covered by the contract shall be committed to the Civil Reserve Air Fleet;~~

~~(2) that, so long as the aircraft is owned or controlled by a contractor, the contractor shall operate the aircraft for the Department of Defense as needed during any activation of the full Civil Reserve Air Fleet, notwithstanding any other contract or commitment of that contractor; and~~



~~(3) that the contractor operating the aircraft for the Department of Defense shall be paid for that operation at fair and reasonable rates.~~

~~(b) Notwithstanding section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071), each aircraft covered by a contract under section 9512 of this title shall be committed exclusively to the Civil Reserve Air Fleet for use by the Department of Defense as needed during any activation of the full Civil Reserve Air Fleet unless the aircraft is released from that use by the Secretary of Defense.~~

### **3.3.14. 10 U.S.C. § 7201**

#### **Guided missiles; research and development, procurement, construction**

##### **3.3.14.1. Summary of Law**

This law authorizes the Secretary of the Navy to conduct guided missile-related R&D and procurement.

##### **3.3.14.2. Background of Law**

This section was enacted by the 1949 Army and Air Force Authorization Act.<sup>1</sup> It was intended to facilitate the development of the post-war guided missile program.<sup>2</sup>

##### **3.3.14.3. Law in Practice**

The Navy Offices of Counsel from whom comments were solicited, including Comptroller of the Navy, Naval Sea Systems Command, and Naval Air Systems Command, all report that this law is no longer utilized by the Navy and recommend its repeal.<sup>3</sup>

##### **3.3.14.4. Recommendation and Justification**

###### **Repeal**

This law should be repealed in its entirety. It is obsolete and does not serve any continued purpose within the Navy.

##### **3.3.14.5. Relationship to Objectives**

Repeal of this statute facilitates the goal of streamlining the DOD acquisition process by deleting an obsolete naval authority.

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<sup>1</sup>Pub. L. No. 81-604, ch. 454, § 303(b), 64 Stat. 325 (1950).

<sup>2</sup>H.R. CONF. REP No. 2322, 81st Cong., 2d Sess. 8 (1950).

<sup>3</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

### **3.3.15. 10 U.S.C. § 7203**

#### **Scientific investigation and research**

##### **3.3.15.1. Summary of Law**

This section authorizes the Secretary of the Navy to expend available appropriations for scientific investigation and research. It also authorizes the Secretary of the Navy to delegate that authority.

##### **3.3.15.2. Background of Law**

This law was enacted by the Naval Appropriation Act of 1946.<sup>1</sup> The legislative history merely states that it intended to provide a permanent authorization for recurring appropriations of this type.<sup>2</sup>

##### **3.3.15.3. Law in Practice**

A survey of cognizant Department of Navy Offices of Counsel regarding this section revealed that the Navy Comptroller and the Office of Naval Research do not currently rely upon this authority and recommend its repeal.<sup>3</sup> The Navy International Programs Office states, however, that the Navy's Scientist and Engineer Exchange Program and Data Exchange Agreements and Information Exchange Program rely on 10 U.S.C. § 7203 for their legal underpinning.<sup>4</sup> Based thereon, the Navy Office of General Counsel suggests the alternative of developing a more narrowly tailored, new statutory authority for international exchange programs rather than retaining this section for limited use to justify exchange programs and international agreements.<sup>5</sup>

The other military departments do not have comparable authority to engage in the international exchange of scientific personnel outside the scope of an established Memorandum of Understanding or international cooperative R&D agreement. To rectify that problem, the DOD Office of General Counsel has initiated a legislative proposal to grant such authority department-wide. The military departments have reached consensus upon the language submitted by the DOD Office of General Counsel.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 79-604, ch. 756, § 24(a), 60 Stat. 856 (1946).

<sup>2</sup>S. REP. NO. 762, 79th Cong., 2d Sess. 1, 2 (1946).

<sup>3</sup>Memorandum from Mr. Harvey Wilcox, Deputy General Counsel (Logistics), Department of the Navy, Office of General Counsel, to Counsel, Acquisition Law Task Force, dated 8 April 1992.

<sup>4</sup>*Id.* See also Memorandum from Mr. R. David Gale, Jr., Assistant to the General Counsel (International) Department of the Navy, to Assistant to the General Counsel (FOIA), Department of the Navy, dated 27 Apr. 1992.

<sup>5</sup>*Id.*

<sup>6</sup>Memorandum from Department of Defense Office of General Counsel, to Under Secretary of Defense for Acquisition, dated 14 Apr. 1992.

#### 3.3.15.4. Recommendation and Justification

##### Amend and redesignate to provide scientific exchange authority

The Panel recommends that this statute be amended to provide for the international exchange of scientific personnel by all military departments. The Panel also recommends that this statute be redesignated outside the naval procurement chapters of Title 10 to clarify that the authority provided is not limited to the Department of the Navy.

#### 3.3.15.5. Relationship to Objectives

Amendment and redesignation of this statute will promote the best interests of the DOD by providing a needed authority for international scientific personnel exchanges.

#### 3.3.15.6. Proposed Statute

##### § ~~XXXX~~ Exchange of Scientific Personnel

(a) The Secretary of Defense is authorized to enter into agreements with the governments of allied and other friendly foreign countries for the exchange of military and civilian personnel of the United States Department of Defense and such personnel of the defense ministries of such foreign governments.

(b) Pursuant to these agreements, personnel of foreign defense department or ministries may be assigned to positions in the U.S. Department of Defense, and personnel of the U.S. Department of Defense may be assigned to positions in foreign defense departments or ministries. In the case of agreements for the exchange of personnel engaged in research and development activities, such agreements may provide for assignments to positions in private industry which support the foreign defense departments or ministries. The specific positions and the individuals to be assigned must be acceptable to both governments.

(c) These agreements shall be based on the principle of reciprocity such that each government will provide personnel of essentially equal qualifications, training, and skill. Salary, per diem, cost of living, travel, cost of language or other training, and other costs (except for cost of temporary duty directed by the host government and costs incident to the use of host government facilities in the performance of assigned duties) shall be paid by each government for its own personnel in accordance with its laws and regulations.

~~(a) The Secretary of the Navy may make such expenditures as he considers appropriate for scientific investigations and research from any naval appropriation available for these purposes.~~

~~(b) The Secretary, to the extent he considers proper, may delegate the authority conferred by this section to any person in the Department of the Navy, with or without the authority to make successive redelegations.~~

### **3.3.16. 10 U.S.C. § 7213**

#### **Relief of contractors and their employees from losses by enemy action**

##### **3.3.16.1. Summary of the Law**

This statute provides that public works construction funds may be used to recompense contractors and their employees from losses from enemy action.

##### **3.3.16.2. Background of the Law**

This section was enacted by the 1942 Act Authorizing Navy Public Works Construction.<sup>1</sup> It was intended to function as relief authorization for contractors and their employees engaged on public works projects on Wake Island and Guam when these places were captured and occupied during World War II.<sup>2</sup>

##### **3.3.16.3. Law in Practice**

The Naval Facilities Engineering Command Office of Counsel commented that the statute, taken at face value, does not limit relief to construction contractors, although the only appropriation made available is the military construction appropriation.<sup>3</sup> That Office also stated that extraordinary relief is limited to losses from enemy action, and that the authority granted by Pub. L. No. 85-804 was now generally used as a basis for extraordinary relief. Further, Executive Order 10789 allowed the Secretary of Defense to grant relief on a broader basis than losses associated with enemy action. Based on these conclusions, the Navy Office of General Counsel recommends repeal of this section.<sup>4</sup>

##### **3.3.16.4. Recommendation and Justification**

#### **Repeal**

This statute should be repealed in its entirety. It provides relief authority intended for a specific historical circumstance. It no longer serves any useful purpose for the Navy.

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<sup>1</sup>Pub. L. No. 77-438, ch. 431, § 3, 56 Stat. 51 (1942).

<sup>2</sup>S. REP. NO. 998, 77th Cong., 2d Sess. 3 (1942).

<sup>3</sup>Memorandum from Mr. Harvey Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>4</sup>*Id.*

### **3.3.16.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process by removing an obsolete provision.

### 3.3.17. 10 U.S.C. § 7229

#### Purchase of Fuel

##### 3.3.17.1. Summary of Law

This section provides that the Secretary of the Navy may purchase fuel in any manner considered proper.

##### 3.3.17.2. Background of Law

This section was originally enacted by the Naval Service Appropriation Act of 1850.<sup>1</sup> The legislative history for that law does not contain any language directly relevant to this particular provision. The original language contained a domestic preference requirement that was repealed by a 1933 Naval Appropriations Act, also without explicating language.<sup>2</sup>

In the 1956 codification of Title 10, the following italicized language was deleted from this section:

In purchasing fuel for the Navy, *or for naval stations and yards*, the Secretary of the Navy shall have the power to discriminate and purchase in such manner as he may deem proper that kind of fuel which is best adapted to the purpose for which it is to be used.<sup>3</sup>

The relevant portion of the report to the 1956 Act merely stated that this language was being deleted because this law had been interpreted as authorizing the Armed Services Petroleum Purchasing Agency (predecessor to the Defense Fuel Supply Center) to negotiate fuel contracts when filling the consolidated fuel requirements of the entire armed forces.<sup>4</sup> The note in the United States Code Annotated has adopted this same language.

However, a search of the GAO Comptroller General decisions, both published and unpublished, reveals no document discussing this provision or setting forth such an interpretation. A computer search of relevant case law reveals no case that cites to or interprets this provision of law.

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<sup>1</sup>Revised Statutes § 3728.

<sup>2</sup>Act of Mar. 3, 1933, ch. 212 (41 U.S.C. § 10a).

<sup>3</sup>Pub. L. No. 84-1028, ch. 104, 70A Stat. 1056 (1956).

<sup>4</sup>H. R. Rep. No. 970, 84th Cong., 2nd Sess. 532 (1956).

### 3.3.17.3. Law in Practice

Despite the apparent historical interpretation of this provision as governing all fuel purchases by the Defense Fuel Supply Center predecessor agency, Defense Fuel Supply Center states that it does not rely upon this law when entering into any type of fuel purchase.<sup>5</sup>

Navy Petroleum Office at Cameron Station, Virginia, reports that NavSup Instruction 4200.81 and NavSup Publication 485 govern all of its fuel acquisition procedures. Those regulations do not refer to this statute as providing contracting authority for any fuel purchasing, emergency or otherwise. NavSup Instruction 4200.81 cites to 10 U.S.C. § 2304(c)(2) as authority for emergency ship's fuel purchases over \$25,000.

Navy Command offices of counsel state:

**Navy Comptroller:** Section 7229 is considered to be important and needed authority that must be retained. It is employed by the Navy regularly to purchase fuel world-wide in connection with Fuel Exchange Agreements and in the absence of existing fuel purchase contracts. It confers needed flexibility that would be lost by repeal. Section 7229 is distinct from and unrelated to 41 U.S.C. § 11a, which provides a bona fide needs exception to the Secretary of the Army for fuel purchases.

**International Programs:** Without offering an opinion as to its validity, we can advise that Navy JAG relies in part on this section as the legal authority to enter into international fuel exchange agreements.

**Military Sealift Command:** This statute permits the Secretary of the Navy to purchase fuel in any manner he considers proper. This statute is used extensively by MSC in the purchase of fuel for USNS vessels when outside CONUS. This statute does not overlap 41 U.S.C. § 11a, which is only applicable to the Army. Recommend retention of this statute.<sup>6</sup>

Based on the above, Navy Office of General Counsel recommends that this section be retained without change.<sup>7</sup>

The Panel inquired further why the emergency fuel purchasing authority cited in the regulations, relying upon CICA authority, was insufficient. The Navy responded that the CICA

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<sup>5</sup>Memorandum from Ms. Kay Bushman, Associate Counsel, Defense Fuel Supply Center Office of Counsel, to Ms. Theresa Squillacote, Counsel, Acquisition Law Task Force, dated 11 Dec. 1992.

<sup>6</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>7</sup>*Id.*



"unusual and compelling" authority requires a written justification and approval regarding the potential serious injury to the government absent full and open competition. While a master of a ship is presumed to have authority to procure necessities for a vessel,<sup>8</sup> that master is not a contracting officer and therefore cannot make the requisite justification and approval. Consequently, the authority of § 7229 is required.<sup>9</sup>

#### **3.3.17.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retaining this law should be retained in its entirety because it continues to serve a valid purpose as emergency fuel purchasing authority for the Navy.

#### **3.3.17.5. Relationship to Objectives**

Retention of this statute will promote the best interests of DCD.

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<sup>8</sup>Marine Fuel Supply & Towing v. M/V Kentucky, 869 F. 2nd 473 (9th Cir. 1988).

<sup>9</sup>Memorandum from Mr. Theodore P. Fredman, Assistant to the General Counsel, Department of the Navy, to Counsel, Acquisition Law Task Force, dated 22 May 1992.

### **3.3.18. 19 U.S.C. § 7230**

#### **Sale of Degaussing Equipment**

##### **3.3.18.1. Summary of the Law**

This section provides the Secretary of the Navy with authority to sell degaussing equipment that is not readily available to private ship owners, and states that the proceeds may be credited to the involved appropriation.

##### **3.3.18.2. Background of the Law**

This statute was originally enacted in 1957 by An Act Authorizing the Sale of Degaussing Equipment.<sup>1</sup> It was intended to assist private owners in maintaining degaussing equipment on their vessels in order to deal with the large number of ocean magnetic mines that remained after World War II.<sup>2</sup>

##### **3.3.18.3. Law in Practice**

The Naval Sea Systems Command was not aware of any use of this statute.<sup>3</sup>

The Navy Office of General Counsel states that this section appears to be an obscure section without application to current circumstances and recommends its repeal.<sup>4</sup>

##### **3.3.18.4. Recommendation and Justification**

###### **Repeal**

This section was enacted to deal with a unique situation that existed after World War II. It has no current applicability to the Navy and should be repealed.

##### **3.3.18.5. Relationship to Objectives**

Repeal of this section will further the goal of streamlining the DOD acquisition process by deleting an obsolete provision.

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<sup>1</sup>Pub. L. No. 85-43, § 1, 71 Stat. 44, 45 (1957).

<sup>2</sup>H. R. Rep. No. 140, 85th Cong., 1st Sess. 2 (1957).

<sup>3</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>4</sup>*Id.*

### 3.3.19. 10 U.S.C. § 7296

#### Appropriations; available for other purposes

##### 3.3.19.1. Summary of Law

This section permits interchange of funds appropriated for vessel construction or conversion and their machinery and equipment. Conversion appropriations for auxiliary vessels may be used to purchase such vessels as well.

##### 3.3.19.2. Background of Law

The auxiliary vessel authority was enacted in 1939 by An Act to Permit the President to Acquire and Convert Certain Auxiliary Vessels.<sup>1</sup> It was intended to permit the Navy quickly to acquire three tankers then being constructed under a Maritime Commission contract.<sup>2</sup> The remaining language was contained within a 1950 Naval Authorization Act and was intended to facilitate a post-World War II naval modernization effort.<sup>3</sup>

##### 3.3.19.3. Law in Practice

The following comments were received by the cognizant Navy OGC offices of counsel:

Navy Comptroller: We are not aware of any recent use of this statute. As it does not appear to be a necessary one, we would not object to its repeal.

Naval Sea Systems Command: It does not appear that this statute is necessary. The Shipbuilding and Conversion, Navy (SCN) includes all the amounts for acquisition of ships, including auxiliaries, and machinery and equipment for those ships. Within this appropriation, the Navy presently has the flexibility, at least within a program, to move money between the hull, machinery and equipment.<sup>4</sup>

The Navy Office of General Counsel recommends the repeal of this section.<sup>5</sup> The DOD Office of General Counsel (Fiscal and IG) has also reviewed this statute and concurs in recommending its repeal as anachronistic law.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 76-45, ch. 89, § 2, 53 Stat. 619 (1939).

<sup>2</sup>H.R. REP. No. 186, 76th Cong., 1st Sess. 1, 2 (1939).

<sup>3</sup>Pub. L. No. 81-674, ch. 647, 64 Stat. 420 (1950). See H.R. REP. No. 1975, 81st Cong. 2d Sess. 1-3 (1950).

<sup>4</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>5</sup>*Id.*

#### **3.3.19.4. Recommendation and Justification**

##### **Repeal**

This statute should be repealed as it no longer serves any useful purpose.

#### **3.3.19.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process by removing an obsolete provision.

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<sup>6</sup>Memorandum from Mr. Tom Morgan, Deputy General Counsel (Fiscal & IG), Department of Defense, to Ms. Theresa Squillacote, dated 5 May 1992.

### **3.3.20. 10 U.S.C. § 7298**

#### **Conversion of combatants and auxiliaries**

##### **3.3.20.1. Summary of the Law**

This section provides that the President may convert vessels as needed without limitation on expenditures for each individual conversion but within an overall set amount.

##### **3.3.20.2. Background of the Law**

This section was enacted by a 1947 Act to Convert Certain Naval Vessels, and was intended to assist the Navy in developing prototype vessels to incorporate the latest technological developments in naval warfare.<sup>1</sup>

##### **3.3.20.3. Law in Practice**

Naval Sea Systems Command Office of Counsel stated that it does not appear that this authority is necessary. As conversions are authorized and appropriated within the Shipbuilding and Conversion appropriation, additional authority is not necessary to complete multiple conversions within the total amount appropriated.<sup>2</sup>

The Navy Office of General Counsel recommends that this section be repealed.<sup>3</sup>

##### **3.3.20.4. Recommendation and Justification**

###### **Repeal**

This statute should be repealed as obsolete law that no longer serves any continuing purpose within the Navy.

##### **3.3.20.5. Relationship to Objectives**

Repeal of this statute furthers the goal of streamlining the DOD acquisition process.

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<sup>1</sup>Pub. L. No. 80-320, ch. 439, § 1, 61 Stat. 718 (1947). See S. REP. NO. 604, 80th Cong., 1-2 (1947)

<sup>2</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>3</sup>*Id.*

### **3.3.21. 10 U.S.C. § 7299a**

#### **Construction of combatant and escort vessels and assignment of vessel projects**

##### **3.3.21.1. Summary of Law**

This section provides that:

(a) combatant and escort vessel construction is subject to the requirements of the Act of March 27, 1934, requiring that alternate vessels be constructed in a Navy yard; the president may direct otherwise when not inconsistent with the public interest.

(b) the assignment of naval conversion and repair work may not be assigned based on a particular type of shipyard or geographic area.

(c) bid evaluation for vessel repair work shall include evaluation of costs of moving the vessel and its crew to and from vessel homeport.

(d) a determination of whether adequate competition among homeport firms exists must be made before bid solicitation for short term repair work; if adequate competition exists among such firms, the Secretary shall solicit only to homeport firms and may not award to any other firms; this paragraph supersedes paragraph (b) but does not apply to voyage repairs.

##### **3.3.21.2. Background of Law**

The language of subsections (a) and (b) was codified in 1982.<sup>1</sup> The source law for these original sections is not identified in the 1982 codification act.

The language of subsection (c) was added as a floor amendment to the House version of the National Defense Authorization Act for 1987.<sup>2</sup> It was intended to require the Navy to acknowledge interport cost differential (i.e., the cost of moving a vessel from its homeport to the port of repair) when evaluating bids for overhaul and repair work.<sup>3</sup>

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<sup>1</sup>Pub. L. No. 97-295, § 1(48)(A), 96 Stat. 1298 (1982).

<sup>2</sup>Pub. L. No. 99-661, § 1201(A), 100 Stat. 3967 (1987).

<sup>3</sup>133 Cong. Rec. 11891 (May 11, 1987)(debate on amendment to H.R. 1748 offered by Rep. Hunter).

The language of subsection (d) was enacted by the National Defense Authorization Act for Fiscal Years 1988 and 1989.<sup>4</sup> It was intended to prevent disruption of vessel crews by establishing a preference for firms that would perform work at the homeport when the repair would be short-term (six months or less).

### **3.3.21.3. Law in Practice**

The following comments were received from the cognizant Navy Command offices of counsel:

Naval Sea Systems Command: Paragraph (a) of Section 7299a addresses the requirement that alternate vessels be constructed in a Navy shipyard unless determined by the President to be inconsistent with the public interest. It has been approximately twenty years since the last ship constructed in a Navy shipyard was delivered. This has necessitated preparing and staffing Presidential findings for more than two decades. Exec. Order 12765 of June 11, 1991, 56 F.R. 27401 (June 13, 1991), delegated to the Secretary of Defense this authority. This authority was further delegated to the Secretary of the Navy on 27 September 1991 subject to further redelegation to civilian presidential appointees. Considering the realities of present Navy ship construction entirely in private shipyards, it is likely that an annual exception to the statute will continue to be required. As the statute has not been applied in some time and in order to avoid the need to continue processing an exception, its repeal is recommended.

The language in 7299a(b) is considered unnecessary and confusing to both the industry and the Government. We believe that the intention of this statute was to restrict the Navy from making a decision to overhaul, for example, all FFGs in the Northeast or all Aegis class cruisers in a Navy shipyard. On the other hand, 7299a(d) (1) clearly codifies what has been the Navy's Homeport Policy since the early 1970's, that is to perform overhauls (short term in its latest iteration) in the homeport of the vessel whenever practicable. This policy is based on the Navy's underlying implementation of the Homeport Policy necessarily requires geographical restrictions and light of the recognition of this policy in 7299a(d)(1), 7299(b) is considered to be potentially inconsistent and therefore, it should be deleted.

The remaining paragraphs are considered important in providing support for the Navy's Homeport Policy applicable to the overhaul

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<sup>4</sup>Pub. L. No. 100-180, § 1101, 101 Stat. 1145 (1990).

and repair of naval vessels... Therefore, paragraphs (c) and (d) should be retained.<sup>5</sup>

Based on the above, the Navy Office of General Counsel recommends that subsections (a) and (b) be repealed while the remainder of the statute be retained without modification.<sup>6</sup>

#### **3.3.21.4. Recommendation and Justification**

##### **Amend to repeal obsolete and contradictory provisions**

The Panel recommends repeal of subsections (a) and (b). Subsection (a) is obsolete. Subsection (b) clearly conflicts with the Navy's Homeport Policy embodied in subsections (c) and (d). That Homeport Policy is the result of recently enacted legislation that continues to serve a valid purpose. Thus, the Panel recommends retention of subsections (c) and (d).

#### **3.3.21.5. Relationship to Objectives**

Amendment of this statute will further the goal of streamlining the DOD acquisition process by deleting obsolete and contradictory provisions of law.

#### **3.3.21.6. Proposed Statute**

##### **§ 7299a. Construction of combatant and escort vessels and assignment of vessel projects**

~~(a) The distribution of assignments and contracts for the construction of combatant vessels and escort vessels is subject to the Act of March 27, 1934 (ch. 95, 48 Stat. 503), requiring that the first and each succeeding alternate vessel be constructed in a Navy yard. However, the President may direct that a vessel be constructed in a Navy or private yard if the requirement of this subsection is inconsistent with the public interest.~~

~~(b) The assignment of naval vessel conversion, alteration, and repair projects shall be based on economic and military considerations and may not be restricted by a requirement that certain parts of naval shipwork be assigned to a particular type of shipyard or geographical area or by a similar requirement.~~

(a)(e) In evaluating bids or proposals for a contract for the overhaul, repair, or maintenance of a naval vessel, the Secretary of the Navy shall, in determining the cost or price of work to be performed in an area outside the area of the homeport of the vessel, consider foreseeable costs of moving the vessel and its crew from the homeport to the outside area and from the outside area back to the homeport at the completion of the contract.

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<sup>5</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>6</sup>*Id.*



(b)(4)(1) Before issuing a solicitation for a contract for short-term work for the overhaul, repair, or maintenance of a naval vessel, the Secretary of the Navy shall determine if there is adequate competition available among firms able to perform the work at the homeport of the vessel. If the Secretary determines that there is adequate competition among such firms, the Secretary-

(A) shall issue such a solicitation only to firms able to perform the work at the homeport of the vessel; and

(B) may not award such contract to a firm other than a firm that will perform the work at the homeport of the vessel.

(2) Paragraph (1) applies notwithstanding ~~subsection (b)~~ or any other provision of law.

(3) Paragraph (1) does not apply in the case of voyage repairs.

(4) In this subsection, the term "short-term work" means work that will be for a period of six months or less.

### **3.3.22. 10 U.S.C. § 7301**

#### **Bids on Construction: Estimates Required**

##### **3.3.22.1. Summary of Law**

This section requires that bidders on naval contracts shall include their estimates on which the bid is based with their bids. It also includes delegation authority.

##### **3.3.22.2. Background of Law**

This statute was originally enacted by the 1946 Act Enacting Certain Provisions now included in the Naval Appropriation Act.<sup>1</sup> The report to that legislation merely indicated that the purpose of the bill was to provide authority in substantive law contained in numerous appropriations customarily made in the past for the Navy.<sup>2</sup> It was intended to return the Naval Appropriation Bill to its primary purpose of appropriating money rather than enacting law.<sup>3</sup>

##### **3.3.22.3. Law in Practice**

Naval Sea Systems Command has reported to the Navy Office of General Counsel that it did not see any continuing need for this statute. Therefore, the Navy Office of General Counsel recommends that this statute be repealed.

##### **3.3.22.4. Recommendation and Justification**

###### **Repeal**

This statute should be repealed. The specific problem sought to be addressed by this statute is unknown. Furthermore, the requirement that estimates be submitted with naval construction bids is not necessary under current procurement procedures.

##### **3.3.22.5 Relationship to Objectives**

Repeal of this statute furthers the goal of streamlining the DOD acquisition process by deleting an obsolete provision.

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<sup>1</sup>Act of Aug. 2, 1946, ch. 756, 60 Stat. 857 (1946).

<sup>2</sup>H. R. Rep. No. 2549, 79th Cong., 2d Sess. (1946).

<sup>3</sup>*Id.*

### **3.3.23. 10 U.S.C. § 7302**

#### **Construction on Pacific Coast**

##### **3.3.23.1. Summary of the Law**

This section requires the Navy to construct in Pacific Coast shipyards such vessels as the President determines necessary to maintain shipyards there adequate to meet the requirements of the national defense.

##### **3.3.23.2. Background of the Law**

This section was enacted by the Naval Vessel Authorization Act of 1938 and was intended to improve a perceived weakness in Pacific coast shipyard facilities in preparation for war.<sup>1</sup>

##### **3.3.23.3. Law in Practice**

The Naval Sea Systems Command reported to the Navy Office of General Counsel that, to their knowledge, this section has only rarely been discussed<sup>2</sup>. Comments received from the Navy Office of General Counsel, through the Deputy Assistant Secretary of the Navy (Ship Programs), note that, while there are several industrial base studies presently underway, none will implicate this section. The Navy further reports the only remaining ship construction on the west coast is at NASCO, and that decisions regarding that shipyard are not driven by any specific need to have Pacific Coast shipyards. Indeed, in the mid-1980's, when a major combatant shipyard was closed on the west coast, the Navy decided that there was no need for yards on both coasts.<sup>3</sup> Based on the above, the Navy Office of General Counsel recommends repeal of this section.<sup>4</sup>

##### **3.3.23.4. Recommendation and Justification**

###### **Repeal**

This section should be repealed. It was enacted to address a specific problem in naval readiness that existed prior to World War II. That problem is no longer an issue for the Navy, and the statute does not serve any other valid purpose.

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<sup>1</sup>Pub. L. No. 75-528, ch. 243, § 11, 52 Stat. 401 (1938). See H. R. Rep. No. 1899, 75th Cong., 3d Sess. 22-24 (1938).

<sup>2</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>3</sup>Datafax transmission from Mr. Theodore Fredman, Assistant to the General Counsel, to Ms. Theresa Squillacote, Acquisition Law Task Force, dated 28 Apr. 1992.

<sup>4</sup>Notes 2 and 3, *supra*.

### **3.3.23.5. Relationship to Objectives**

Repeal will further the goal of streamlining the DOD acquisition process by removing an obsolete requirement.

### **3.3.24. 10 U.S.C. § 7304**

#### **Examination by board; unfit vessels stricken from Naval Vessel Register**

##### **3.3.24.1. Summary of the Law**

This section provides that the Secretary of the Navy shall designate boards of naval officers to examine naval vessels at least every three years, and to recommend which, if any, shall be found unfit for service and stricken from the Naval Vessel Register. If the Secretary concurs, the Secretary shall strike the vessel(s) from the Naval Vessel Register.

##### **3.3.24.2. Background of the Law**

This section was originally enacted by the Act Making Appropriations for the Naval Service for Fiscal Year 1883.<sup>1</sup> The House Committee Report on that legislation merely reiterated the requirements of the legislation without further explanation.

##### **3.3.24.3. Law in Practice**

This law is administered by the Naval Sea Systems Command. That Command reports that this law is still relied upon by the Navy to review vessel fitness.<sup>2</sup>

##### **3.3.24.4. Recommendation and Justification**

###### **Retain and Consolidate**

The Panel recommends that this section be consolidated with 10 U.S.C. §§ 7305, 7306, 7307(a) and 7308 into a single statute that sets forth authority to strike vessels and to dispose of vessels that have been so stricken, as well as other vessels. Technically, this provision is not related to the DOD acquisition process. However, it is intimately related to the other sections cited above that are acquisition-related. For streamlining purposes, the Panel believes that this section is appropriately consolidated with those provisions.

Naval Sea Systems Command concurs in this proposed consolidation.<sup>3</sup>

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<sup>1</sup> Act of August 5, 1882, ch. 391, § 2, 22 Stat. 296 (1882)

<sup>2</sup> Datafax transmission from Ms. Janice Passo, Naval Sea Systems Command, Office of Counsel, to Ms. Theresa Squillacote, dated 17 Sep. 1992.

<sup>3</sup> *Id.*

### 3.3.24.5. Relationship to Objectives

Retention and consolidation of this section would promote the goal of streamlining the DOD acquisition process by providing a single statement of authority for related statutory provisions.

### 3.3.24.6. Proposed Statute<sup>4</sup>

#### Consolidated Statute Disposition of Naval Vessels

a) The Secretary of the Navy shall designate boards of naval officers to examine all naval vessels, including unfinished vessels. Each vessel shall be examined at least once every three years if practicable.

b) That board shall recommend to the Secretary of the Navy in writing which vessels, if any, should be stricken from the Naval Vessel Register. In making such recommendations, the board shall consider whether any vessel is unfit for service or whether any unfinished vessel cannot be finished without disproportionate expense.

c) Where the Secretary concurs with any such recommendation, the Secretary shall strike the name of that vessel from the Naval Vessel Register. The Secretary of the Navy shall appraise each vessel so stricken. When the Secretary determines that it is in the national interest, the Secretary is authorized to sell such vessels under prescribed regulations.

(1) Vessels stricken from the Naval Vessel Register and not subject to disposition under any other law, may be sold at public sale to the highest acceptable bidder, regardless of their appraised value, after being advertised for sale for a period of not less than 30 days.

(2) If the Secretary determines that the bid prices received after advertising are not considered reasonable and that readvertising will serve no useful purpose, such vessels may be sold by negotiation to the highest acceptable offeror, provided:

(A) that each responsible bidder has been notified of intent to negotiate and has been given a reasonable opportunity to negotiate; and

(B) the negotiated price is higher than the highest rejected price of any responsible bidder, or

(C) the negotiated price is reasonable and is in the national interest.

d) The Secretary of the Navy is further authorized to transfer, by gift or otherwise, any stricken or captured vessel to:

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<sup>4</sup>This proposed consolidated statute is referenced in the individual analyses for §§ 7305, 7306, 7307 and 7308.

(1) any state, commonwealth or possession of the United States, municipal corporation or any political subdivision thereof;

(2) the District of Columbia; or

(3) any not-for-profit or nonprofit entity provided, that the transfer occurs at no cost to the United States and that the transferee agrees to maintain the vessel in a condition satisfactory to the Navy.

e) The Secretary of the Navy is further authorized to use any stricken vessel for experimental purposes, provided that the vessel shall first be stripped as practicable. The proceeds received from stripping the vessel shall be credited to appropriations available for the procurement of those scrapping services needed for stripping. Excess receipts shall be deposited into the general fund of the Treasury.

f) The provisions of the Federal Property and Administrative Services Act (40 U.S.C. 471 et seq.) do not apply to the disposition of a naval vessel under this section.

g) Notwithstanding any other provision of law, no battleship, aircraft carrier, cruiser, or destroyer, or submarine of the Navy may be sold, transferred, or otherwise disposed of, unless the Chief of Naval Operations certifies that it is not essential to the defense of the United States.

#### **Current Statutes**

The text of the current section 7304 is as follows:

**10 U.S.C. § 7304. Examination by board; unfit vessel stricken from Naval Vessel Register**

(a) The Secretary of the Navy shall designate boards of naval officers to examine vessels of the Navy. Each vessel shall be examined by a board at least once every three years, if practicable.

(b) When a board, in conducting an examination under this section, finds that any vessel is unfit for service or that an unfinished vessel in any naval shipyard cannot be finished without disproportionate expense, it shall submit a written report to the Secretary stating fully the reasons for its opinion. If the Secretary concurs, he shall strike the name of that vessel from the Naval Vessel Register.

### **3.3.25. 10 U.S.C. § 7305**

#### **Sale of vessel stricken from Naval Vessel Register**

##### **3.3.25.1. Summary of Law**

This section provides that the Secretary of the Navy shall appraise stricken vessels. When in the national interest, the Secretary is directed to offer the vessel for sale. The section sets forth a detailed, advertisement and bid procedure to be utilized when offering such vessels for sale. That procedure requires a three month advertisement period, a 10% of bid cash deposit, and a surety bond. The section further provides that, unless otherwise provided by law, no naval vessel may be sold in any other manner or for less than the appraised value unless the President so directs in writing. Finally, the statute also provides that its terms do not apply to vessels whose disposition is authorized by the Federal Property and Administrative Services Act.

##### **3.3.25.2. Background of Law**

This section was originally enacted by the Act Making Appropriations for the Naval Service for Fiscal Year 1883.<sup>1</sup> The House Committee Report to that legislation merely reiterated the requirements of the legislation without further explanation.<sup>2</sup>

##### **3.3.25.3. Law in Practice**

This section is administered by the Naval Sea Systems Command. That Command reports that the statute continues adequately to serve a valid purpose. The Command does report, however, that the three month advertisement requirement is burdensome and hinders efficient disposition of stricken vessels.<sup>3</sup>

By Executive Order Number 11765,<sup>4</sup> the President authorized the sale of stricken vessels pursuant to this section by negotiation if bids received are deemed not reasonable and if no useful purpose would be served by readvertising.

##### **3.3.25.4. Recommendation and Justification**

#### **Amend and Consolidate**

The Panel recommends that this section be amended and consolidated into the draft, consolidated statute, "Disposition of Naval Vessels." The Navy desires retention of authority to sell, transfer or otherwise dispose of stricken naval vessels. While the current statute provides

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<sup>1</sup>Act of August 5, 1882, Sec. 2, 22 Stat. 296 (1882).

<sup>2</sup>H.R. REP. NO. 1433, 47th Cong., 1st Sess. 8 (1882).

<sup>3</sup>Datafax transmission from Ms. Janice Passo, Naval Sea Systems Command, Office of Counsel, to Ms. Theresa Squillacote, dated 17 Sep. 1992.

<sup>4</sup>January 29, 1974, 39 F.R. 2577.



such authority, the current bid procedure is antiquated and frequently supplemented by the negotiation procedures in the relevant Executive Order. The proposed consolidated statute modernizes the sealed bid procedure and incorporates the regulatory negotiation procedure. The consolidated statute also incorporates other statutes relevant to the same subject.

Naval Sea Systems Command, Office of Counsel, concurs with this proposed consolidation.<sup>5</sup>

### **3.3.25.5. Relationship to Objectives**

Consolidation of this statute will promote the goal of streamlining the DOD acquisition process.

### **3.3.25.6. Proposed Statute**

Subsection (c) of proposed text of the consolidated statute, Disposition of Naval Vessels, at ch. 3.3.24 provides as follows:

c) Where the Secretary concurs with any such recommendation, the Secretary shall strike the name of that vessel from the Naval Vessel Register. The Secretary of the Navy shall appraise each vessel so stricken. When the Secretary determines that it is in the national interest, the Secretary is authorized to sell such vessels under prescribed regulations.

(1) Vessels stricken from the Naval Vessel Register and not subject to disposition under any other law, may be sold at public sale to the highest acceptable bidder, regardless of their appraised value, after being advertised for sale for a period of not less than 30 days.

(2) If the Secretary determines that the bid prices received after advertising are not considered reasonable and that readvertising will serve no useful purpose, such vessels may be sold by negotiation to the highest acceptable offeror, provided:

(A) that each responsible bidder has been notified of intent to negotiate and has been given a reasonable opportunity to negotiate; and

(B) the negotiated price is higher than the highest rejected price of any responsible bidder, or

(C) the negotiated price is reasonable and is in the national interest.

### **Current Statutes**

The text of the current Section 7305 that is to be repealed and replaced by subsection (c) is as follows:

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<sup>5</sup>Supra note 3.

**10 U.S.C. § 7305. Sale of vessel stricken from Naval Vessel Register**

**(a) This section does not apply to a vessel the disposal of which is authorized by the Federal Property and Administrative Services Act of 1949 (40 U. S. C. 471 et seq.), if it is to be disposed of under that Act.**

**(b) The Secretary of the Navy shall appraise each vessel stricken from the Naval Vessel Register under section 7304 of this title. If he considers that the sale of the vessel is in the best interest of the United States, he shall advertise it for sale.**

**(c) The advertisement shall ask for sealed bids for the purchase of the vessel and shall be published for at least three months in newspapers used by the Department of the Navy for other advertisements. It shall--**

**(1) state the name, location, and appraised value of the vessel to be sold;**

**(2) state the day, hour, and place for the opening of the bids;**

**(3) state that the sale will be for cash to the bidder submitting the highest bid above the appraised value of the vessel; and**

**(4) specify the period of time, after the opening of the bids, within which the successful bidder will be required to pay the remaining 90 percent of the amount bid by him.**

**(d) The Secretary shall--**

**(1) require that each bid be accompanied by a cash deposit of not less than 10 percent of the amount of the bid; and**

**(2) require that each bid be accompanied by a bond, with two or more sureties to be approved by him, conditioned on the payment of the remaining 90 percent within the time specified in the advertisement.**

**(e) The bids shall be opened at the time and place stated in the advertisement, and a record shall be made of them.**

**(f) If the bidder whose bid is accepted defaults in the payment of all or part of the remaining 90 percent of the amount of his bid within the time specified, his cash deposit of 10 percent of that amount shall be forfeited to the United States and the Secretary shall advertise the vessel again and resell it in the manner prescribed in this section.**

**(g) The cash deposit forfeited by a defaulting bidder shall be applied, first, to the payment of the expenses of the advertisement and resale of the vessel and, second, to the payment of the**

difference, if any, between the amount bid by the defaulting bidder and the amount for which the vessel is resold. Any balance remaining shall be covered into the Treasury.

(h) This section does not prevent a suit for breach of any condition of a bond furnished by a bidder.

(i) Each vessel sold as prescribed in this section shall be delivered to the purchaser upon full payment to the Secretary of the amount bid.

(j) The net proceeds of each sale under this section shall be covered into the Treasury.

(k) A sale under this section of a vessel the disposal of which is authorized by the Federal Property and Administrative Services Act of 1949 (40 U. S. C. 471 et seq.), is subject to regulations under section 205 of that Act (40 U. S. C. 486).

(l) Except as otherwise provided by law, no vessel of the Navy may be sold in any other manner than that provided by this section, or for less than its appraised value, unless the President so directs in writing.

### **3.3.26. 10 U.S.C. § 7306**

#### **Use for experimental purposes**

##### **3.3.26.1. Summary of Law**

This section provides that the Secretary of the Navy, with presidential approval, may use any stricken vessel for experimental purposes when in the best interests of the United States. The Secretary must carry out such stripping of the vessel as is practicable before use for experimental purposes. Proceeds resulting from stripping may be credited to applicable appropriations.

##### **3.3.26.2 Background of Law**

This section was originally enacted by the Act Authorizing the President to Dispose of Certain Public Vessels.<sup>1</sup> The House Committee Report accompanying this legislation noted that there was then no existing provision for the legal disposition of stricken vessels other than by sale.<sup>2</sup> The Committee noted that in some instances it would be more advantageous to withhold vessels from sale and to use them for experimental purposes, such as targets for experimental firings.<sup>3</sup>

##### **3.3.26.3. Law in Practice**

Naval Sea Systems Command reports that, while it is not aware of any restriction on the use of stricken vessels absent this section, the authority is a useful one. This section continues adequately to serve a valid purpose. Naval Air Systems Command reports that this statute appears necessary to authorize the use of stricken vessels as targets and should be preserved.<sup>4</sup>

Based on the above, Navy Office of General Counsel recommends that this section should be retained because of the need for periodic use of vessel hulks for weapon tests.<sup>5</sup>

##### **3.3.26.4. Recommendation and Justification**

###### **Retain and Consolidate**

The Panel recommends that this section be consolidated with 10 U.S.C. §§ 7304, 7305, 7307(a) and 7308 into a single section that sets forth authority to strike vessels and to dispose of vessels that have been so stricken and of other vessels. Arguably, this section is not related to the DOD acquisition process. However, it is intimately related to the other sections cited above that

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<sup>1</sup>Pub. L. No. 77-126, ch. 231, 55 Stat. 260 (1941).

<sup>2</sup>H.R. REP. No. 745, 77th Ccong., 1st Sess. 1, 2 (1941).

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>5</sup>*Id.*

also deal with disposition of stricken vessels and that are acquisition related. For streamlining purposes, the Panel believes that this section is appropriately consolidated.

Naval Sea Systems Command, Office of Counsel, had no strong views regarding the proposed consolidation of this section.<sup>6</sup>

### **3.3.26.5. Relationship to Objectives**

Consolidation of this statute will promote the goal of streamlining the DOD acquisition process.

### **3.3.26.6 Proposed Statute**

Subsection (e) of proposed text of consolidated statute, Disposition of Naval Vessels, at ch. 3.3.24 provides as follows:

e) The Secretary of the Navy is further authorized to use any stricken vessel for experimental purposes, provided that the vessel shall first be stripped as practicable. The proceeds received from stripping the vessel shall be credited to appropriations available for the procurement of those scrapping services needed for stripping. Excess receipts shall be deposited into the general fund of the Treasury.

The text of the current Section 7306, to be repealed and replaced by subsection (e), above, is as follows:

#### **Current Statutes**

10 U.S.C. § 7306. Use for experimental purposes

(a) The Secretary of the Navy, with the approval of the President, may use for experimental purposes any vessel stricken from the Naval Vessel Register under section 7304 of this title, if he determines that it is in the best interest of the United States.

(b)(1) Before using any vessel for an experimental purpose pursuant to this section, the Secretary shall carry out such stripping of the vessel as is practicable.

(2) Amounts received as a result of stripping of vessels pursuant to this subsection shall be credited to applicable appropriations available for the procurement of scrapping services under this subsection, to the extent necessary for the procurement of those services. Amounts received which are in excess of amounts necessary for procuring those services shall be deposited into the general fund of the Treasury.

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<sup>6</sup>Datafax transmission from Ms. Janice Passo, Naval Sea Systems Command, Office of Counsel, to Ms. Theresa Squillacote, dated 17 Sep. 1992.

(3) In providing for stripping of a vessel pursuant to this subsection, the Secretary shall ensure that such stripping does not destroy or diminish the structural integrity of the vessel.

### **3.3.27. 10 U.S.C. § 7307**

#### **Restriction on disposal**

##### **3.3.27.1. Summary of Law**

This section provides that, notwithstanding any other provision of law, no battleship, aircraft carrier, cruiser, destroyer or submarine may be sold, transferred, or otherwise disposed of unless the Chief of Naval Operations certifies that it is not essential to the national defense. It further provides that, after August 5, 1974, no vessel in excess of 3,000 tons or less than 20 years of age may be sold or otherwise disposed of to another national unless such disposition has been approved of by law. Finally, the section also provides that, after August 5, 1974, any other type of naval vessel may be sold or otherwise disposed of to a foreign nation only after notification to the Senate and House Armed Services committees and after expiration of 30 days continuous session of the Congress.

##### **3.3.27.2. Background of Law**

The language of subsection (a) was originally enacted in 1940 by An Act to Expedite the National Defense and for Other Purposes.<sup>1</sup> That Act prohibited the disposal of any military or naval weapon, ship, aircraft or other military supplies without certification by the Chief of Naval Operations or the Army Chief of Staff that such material is not essential to the national defense. It also included a congressional notice requirement. The legislative history to that legislation does not contain any explanatory language. The statute was amended in 1946 to delete the congressional reporting requirement.<sup>2</sup> It was deemed superfluous because of then-current disposal procedures under the Surplus Property Act of 1944.<sup>3</sup>

In 1951, the language of current subsection (b) was added. It originally provided that, notwithstanding the Mutual Defense Assistance Act of 1949, no battleship, carrier, cruiser, destroyer, or submarine that has not been stricken may be sold or otherwise disposed of unless authorized by the Congress.<sup>4</sup> The House Committee Report indicated that the provisions "embody the intent . . . that the combatant capabilities of the United States Navy should not be decreased as a result of the sale or gift of combat ships to foreign governments without the specific approval of the Congress in each instance."<sup>5</sup>

In 1974, subsection (b) was amended to substantially its present form by the Military Authorization Act for Fiscal Year 1975.<sup>6</sup> The language originated in the Senate version of that bill. The Senate Committee Report indicated that the language was added to the bill to insure that

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<sup>1</sup>Pub. L. No. 76-671, § 14, 54 Stat. 681 (1940).

<sup>2</sup>Pub. L. No. 79-615, §§ 29 and 57, 60 Stat. 871 (1946).

<sup>3</sup>H.R. REP. No. 311, 79th Cong., 1st Sess. (item 59) (1945).

<sup>4</sup>Pub. L. No. 82-3, § 4, 65 Stat. 4 (1951).

<sup>5</sup>H.R. REP. No. 1, 82nd Cong., 2nd Sess. 1 (1951).

<sup>6</sup>Pub. L. No. 93-365, § 702, 88 Stat. 405 (1974).

Congress would be made aware of and approve the disposal of naval vessels as authorized.<sup>7</sup> The Conference Report to that legislation indicated that the language was intended to get formal congressional control over the transfer of naval vessels to other nations.<sup>8</sup> In 1976, the statute was amended to raise the vessel transfer notification threshold from 2,000 to 3,000 tons.<sup>9</sup> The House Committee Report indicated that the amendment was intended to reduce the number of transfers that would require authorizing legislation.<sup>10</sup>

In 1985, subsection (b) was again amended to add the requirement that any lease or loan under that section must be made in accordance with the provisions of the Arms Export Control Act or the Foreign Assistance Act of 1961.<sup>11</sup> The Senate Report indicated that the amendment was intended to clarify ambiguity within the Navy as to whether transfers under this section were in fact subject to pricing standards established by the Arms Export Control Act.<sup>12</sup>

### 3.3.27.3. Law in Practice

There are no specific FAR, DFARS, or Navy Supplement regulations implementing this statute. The Office of the Chief of Naval Operations recommends retention of subsection (a) in order to ensure not all Chief of Naval Operations has the opportunity to review proposed dispositions of vessels in order to certify that the vessel is not essential to the national defense.<sup>13</sup> Subsection (b) is administered by Navy International Programs Office (Navy IPO). That Office reports that the sole purpose of this statute is to provide congressional notification for ship transfers either through enactment of enabling legislation or through the 30-day congressional notification provision.<sup>14</sup> This statute is not relied upon as statutory authority to transfer naval vessels. The Navy relies exclusively upon the following statutes, all of which contain their own congressional notification provisions, as authority to transfer vessels to foreign governments:

- The Arms Export Control Act, sections 21 and 36(b)(1)(sales)(22 U.S.C. §§ 2761 and 2776);
- The Arms Export Control Act, section 61 (lease) (22 U.S.C. § 2796); (30 day congressional notification provisions)
- Foreign Assistance Act, section 516 (22 U.S.C. § 2321j);
- Foreign Assistance Act, section 517 (22 U.S.C. § 2321k); (30 day congressional notification provisions);

<sup>7</sup>S. REP. NO. 884, 93rd Cong., 2nd Sess. (1974).

<sup>8</sup>S. CONF. REP. NO. 1038, 93rd Cong., 2nd Sess. 148 (1971).

<sup>9</sup>Pub. L. No. 94-457, § 2, 90 Stat. 1938, (1976).

<sup>10</sup>H.R. REP. NO. 1646, 94th Cong., 2nd Sess. 4, 5 (1976).

<sup>11</sup>Pub. L. No. 99-83, § 122, Aug. 8, 1985.

<sup>12</sup>S. Rep. 34, 99th Cong., 1st Sess. April 19, 1985.

<sup>13</sup>Memorandum from Deputy Advisor, Chief of Naval Operations, to Deputy Chief of Naval Operations, dated 6 Nov. 1992.

<sup>14</sup>Datafax transmission from Mr. R. David Gale, Jr., Assistant to the General Counsel (International), Department of the Navy, to Ms. Theresa Squillacote, dated 24 Aug. 1992.



- Foreign Assistance Act, section 519 (22 U.S.C. § 2321m) (15 day congressional notification provision)

Navy IPO reports further that this statute is extremely burdensome to administer because it frequently jeopardizes "hot ship" transfers. In a "hot ship" transfer, the foreign crew relieves the watch of the U.S. Navy crew coincident with the decommissioning of the ship from the U.S. Navy. Such transfers are mutually beneficial since inactivation costs for the U.S. Navy and reactivation costs for the recipient Navy are minimized. However, timing on such transfers is crucial, and a delay in transfer is costly in terms of both money and manpower. The timing of enabling legislation required by this statute, as well as the 30 day continuous congressional session requirement,<sup>15</sup> is often uncertain. This statute therefore frequently renders "hot ship" transfers difficult or even impossible, resulting in a waste of appropriated funds. The Navy IPO cites as a recent example of this problem a significant delay in the transfer of 3 Knox class frigates and an Adams class destroyer to Greece in early 1992.<sup>16</sup>

#### **3.3.27.4. Recommendation and Justification**

**Amend to repeal subsection (b); retain and consolidate subsection (a).**

Subsection (a) of this section should be retained and consolidated into the proposed Disposition of Naval Vessels statute. Subsection (a) of this section provides that no ship may be transferred to any entity without prior approval by the Chief of Naval Operations. This certification requirement ensures appropriate consideration of national defense issues within the department of the Navy prior to disposition of the listed vessels.

Subsection (b) of the statute, as amended, was intended to provide Congress with authority to control vessel transfers by requiring notice and enabling legislation for transfers to foreign governments. However, Congress is able to obtain the same control through the notification provisions present in the statutory authorities relied upon by the Navy IPO for vessel transfers to other nations. Moreover, because authority to sell, lease or otherwise dispose of such vessels is provided by other statutory authority, the enabling legislation requirement of this statute is also redundant. Therefore, the Panel recommends repeal of subsection (b).

The Department of the Navy concurs with the proposed disposition.<sup>17</sup>

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<sup>15</sup>The statutory authorities relied upon by Navy IPO for authority to transfer require advance congressional notification periods but they do not contain the continuous session requirement present here.

<sup>16</sup>Datafax transmission from Mr. R. David Gale, Jr., Assistant to the General Counsel (International), Department of the Navy, to Ms. Theresa Squillacote, dated 24 Aug. 1992

<sup>17</sup>Memorandum from Mr. R. David Gale Jr., Assistant to the General Counsel (International), Department of the Navy to Chief of Naval Operations, dated 12 Nov. 1992.

### **3.3.27.5. Relationship to Objectives**

Amendment of this statute will further the goal of streamlining the DOD acquisition process by deleting a redundant provision and consolidating the remaining authority into a streamlined statute.

### **3.3.27.6. Proposed Statute**

Subsection (g) of proposed text of consolidated statute, Disposition of Naval Vessels at chapter 3.3.24 contains the language currently set forth within subsection 7303(a). Proposed subsection (g) provides as follows:

g) Notwithstanding any other provision of law, no battleship, aircraft carrier, cruiser, or destroyer, or submarine of the Navy may be sold, transferred, or otherwise disposed of, unless the Chief of Naval Operations certifies that it is not essential to the defense of the United States.

### **Current Statutes**

The text of the current subsection 7307(a) is as follows:

10 U.S.C. § 7307. Restriction on disposal

(a) Notwithstanding any other provision of law, no battleship, aircraft carrier, cruiser, destroyer, or submarine of the Navy may be sold, transferred, or otherwise disposed of, unless the Chief of Naval Operations certifies that it is not essential to the defense of the United States.

The text of the current subsection (b), recommended for repeal, is as follows:

(b)(1) A naval vessel in excess of 3,000 tons or less than 20 years of age may not be sold, leased, granted, loaned, bartered, transferred, or otherwise disposed of to another nation unless the disposition of that vessel is approved by law enacted after August 5, 1974, except that any lease or loan of such a vessel under such a law shall be made only in accordance with the provisions of chapter 6 of the Arms Export Control Act (22 U.S.C. 2796 et seq.) or chapter 2 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2311 et seq.)

2) A naval vessel not subject to the provisions of paragraph (1) may be sold, leased, granted, loaned, bartered, transferred, or otherwise disposed of to another nation in accordance with applicable provisions of law only after the Secretary of the Navy, or his designee, has notified the Committees on Armed Services of the Senate and the House of Representatives in writing of the proposed disposition and 30 days of continuous session of Congress have expired following the date on which notice was transmitted to such committees. For purposes of this paragraph, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 30-day period.

### **3.3.28. 10 U.S.C. § 7308**

#### **Transfer or gift of obsolete, condemned, or captured vessels**

##### **3.3.28.1. Summary of Law**

This section provides that, subject to certain provisions in the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 474), the Secretary of the Navy may transfer by gift or under such terms as the Secretary prescribes, any obsolete, condemned, or captured naval vessel to any State, Territory, Commonwealth, or U.S. possession, any municipal corporation or political subdivision thereof, the District of Columbia or any nonprofit or not-for-profit entity. Each transfer agreement must provide that the transfer shall be without cost to the government and that the vessel will be maintained in a condition satisfactory to the Navy. The section also contains a 60 day congressional notice requirement.

##### **3.3.28.2. Background of Law**

This section was originally enacted in 1946 by An Act to Provide for the Disposition of Vessels, Trophies, Relics and Material of Historical Interest.<sup>1</sup> The House Committee Report indicated that the authority was conferred because transfer of trophies and naval material of historic interest would promote the interest of the public in national defense matters and because such material commemorates historic deeds performed with and by such materials.<sup>2</sup> Major language changes were made in 1980 and 1988.<sup>3</sup> In 1990 an additional requirement that during the 60 day period, the transfer is approved only if Congress does not pass a concurrent resolution stating that it does not favor the proposed transfer, was deleted.<sup>4</sup>

##### **3.3.28.3. Law in Practice**

This section is administered by Naval Sea Systems Command. That Office reports that it frequently relies on this law.<sup>5</sup> That Office notes that it is particularly important that the vessel donation be at no cost to the government, and that the transferee be required to maintain the vessel in a condition satisfactory to the Navy.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 79-649, § 1, 60 Stat. 847, (1946).

<sup>2</sup>H.R. REP. No. 2552, 79th Cong., 2nd Sess. 1,2 (1946).

<sup>3</sup>Pub. L. No. 96-513, § 513(29), 94 Stat. 2933 (1980); Pub. L. No. 100-456, § 1234(a)(6), 102 Stat. 2059 (1986).

<sup>4</sup>Pub. L. No. 101-510, § 1427, 104 Stat. 1685 (1990).

<sup>5</sup>Datafax transmission from Ms. Janice Passo, Naval Sea Systems Command, Office of Counsel, to Ms. Theresa Squillacote, dated 17 September 1992.

<sup>6</sup>*Id.*

#### 3.3.28.4. Recommendation and Justification

##### Retain and Consolidate

The Panel recommends that the authority conferred by this statute be retained because it continues to serve a valid purpose within the Department of the Navy. However, this authority should be consolidated within the draft, consolidated statute on Disposition of Naval Vessels.

Naval Sea Systems Command, Office of Counsel, concurs with this proposed consolidation.<sup>7</sup>

#### 3.3.28.5. Relationship to Objectives

Consolidation of this statute will promote the goal of streamlining the DOD acquisition process.

#### 3.3.28.6. Proposed Statute

Subsection (d) of proposed text of consolidated statute, Disposition of Naval Vessels at chapter 3.3.24 provides as follows:

d) The Secretary of the Navy is further authorized to transfer, by gift or otherwise, any stricken or captured vessel to:

(1) any state, commonwealth or possession of the United States, municipal corporation or any political subdivision thereof;

(2) the District of Columbia; or

(3) any not-for-profit or nonprofit entity provided, that the transfer occur at no cost to the United States and that the transferee agrees to maintain the vessel in a condition satisfactory to the Navy.

#### Current Statutes

The text of the current Section 7308 is as follows:

10 U.S.C. § 7308. Transfer or gift of obsolete, condemned, or captured vessels

(a) Subject to subsections (c) and (d) of section 602 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 474), the Secretary of the Navy may transfer by gift or otherwise, on terms prescribed by him, any obsolete or condemned vessel of the Navy or any captured vessel in the possession of the Department of the Navy to--

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<sup>7</sup>*Id.*

(1) any State, Territory, Commonwealth, or possession of the United States, or any municipal corporation or political subdivision thereof;

(2) the District of Columbia; or

(3) any corporation or association whose charter or articles of agreement denies it the right to operate for profit.

(b) Each agreement for the transfer of a vessel under this section shall include a stipulation that--

(1) the transferee will maintain the vessel in a condition satisfactory to the Department of the Navy; and

(2) no expense to the United States will result from the transfer.

(c) No transfer under this section takes effect unless--

(1) notice of the proposal to make the transfer is sent to Congress; and

(2) 60 calendar days of continuous session of Congress have expired after the notice is sent to Congress.

### **3.3.29. 10 U.S.C. § 7310**

#### **Policy in constructing combatant vehicles**

##### **3.3.29.1. Summary of Law**

This section states a policy to modernize the combatant forces of the Navy through construction of advanced, versatile, survivable and cost-effective combatant vessels in sufficient numbers. It requires the Navy to develop plans and programs for the construction and deployment of weapons systems, including naval aviation, that are more effective, more survivable, and less costly than those naval systems as of October, 1978. It includes a reporting requirement.

##### **3.3.29.2. Background of Law**

This section was enacted by the DOD Appropriation Authorization Act of 1979 [sic].<sup>1</sup> The language first appeared in the Senate version of the bill.<sup>2</sup> The Senate Report stated that the provision was intended to bring greater insight and expertise to the problem of obtaining needed ships in a timely and efficient manner.<sup>3</sup>

##### **3.3.29.3. Law in Practice**

The Space and Naval Warfare Systems Command Office of Counsel commented that it did not see a need for the continued existence of this section. The issues raised by this statute are resolved during the give and take of the budget process. The Naval Air Systems Command Office of Counsel also felt that the section was unnecessary, given today's circumstance of downsizing the naval force structure.<sup>4</sup>

Based on the above, the Navy Office of General Counsel concluded that today's circumstances of downsizing the naval force structure are completely different from those prevailing in 1978. This section no longer accurately expresses national policy. Accordingly, this section should be recommended for repeal.<sup>5</sup>

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<sup>1</sup>Pub. L. No. 95-485, § 810(a), 92 Stat. 1623 (1978).

<sup>2</sup>S. REP. NO. 2571, 95th Cong., 1st Sess. 342 (1979).

<sup>3</sup>S. REP. NO. 826, 95th Cong., 2d Sess. 106 (1978).

<sup>4</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 8 Apr. 1992.

<sup>5</sup>*Id.*

#### **3.3.29.4. Recommendation and Justification**

##### **Repeal**

The Panel concurs with the recommendation of the Navy Office of General Counsel that this section should be repealed. The statute was relevant to the national security conditions existing at the time the law was enacted. However, changed conditions have made this statute obsolete. A naval modernizing policy mandating a comparison of force structure to that in existence on a specified date serves no value where political and military conditions have changed so drastically since this section was originally enacted.

#### **3.3.29.5. Relationship to Objectives**

Repeal of this statute furthers the goal of streamlining the DOD acquisition process by removing an anachronistic provision.

### **3.3.30. 10 U.S.C. § 7311**

#### **Repair or maintenance of naval vessels: handling of hazardous waste**

##### **3.3.30.1. Summary of Law**

This section provides that each contract entered into for work on a naval vessel (other than for new construction) shall include provisions requiring the identification of hazardous waste, specifying government and contractor responsibility for hazardous waste removal, providing for contractor compensation for hazardous waste removal, and establishing accountability guidelines. It also provides for contract renegotiation in specified circumstances.

##### **3.3.30.2. Background of Law**

This section was originally enacted by the National Defense Authorization Act for 1987.<sup>1</sup> It was intended to accommodate contractors' concern regarding liability for the disposition of hazardous waste produced on ships during overhaul. In 1989, the section was amended to apply to all contracts for naval vessel work except new construction, to set forth the identification requirements at subsection (a)(1) and to specify the situations in which contract negotiation is required.<sup>2</sup> The Conference Report indicated that the amendments were designed to ensure that hazardous waste is appropriately identified.<sup>3</sup> The Report stated that:

The conferees emphasize that the conference agreement does not alter any federal liability for the handling of hazardous waste as established by the Solid Waste Disposal Act, and other applicable Federal laws and regulations. Finally, the conferees agree that this approach to handling hazardous wastes arising from ship repair work is taken only because of the unique circumstances of such work, such as the quantity and diverse nature of hazardous wastes arising from such work, and because of the complexity of the determination under law and implementing regulations of how and when hazardous waste is generated on board a U.S. naval vessel. For these reasons, the conferees do not view this conference agreement as providing a precedent for similar handling of issues involving hazardous wastes arising from other situations.<sup>4</sup>

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<sup>1</sup>Pub. L. No. 99-661, §1202(a), 100 Stat. 3967 (1986).

<sup>2</sup>Pub. L. No. 101-189, § 1011(a), 103 Stat. 1599 (1989).

<sup>3</sup>H.R. REP. No. 331, 101st Cong., 1st Sess. 669 (1989).

<sup>4</sup>*Id.*



### 3.3.30.3. Law in Practice

As presently written, 10 U.S.C. § 7311 presents two problems. First, estimating the type and amount of hazardous waste to be generated during ship repair is difficult because this information is not generally available during ship operation periods and often is developed only as contract work progresses. Second, section 7311's requirements regarding the use of Navy and contractor generator numbers are inconsistent with the general Federal and state regulatory schemes covering the issuance of generator identification numbers and use of hazardous waste manifests.

Any effort to address the first problem by repealing section 7311's provisions requiring notice to ship repair contractors about types and amounts of hazardous waste would be contentious.<sup>5</sup> The statute addresses the difficulty of preparing such estimates by requiring renegotiation of any contract in which the type and amount of waste is different from the Government's estimates. Inasmuch as Congress has placed the risk on the Navy, the Navy must work on ways to lessen this risk within the established statutory scheme.

The second problem involves subsection 7311(a)(4), which requires the use of a Navy generator number for solely Navy generated waste, a contractor generator number for solely contractor generated waste, and both Navy and contractor generator numbers for co-generated waste on manifests, contracts, invoices, and other documents. At present, the Environmental Protection Agency (EPA) has no regulations defining co-generators nor do EPA manifests allow space for the names and numbers of more than one generator. The Navy's definition is consistent with the regulatory definition of "generator" at 40 C.F.R. § 260-10 as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." Implementation of the Navy's definition, however, has been difficult because EPA has refused to issue guidance on the implementation of 7311 and States have refused to issue more than one generator number for a particular site or have issued numbers with restrictions on their use.

Ship repair contractors want this problem resolved by amending section 7311 to make the vessel itself, when in the shipyard, the "site" for which a generator number is issued and to require EPA to issue such numbers to the Navy.<sup>6</sup> The Navy does not support this position because it is inconsistent with specific provisions enacted in the Federal Facilities Compliance Act at the Administration's request. These provisions establish that shipboard hazardous material is not subject to regulation under the Resource Conservation and Recovery Act (RCRA) until it is removed from the vessel.<sup>7</sup>

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<sup>5</sup>Memorandum from Mr. Harvey J. Wilcox, Deputy General Counsel (Logistics), Department of the Navy, to Counsel, Acquisition Law Task Force, dated 28 Apr. 1992.

<sup>6</sup>Letter from Council of Defense and Space Industry Associations (CODSIA) to Mr. Gary Quigley and Mr. Jack Harding, dated 23 Apr. 1992.

<sup>7</sup>Memorandum from Naval Sea Systems Command to Director, Defense Procurement, DOD, dated 12 Dec. 1991. The Panel's review of RCRA is at ch 4.4.3. of this Report.

Ship repair contractors appear to oppose use of their generator numbers on any hazardous wastes from Navy vessels because their identification as generators may expose them to potential liability for cleanup costs for improperly disposed of hazardous waste. Their position, however, is inconsistent with the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which clearly regards the person who arranges for disposal or the transporter who selects the disposal as the liable entity. The shift of all the liability to the Navy would remove any incentive for the repair contractor to take the necessary care in making these arrangements. Moreover, there is no evidence that Congress, in enacting 10 U.S.C. § 7311, intended to shield ship repair contractors from all liability for their hazardous waste activities. Subsection 7311(a)(4) repeatedly references "applicable law" and the RCRA. And, subsection 7311(d) states that nothing in the statute is intended to alter those provisions of RCRA (which amended the Solid Waste Disposal Act) relating to generators of hazardous waste. Therefore, the Navy recommends forwarding the statute to EPA for the promulgation of regulations defining co-generators and related implementation instructions dealing with co-generation or referring it to congressional committees reviewing RCRA authorization with a request to address the co-generation issue.<sup>8</sup>

With respect to this statute, the Shipbuilders' Council of America notes that congressional action is required to direct the EPA to implement 10 U.S.C. § 7311 with a standard that will ensure that hazardous waste is properly identified, and that hazardous waste generator identification numbers are issued in a uniform manner throughout the United States.<sup>9</sup> The Council notes that such action by the Congress would alleviate most of the problems that evolve around the contract clauses that currently reference 10 U.S.C. § 7311, and most importantly, would alleviate the situation that places both the Navy and contractors in jeopardy of civil or criminal violations of existing environmental laws.<sup>10</sup>

#### **3.3.30.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this section be retained. Portions of the section may be considered related to the DOD acquisition process because the statute mandates certain contract terms. However, the Panel does not propose any amendment to address the issues raised above as such statutory provisions are secondary to the fundamental environmental issues regarding the reconciliation of the statute with the Resource Conservation and Recovery Act and the allocation of liability between the Government and the contractor for hazardous waste generated during the course of ship repair. The definition of a co-generator and the related implementation procedures are currently under consideration by the Environmental Protection Agency, which has primary responsibility and the expertise to resolve these legal issues. Any attempt to repeal section 7311 will engender strong opposition and any attempt to move section 7311 from Title 10 to Title 42

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<sup>8</sup>*Id.*

<sup>9</sup>Letter from Mr. Frank Losey, General Counsel, Shipbuilders Council of America, to Mr. Anthony Gamba and Mr. LeRoy Haugh, dated 17 Nov. 1992.

<sup>10</sup>*Id.*

will require support from both the Congressional Armed Services Committees and the Environmental Committees.

Therefore, the Panel recommends retention of this statute with a further recommendation to the Congress that it direct the EPA to implement 10 U.S.C. § 7311 with a standard that will ensure that hazardous waste is properly identified, and that hazardous waste generator identification numbers are issued in a uniform manner throughout the United States.

#### **3.3.30.5. Relationship to Objectives**

Retention of this statute will promote the best interests of the DOD by maintaining an equitable distribution of liability for hazardous waste disposal between DOD and private ship contractors.

### **3.3.31. 10 U.S.C. § 7313**

#### **Ship overhaul work: availability of appropriations for unusual cost overruns and for changes in scope of work**

##### **3.3.31.1. Summary of Law**

This section provides that appropriations available to the DOD for a fiscal year may be used for payment of unusual cost overruns incident to ship overhaul, maintenance, and repair for a vessel inducted into an industrial-fund activity or contracted for during a prior fiscal year. This statute also provides that an appropriation may be used after the otherwise-applicable expiration of the availability for obligation of that appropriation for changes in scope of work for ship overhaul, maintenance, and repair.

##### **3.3.31.2. Background of Law**

This section was originally enacted by the National Defense Appropriations Act for Fiscal Year 1987.<sup>1</sup> No legislative history is available. It was codified into Title 10 in 1988.<sup>2</sup>

##### **3.3.31.3. Law in Practice**

The Office of General Counsel, Department of the Navy, reports that this statute is still currently relied upon, particularly by Naval Sea Systems Command, which strongly urges its retention.<sup>3</sup> That Office notes that the statute provides needed flexibility in unique fiscal issues arising from ship repair and overhaul.<sup>4</sup>

##### **3.3.31.4. Recommendation and Justification**

###### **Retain**

The Panel recommends that this statute be retained. It continues adequately to serve a valid purpose within the Department of the Navy.

##### **3.3.31.5. Relationship to Objectives**

Retention of this statute will promote the best interests of the DOD by providing essential fiscal authority to meet unique naval repair needs.

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<sup>1</sup>Pub. L. No. 99-190, §§ 8005(j) and (k), 99 Stat. 976 (1986).

<sup>2</sup>Pub. L. No. 100-370, § 1(11)(1), 102 Stat. 850 (1988).

<sup>3</sup>Datafax transmission from Mr. Theodore Fredman, Assistant to the General Counsel, Department of the Navy, to Counsel, Acquisition Law Task Force, dated 30 Dec. 1992.

<sup>4</sup>*Id.*

### **3.3.32. 10 U.S.C. §§ 7361 - 7367**

#### **Naval salvage facilities**

##### **3.3.32.1. Summary of Laws**

The sections within chapter 637 of Title 10 set forth authorization for naval salvage activities by the Department of the Navy. Specifically, section 7361 authorizes the Secretary of the Navy to provide for necessary salvage facilities. The Secretary must submit any proposed contract that affects the Department of Transportation to the Secretary of Transportation. Term contracts are authorized only if available commercial facilities are inadequate, and public notice has ensured adequate competition.

Section 7362 authorizes the Secretary of the Navy to acquire vessels and equipment for operation by private salvage companies. Section 7363 requires the Secretary of the Navy, prior to obtaining a salvage vessel, to obtain a written agreement that any transferee will use a transferred vessel to support organized offshore salvage facilities for as many years as the Secretary deems appropriate.

Section 7364 authorizes the Secretary of the Navy to advance to private salvage companies funds as necessary to provide for immediate financing of salvage operations.<sup>1</sup> Section 7365 provides authority to settle claims by the U.S. for Navy salvage services. Section 7366 limits annual appropriations for salvage activities to \$3,000,000 annually. Finally, section 7367 provides that amounts received under these authorities shall be credited to salvage appropriations. However, any amount that exceeds costs incurred must be submitted to the Treasury.

##### **3.3.32.2. Background of Laws**

All of the sections within this chapter were enacted by the 1948 Act Authorizing Naval Salvage Facilities.<sup>2</sup> The purpose of that legislation was to authorize the Secretary of the Navy to provide offshore salvage facilities for the protection of public and private shipping in U.S. waters. The House Committee report noted that offshore salvage was essential to prevent stranded vessels from becoming a complete loss.<sup>3</sup> The Report also noted there was an insufficient level of private services available because private salvage companies were often unable to generate a profit by their work. The bill was intended to correct that problem by enabling the Secretary of the Navy to contract with private salvage companies and to assist those companies in maintaining adequate facilities and equipment.<sup>4</sup>

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<sup>1</sup>Providing for advancement of funds for salvage operations, 10 U.S.C. § 7364 has been addressed in ch. 2.1.4 of this Report.

<sup>2</sup>Pub. L. No. 80-513, ch 256, § 1(a), 62 Stat. 209 (1948).

<sup>3</sup>H.R. REP. No. 1605, 80th Cong., 2d Sess. 2, 3 (1948).

<sup>4</sup>*Id.*

### 3.3.32.3. Laws in Practice

Naval Sea Systems Command Office of Counsel reports all of these sections continue to provide the basis for the operations of the Navy's Supervisor of Salvage and should be retained. The Navy Office of General Counsel recommends that these sections be retained.<sup>5</sup> No issues regarding regulatory implementation or other practical application of these sections have been identified.<sup>6</sup>

### 3.3.32.4. Recommendation and Justification

#### Retain and Consolidate

The authorities provided by these sections should be retained in their entirety but consolidated. They continue to serve a valid purpose by providing the statutory basis for naval salvage operations. Further, no problems with these provisions have been raised requiring legislative adjustment.

However, the Panel recommends these statutes be consolidated into a single statute for streamlining purposes. The Naval Sea Systems Command Office of Counsel concurs in the language of the consolidated statute proposed below.<sup>7</sup>

### 3.3.32.5. Relationship to Objectives

Retention and consolidation of these statutory authorities would promote the goal of streamlining the DOD acquisition process.

### 3.3.32.6. Proposed Statute

#### Consolidated Naval Salvage Facilities Statute

- a) The Secretary of the Navy may contract or otherwise provide for necessary salvage facilities for public and private vessels.
- b) The Secretary shall submit to the Secretary of Transportation each proposed salvage contract that affects the interests of the Department of Transportation.

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<sup>5</sup>Memorandum from Mr. Harvey Wilcox, Deputy General Counsel, Department of the Navy, to Counsel, Acquisition Law Task Force, dates 8 April 1991.

<sup>6</sup>Memorandum from Mr. Richard A. Lisker, Assistant Counsel, Naval Sea Systems Command to Ms. Theresa Squillacote, dated 24 July 1992.

<sup>7</sup>*Supra* note 5. The annual appropriation limit of \$3 million, § 7366, is deleted. The original purpose of this appropriation limit is unclear, but it appears to have little utility in the current authorization and appropriation process.

c) Term contracts are authorized only upon a showing that available commercial salvage facilities are inadequate to meet national defense requirements and upon adequate public notice of intent to so contract.

d) The Secretary of the Navy may acquire or transfer such vessels and equipment for operation by private salvage companies as the Secretary considers necessary.

e) Any private recipient of any salvage vessel or gear must agree in writing that such vessel or gear will be used to support organized offshore salvage facilities for as many years as the Secretary shall consider appropriate.

f) Monies received under this chapter shall be credited to appropriations for maintaining naval salvage facilities. However, any amount received in excess of naval salvage costs incurred in that fiscal year shall be covered into the Treasury.

g) The Secretary of the Navy, or designee, may settle and receive payment of any claim by the United States for salvage services rendered by the Department of the Navy.

### **Current Statutes**

The current statutes provide as follows:

#### **§ 7361. Naval salvage facilities: contracts for commercial facilities**

(a) The Secretary of the Navy may provide, by contract or otherwise, necessary salvage facilities for public and private vessels upon such terms as he determines to be in the best interest of the United States.

(b) The Secretary shall submit to the Secretary of Transportation for recommendation and comment each proposed contract for salvage facilities that affects the interests of the Department of Transportation.

(c) Term contracts for salvage facilities may be made under this section only if--

(1) the Secretary of the Navy determines that available commercial salvage facilities are inadequate to meet the requirements of national defense; and

(2) public notice of the intention to enter into the contracts has been given in a manner and for a period that will, in the Secretary's judgment, provide the maximum competition for such contracts among commercial salvage organizations.

#### **§ 7362. Commercial use of naval facilities**

The Secretary of the Navy may acquire or transfer, by charter or otherwise, for operation by private salvage companies, such vessels and equipment as he considers necessary.

**§ 7363. Transfer of equipment: contract provisions**

Before any salvage vessel or salvage gear is sold, chartered, leased, lent, or otherwise transferred by the Department of the Navy to any private party, the transferee must agree in writing with the Department that the vessel or gear will be used to support organized offshore salvage facilities for a period of as many years as the Secretary considers appropriate. The agreement shall contain such other provisions as the Secretary considers appropriate to assure the fulfillment of the undertaking.

**§ 7365. Settlement of claims**

The Secretary of the Navy, or his designee, may consider, ascertain, adjust, determine, compromise, or settle and receive payment of any claim by the United States for salvage services rendered by the Department of the Navy.

**§ 7366. Limitation on appropriations**

Not more than \$ 3,000,000 may be appropriated annually for the administration of this chapter.

**§ 7367. Disposition of receipts**

Money received under this chapter shall be credited to appropriations for maintaining salvage facilities by the Department of the Navy. However, if the amount received in any year exceeds the cost incurred by the Navy during that year in giving and maintaining salvage services, the excess shall be covered into the Treasury.



## **3.4. The Brooks Act and the Warner Amendment**

### **3.4.0. Introduction**

This subchapter examines the difficult issue of the process and structure by which the DOD acquires automatic data processing equipment (ADPE). Under the Brooks Act, the acquisition of ADPE by the federal executive agencies is centralized under the General Services Administration (GSA). That agency retains exclusive power to procure ADPE. While GSA delegates that authority, to varying degrees, to the individual agencies, it still retains extensive managerial oversight of this acquisition process.

GSA fulfills its oversight responsibilities under the Brooks Act by performing Information Resources Management (IRM) reviews. In its IRM review program, GSA conducts comprehensive information resources procurement and management review of federal agencies, including DOD. The IRM reviews include assessments of pre-acquisition studies, procurement and contracting practices, oversight of acquisition activities, internal delegations of procurement authority and specific agency delegation requests.

Under the Warner Amendment, however, DOD is authorized to purchase directly certain, delineated types of ADPE related to military or intelligence missions. In the exercise of that authority, and in conducting individual procurements when delegated authority by the GSA (through Delegations of Procurement Authority, or DPAs), the DOD components have developed their own, internal mechanisms for ADPE procurement. Indeed, DOD has recently begun implementation of Defense Management Review Directive 918, mandating the establishment of a new agency (the Defense Information Systems Agency, or DISA) within DOD to centralize ADPE acquisition and management.

The overlap between these structures has created a confusing hierarchy for ADPE procurement, one that is complicated by the statutory exemption in the Warner Amendment and by the legal issues surrounding the definition of ADPE. Because of this situation, many questions have arisen regarding the continued validity of the current GSA role in this process.

The Panel deliberated extensively over this question. It received comments from a wide variety of parties on this issue, and considered a number of alternative recommendations.<sup>1</sup> Nonetheless, the Panel was unable to achieve a consensus among its members as to a formal, legislative recommendation in this area. At a minimum, however, the Panel agreed that the blanket delegation of procurement authority to the DOD should be raised significantly.

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<sup>1</sup>The Panel solicited comments from a number of Army Commands, as well as the Council of Defense and Space Industry Associations (CODSIA). In addition, a representative of the GSA Management Reviews Division made an extensive oral presentation to the Panel on 22 October 1992, followed by a written submission. Finally, agencies that specialize in DOD ADPE procurement, such as the Department of the Army Information System Selection and Acquisition Agency (ISSAA) and the Defense Information Systems Agency (DISA) also contributed to the Panel's deliberations in this area.

Therefore, this subchapter presents the two major alternative recommendations considered by the Panel, with supporting rationale for each. It precedes that discussion by examining the legislative histories of the two relevant statutes, and by examining the administrative and managerial aspects of DOD ADPE procurement.

The two primary recommendations considered by the Panel were (1) to amend the Warner Amendment to wholly exempt DOD from the Brooks Act, and with it from GSA oversight, or (2) to significantly increase the blanket delegation of procurement authority for DOD.

In support of the first recommendation, the Panel noted the following points. First, it was apparent that many of the underlying reasons for enactment of the Brooks Act in 1965 are no longer relevant. These reasons include better utilization of government ADPE, better management information and more economic acquisition of government ADPE. The near-obsolence of large, mainframe computer systems obviates multiagency service centers and effective reutilization of ADPE resources within the federal government. Also, individual agencies have at times been able to achieve greater economies of scale than the GSA when purchasing ADPE on their own. This conclusion is particularly true of DOD, the federal sector's largest single ADPE purchaser.

Second, significant delays are associated with GSA oversight of ADPE procurement, and this oversight has spawned overlapping, and arguably unnecessary, layers of bureaucracy. This latter issue takes on greater meaning with the advent of the DISA within DOD.

Third, increasing ambiguity as to the legal definition of the term "automatic data processing equipment" has broadened the scope of the Brooks Act, significantly enlarging the scope of GSA's oversight role.

Based on these reasons, and particularly on the evidence that DOD, under DISA, should be able to exercise significant expertise when conducting its own ADPE procurements, the Panel considered at length the option of recommending a wholesale exemption of DOD from the Brooks Act.

The second alternative recommendation considered by the Panel was to amend the Brooks Act to mandate a significantly higher blanket delegation of procurement authority to DOD. This alternative would retain GSA's overall management review role, while permitting DOD greater latitude in conducting its individual ADPE procurements. This view is premised on the belief that GSA has developed significant expertise in ADPE acquisition and can meaningfully assist DOD components to more effectively manage their ADPE acquisition. This latter alternative was considered in conjunction with a recommendation that statutory limits be established to prevent a further broadening of the Brooks Act through legal interpretation.

The Panel did not achieve a consensus on this recommendation, either.

All Panel members agreed, however, that the DOD should have some relief from the DPA process, and, to this end, a significant increase in the blanket DPA should be granted.

In their oral presentation to the Panel, the GSA representatives indicated that the dollar value of DOD procurements that require individual DPAs should be raised. The Panel agrees, although it does not have an empirical basis upon which to recommend a specific dollar level. With the establishment of DISA, there will be a central point of review for most DOD ADPE procurements. Accordingly, the Panel believes that a uniform blanket DPA for DOD is justified. According to the GSA representatives, the level of blanket DPAs for major agencies may be raised to \$25 million. Given the substantial ADPE expertise and the central review of DISA, it appears that the DOD blanket delegation should be at least as high.

### 3.4.1. 40 U.S.C. § 759 and 10 U.S.C. § 2315

#### The Brooks Act and the Warner Amendment

##### 3.4.1.1. Summary of Laws

- 40 U.S.C. § 759

This section, known as the Brooks Act, assigns to the General Services Administration (GSA) responsibility for acquisition of all automatic data processing equipment (ADPE) and related services for the federal agencies. Specifically, this law authorizes and directs the Administrator of the GSA to coordinate and provide for the purchase, lease and maintenance of ADPE by federal agencies. ADPE is defined as "any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information . . . by a Federal agency."<sup>1</sup>

The Administrator is not responsible for the acquisition of certain, specified categories of ADPE acquisition, including DOD ADPE procurement if the function, operation, or use involves intelligence activities, national security cryptologic activities, the command and control of military forces, or equipment that is integral to a weapon system or critical to the direct fulfillment of military or intelligence missions.

The Administrator may provide for joint utilization by, or transfer of, such equipment among federal agencies, and may also delegate that authority. The Administrator may also delegate to an agency official<sup>2</sup> authority to lease, purchase or maintain ADPE if the Administrator determines that this official is sufficiently independent of program responsibility, and has sufficient experience and resources and the ability to carry out fairly and effectively procurements under this section.<sup>3</sup>

The Administrator may also delegate to Federal agencies the authority to purchase, lease and maintain ADPE when necessary for economy and efficiency, when essential to national defense or security, or when necessary or desirable to allow for the orderly implementation of a program for the utilization of such equipment. These delegations are referred to as Delegations of Procurement Authority, or DPAs. The Administrator retains authority to revoke any such delegation, and a delegation does not preclude further review by the Administrator.<sup>4</sup>

This law also provides that the Secretary of Commerce shall promulgate compulsory standards for federal computer systems, although the agency may set more stringent standards in

<sup>1</sup>40 U.S.C. § 759(a)(2)(A)(1986 and Supp. 1992). The definition also applies to such equipment as used under a federal agency contract.

<sup>2</sup>That official must be designated as the senior information management official pursuant to 44 U.S.C. § 3506.

<sup>3</sup>40 U.S.C. § 759(b) (1986 and Supp. 1992).

<sup>4</sup>*Id.*

certain circumstances. Also, the Secretary may waive such standards if they would adversely affect mission or cause a major adverse financial impact.<sup>5</sup>

All authority granted the Administrator and Secretary under this section must be exercised subject to direction by the President. Nor may the Administrator interfere with agency determinations as to their ADPE needs.<sup>6</sup>

This law also establishes that, upon the request of an interested party in connection with any procurement subject to this section, the Board of Contract Appeals of the General Services Administration (GSBCA or the Board) shall review any decision by a contracting officer concerning an ADPE procurement that is alleged to violate a statute or regulation.<sup>7</sup> This provision requires the GSBCA to hold a hearing within 10 days of receiving a protest and to make a final ruling within 45 working days. It also requires the Board to suspend the Agency Delegation of Procurement Authority until the resolution of the case, unless compelling reasons dictate otherwise. This law also provides each party the right to appeal any decision to a federal court of appeals.<sup>8</sup>

- **10 U.S.C. § 2315**

This section, known as the Warner Amendment, reiterates within Title 10 the exemption from the Brooks Act of DOD ADPE procurement if the function, operation, or use involves intelligence activities, national security cryptologic activities, the command and control of military forces, or equipment that is integral to a weapon system or critical to the direct fulfillment of military or intelligence missions.

### **3.4.1.2. Background of Laws**

- **The Brooks Act**

Before the advent of the Brooks Act in 1965, the acquisition of ADPE and services was decentralized among the various federal agencies. A Bureau of the Budget report in 1959 noted extensive inefficiency and duplication of effort from the decentralization of the federal ADPE acquisition function.<sup>9</sup> In response, and concerned that agencies were not conducting their ADPE acquisition properly, Congress commissioned the General Accounting Office between 1959 and 1964 to prepare reports and perform audits on the present state of ADPE acquisitions. Those reports and audits revealed essentially the same deficiencies cited in the initial Bureau of Budget report.<sup>10</sup>

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<sup>5</sup>40 U.S.C. § 759(d) (1986 and Supp. 1992).

<sup>6</sup>40 U.S.C. § 759(e) (1986 and Supp. 1992).

<sup>7</sup>40 U.S.C. § 759(f) (1986 and Supp. 1992). This section is discussed in further detail in this report at ch. 1.5.9.

<sup>8</sup>*Id.*

<sup>9</sup>"Report of Findings and Recommendations Resulting from the Automatic Data Processing (ADP) Responsibilities Study, Sep. 1958 to June 1959," Bureau of the Budget. Reprinted in hearings on H.R. 4845, 89th Cong., 1st Sess. (1958).

<sup>10</sup>S. REP. NO. 938, 89th Cong., 1st Sess. 2 (1965).

It was against this background that the Congress enacted the Brooks Act in 1965.<sup>11</sup> At that time, annual government ADPE expenditures totaled about \$3 billion, or 3% of the entire federal budget. It was hoped that the Brooks Act would save the government between \$100 million and \$200 million annually.<sup>12</sup>

The Act's objectives were threefold: (1) to improve information management; (2) to optimize the utilization of government ADPE through sharing of assets, and (3) to provide more economical ADPE acquisition. In particular, the Brooks Act emphasized the efficient utilization of ADPE assets.<sup>13</sup> Because much government-owned equipment was used less than 20% of the time, Congress believed that increased time-sharing of this equipment would diminish the number of ADPE procurements. In addition, by creating a revolving fund, the government hoped to combine small buys into a single periodic government "mega-buy." Officials also hoped that buying in quantity would lower the overall costs to the government.<sup>14</sup>

The Brooks Act ultimately made the GSA the sole, directly-authorized procurer of all government automatic data processing equipment. This choice was based on GSA's role as the government's principal buyer and property manager. Assigning responsibility to the GSA also provided that agency with the opportunity to develop contracting and technical expertise in sufficient depth to keep pace with technological change and to avoid some of the worst problems of the past. At that time, the federal government was the largest single user of ADPE in the world.

- **The Paperwork Reduction Act of 1980 and the Paperwork Reduction Reauthorization Act of 1986**

In 1980, Congress passed the Paperwork Reduction Act of 1980 to promote greater efficiency and economy in federal agencies' information management activities.<sup>15</sup> That legislation, while not directly amending the Brooks Act, did require an agency head to designate a senior official to review agency information management, including information collection requests. The act also required federal agencies to assign to that official the responsibility for the conduct of acquisitions made pursuant to a Brooks Act delegation. As initially passed, the legislation required the Director of the newly established Office of Information and Regulatory Affairs to develop, in consultation with the Administrator of GSA, a five-year plan for meeting the ADPE needs of the federal government under the Brooks Act.

This Act was based in part upon the congressional perception that federal procurement of ADPE was inefficient and overly time-consuming.<sup>16</sup> However, four members of the Senate Governmental Affairs Committee expressly and vehemently opposed any legislation that would in effect constitute an expansion of the Brooks Act by broadening GSA's managerial role. Citing

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<sup>11</sup>Pub. L. No. 89-306, 79 Stat. 1127 (1965).

<sup>12</sup>S. REP. NO. 938, 89th Cong., 1st Sess. 4 (1965).

<sup>13</sup>*Id.* at 5.

<sup>14</sup>*Id.*

<sup>15</sup>Pub. L. No. 96-551, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501 et. seq.

<sup>16</sup>S. REP. NO. 930, 96th Cong., 2d Sess. (1980).

numerous studies, these members noted that implementation of the Brooks Act had resulted in unforeseen adverse impacts on timely and efficient procurement of ADPE.<sup>17</sup> These members noted that the deficiencies of ADPE procurement under the Brooks Act procedures were particularly evident in ADPE procurement by national defense and intelligence agencies. These members noted that significant delays had been demonstrated by Brooks Act mandated procedures, and that these procedures, if expanded by the current legislation, could seriously undermine national defense.<sup>18</sup>

The second major amendment to the Brooks Act was enacted by the Competition in Contracting Act of 1984.<sup>19</sup> That Act enacted the current subsection (f), authorizing the GSA Board of Contract Appeals to review "any decision by a contracting officer alleged to violate a statute or regulation," upon request of an interested party.<sup>20</sup>

In 1986, the Brooks Act was again amended by the Paperwork Reduction Reauthorization Act of 1986.<sup>21</sup> That Act revised the definition of ADPE at subsection (a)(2)(A) to include computer hardware, software, support services and communications. The broader definition was intended to acknowledge the merging of ADPE and communications technology.<sup>22</sup>

That legislation also authorized the "Agency Designated Senior IRM Officials" as individuals responsible for conduct of acquisitions under the Brooks Act delegation.<sup>23</sup> The Conference Report noted that this designation was intended to encourage the GSA Administrator to delegate procurement authority to officials with sufficient experience, resources and ability to conduct such procurements soundly. It was contemplated that the Administrator would grant such authority for all procurement for a period of time rather than on a case-by-case basis.<sup>24</sup> "Such delegations would be limited to agencies that demonstrate viable planning and management of their use of automatic data processing equipment."<sup>25</sup> This legislation is thus the statutory basis for establishment of the Management Reviews Division within the General Services Administration, responsible for on-site reviews of the agencies' information resources programs under the Brooks Act.

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<sup>17</sup>S. REP. NO. 930, 96th Cong., 2d Sess. 65-107 (1980). These additional views were filed by Senators Henry Jackson, William Cohen, Ted Stevens and John Glenn.

<sup>18</sup>*Id.* These four members noted their intent to propose, during floor debates, an amendment that would exempt certain military critical ADPE. The scope of their amendment later formed the basis for the Warner Amendment legislation passed the following year.

<sup>19</sup>Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2713, 98 Stat. 494, 1184 (1984).

<sup>20</sup>*Id.* The Conference Report to that legislation noted that, "due to the increasing number of computer procurements conducted every year, coupled with the complexity of the technology, the current informal process of resolving conflicts between the buying agency and the suppliers has become cumbersome and prolonged. Further, charges have been made by both the agencies and the contractors that GSA's current process does not provide an objective forum for dispute resolution. The conferees believe that it has become increasingly apparent that a new forum is needed to provide a fair, equitable and timely remedy in this area." H. R. CONF. REP. NO. 861, 98th Cong., 2d Sess. 1430 (1984).

<sup>21</sup>Pub. L. No. 99-500, § 101(m), 100 Stat. 3341-344 (1986)(Identical legislation omitted).

<sup>22</sup>H. R. Rep. No. 105, 99th Cong., 2d Sess. 776 (1986).

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 777.

<sup>25</sup>*Id.* at 778.

## • The Warner Amendment

The first major change in Brooks Act procedures specific to DOD ADPE procurement was the Warner Amendment of 1981, codified at 10 U.S.C. § 2315.<sup>26</sup> This amendment exempts certain DOD ADPE procurements from the restrictions of the Brooks Act if their function or operational use involves: intelligence activities, or cryptologic activities related to national security; command and control of military forces; equipment which is an integral part of a weapons system; or functions, operations, or uses that are critical to the direct fulfillment of military or intelligence missions. Specifically excluded from the scope of this exemption, however, is ADPE used for routine administrative and business applications, such as payroll, finance, logistics and personnel management.

During its enactment, the Warner Amendment was the subject of a heated controversy between the Senate and the House of Representatives. The Senate asserted that the national defense would be best served by streamlining the ADPE procurement process, arguing that the cumbersome procedures of the Brooks Act should not apply to most defense-related procurements.<sup>27</sup> The Senate Committee noted:

the redundant and time-consuming reviews and procedures entailed in the procurement of defense automatic data processing equipment and ADP services are not in the national interest. Beyond encouraging the acquisition of obsolescent equipment, the effect on the Department of Defense of Federal Government ADP procurement regulations has been essentially threefold: (1) They induce monetary inefficiencies by making it difficult for the armed services to obtain fewer and less costly ADPE services..(2) Federal regulations remove the ADP decision-making process from the Service level where knowledge and understanding of the operational requirements resides, and place it within ADP bureaucracies of the General Services Administration and the Office of Management and Budget not familiar with these requirements.. (3) Significant and unnecessary time and personnel costs are incurred in the course of most ADP procurements. <sup>28</sup>

The House opposed this idea, with some members pointing out that the government had saved \$4.2 billion in ADPE costs because of the competition requirements of the Brooks Act delegations. They argued that the Senate bill would waive many of those requirements, allowing the DOD "free reign" at the taxpayers expense.<sup>29</sup> Dissenting members of the House Committee, however, supported the exemption: "By involving GSA a new layer of regulation and bureaucracy will be imposed upon these computer acquisitions. To the degree that such specialized, non-general purpose ADPE are procured in a manner less timely than would

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<sup>26</sup>This amendment was contained in the DOD Authorization Act for FY82, Pub. L. 97-86, 95 Stat. 1117 (1981).

<sup>27</sup>S. REP. NO. 58, 97th Cong., 1st Sess. 21 (1981)

<sup>28</sup>*Id.* at 142-43.

<sup>29</sup>H.R. REP. No. 71, 97th Cong., 1st Sess. 22 (1981).



otherwise be the case and to the extent that, because of interference with the planned procurement on the part of GSA, less capable systems are procured than had been sought, the defense posture of the United States will be adversely affected."<sup>30</sup>

In conference, the Senate version prevailed.<sup>31</sup> The Warner Amendment thus removes the procurement of all "military operational" ADPE resources from the jurisdiction of GSA and places the authority to procure directly with the DOD. No delegation is required, nor are these procurements subject to the protest resolution provisions of the Brooks Act.

### 3.4.1.3. Laws in Practice

- **GSA Oversight Responsibilities**

The GSA's regulations governing Federal Information Program (FIP) resources<sup>32</sup> are contained in the Federal Information Resource Management Regulation (FIRMR). The FIRMR specifies that it "relies on the FAR for general policies and procedures."<sup>33</sup> Part 39 of the FAR deals with acquisition of Information Resources within the government. An appendix to FAR Part 39 contains a republication of the entire section of the FIRMR acquisition provisions that apply to FIP resources. The FAR cautions that acquisition personnel "shall follow the FAR, except where the FIRMR prescribes special policies, procedures, provisions or clauses."<sup>34</sup> The Defense Federal Acquisition Regulation Supplement (DFARS), Part 239, supplements the FAR and the FIRMR within DOD. The DFARS specifies that the FIRMR takes precedence and must be followed when acquisitions are subject to the Brooks Act.<sup>35</sup>

While the administrator of the GSA has the sole authority to procure ADPE, he or she may delegate such authority to executive agencies and does so via both "blanket" delegations of procurement authority (DPA) up to a stated dollar amount and by a case-by-case delegation above that ceiling.<sup>36</sup> Generally, agencies may "competitively" acquire ADPE where the dollar value does not exceed \$2.5 million. Sole source procurements by agencies are limited to \$250,000 without GSA processing.<sup>37</sup> Some agencies have higher "blanket" delegations of procurement authority than others. Based on GSA's latest review of DOD components, the Departments of the Army and Air Force have received increased procurement authority; the Office of the Secretary of Defense and Department of the Navy's procurement authority remain at \$2.5 million; and the Defense Logistics Agency and the Army Corps of Engineers' procurement authorities were reduced to \$500,000.<sup>38</sup>

<sup>30</sup>H.R. REP. No. 71, Part 3, 97th Cong., 1st Sess. 53-54 (1981).

<sup>31</sup>H. R. CONF. REP. No. 311, 97th Cong., 1st Sess. 123, 124 (1981).

<sup>32</sup>GSA refers to ADPE by this term; FIP resources and ADPE are used herein interchangeably.

<sup>33</sup>FIRMR, 48 C.F.R. 201-39.1002a.

<sup>34</sup>FAR, 48 C.F.R. 39.001.

<sup>35</sup>DFARS, 48 C.F.R. 239.001.

<sup>36</sup>FIRMR, 41 C.F.R. 201-45 Appendix B, Bulletin C-5.

<sup>37</sup>FIRMR, 41 C.F.R. 201-20.305-1(a) and FIRMR Bulletin A-1, Attachment B, Section 201-1.002.2(a)).

<sup>38</sup>The GSA is currently examining whether it will raise the DOD DPA blanket threshold to \$25 million. Ms. Susan Tobin, Management Reviews Division, General Services Administration, Remarks at the Meeting of the Acquisition Law Advisory Panel, 22 October 1992.

If any part of an acquisition exceeds a blanket delegation or a specific delegation, a new DPA is required for the entire acquisition.<sup>39</sup> Likewise, if the procurement "materially" deviates from the terms and conditions of a DPA, an amendment must be obtained from GSA. Once a delegation of procurement authority has been requested by an agency within the DOD, the DPA is deemed approved after 30 days if it has not been specifically disapproved before then. Thus, a delegation can occur regardless of whether GSA reviews or approves the request. GSA adopted this policy in response to criticism that the delegation process delayed DOD ADPE procurements.

GSA also fulfills its oversight responsibilities under the Brooks Act by performing Information Resources Management (IRM) reviews. In its IRM review program, GSA conducts comprehensive information resources procurement and management review of federal agencies, including DOD. The IRM reviews include assessments of pre-acquisition studies, procurement and contracting practices, oversight of acquisition activities, internal delegations of procurement authority and specific agency delegation requests.

- **DOD ADPE Procurement**

In Fiscal Year 1992, DOD's estimated information technology expenditures amounted to nearly 40% of the entire federal government's information technology expenditures, or \$9.5 billion out of \$24 billion.<sup>40</sup>

Procurement of ADPE by DOD can be divided into two very distinct classes. The first class is equipment intended solely for business applications. Other terms for this class include IRM or non-tactical. This class of ADPE is typically used for support functions and for research. Equipment is usually limited to that available in the marketplace, or commercial, off-the-shelf equipment. There is usually no large research and development investment for the government for this hardware. The government buys the same software and hardware that is available to the private sector.

The second class of equipment is that which is used as an integral part of military operations or weapons systems. ADPE in this category is said to be embedded, mission-critical or militarized. This equipment differs from business applications primarily in the fact that tactical computer hardware is very much an integral part of a "system of systems," and not a stand-alone processor. Although the processor is often the very visible center piece of a business application, it may be much less prominent in a weapon system which is built around the sensors and displays.<sup>41</sup>

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<sup>39</sup>FIRMR, 41 C.F.R. 201-20.305-3.

<sup>40</sup>Memorandum from Martin Kwapinski, Management Reviews Division, General Services Administration, to Ms. Theresa Squillacote, dated 23 October 1992.

<sup>41</sup>There has been considerable litigation regarding the definition of this type of ADPE. See Communications Technology, Inc., GSBICA No. 9978-P, 89-3 BCA Para. 21, 941 (1989)(software used to train operational fighter pilots too remote from actual mission)(J. Hendley, dissenting); Information Systems & Networks Corp. v. U.S., 946 F.2d 876 (Fed. Cir. 1989)(exemption requires finding of real and convincing nexus; not present where not all computers would contribute to military/intelligence mission). But see, Cyberchron Corp., GSBICA No. 10263-P, 90-1 BCA Para. 22,390, enfd. 867 F.2d 1407 (1989)(exemption where all equipment would be used as integral part

The current statutory and regulatory framework is complex and makes it difficult for the DOD to buy ADPE. The Information System Selection & Acquisition Agency, Department of the Army (ISSAA), notes the following examples of ADPE procurement under GSA oversight:

In a procurement to obtain FIP maintenance and FIP software in support of Fort Sam Houston, the Agency Procurement Request (APR) was received at ISSAA on 30 May 1990. On 6 June 1990, ISSAA forwarded the APR to GSA. On 12 June 1990, GSA notified ISSAA that the projected return date of the approved DPA was 12 July 1990. On 12 July 1990, GSA issued a letter to ISSAA stating that "the requirements justification and certifications referenced in the justification for other than full and open competition need to be updated. Therefore, we are denying your request." GSA also directed the Army to re-conduct its market survey and re-evaluate its requirements, to include the system's life. The referenced J&A had been approved on 31 October 1989. On approximately 15 July 1990, ISSAA issued memorandum to Sacramento stating, per GSA, that "GSA has denied your request for a delegation of procurement because the requirements justification and certifications in the J&A are a year or more old. GSA requires that the requirements justification and certification in the J&A be updated." On 31 October 1990, ISSAA resubmitted the APR with revised J&A dated 12 October 1990. No "sole source" justification had been changed, but the contract life was reduced by six months because of the delays in getting a DPA. On 23 November 1990, GSA issued the DPA for the Army's requirements.<sup>42</sup>

In another example, in a procurement for an Automated Retail Outlet System,

GSA notified the Army on 10 June 1992 that they would reject the Army's APR dated 14 May 1992 because the certified dates for FIRMR studies were out of sequence.<sup>43</sup> The Justification & Approval for sole source was certified in the APR as completed in January, 1992. The dates of the Requirements Analysis and Analysis of Alternatives were in May 1992. The GSA concluded, without consulting ISSAA, that the Army had first picked their favorite contractor and then worked backwards to justify this choice. ISSAA explained that this was not true, that the customer

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of weapon system), and Computer Sciences Corp., GSBGA No. 10388-P, 90-1 BCA Para. 22,538 (exemption where nonexempt uses of equipment were incidental to primary intelligence and command and control functions).

<sup>42</sup>Datafax transmissions from Mr. Rex Bolton, Chief, Authorizations and Review, ISSAA, to Ms. Theresa Squillacote, dated 21 and 22 December 1992. That Office notes, however, that good interagency working relationships between ISSAA and GSA have been established over the years.

<sup>43</sup>This sequencing is not prohibited by any law or regulation nor by GSA guidance.

had been asked to update and provide more detail in the studies, and the dates reflected the revised completion times. ISSAA complained that they had not been asked to clarify this situation before a decision had been made to reject the APR. ISSAA told GSA that the Army had received more DPA authority from the GSA since APR submission, and that ISSAA intended to withdraw the APR and issue an Army DPA. The GSA supervisor said that he would not allow the Army to withdraw the APR, and that GSA would reject it anyway, despite the explanation. An undated rejection was received by data fax transmission within the hour. GSA explained that "the documentation provided does not support the proposed acquisition strategy. GSA's review indicates that the documentation was prepared after the acquisition strategy had been determined."<sup>44</sup>

As these examples illustrate, the complexity of the DPA process has also raised issues regarding the delay inherent in this process. In 1980, when Congress passed the Paperwork Reduction Act,<sup>45</sup> the Senate expressly stated its concern with the length of time required to obtain DPAs from the GSA, particularly as regards weapon systems.<sup>46</sup>

Currently, GSA reports that the average time for review of all agency procurement requests is 18.4 days.<sup>47</sup> However, GSA also reports that that figure is considerably longer -- up to six to eight weeks -- in more complex ADPE procurements.<sup>48</sup> And, that figure may extend even further if a procurement involves a DPA amendment or additional technical review. Because of this complexity, in extreme cases the equipment at time of purchase may not be state-of-the-art because it is based on specifications written considerably earlier.

Recently, DOD implemented an initiative to centralize DOD ADPE procurement within a new DOD agency. On 25 June 1991, the Defense Communications Agency was rechartered as the Defense Information Systems Agency (DISA) in recognition of plans to greatly expand the agency's scope of operations.

Under Defense Management Review Directive 918,<sup>49</sup> DISA became the central manager of the defense information infrastructure. This role encompasses: (1) implementation of systems security; (2) development, specification, certification, and endorsement of information technology standards; (3) network management, engineering, design and control of long haul and regional communications and technical management of base level communications; (4) management and workload control of data processing installations; (5) central design activities for support systems

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<sup>44</sup>*Supra* note 42.

<sup>45</sup>Pub. L. No. 96-551, 94 Stat. 2812, codified at 44 U.S.C. §§ 3501 et. seq. (1980).

<sup>46</sup>S. Rep. 96-630, at p. 69.

<sup>47</sup>Memorandum from Martin Kwapinski, Management Reviews Division, General Services Administration, to Ms. Theresa Squillacote, (atch 1, p. 7) dated 23 Oct. 1992.

<sup>48</sup>Ms. Susan Tobin, Management Reviews Division, General Services Administrations, Remarks at the Meeting of the Acquisition Law Advisory Panel, 22 Oct. 1992.

<sup>49</sup>As issued 15 Sep. 1992.

activities; and (6) acquisition of information technology components and services that require integration.

In acquisition, DISA will assume responsibility for centrally acquiring information technology hardware, software, and services requiring systems integration. DISA will acquire commodity goods and services and will function as the information technology reuse organization. DISA is delegated authority to procure information technology assets and services.

- **GSA Position**

GSA opposes any alteration of its current oversight role in ADPE procurement.<sup>50</sup> GSA maintains that its extensive experience with all federal agencies and programs gives it a Government-wide perspective on issues relating to the business and administrative use of federal information processing resources. GSA contends that this experience provides an advantage over a single agency focus, and that it uses this advantage to share information with DOD agencies, and to formulate recommendations for improvement. GSA also promotes the establishment and use of government-wide standards for systems and software.<sup>51</sup>

GSA's involvement in pre-acquisition processes, it is contended, ensures that the acquisition planning process promotes competition and efficiency. An agency's efforts and ability to promote and obtain competition will be a determining factor in GSA's decision to grant or deny authority to acquire information resources.

GSA maintains that exemption of DOD from its oversight role will have a significant negative impact on federal ADPE procurement, both in DOD and within the government in general. As the single largest federal purchaser, DOD would be able to set a de facto standard, thus splitting the aggregated buying power of the Federal Government. This split would result in increased costs for both the civilian agencies and DOD. Because GSA also contends that the Office of the Secretary of Defense does not provide sufficient oversight of information resources management by its components, any DOD exemption from the Brooks Act would therefore require the creation of a duplicate, oversight bureaucracy within DOD.

#### **3.4.1.4. Recommendation and Justification**

##### **No Legislative Recommendation**

The Panel considered two alternative recommendations regarding these statutes but was unable to reach consensus. All Panel members agreed, however, that the DOD should have some relief from the DPA process, and, to this end, a significant increase in the blanket DPA should be granted.

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<sup>50</sup>The GSA position summarized here is based on Memorandum from Martin Kwapinski, Management Reviews Division, General Services Administration, to Ms. Theresa Squillacote, (with attachments) dated 23 Oct. 1992.

<sup>51</sup>This role may be increasingly compromised by the growing tendency for government to adopt open systems architectures.

The Panel does recommend unanimously that Congress examine in-depth the method by which DOD procures ADPE. To assist in that examination, the two primary alternatives considered by the Panel, with a supporting rationale for each, are set forth below.

- **Amend the Warner Amendment to Wholly Exempt DOD from the Brooks Act**

This recommendation is based on an analysis of the Brooks Act legislative history, and on an analysis of its current implementation.

## **LEGISLATIVE HISTORY**

The Brooks Act was intended to give the Administrator of General Services operational responsibility to provide the federal government with: (1) optimum utilization of ADPE resources, (2) more economic acquisition of government ADPE, and (3) better management information. As discussed below, these reasons are no longer relevant.

### **Optimum Utilization of Government ADPE**

**ADPE Service Centers:** In 1965, Congress felt that there was "widespread waste in available but unused Government ADPE time." The Brooks Act was intended to authorize GSA to establish multiagency service centers to furnish ADPE support to multiple users.

The technology and architecture of ADPE systems has changed dramatically since 1965. Large processing centers have become the dinosaurs of the computer age. The technology has progressed to the point where personal computers have far greater computational power than the large main-frame computers of the 1960s. At the same time, decentralized and distributed data processing is becoming more common than centralized processing.

Today, cost savings associated with centralized processing are not as significant as they were when the Brooks Act was enacted. Software is now the major cost driver, not hardware. Rather than saving money, large processing centers can promote waste. The capital investment associated with large processing centers often inhibits conversion to more efficient distributed processing systems. Large processing centers can also foster noncompetitive sole source relationship with vendors.

**Reutilization of ADPE Resources:** In the 1960s and 1970s some savings were obtained by reutilizing ADPE resources. During that period, the hardware for large computer systems was very expensive and often represented the major cost component of a computer system. Savings could be achieved by reutilizing equipment that had not become obsolete.

However, reuse of old hardware often resulted in lack of compatibility with newer systems and sole-source dependence upon the original manufacturer. The revolution in microchip technology caused a dramatic increase in computing power throughout the 1980s, together with an equally dramatic drop in prices. Not only did these trends diminish costs, but maintenance of

old equipment also became very expensive when manufacturers stopped supporting obsolete equipment.

The federal government derives minimal benefit today from the reutilization of ADPE. While reutilization of hardware and software should be encouraged within an agency wherever possible, the limited economic benefits of reutilization no longer justify maintenance of a large government-wide bureaucracy. Changes in technology and system architecture, the reduced cost of new equipment, and the high cost of maintaining old equipment generally favor the acquisition of new equipment.<sup>52</sup> The significant economic benefits associated with reutilization in 1965 no longer apply today as markedly as they did when the Brooks Act was originally enacted.

#### More Economic ADPE Acquisition of Government ADPE

When the Brooks Act was enacted, Congress believed that the federal government was not receiving special advantages, such as volume discounts from volume purchases, and attempted to achieve such advantages through GSA oversight. In practice, however, agencies awarding large Indefinite Delivery/Indefinite Quantity (IDIQ) or requirements contracts have often been more successful than GSA in achieving significant cost savings.<sup>53</sup> These agencies have attained the volume discounts that are still elusive for GSA, particularly on multiple award schedule contracts.

There is also growing pressure to compete each ADPE procurement without imposing "compatibility limited" requirements. This pressure has reduced the Government's ability to consolidate requirements and obtain volume discounts. Also, large IDIQ or requirement contracts inevitably result in protracted litigation and resulting delays.

Further, in 1965, hardware acquisition was the major expense of an ADPE system. The availability of investment funds to make a capital investment in hardware often determined the nature of the system acquired.<sup>54</sup> Recognizing the high cost associated with equipment leases, GSA was expected to monitor the leasing of ADPE. The revolving fund was established as a mechanism to combine requirements and make a single capital investment with the objective of saving money.

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<sup>52</sup>In response to pressure from both new and used ADPE sellers, GSA requires agencies to consider offers of used components in ADPE procurements. FIRMR, § 201.39.803-3(a)(1); FAR § 10.010. See generally SIRM Bulletin C-29, 2Feb. 1991, "Acquisition of Used Computer Equipment. Unless the agency has a critical requirement that mandates the use of new equipment, agencies may be forced to accept used equipment and components. This requirement permits manufacturers and resellers to recycle old, otherwise unmarketable equipment to the federal government.

<sup>53</sup>Indeed, the Director of Management Reviews of General Services Administration noted that the DOD very often can get a better price on a contract. Ms. Susan Tobin, Management Reviews Division, General Services Administration, Remarks at the Meeting of the Acquisition Law Advisory Panel, 22 Oct. 1992.

<sup>54</sup>Consistent with Congressional guidance, DOD categorizes a cost as either an investment or an expense. With certain exceptions, items costing less than \$15,000 are considered expense items while items over \$15,000 are considered investment items. DOD categorizes ADPE by the cost of the complete system rather than by the cost of its components parts.

Consistent with congressional guidance, and excluding large telecommunication ADPE, DOD seldom leases ADPE.<sup>55</sup> The cost of hardware has fallen so dramatically that this availability of capital investment funds is often not the major issue it once had been. Similarly, the revolving fund provides little, if any, value to DOD.

### Better Management Information

In enacting the Brooks Act, Congress expected GSA to assimilate and collect information needed for ADPE management in the federal government. Today, GSA has only a limited role in the actual collection or assimilation of data concerning ADPE within the federal government.

In practice, GSA simply collects and collates limited information (the estimated value of the project, etc.) about pending procurements as part of the process by which it grants a delegation of procurement authority. GSA also monitors and reports on protests before the GSBICA. A periodic publication by GSA attempts to make correlations between GSBICA decisions and the overall ADPE procurement process.

Exemption of DOD from the Brooks Act would not necessarily end GSA's collection of information. DOD routinely keeps the same type of information collected by GSA. It would not be difficult for DOD to continue to provide the information now collected through the DPA process.

In any event, GSA's collection of information arguably has added little to the overall procurement process. While it has complied with its statutory mandate, it is difficult to argue that this limited information is very useful. Indeed, the Congress has itself raised questions regarding the adequacy of GSA's management information role.<sup>56</sup>

Perhaps most importantly, the government-wide management role for GSA that was envisioned under the Brooks Act for information resources is no longer needed. Virtually every federal agency has an information management organization that defines requirements, conducts procurements, and fields information systems. Within DOD, this role is being assumed by the DISA. Further, there is an increasing tendency for the government to adopt open systems architecture that depends on industry standards.

### IMPLEMENTATION

The Panel also notes the following reasons for exempting DOD from the Brooks Act, in addition to those based on the legislative history of the Act:

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<sup>55</sup>DOD policy permits leasing of ADPE only under a limited number of circumstances. For example, ADPE can be leased to satisfy a short term requirement or for evaluation.

<sup>56</sup>See, for example, Thirty-eighth Report by the Committee on Government Operations, "Administration of Pub L. No. 89-306,, Procurement of ADP Resources by the Federal Government," H.R. REP. No. 1746, 94th Cong., 2d Sess. (1976).



## Delays Associated with GSA Oversight of ADPE Procurements

DOD has frequently expressed concern over the additional time required to obtain delegations of procurement authority from GSA. The Senate Report to the Paperwork Reduction Act of 1980 also expressed these same concerns, particularly as they might apply to computer systems embedded in weapons systems.<sup>57</sup>

GSA's current policies concerning approvals of delegations of procurement authority are perhaps the best evidence that this process has no substantive value. Once a delegation of procurement authority has been requested by an agency within DOD, the DPA is deemed approved after 30 days if it has not been specifically disapproved. Thus, a delegation can occur regardless of whether GSA reviews or approves the request. GSA adopted this policy in response to criticism that the delegation process delayed DOD procurements.

### Overly Broad Definitions of ADPE

When enacted, the Brooks Act applied only to general purpose commercially available ADPE systems and components. As a result in part of a jurisdictional issue that arose during the protest of the award on an Army printing and publishing contract, the Congress amended the Brooks Act and expanded the definition of ADPE. The term "Automatic data processing equipment" was redefined to mean "any equipment or interconnected system or subsystems of equipment that are used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information, including communications."<sup>58</sup> This definitional change has enormously broadened the scope of the Brooks Act.

### Unnecessary Bureaucracy

An unfortunate result of the Brooks Act has been to foster separate organizations for the acquisition of general purpose ADPE. A separate culture has been spawned in which requirements are defined and approved in different channels, while separate procuring agencies have been established in each DOD agency to acquire general purpose ADPE. In some procurements, the approving official and the procuring activity are determined by how the item will be used rather than the nature of the item itself.

Based on the above rationale, one alternative considered by the Panel was to amend 10 U.S.C. § 2315 to read as follows:

(a) Section III of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759) is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services.

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<sup>57</sup>S. REP. NO. 630, 96th Cong., 2d Sess. 69 (1980).

<sup>58</sup>H.R. CONF. REP. NO. 1005, 99th Cong., 2d Sess. 776 (1986).

- **Significantly Increase the Blanket Delegation of Procurement Authority for DOD**

The Panel also considered a proposal to significantly increase the blanket delegation of procurement authority for DOD. Under this proposal, however, the GSA would retain its managerial oversight functions but more limited procurement authority.

In support of this alternative, some members of the Panel noted the following points:

First, on several occasions since the Brooks Act was passed in 1965, Congress has determined that the Brooks Act should apply to DOD procurements and no compelling justification has been presented to change the law. In 1982, for example, Congress considered and rejected the wholesale exemption of DOD from the Brooks Act.<sup>59</sup> In 1984 Congress strengthened the Brooks Act application to DOD and other federal agencies. At that time, Congress authorized the GSBCA to suspend an agency's delegation of procurement authority under the Brooks Act when there was a protest in which the GSBCA found that the agency's actions, leading to contract award, violated a law, regulation, or the terms of the DPA.<sup>60</sup> The GSBCA was given this protest authority on an experimental basis. In 1986, Congress gave the GSBCA permanent protest authority and the House and Senate conferees on the Paperwork Reduction Reauthorization Act stated that the GSBCA had "lived up to, and surpassed, the expectations expressed when the determination was made to grant it protest jurisdiction."<sup>61</sup>

Second, the DPA process is an essential part of the GSA oversight of DOD acquisitions and should be retained. The GSA has significant ADPE expertise and over the years it has made numerous recommendations through its oversight responsibilities to strengthen the DOD ADPE acquisition process.<sup>62</sup> DOD has acknowledged the benefit of these recommendations.<sup>63</sup> In addition, the DPA process does not appear to significantly delay ADPE procurements. A GAO study in 1986 found that the time required for ADPE procurements that were exempt from the Brooks Act did not differ significantly from the time required for ADPE procurements which required a DPA:

Defense reported to us that it has conducted 141 procurements under the Warner Amendment from the time of its enactment to July 1985. The extent of competition reported by Defense is similar for both Warner Amendment and Brooks Act procurements. In the 22 selected examples we reviewed, we found that there is little difference between Warner Amendment and Brooks Act procurements in the acquisition procedures followed and total time needed to complete procurements. Defense could not provide

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<sup>59</sup>Department of Defense Authorization Act for FY 1982, Pub. L. No. 97-86, § 908(a)(1), 95 Stat. 1117 (1982).

<sup>60</sup>Competition in Contracting Act of 1984, Pub L. No. 98-369, 98 Stat. 1175, 1182-84 (1984).

<sup>61</sup>H. R. CONF. REP. No. 1005, 99th Cong., 2nd Sess. 774 (1986).

<sup>62</sup>Ms. Susan Tobin, Management Reviews Division, General Services Administrations, Remarks at the Meeting of the Acquisition Law Advisory Panel, 22 Oct. 1992.

<sup>63</sup>*Id.*

studies or other support for claims of shorter acquisition time for Warner Amendment procurements. On the basis of our review, we believe that Defense's implementation of the Warner Amendment has not resulted in more expeditious acquisition of computer resources for critical military missions. Therefore, we do not believe the use of acquisition time provides a basis for justifying the extension of the Warner Amendment to exempt all Defense ADP procurements from requirements of the Brooks Act.<sup>64</sup>

The following comments of the Computer and Communications Industry Association are also noted:

DPAs should be issued in a manner that not only faithfully reflects the requirements and intent of the Brooks Act, but to actually assist the Government in managing a set of policies and practices to improve the efficiency, effectiveness and competitiveness of computer and communications acquisitions. The information movement and management industry not only supports the Brooks Act, but believes the balance and fairness it brings is equally in the interest of all competitors and all participants in the contract process.<sup>65</sup>

Third, the Brooks Act helps assure uniform government-wide ADPE standards by providing one agency, GSA, the authority to establish regulations and procedures for ADPE procurements except those exempt under the Warner Act amendment. Such uniformity fosters competition by establishing a common base for all offerors to consider. The Warner Act modified that common base in 1982 for critical military functions. No further modifications are justified. As the GSA representatives stated in the discussions with the Panel, the Warner Amendment:

actually created two markets for computers: the administrative general processing market, and the weapons systems market. Think about creating a third market, general purpose computing under DOD. Otherwise you may find yourselves embedding more into the weapons systems and paying higher dollars.<sup>66</sup>

Fourth, GSBCA should continue to have jurisdiction over DOD procurements which are not exempt from the Brooks Act. As the House and Senate Conferees on the Paperwork Reduction Reauthorization Act stated in 1986 "with the Board, vendor(s) are far better assured that the federal procurement system has treated them fairly and honestly, . . . while agencies are

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<sup>64</sup>*Id.*; GAO/IMTEC-86-29, p. 1 (July 1986).

<sup>65</sup>Comments to the Advisory Panel from the Computer and Communications Industry Association, November 19, 1992.

<sup>66</sup>Ms. Susan Tobin, Management Reviews Division, General Services Administration, Remarks at the Meeting of the Acquisition Law Advisory Panel, 22 October 1992.

better able to reap the benefits of competition."<sup>67</sup> If the Warner amendments were changed to exempt all DOD procurements, then the GSBCA would no longer have jurisdiction over these procurements.

Therefore, an alternative by which the GSA retains managerial oversight, but DOD retains authority over the majority of its individual ADPE procurements, is one that the Panel believes also warrants consideration by the Congress. Such consideration may be particularly useful at this time when the establishment of DISA offers the opportunity for DOD to develop and institutionalize greater expertise and more effective internal management control of its ADPE acquisition process.

Finally, the Panel also believes that the definition of ADPE, and of general purpose versus special purpose ADPE, should be set forth with greater clarity to avoid an unwarranted expansion of the scope of the Brooks Act.

#### **3.4.1.5. Relationship to Objectives**

A significant increase in GSA's blanket DPA to DOD would promote the streamlining and cost effectiveness of DOD ADPE acquisition by minimizing excessive bureaucracy and by affording greater latitude to DOD in the internal management of its ADPE acquisition.

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<sup>67</sup>H.R. CONF. REP No. 1005, 99th Cong., 2d Sess. 774-75 (1986).

## **3.5. DOD Commercial AND Industrial Activities**

### **3.5.0 Introduction**

This subchapter encompasses those sections within Chapter 146 of Title 10 dealing with DOD Commercial and Industrial Activities. Specifically, this subchapter analyzes those laws regulating DOD contracting for commercial services under OMB Circular A-76. It includes restrictions on the contracting out of core logistics activities by DOD, and sets forth specific guidance on depot-level maintenance activities by DOD.

The statutory provisions in Chapter 146 of Title 10 present a confusing and contradictory set of rules regarding the DOD's contracting-out process. The tension among these sections clearly reflects the diversity of interests at stake in this area. For example, 10 U.S.C. § 2461, prohibiting conversion to private contractor performance of an in-house function unless extensive notice to the Congress has occurred, serves generally to protect in-house performance by maximizing congressional and community input before a decision to contract out. However, 10 U.S.C. § 2462 requires the Secretary of Defense to procure a supply or service related to a DOD function from the private sector if that source is less expensive.

The Panel's goal in this area was to consolidate and streamline these conflicting rules into a coherent statement of basic and essential principles that eliminates, as far as possible, unnecessary detail. The Panel also attempted to balance these competing interests into a proposed set of rules that affords the Department managerial flexibility while preserving meaningful congressional oversight and effective community input. To that end, the Panel proposes a single section, 24XX, governing traditional A-76 contracting procedures for the Department. A second section, 24XY, sets forth the basic principles regarding identification and competition for core logistics functions by DOD.<sup>1</sup> The Panel developed these proposed sections based on its analysis of the legislative histories of the extant laws, and based on extensive comments from affected parties within the DOD acquisition community, including relevant federal employee labor organizations. The Panel achieved a high degree of consensus of support within that community on these proposals.

Proposed section 24XX provides that DOD shall procure from the private sector if such a source can provide a service or supply adequate to meet defined performance standards at a cost lower than that of an in-house, government source. This statement reiterates the basic rule currently set forth in 10 U.S.C. § 2462, but adds a new performance factor in the phrase "adequate to meet defined performance standards." This addition is discussed in the individual analysis for 10 U.S.C. § 2462.

Proposed section 24XX adopts the "realistic and fair" cost comparison standard currently set forth in 10 U.S.C. § 2462. It also consolidates within that section a brief delineation of the

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<sup>1</sup>Those two statutes are set forth immediately following this introduction, followed then by the individual analyses that reference them.

types of costs to be included in that comparison, as now set forth in greater detail in 10 U.S.C. § 2467.

This proposed section maintains the requirement of federal employee consultation currently in 10 U.S.C. § 2467. As noted in the individual analysis for that section, federal employee consultation is an important avenue for ensuring that cost comparisons not only reflect the most efficient organization possible, but also are based on essential performance standards. Section 24XX also maintains, albeit in streamlined form, the extant requirement in 10 U.S.C. § 2461 of notice to Congress of intent to study a conversion, as well as notice of the decision itself. The Panel regards notice of intent to study as a legitimate tool to promote community involvement, and involvement by other interested parties, in this important, decision-making process.

Finally, proposed section 24XX waives these requirements for specified functions, as does the current 10 U.S.C. § 2461. It adds, however, installations scheduled for closure as an additional item not subject to these procedures on the basis that additional flexibility is required when implementing a base closure.

The Panel recommends repeal of sections 2463 (Maintenance of cost data), 2465 (Prohibition on contracting out fire fighting and security guard functions) and 2468 (Installation commanders' contracting out authority). The supporting rationale for these recommendations is set forth in the individual analyses for each of these sections.

Proposed section 24XY restates the basic, core logistics standard now set forth at 10 U.S.C. § 2464. It adopts the definition of "core" currently contained in that section, but permits DOD secretaries to define "core capabilities," and to identify those activities necessary to sustain those capabilities. The proposed section then requires DOD secretaries to perform such core functions in-house. It does not permit DOD secretaries to deviate from that requirement, however, as does the current section. It does permit competition among government entities for assignment of such work as a means of encouraging greater economy and efficiency in these activities.

For requirements in excess of core requirements, DOD secretaries are permitted, at their discretion, to use competition to acquire additional maintenance and repair of defense supplies. Such competition may be public/public, public/private, or private/private. However, in order to ensure a level playing field in such competitions, the proposed section requires that all bids "shall accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities." This new cost comparison language attempts to address issues regarding comparability raised by both the private sector and DOD activities regarding inequities in the current cost comparison process. Finally, competitions under this proposed section are exempt from A-76 requirements.

Based on this modification of the current, core logistics section, the Panel recommends the repeal of 10 U.S.C. § 2466. That section sets forth the 60/40 rule regarding DOD contracting for depot-level maintenance: that the Department may not contract out more than 40% if of its

depot-level maintenance. The 60% in-house requirement was a somewhat arbitrary figure, used first by the Department and later adopted by the Congress. It was thought to represent the amount of in-house maintenance necessary to preserve the department's military readiness and surge capabilities. The same standard, however, underlies the core logistics concept. The Panel believes, therefore, that the level of in-house depot-level maintenance necessary to preserve military readiness and surge capability should not be subject to an arbitrary figure. Rather, the Panel believes that this area is best guided by the same, industrial base-related core logistics concept set forth in the current section 2464. The Panel believes that the Secretary of Defense should have the flexibility to determine core requirements for depot-level maintenance purposes. These requirements will undoubtedly vary for each facility. The Panel recognizes that this area is extremely complex and controversial and one in which industry, DOD, and the Congress attempt to reconcile competing interests and to achieve a balance that preserves a viable public and private sector defense industrial base.

The Panel considered, but rejected, application of the same "core" concept to Departmental in-house manufacturing capabilities. The Panel decided that these capabilities were not sufficiently developed to warrant this treatment. Instead, the Panel recommends consolidation and amendment of the Army and Air Force Arsenal Acts to provide DOD secretaries with discretionary authority to workload in-house manufacturing requirements.

Finally, the Panel recommends repeal of 10 U.S.C. § 2212, requiring line-item budgeting of contracted advisory and assistance services. The Panel notes that this same budgetary requirement is present in a recent appropriations act.

## **10 U.S.C. § 24XX Contracting for DOD Commercial or Industrial Functions**

**(a) IN GENERAL** - Except as otherwise provided by law, the Secretary of Defense or secretary of a military department shall procure those supplies and services necessary for or beneficial to the performance of authorized functions of the Department of Defense from a source in the private sector, if such a source can provide the service or supply adequate to meet defined performance standards at a cost that is lower than the cost at which the Department can provide the same supply or service. This cost comparison shall include any cost differential required by law, Executive Order, or regulation. The requirements of this subsection shall not apply to inherently governmental functions or functions which the Secretary concerned determines must be performed by military or Government personnel.

(1) A DOD function may not be converted to performance by a private contractor to circumvent civilian personnel hiring policies.

(2) A DOD function may not be in any way altered for the purpose of exempting such function from conversion to performance by a private contractor.

**(b) REALISTIC AND FAIR COST COMPARISONS--** For the purpose of determining whether to contract with a source in the private sector, in contrast with performance by a government source, for the performance of a DOD function on the basis of a cost comparison, the Secretary of Defense or secretary of a military department shall ensure that all costs considered are realistic and fair. At a minimum, such estimated costs must include costs of quality assurance, technical performance monitoring, liability insurance, employee retirement and disability benefits, and all other applicable overhead costs.

**(c) CONSULTATION** - The Secretary of Defense shall ensure that affected civilian employees are consulted and that their views on the development and preparation of any performance work statements or management efficiency studies to be used in the cost comparison are obtained by cognizant DOD officials. In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of Title 5, U.S. Code, consultation with representatives of that labor organization shall satisfy the consultation requirement in this subsection. In the case of employees not exclusively represented by a labor organization under section 7111 of Title 5, consultation with appropriate representatives of those employees shall satisfy the consultation requirement of this subsection.

**(d) NOTICE AND REPORTING** - Prior to conversion to a private source of any DOD function currently performed by Government personnel, the Secretary of Defense or secretary of a military department must:

(1) notify the Congress of a decision to study such conversion and of a decision to convert, provide a summary of the cost comparison, certify that the performance of such function by a private contractor is expected to result in a cost savings and equivalent performance quality, and certify that the costs for performance by government employees are based on the most efficient method of operation, and,



(2) report to the Congress on the potential economic effect of the conversion on the affected employees and local community and on the effect on the military mission of the function. Such report must also include the amount of the accepted private contractor bid, of the comparable cost of performance by government employees, and of relevant contract administration costs.

(e) This section shall not apply:

(1) to functions included on the procurement list established pursuant to section 2 of the Act of June 25, 1938, (41 U.S.C. § 47), popularly referred to as the Wagner-O'Day Act;

(2) to functions that are planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act;

(3) to functions performed by 50 or fewer government employees;

(4) to installations that are scheduled for closure under base realignment and closure procedures;

(5) to those core logistics functions designated for in-house, government performance pursuant to section 24XY; or

(6) during war or during a period of national emergency declared by the President or Congress.

## **10 U.S.C. § 24XY Core Logistics Functions**

**(a) POLICY** - It is essential for the national defense that Department of Defense activities maintain a core logistics capability (including personnel, equipment, and facilities) sufficient to ensure a ready and controlled source of technical competence and resources necessary for an effective and timely response to national defense contingency situations and other emergency requirements.

**(b)** Accordingly, the Secretary of Defense or secretary of a military department shall identify those logistics activities that are necessary to maintain the logistics capabilities described in subsection (a).

**(1)** Notwithstanding any other provision of law, the Secretary of Defense or secretary of a military department shall have the modification, depot maintenance, and repair of defense-related material performed by Government or military personnel at activities identified in subsection (b) as the secretary determines necessary to maintain the core logistics capabilities described in subsection (a).

**(2)** The Secretary of Defense or the secretary of a military department may use competition among these Government-owned facilities to determine which entity can most efficiently perform the core logistics requirements described at subsection (a) above, considering both cost and performance factors.

**(c)** In excess of the core logistics requirements described in subsection (b), above, the Secretary of Defense or secretary of a military department may acquire the additional modification, depot maintenance and repair of defense-related material and components, and the production of defense-related supplies, needed for the Department of Defense through (i) competition among maintenance activities owned by the United States, (ii) competition between such activities and private firms, or (iii) competition among private firms.

**(d)** In competitions under this section, whether between DOD activities, between DOD activities and private firms, or between private firms, bids from these entities shall accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities.

**(e)** The procedures or requirements of OMB Circular A-76 do not apply to determinations made or competitions entered into pursuant to this section.

### **3.5.1. 10 U.S.C. § 2461**

#### **Commercial or industrial type functions; required studies and reports before conversion to contractor performance**

##### **3.5.1.1. Summary of Law**

This section states that commercial or industrial functions of DOD being performed on October 1, 1980 by DOD civilian employees may not be converted to performance by a private contractor unless the Secretary of Defense notifies the Congress of a decision to study such a potential conversion, provides a detailed cost comparison report that concludes that a cost savings will result from the conversion, and certifies that the in-house cost estimate is based on the most efficient and cost effective organization. The Secretary of Defense must also report on the potential economic effect of contracting for the function if more than 75 employees are involved, the effect on the military mission, the accepted bid amount and contract administration costs and the cost of in-house performance.

The Secretary of Defense must notify the Congress of any final decision to convert. The Secretary must also annually report to the Congress on the percentage of commercial and industrial type functions that are performed in-house and performed by contractor employees. The section does not apply to functions performed by 45 or fewer in-house employees, nor to functions established pursuant to the Wagner-O'Day Act. No conversion may occur to circumvent a civilian personnel ceiling, nor may a function be modified to circumvent conversion to a private contractor. Finally, the section does not apply during war or a period of declared national emergency.

##### **3.5.1.2. Background of Law**

This section was originally enacted by the DOD Authorization Act for Fiscal Year 1981.<sup>1</sup> The House version of that bill had set forth restrictions on conversion to performance by private contractors of functions then being performed by DOD personnel. The House language prohibited such conversions when used to avoid civilian personnel ceilings, and also required notification to Congress when in-house functions were being examined for potential conversion. The original legislation required cost comparisons between in-house and contractor performance and certification that the in-house activity was organized in the most efficient manner. A report to the Congress on the impact of such conversion was required, as well as notification of a final decision to convert. Finally, the House legislation provided a cause of action in U.S. district court to government employees reduced in force because of such a conversion.<sup>2</sup>

The House Committee report indicated that this provision was intended to make permanent a provision that had been first contained within the prior year's authorization bill. The

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<sup>1</sup>Pub. L. No. 96-342, § 502, 94 Stat. 1077 (1980).

<sup>2</sup>H.R. REP. No. 6974, 97th Cong., 2d Sess. 804 (1981).

proposed language differed from the extant law by requiring the cost comparison to be based on the most efficient manner of organization, as opposed to costs at the point of decision to study the conversion. It also required reporting on an annual basis.<sup>3</sup>

In conference, the Senate receded with an amendment deleting the U.S. district court cause of action and a requirement that the public availability of the cost comparison be certified to the Congress.<sup>4</sup>

This language was codified into Title 10 in 1988.<sup>5</sup> It was amended in 1989 by the National Defense Authorization Act for Fiscal Year 1990 to add the Wagner-O'Day exemption.<sup>6</sup> The exemption originated in the House version of the bill. The House Committee Report indicated the Committee's belief that statutory contracting out restrictions should not impede federal commitments to blind and handicapped workers through Wagner-O'Day contracts.<sup>7</sup>

### **3.5.1.3. Law in Practice**

There is no direct, regulatory implementation of the overall congressional notice provisions of this section.

The Department of the Navy, Office of the Chief of Naval Operations, Shore Activities Division, recommends repeal of this statute.<sup>8</sup> That Office notes that many of the requirements of this section duplicate analysis already required under the A-76 regulatory process. That Office also notes that the requirements of this section impede management flexibility during the base closure process.

The Department of the Air Force, Deputy Assistant Secretary (Communications, Computers & Logistics), recommends that this section be amended to limit congressional notification requirements to intent to study and to decision results.<sup>9</sup> The annual congressional report could then be deleted as duplicative of these requirements.

The Office of the Assistant Secretary of Defense, (Production & Logistics), Installations, recommends that this provision be amended to provide an additional waiver for functions at installations identified for closure, noting that it is wasteful to spend time and money on cost comparisons when no viable options for in-house performance are available.<sup>10</sup>

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<sup>3</sup>H.R. REP. No. 916, 96th Cong., 2d Sess. 140 (1980).

<sup>4</sup>H.R. REP. No. 1222, 96th Cong., 2d Sess. 93, 94 (1980).

<sup>5</sup>Pub. L. No. 100-370, 102 Stat. 851 (1988).

<sup>6</sup>Pub. L. No. 101-189, § 1132, 103 Stat. 1561 (1989).

<sup>7</sup>H.R. REP. No. 121, 101st Cong., 1st Sess. 231-232 (1989).

<sup>8</sup>Memorandum from Mr. Theodore Fredman, Assistant to the General Counsel, Department of the Navy, to Acquisition Law Task Force, dated 14 Sep. 1992.

<sup>9</sup>Memorandum from Mr. Lloyd K. Mosemann, Deputy Assistant Secretary (Communications, Computers & Logistics), Department of the Air Force, to DOD Advisory Panel, dated 21 Oct. 1992.

<sup>10</sup>Memorandum from Mr. David L. Spoede, Special Assistant, Office of the Assistant Secretary of Defense, (Production & Logistics), Installations, to DOD Panel, dated 29 Sep. 1992.

The American Federation of Government Employees, AFL-CIO, states that "this section of law is essential for Congressional oversight and public information concerning the government's contracting out program. Without the required method of disclosure, members of Congress and the public would have very limited information concerning the program."<sup>11</sup>

#### **3.5.1.4. Recommendation and Justification**

##### **Amend to eliminate unnecessary requirements and consolidate into a single streamlined statute.**

The Panel recommends consolidation of the essential requirements of this statute -- notice to Congress before conversion to private sector performance -- into a single statute at 10 U.S.C. § 24XX setting forth the general A-76 procedures applicable to the DOD.

Subsection (d) and (e) of 10 U.S.C. § 24XX contain many, but not all, of the requirements of this section. The Panel recommends retention of the notice of decision to study because it indirectly affords affected communities and parties the opportunity to participate in this process through their elected representatives. This participation can significantly benefit the contracting, decision-making process.<sup>12</sup> For that same reason, the Panel recommends retention of the requirement to report to Congress on the potential economic effect of the conversion on affected employees and the local community. This requirement ensures accountability by the DOD to the affected parties. Further, the Panel retains the requirement to notify Congress when a final decision to convert has been made. This requirement is an effective means for both internal Department and congressional oversight over the degree to which DOD functions are contracted-out. However, the Panel would repeal the requirement for an annual report of these decisions as duplicative of this requirement.

The Panel also recommends retention of the requirement to certify that conversion will result in a cost savings. The proposed statutory provision, however, would also require certification that there is cost savings and equivalent performance quality. It may be difficult to certify as to performance quality prior to actual performance by a commercial entity.<sup>13</sup> Hence, to permit flexibility and estimation in that certification, the phrase "equivalent" is used. Nonetheless, the introduction of this phrase attempts to ensure that performance quality factors are adequately considered, and particularly that the quality that may develop within an established, in-house staff is not vitiated by a solely cost-based certification. This requirement, however, is balanced by the retention of the requirement that costs of performance by government employees must be based on the most efficient method of operations. This concept attempts to discipline the comparison

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<sup>11</sup>Letter from Mr. Robert E. Edgell, Deputy Director, Field Services Department, American Federation of Government Employees, AFL-CIO, to Acquisition Law Task Force, dated 26 Aug. 1992.

<sup>12</sup>Compare comment received from Dr. Garry Kauvar, Principal Director, Installations, Office of the Assistant Secretary of Defense (Production & Logistics), to Ms. Theresa Squillacote, dated 16 Nov. 1992 (recommendation to delete congressional notification of study because it serves to initiate pressure in advance of the collection of evidence).

<sup>13</sup>See, e.g., letter from Mr. Anthony Perfilio, Principal Deputy Staff Judge Advocate, Department of the Air Force, HQ AFMC, to Working Group Six, Advisory Panel, dated 18 Nov. 1992 ("It is difficult to provide a summary of performance by a commercial entity when that performance has not occurred.").

process by mandating in-house the type of efficiencies that the market place mandates in the private sector.

The Panel would also retain the extant exemption provisions, and add a provision that exempts the requirements for installations scheduled for closure under base realignment and closure proceedings, (as well as a conforming exemption to the newly proposed 10 U.S.C. § 24XY, discussed below). As the workforce diminishes at closing bases, many installation commanders will be forced to rely upon contractors to carry out interim requirements. It is illogical to spend time and money on cost comparisons when maintenance of in-house performance is not a viable option. As noted by the Navy commenter, "As the base closure process unfolds, it is becoming clearer that the use of a single contract to provide for interim maintenance and security during the period between closure of the base and its disposal provides the most flexible means of managing these assets. Such an approach not only facilitates the drawing down of resources but also relieves the on-site personnel from the need to maintaining [sic] a staff to support a continuing government work force."<sup>14</sup>

#### **3.5.1.5. Relationship to Objectives**

Amendment and consolidation of this statute will further the goal of streamlining and simplifying the DOD acquisition process by providing a clear statement of the rules regarding contracting for commercial and industrial functions applicable to DOD.

#### **3.5.1.6. Proposed Statute**

The proposed statutory provision set forth as 10 U.S.C. § 24XX, at subsections (a), (d) and (e), provides as follows: <sup>15</sup>

(a) **IN GENERAL** - Except as otherwise provided by law, the Secretary of Defense or secretary of a military department shall procure those supplies and services necessary for or beneficial to the performance of authorized functions of the Department of Defense from a source in the private sector, if such a source can provide the service or supply adequate to meet defined performance standards at a cost that is lower than the cost at which the Department can provide the same supply or service. This cost comparison shall include any cost differential required by law, Executive Order, or regulation. The requirements of this subsection shall not apply to inherently governmental functions or functions which the Secretary concerned determines must be performed by military or Government personnel.

(1) A DOD function may not be converted to performance by a private contractor to circumvent civilian personnel hiring policies.

(2) A DOD function may not be in any way altered for the purpose of exempting such function from conversion to performance by a private contractor.

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<sup>14</sup>*Supra* note 8.

<sup>15</sup>See ch. 3.3.5, note 18.

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(d) **NOTICE AND REPORTING** - Prior to conversion to a private source of any DOD function currently performed by Government personnel, the Secretary of Defense or secretary of a military department must:

(1) notify the Congress of a decision to study such conversion and of a decision to convert, provide a summary of the cost comparison, certify that the performance of such function by a private contractor is expected to result in a cost savings and equivalent performance quality, and certify that the costs for performance by government employees are based on the most efficient method of operation, and,

(2) report to the Congress on the potential economic effect of the conversion on the affected employees and local community and on the effect on the military mission of the function. Such report must also include the amount of the accepted private contractor bid, of the comparable cost of performance by government employees, and of relevant contract administrative costs.

(e) This section shall not apply:

(1) to functions included on the procurement list established pursuant to section 2 of the Act of June 25, 1938, (41 U.S.C. § 47), popularly referred to as the Wagner-O'Day Act;

(2) to functions that are planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act;

(3) to functions performed by 50 or fewer government employees;

(4) to installations that are scheduled for closure under base realignment and closure procedures;

(5) to those core logistics functions designated for in-house, government performance pursuant to section 24XY; or

(6) during war or during a period of national emergency declared by the President or Congress.

### **Current Statutes**

The current section, which would be repealed by the Panel's recommended statute, 10 U.S.C. § 24XX, provides as follows:

10 U.S.C. § 2461. Commercial or industrial type functions: required studies and reports before conversion to contractor performance

(a) Required notice to Congress. A commercial or industrial type function of the Department of Defense that on October 1, 1980, was being performed by Department of Defense civilian employees may not be converted to performance by a private contractor unless the Secretary of Defense provides to Congress in a timely manner--

(1) notification of any decision to study such function for possible performance by a private contractor;

(2) a detailed summary of a comparison of the cost of performance of such function by Department of Defense civilian employees and by private contractor which demonstrates that the performance of such function by a private contractor will result in a cost savings to the Government over the life of the contract and a certification that the entire cost comparison is available;

(3) a certification that the Government calculation for the cost of performance of such function by Department of Defense civilian employees is based on an estimate of the most efficient and cost effective organization for performance of such function by Department of Defense civilian employees; and

(4) a report, to be submitted with the certification required by paragraph (3), showing--

(A) the potential economic effect on employees affected, and the potential economic effect on the local community and Federal Government if more than 75 employees are involved, of contracting for performance of such function;

(B) the effect of contracting for performance of such function on the military mission of such function; and

(C) the amount of the bid accepted for the performance of such function by the private contractor whose bid is accepted and the cost of performance of such function by Department of Defense civilian employees, together with costs and expenditures which the Government will incur because of the contract.

(b) Congressional notification of decision to convert. If, after completion of the studies required for completion of the certification and report required by paragraphs (3) and (4) of subsection (a), a decision is made to convert the function to contractor performance, the Secretary of Defense shall notify Congress of such decision.

(c) Annual reports. Not later than February 1 of each fiscal year, the Secretary of Defense shall submit to Congress a written report describing the extent to which commercial and industrial type functions were performed by Department of Defense contractors during the preceding fiscal year. The Secretary shall include in each such report an estimate of the percentage of commercial and industrial type functions of the Department of Defense that will be performed by Department of Defense civilian employees, and the percentage of such functions that will be performed by private contractors, during the fiscal year during which the report is submitted.



(d) Waiver for small functions. Subsections (a) through (c) shall not apply to a commercial or industrial type function of the Department of Defense that is being performed by 45 or fewer Department of Defense civilian employees.

(e) Waiver for the purchase of products and services of the blind and other severely handicapped persons. Subsections (a) through (c) shall not apply to a commercial or industrial type function of the Department of Defense that--

(1) is included on the procurement list established pursuant to section 2 of the Act of June 25, 1938 (41 U.S.C. 47), popularly referred to as the Wagner-O'Day Act; or

(2) is planned to be converted to performance by a qualified nonprofit agency for the blind or by a qualified nonprofit agency for other severely handicapped persons in accordance with that Act.

(f) Additional limitations.

(1) A commercial or industrial type function of the Department of Defense that on October 1, 1980, was being performed by Department of Defense civilian employees may not be converted to performance by a private contractor to circumvent a civilian personnel ceiling.

(2) In no case may a commercial or industrial type function being performed by Department of Defense personnel be modified, reorganized, divided, or in any way changed for the purpose of exempting from the requirements of subsection (a) the conversion of all or any part of such function to performance by a private contractor.

### 3.5.2. 10 U.S.C. § 2462

#### **Contracting for certain supplies and services required when cost is lower**

##### **3.5.2.1. Summary of Law**

This section provides that the Secretary of Defense shall procure those supplies or services necessary for DOD functions from a private sector source if such a source can provide the supply or service at a real cost lower than the comparable, in-house cost. Such cost comparison must include consideration of all relevant costs that are fair and reasonable.

##### **3.5.2.2. Background of Law**

This section was originally enacted by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> The Senate version of that bill had contained a provision requiring the Secretary of Defense to ensure that all overhead and other costs, such as quality assurance, technical monitoring, liability insurance and pension costs, be included in any relevant cost comparisons. The Senate Report indicated concern that DOD was handicapping contractor bidding on such service and supply functions by adding to vendor bids an arbitrary 10% cost factor, based on contract administration costs, quality assurance and technical supervision costs, and excessive liability costs.<sup>2</sup> The Senate Report stated:

Agency cost comparisons must be made more equal for determination of contracting out. Some DOD organizations have used these handicaps to their advantage in determining the cost comparison outcome. In addition to opening the door for more competition, the competitions must be conducted on an 'apples to apples' basis. These cost comparisons are also the reason that an excessive backlog of evaluations will always exist. These are reasons why the DOD does not have to contract out if they choose not to. The cost comparisons should be able to be accomplished fairly and quickly. OMB must evaluate and modify their cost comparison regulations and enforce the intent of the contracting out goals.<sup>3</sup>

In conference, the House receded with an amendment providing that the Secretary of Defense ensure that such costs are considered and are fair and realistic.<sup>4</sup> This section was codified in 1988 and has not been amended since that time.<sup>5</sup>

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<sup>1</sup>Pub. L. No. 99-661, § 1223, 100 Stat. 3967 (1986).

<sup>2</sup>S. REP. NO. 331, 99th Cong., 2d Sess. 277-78 (1986).

<sup>3</sup>*Id.* at 278.

<sup>4</sup>H.R. CONF. REP. 1001, 99th Cong., 2d Sess. 527 (1986).

### 3.5.2.3. Law in Practice

This section sets forth the basic, contracting out policy and requirement for the DOD. This section is implemented in Title 32, Code of Federal Regulation--National Defense, Subtitle A--Department of Defense, Part 169, Commercial Activities Program, revised as of July 1, 1991.

The Office of the Assistant Secretary of Defense, (Production & Logistics), Installations, recommends that this provision be amended to provide an additional waiver for functions at installations identified for closure, noting that it is wasteful to spend time and money on cost comparisons when no viable options are available.<sup>6</sup>

The Council of Defense and Space Industry Associations (CODSIA) recommended to the Panel that this section be amended to provide specifically that cost comparisons in the contracting out process must accommodate costs or accounting procedures that are unique to the private sector.<sup>7</sup>

### 3.5.2.4. Recommendation and Justification

**Amend to eliminate unnecessary provisions and consolidate into a single streamlined statute.**

The Panel recommends amendment of this section and consolidation of the basic rule set forth in this section within a new, consolidated 24XX that sets forth all general rules for the contracting out program. The essential rule within this section - that DOD shall procure commercial services from a private source when overall costs are lower - is set forth as the general rule within the new, consolidated 24XX at subsections (a) and (b).

However, the consolidated section at 24XX includes a new requirement, at subsection (a), that the private sector source must be able to provide the supply or service "adequate to meet defined performance standards." This language, not present in the current section, attempts to introduce the concept that lower cost is not, by itself, a sufficient basis upon which to make a contracting out determination. Rather, that determination should be one that includes performance evaluation factors.

This requirement may be perceived as imposing an additional burden in this administrative process. One commenter noted that this standard may result in unnecessary litigation, that the standard is implied in any cost study, and that the requirement is essentially already included in OMB implementing guidance.<sup>8</sup> Where the requirement is present in implementing regulations, no

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<sup>5</sup>Pub. L. No. 100-370, § 2(a)(1), 102 Stat. 853 (1988).

<sup>6</sup>Memorandum from Mr. David L. Spoede, Special Assistant, Assistant Secretary of Defense (Production & Logistics), Installations, to Acquisition Law Task Force, dated 29 Sep. 1992.

<sup>7</sup>Memorandum from Council of Defense and Space Industry Associations (CODSIA), to Messrs. Anthony Gamboa and LeRoy Haugh, dated 16 Oct. 1992.

<sup>8</sup>OFFP Pamphlet No. 4, supplementing OMB Circular A-76. See Letter from LTC Thomas J. Duffy, Chief, Logistics & Contract Law Branch, Contract Law Division, Department of the Army, Office of the Judge Advocate General, to DOD Advisory Panel, dated 12 November 1992. See also Letter from Mr. Anthony J. Perfillo,

greater burden is imposed through adoption of the requirement in statute. As noted in the analysis of 10 U.S.C. § 2461, the introduction of this standard in law would ensure that performance factors are adequately considered, and in particular that the quality that may develop within an established in-house staff is not vitiated by a solely cost-based statutory requirement. The Panel believes that this requirement more equitably balances the competing interests at stake and affords the Department additional managerial discretion in this area. The executive agency retains the flexibility to identify, when appropriate, specialized performance-based factors that may outweigh cost. Such factors could at times favor in-house performance, and at other times favor contracting out. Such flexibility is important to the DOD with its unique mission concerns, and particularly in this era of severe budget restrictions.<sup>9</sup> Overall, melding of performance standards with cost considerations provides better assurance of a greater return on expenditure than does a strictly monetary standard.

Informal comments received from the Office of Management and Budget, Federal Services Branch, General Management Division, raise the concern that the proposed statute, at subsection (a), "implies that rather than rely on the private sector, as a matter of policy, the law would require cost comparisons before private sector provision [sic] is authorized. . . . [T]he proposal moves away from reliance on the private sector -- as a matter of policy -- and appears to require that the free enterprise system prove itself in competition with govt. performance."<sup>10</sup> With the exception of the "adequate to meet defined performance standard" statement, the language of proposed statute 10 U.S.C. § 24XX fully tracks the requirements of the law as they currently exist in 10 U.S.C. § 2462. The law now requires contracting out of a function if the cost is lower, and that determination must be based on a realistic and fair cost comparison. In proposing 10 U.S.C. § 24XX, it is not the intent of the Panel to alter the previously established policy underlying the current law.

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Principal Deputy Staff Judge Advocate, Department of the Air Force, HQ AFMC, to Ms. Theresa Squillacote, Working Group Six, Advisory Panel, dated 18 November 1992

"while we are not against adequately defined performance standards, we believe that the inclusion of this language in the statute may give rise to litigation by those seeking to have the GAO and/or the courts substitute their judgment for the Department's judgment regarding when defined performance standards are deemed to be adequate. There is no reason, in our judgment to make this requirement statutory."

However, the presence of this requirement in the implementing regulations also affords a basis for challenge through litigation.

<sup>9</sup>See, e.g., Letter from Mr. Robert J. Spazzarini, Chief, Acquisition Law Division, U.S. Army Missile Command, to Commander, U.S. Army Materiel Command, dated 27 August 1992:

"persistent budgetary considerations have highlighted the need for a changed relationship with the commercial activity program... Base support services contracts...pose a particular risk in the context of maintaining effective and efficient operations in the face of funding reductions. They have a direct and significant relationship to governmental functions inasmuch as many of the activities privatized under a base support contract (e.g., housing, water supply, sewage, heating plants, electrical systems...) can cause an unacceptable delay or disruption to an activity's operation in time of funding shortfalls."

<sup>10</sup>Datafax transmission from Mr. David Childs, Office of Management and Budget, Federal Services Branch, General Management Division, to Ms. Theresa Squillacote, Acquisition Law Task Force, dated 18 Nov. 1992.

The Panel does not recommend any additional language to address the issue of comparability of costs. The new consolidated section retains the "realistic and fair" language of the current law. The Congress fully considered this cost comparability issue in 1987 when this section was originally enacted. The Panel believes that the section should set forth broad guidelines in this area. The Panel believes that questions regarding those costs and other practices that are unique to the private sector should be resolved through regulatory implementation.

#### **3.5.2.5. Relationship to Objectives**

Amendment and consolidation of this section will further the goal of streamlining and simplifying the DOD acquisition process by providing a clear statement of the contracting out rules applicable to DOD.

#### **3.5.2.6. Proposed Section**

The proposed statutory provision 10 U.S.C. § 24XX, at subsections (a) and (b), provides as follows.<sup>11</sup>

**(a) IN GENERAL** - Except as otherwise provided by law, the Secretary of Defense or secretary of a military department shall procure those supplies and services necessary for or beneficial to the performance of authorized functions of the Department of Defense from a source in the private sector if such a source can provide the service or supply adequate to meet defined performance standards at a cost that is lower than the cost at which the Department can provide the same supply or service. This cost comparison shall include any cost differential required by law, Executive Order, or regulation. The requirements of this subsection shall not apply to inherently governmental functions or functions which the Secretary concerned determines must be performed by military or Government personnel.

(1) A DOD function may not be converted to performance by a private contractor to circumvent civilian personnel hiring policies.

(2) A DOD function may not be in any way altered for the purpose of exempting such function from conversion to performance by a private contractor.

**(b) REALISTIC AND FAIR COST COMPARISONS** - For the purpose of determining whether to contract with a source in the private sector, in contrast with performance by a government source, for the performance of a DOD function on the basis of a cost comparison, the Secretary of Defense or secretary of a military department shall ensure that all costs considered are realistic and fair. At a minimum, such estimated costs must include costs of quality assurance, technical performance monitoring, liability insurance, employee retirement and disability benefits, and all other applicable overhead costs.

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<sup>11</sup>See chapter 3.3.5, note 18.

## **Current Statutes**

The current text of the law is as follows:

**10 U.S.C. § 2462. Contracting for certain supplies and services required when cost is lower**

**(a) IN GENERAL.** Except as otherwise provided by law, the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense (other than functions which the Secretary of Defense determines must be performed by military or Government personnel) from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower (after including any cost differential required by law, Executive order, or regulation) than the cost at which the Department can provide the same supply or service.

**(b) REALISTIC AND FAIR COST COMPARISONS.** For the purpose of determining whether to contract with a source in the private sector for the performance of a Department of Defense function on the basis of a comparison of the costs of procuring supplies or services from such a source with the costs of providing the same supplies or services by the Department of Defense, the Secretary of Defense shall ensure that all costs considered (including the costs of quality assurance, technical monitoring of the performance of such function, liability insurance, employee retirement and disability benefits, and all other overhead costs) are realistic and fair.

### **3.5.3. 10 U.S.C. § 2463**

#### **Reports on savings or costs from increased use of DOD civilian personnel**

##### **3.5.3.1. Summary of Law**

This section provides that, whenever a commercial or industrial-type DOD function being performed by 50 or more private contractor employees is changed to in-house performance, the Secretary of Defense shall maintain cost data, on continued performance by private contractor employees and on performance by civilian DOD employees, for future cost comparisons. The section applies only when no statutory limit on civilian employee end strength is in effect.

##### **3.5.3.2. Background of Law**

This section was originally enacted by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> The Senate version of that bill had contained a blanket prohibition on conversion to in-house performance except in time of war or national emergency or other national security interest, or when the Secretary of Defense notifies Congress of such a conversion and provides a detailed, five-year cost comparison.

The Senate Report indicated that the provision would enable private industry to compete with the government sector wherever possible, with certain, delineated exceptions. The provision would also allow for comparison using the lowest cost to be paid by DOD.

In conference, the House receded with an amendment that would require an estimate of performance costs of functions performed by more than 50 private sector employees and periodic transmission of such cost reports to the congressional defense committees.

Technical language corrections were made in 1989, and the National Defense Authorization Act for Fiscal Year 1991 deleted a requirement of semiannual reports to the congressional defense committees showing savings or losses.<sup>2</sup>

##### **3.5.3.3. Law in Practice**

This section is implemented by 32 C.F.R. Part 169a, setting forth procedures for cost comparisons conducted under the DOD contracting out program. That regulation includes specified requirements for maintenance of cost data. DOD Instruction 4100.33, Enclosure 9, also provides for the collection and retention of costs for all comparisons.

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<sup>1</sup>Pub. L. No. 99-661, § 1224, 100 Stat. 3967 (1986).

<sup>2</sup>Pub. L. No. 101-510, § 1301(14)(A), 104 Stat. 1668 (1990).

#### **3.5.3.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this section. The section was enacted to address a specific problem regarding conversions from private sector to in-house performance where insufficient cost analyses were being made by the Department.

Current regulations require detailed transfer studies before a function can be moved in-house from contract performance. This section addresses the need for an appropriate cost analysis before bringing a function back in-house. Collecting data pertaining to contractor or in-house performance when there is no ongoing contract is speculative and of limited value for future competitions.<sup>3</sup> Such competitions will be based on a contemporary evaluation of the winning contractor bid and the government Most Efficient Organization. This type of excessive legislative detail is contrary to the goal of a streamlined acquisition process.

#### **3.5.3.5. Relationship to Objectives**

Repeal of this section will further the goal of streamlining the DOD acquisition process by removing a legislative requirement that constitutes an administrative burden while not significantly contributing to Congress' oversight role.

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<sup>3</sup>Letter from Col. Paul C. Smith, Chief, Contract Law Division, Department of the Army, Office of the Judge Advocate General, to DOD Advisory Panel, dated 14 Sep. 1992: "the purpose of the provision is to collect data to support future cost comparisons. We believe the requirement is unnecessary and an administrative burden which should be eliminated. Collecting data pertaining to contractor performance absent an ongoing contract can be speculative."



### **3.5.4. 10 U.S.C. § 2464**

#### **Core Logistics Functions**

##### **3.5.4.1. Summary of Law**

This section provides that DOD activities must maintain a logistics capability sufficient to ensure technical competence and resources necessary for an effective and timely response to a mobilization or other national defense emergency.

The Secretary of Defense is required to identify the logistics activities necessary to maintain that capability. Those activities, as well as the depot-level maintenance of mission-essential material performed at the Defense depot activities identified in section 1231(b) of Pub. Law No. 99-145, may not be contracted out under Circular A-76 procedures. The Secretary may, however, waive that prohibition when government performance is no longer required for national defense reasons. Such a waiver may be made only after a report is submitted to the congressional defense committees.

##### **3.5.4.2. Background of Law**

This section was originally enacted by the DOD Authorization Act for FY85.<sup>1</sup> The House version of that bill had contained a provision limiting the contracting out of core logistics functions under Circular A-76. That language would have required each service secretary or agency director to identify core logistics function, and to exempt them from A-76 provisions unless those individuals waived the limitation and reported thereon to the Congress. A congressional report on identified core logistics functions was required, and no conversions could be made until the report was submitted.

The House language was contained in an amendment to the House bill originating during floor debates. The amendment sponsor stated:

[T]his amendment is consistent with...previous efforts to specifically define the scope of the A-76 contracting-out program. Core logistics functions represent those functions which should remain in-house to preserve readiness and mobilization capabilities. These functions are generally the mission functions at supply depots, shipyards, air rework, and depot maintenance facilities. They do not include installation and base support-or housekeeping-functions which have been generally conceded to be legitimate subjects of contract review.<sup>2</sup>

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<sup>1</sup>Pub. L. No. 98-525, § 106(a), 98 Stat. 2610 (1984).

<sup>2</sup>127 Cong. Rec. 13468 (May 23, 1984) (statement by Rep. Nichols).

The Senate version of that bill contained comparable language, but with responsibility accruing to the Secretary of Defense. The Senate language did not contain a "hold and wait" period from notification of waiver until implementation and did not contain a moratorium on conversion between the enactment of the legislation and the submission of the first core logistics report.

The Senate language arose as an amendment to the bill during floor debates. The amendment sponsor indicated that "critical logistics and readiness tasks and mission essential activities . . . are the basic jobs that should be under the direct control of DOD because they are absolutely necessary for mobilization programs, national defense contingency situations, and other emergency requirements."<sup>3</sup>

The conferees agreed to assign the responsibilities to the Secretary of Defense but adopted the House "hold and wait" period before a waiver is implemented. The conferees agreed to delete the House moratorium period.<sup>4</sup>

The law was amended the following year to specify core-logistics functions at Defense depot activities subject to the contracting out limitation. The subsequent amendment identified depot-maintenance of combat, combat support and combat service support materials at eight separate Defense depot activities.<sup>5</sup>

Technical, clarifying amendments were made to this section in 1989.<sup>6</sup>

#### **3.5.4.3. Law in Practice**

This section is implemented at 32 C.F.R. Part 169b, and DOD Directive 4151.18 (August 12, 1992).

The Council of Defense and Space Industry Associations (CODSIA) recommended to the Panel repeal of this statute on the basis that all depot-level maintenance functions should be competed freely with the private sector. CODSIA states:

Industry's concern is that DOD and the services are deciding to preserve and enlarge their internal organic capacity at the expense of the private sector without the analysis of the impact of such decisions. This can and will have damaging implications for the long-term health of the industrial base. . . .<sup>7</sup>

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<sup>3</sup>130 Cong. Rec. 17225 (June 20, 1984) (statement by Sen. Hollings).

<sup>4</sup>H.R. CONF. REP. 1080, 98th Cong., 2d Sess. 283-284 (1984).

<sup>5</sup>Pub. L. No. 99-145, § 1231, 99 Stat. 731 (1986).

<sup>6</sup>Pub. L. No. 101-189, § 1622(c)(7), 103 Stat. 1604 (1989).

<sup>7</sup>Memorandum from Council of Defense and Space Industry Associations, (CODSIA), to Messrs. Anthony Gamboa and LeRoy Haugh, dated 16 Oct. 1992.

#### 3.5.4.4. Recommendation and Justification

##### **Amend to clarify authority of Secretary of Defense to Establish core requirements.**

The Panel recommends retention of the basic, core logistic standard of this statute.<sup>8</sup> The Panel has retained, in the new core logistics statute at 24XY, the definition of core currently set forth in this statute. The Panel believes that the Secretary of Defense or secretaries of the military departments should have the management discretion to establish core requirements under an established Department methodology. The general rule should remain that performance of such core requirements should, as a general rule, remain in-house but may be competed between relevant DOD activities, when appropriate. Further, such activities should be exempt from the provisions of Circular A-76, as they are under the current statute.<sup>9</sup>

The maintenance in-house of core logistics functions is essentially an industrial base issue<sup>10</sup>. Further, the criticality of a well-trained maintenance capability was demonstrated during Operation Desert Storm/Desert Shield. A recent, preliminary study by the House of Representatives Armed Services Committee noted that, to a substantial degree, the success of high technology weaponry during that operation was "due to the remarkable job performed by thousands of maintenance crews."<sup>11</sup> Clearly, private sector maintenance capabilities contributed significantly to that effort. And, the Panel concurs with the view presented by private sector commenters that mobilization base concerns require preservation of an adequate private sector capability, as well as a public sector one. The Panel also notes the recent conclusions of the Office of Technology Assessment that, in the future, an adequate industrial base will require an appropriate mix of private and public sector capabilities.<sup>12</sup> The Panel believes that the proposed statutory language will provide the optimum flexibility to attain an appropriate mix, while still supporting the rationale underlying this section when originally enacted, i.e., that core logistics must be maintained in-house to preserve readiness and mobilization capabilities within DOD.

Informal comments received from the Office of the Assistant Secretary of Defense (Production and Logistics), Maintenance Policy Directorate, indicate concern that the "proposal goes beyond current law and will add restrictions on the Department's ability to accomplish

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<sup>8</sup>The Panel would delete the identification of depot-level maintenance of specific facilities contained in Pub. L. 99-145, as setting forth the basic principle regarding in-house performance of those logistics functions identified by the Secretary of Defense as core, contrary to the goal of a simplified statute setting forth only broad guidelines.

<sup>9</sup>Because much discretion rests with the Secretary, the Panel believes that it is unnecessary to retain the waiver authority currently present in the statute.

<sup>10</sup>See, Building Future Security: Strategies for Restructuring the Defense Technology and Industrial Base, Office of Technology Assessment, U.S. Congress (June 1992), chapter 5, "The Maintenance Base." That Report notes that maintenance capabilities will become even more critical as greater reliance is placed on upgrades of existing systems and as systems become more technologically complex.

<sup>11</sup>Defense for a New Era: Lessons of the Persian Gulf War, U.S. House of Representatives, Committee on Armed Services, March 30, 1992, pp. 16-17.

<sup>12</sup>*Supra* note 10.

workload consolidations and eliminate inefficient operations." <sup>13</sup> However, the Panel notes that, under the proposed statute, the Secretary retains full discretion to establish core in the first instance. Thus, the Panel does not concur in the belief that the proposal unduly restricts management flexibility in this area.

#### **3.5.4.5. Relationship to Objectives**

Amendment of this statute will further the goal of streamlining and simplifying the DOD acquisition process.

#### **3.5.4.6. Proposed Statute**

The proposed statute 10 U.S.C. § 24XY, at subsections (a) and (b), provides as follows:

(a) **POLICY** - It is essential for the national defense that Department of Defense activities maintain a core logistics capability (including personnel, equipment, and facilities) sufficient to ensure a ready and controlled source of technical competence and resources necessary for an effective and timely response to national defense contingency situations and other emergency requirements.

(b) Accordingly, the Secretary of Defense or secretary of a military department shall identify those logistics activities that are necessary to maintain the logistics capabilities described in subsection (a).

(1) Notwithstanding any other provision of law, the Secretary of Defense or secretary of a military department shall have the modification, depot maintenance, and repair of defense-related material performed by Government or military personnel at activities identified in subsection (b) as the secretary determines necessary to maintain the core logistics capabilities described in subsection (a).

(2) The Secretary of Defense or the secretary of a military department may use competition among these Government-owned facilities to determine which entity can most efficiently perform the core logistics requirements described at subsection (a) above, considering both cost and performance factors.

#### **Current Statutes**

The text of the current law is as follows:

10 U.S.C. § 2464. Core logistics functions

(a) Necessity for core logistics capability.

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<sup>13</sup>Datafax transmission from Mr. Beirn Staples, Office of the Assistant Secretary of Defense (Production and Logistics), Maintenance Policy Directorate, to Ms. Theresa Squillacote, dated 18 Nov. 1992.

(1) It is essential for the national defense that Department of Defense activities maintain a logistics capability (including personnel, equipment, and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situations, and other emergency requirements.

(2) The Secretary of Defense shall identify those logistics activities that are necessary to maintain the logistics capability described in paragraph (1).

**(b) Limitation on contracting.**

(1) Except as provided in paragraph (2), performance of a logistics activity identified by the Secretary under subsection (a)(2), and performance of a function of the Department of Defense described in section 1231(b) of the Department of Defense Authorization Act, 1986 (Public Law 99-145; 99 Stat. 731), may not be contracted for performance by non-Government personnel under the procedures and requirements of Office of Management and Budget Circular A-76 or any successor administrative regulation or policy (hereinafter in this section referred to as OMB Circular A-76).

(2) The Secretary of Defense may waive paragraph (1) in the case of any such logistics activity or function and provide that performance of such activity or function shall be considered for conversion to contractor performance in accordance with OMB Circular A-76. Any such waiver shall be made under regulations prescribed by the Secretary and shall be based on a determination by the Secretary that Government performance of the activity or function is no longer required for national defense reasons. Such regulations shall include criteria for determining whether Government performance of any such activity or function is no longer required for national defense reasons.

(3) A waiver under paragraph (2) may not take effect until--

(A) the Secretary submits a report on the waiver to the Committees on Armed Services and the Committees on Appropriations of the Senate and House of Representatives; and

(B) a period of 20 days of continuous session of Congress or 40 calendar days has passed after the receipt of the report by those committees.

(4) For purposes of paragraph (3)(B), the continuity of a session of Congress is broken only by an adjournment sine die, and the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of such 20-day period.

### **3.5.5. 10 U.S.C. § 2465**

#### **Prohibition on contracts for performance of firefighting or security-guard functions**

##### **3.5.5.1. Summary of Law**

This section provides that DOD funds may not be spent to enter into contracts for the performance of firefighting or security-guard functions at any military installation or facility. The prohibition does not apply to contracts for services at locations outside the United States where armed forces members, otherwise involved in unit readiness, would be performing the function. Nor does it apply to contracts for services at GOCO facilities or for contracts extant on September 24, 1983.

##### **3.5.5.2. Background of Law**

This section was first enacted by the National Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> The Senate version of that bill contained a provision that would extend for one year a freestanding, public law provision setting forth the same prohibition. The Senate language also contained a reporting requirement to review the performance standards and those inherently governmental activities within the firefighting function, and an estimate of cost savings associated with such contracting out over a five year period. The Senate Report indicated that firefighters would continue to be exempt until the congressional report indicated what positions could be contracted out in the future.<sup>2</sup>

The House version of the bill proposed codification of a permanent prohibition on firefighting functions currently being performed by DOD civilians, with the exceptions as currently listed. In conference, the House version was adopted. The conferees also agreed to extend the current prohibition on conversion of security guard functions for one additional year, unless the Secretary of Defense determines that such conversion would not adversely affect installation security, safety and readiness.<sup>3</sup>

##### **3.5.5.3. Law in Practice**

There is no direct, regulatory implementation of this section.

The Department of the Army, Office of the Judge Advocate General, the Assistant Secretary of Defense (Production and Logistics), Installations, and Department of the Navy, Office of the Chief of Naval Operations, Shore Activities Division, all recommend repeal of this statute. Comments received from the Navy office noted that this statute presented special

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<sup>1</sup>Pub. L. No. 99-661, § 1222(a), 100 Stat. 3976 (1986).

<sup>2</sup>S. REP. NO. 331, 99th Cong., 1st Sess. 277-78 (1986).

<sup>3</sup>H.R. REP. NO. 1001, 99th Cong., 1st Sess. 526 (1986).

problems during Operation Desert Shield/Desert Storm. In one case, the Commander of the National Naval Medical Center advised the Chief of Naval Operations that he intended to use contract personnel to supplement his in-house guard force in light of a perceived terrorist threat and the lack of in-house personnel to fill existing vacancies. He was unable to do so because of this statutory prohibition. The commander advised that the National Naval Medical Center, a high visibility target, was placed at significant risk because of the prohibition.<sup>4</sup>

The Navy further notes numerous instances of short-term guard requirements that would have been ideally suited for contract support but instead were met by increased overtime or by diversion of resources from other requirements. Finally, the Navy also notes that there are locations that are uniquely suited for contract performance of such functions. For example, a radar site at Amchitka, Alaska was intended to be maintained by contract personnel. Use of sailors or government civilians to perform security-guard and firefighting functions at such a remote site has been highly unproductive given the overall reliance on a single contract for all other support services. After extensive efforts, the Navy was able to obtain specific, legislative relief from this prohibition for this one site.<sup>5</sup>

The Department of the Army, Office of the Judge Advocate General provides additional support for repeal of this statute. That Office notes that this statute prevents the Army from eliminating duplicative and costly firefighting services where army installations adjoin metropolitan areas that have robust firefighting departments. The installation is forced to maintain a complete in-house force, the cost of which is not warranted by the limited firefighting requirements of the institution. Further, that office states that a number of installations will incur substantial firefighting service costs as a result of the base closure and realignment initiatives. In one case, firefighting services will constitute over 60% of the support costs at one small installation that will be placed in an inactive status.<sup>6</sup>

#### **3.5.5.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute in its entirety. As the numerous examples set forth above demonstrate, this blanket statutory prohibition has significantly impeded management flexibility, has increased costs, and in some instances, has seriously hampered military mission requirements. The ability to decide whether or not to contract for such functions should be left to management discretion based on traditional contracting out principles.

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<sup>4</sup>Memorandum from Mr. Theodore Fredman, Assistant to the General Counsel (FOIA), Department of the Navy, , to Acquisition Law Task Force, dated 14 Sep. 1992.

<sup>5</sup>*Id.*

<sup>6</sup>Memorandum from Col. Paul C. Smith, Chief, Contract Law Division, Department of the Army, Office of the Judge Advocate General, to DOD Advisory Panel, dated 14 Sep. 1992.

### **3.5.5.5. Relationship to Objectives**

Repeal of this statute will further the best interests of the DOD by eliminating a barrier to more efficient and economical operation of some of its facilities.



### **3.5.6. 10 U.S.C. § 2466**

#### **Limitations on the performance of depot level maintenance of materiel**

##### **3.5.6.1. Summary of Law**

This section prohibits Defense Agencies and Military Departments from contracting out more than 40% of their respective depot maintenance workloads for performance by the private sector. With regard to aviation depot-level maintenance only, the Army must retain at least 50% of the workload in-house in fiscal year 1993, with this requirement increasing by 5% each year through 1995. The section provides that the respective military department secretaries and the Secretary of Defense for a Defense Agency may waive this restriction when necessary for national security and upon notification to the Congress. The section further provides that DOD civilian employees involved in the depot-level maintenance of material may not be managed on the basis of any end-strength constraints or numbers of employees limitation, but must be managed solely by available workloads and funding.

The Sacramento Army depot in California is expressly exempted from the contracting out prohibition. The respective military department secretaries and the Secretary of Defense are to report to Congress by January 15, 1994 on the progress of maintaining this level of in-house depot-level maintenance. Finally, the section prohibits the secretaries from canceling a depot-level maintenance contract to comply with the requirements of the section.

##### **3.5.6.2. Background of Law**

This section was first enacted by the National Defense Authorization Act for Fiscal Year 1989.<sup>1</sup> The original language provided that the Secretary of Defense shall prohibit the secretaries of the Army and Air Force, in selecting a depot maintenance service entity, from competing among maintenance activities of their respective departments or between such activities and a private contractor. This provision originated in the House version of the bill. The House Committee Report merely restated the statutory prohibition.<sup>2</sup>

The section was amended in 1989 to clarify the extant prohibition and to make other, technical clarifications.<sup>3</sup>

In 1990, operation of the blanket prohibition was suspended for a one-year period to allow an evaluation of a pilot program for competition of depot maintenance workload in the Army and Air Force. The one-year pilot program was limited to one Air Force logistics center and one Army depot, and recommended to include one Navy aviation center. In implementing the pilot

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<sup>1</sup>Pub. L. No. 456, § 326(a), 102 Stat. 1955 (1988).

<sup>2</sup>H.R. REP. No. 563, 100th Cong., 1st Sess. 232 (1988).

<sup>3</sup>Pub. L. No. 189, §313, 103 Stat 1412 (1989).

program, the Secretary of Defense was to ensure that all competing DOD activities submit bids with comparable estimates for direct and indirect cost factors. The Secretary was also required to report to the congressional defense committees on the program's results by March 31, 1992. Agreement on the pilot program was reached in conference in lieu of a Senate proposal to repeal 10 U.S.C. § 2466 in its entirety.<sup>4</sup> That same year the Defense Appropriations Act authorized a broader competition among the depots and the private sector. The competition was not limited to one Army and one Air Force activity but had to involve the modification, depot maintenance or repair of aircraft, vehicles or vessels.<sup>5</sup>

In 1991, section 2466 was amended to eliminate the blanket prohibition on competitions entirely, and instead require that at least 60% of the depot-level maintenance of the Army and Air Force be performed by government employees.<sup>6</sup> This limitation was to be measured in fiscal year dollars.<sup>7</sup> The House version of the bill would have allowed DOD to compete annually between \$5 to \$15 million of depot maintenance workload with the private sector and would have limited competition to 40% of depot workload. The House Committee Report based this proposal on concerns regarding a DOD proposal to compete between depots and private contractors. Specifically, such competition would:

- (1) add bid and proposal costs to government activities that bid;
- (2) skew establishment of those core in-house maintenance levels necessary to surge in critical military situations, and
- (3) result in an unequal playing field because of excessive, continuing costs that must be included in the government's bid.<sup>8</sup>

The Senate version of the bill would have extended the existing pilot program and repealed the extant prohibition entirely.

In conference, the Senate receded with amendments that codified the 60% in-house performance minimum, the prohibition on management by end-strength, waiver authority and reporting requirement.<sup>9</sup>

The same public law also contained a freestanding provision authorizing a depot maintenance competition pilot program for the Army and Air Force during fiscal years 1992 and 1993 for up to 10% of all depot-level maintenance not required to be performed in-house under the newly-enacted law.<sup>10</sup> A report with a five-year strategy for use of competition in this area

<sup>4</sup>Pub. L. No. 101-510, § 922. See H. R. Rep. No. 923, 101st Cong., 1st Sess. 195 (1990).

<sup>5</sup>Pub. L. No. 101-511, § 8072, 104 Stat. 1891 (1990).

<sup>6</sup>Pub. L. No. 102-190, § 314, 105 Stat. 1457 (1991).

<sup>7</sup>H. R. CONF. REP. No. 311, 102d Cong., 1st Sess. 526 (1991).

<sup>8</sup>H.R. REP. No. 60, 102d Cong., 1st Sess. 195 (1991).

<sup>9</sup>H.R. CONF. REP. No. 311, 102d Cong., 1st Sess. 526-27 (1991).

<sup>10</sup>Once again the Appropriations Act also contained a provision authorizing depot-level maintenance competitions that differed from the pilot program. Pub. L. No. 102-172, § 8120, 105 Stat. 1204 (1991).

must be submitted to the Congress by December 1, 1993. The same provision also prohibited the military department secretaries from canceling any extant contract to comply with the new law.

The National Defense Authorization Act for Fiscal Year 1993 converted the affirmative 60% in-house requirement for depot-level maintenance workload to a prohibition against contracting out more than 40% of the workload.<sup>11</sup> The limitation was also extended to the Navy and Defense agencies. The legislative history indicates that the prohibition should not be measured by each type of equipment or material.<sup>12</sup> In addition, the Act again amended subsection (a) to permit the Secretary of the Army to maintain only a 50% in-house workload requirement as to Army aviation, although that figure increases each year by 5% through 1995. That Act extended the reporting requirement and added the current contract cancellation prohibition. Finally, that Act also repealed the pilot program for depot-level maintenance competition. The provision authorizing depot-level maintenance competitions in the last two appropriations acts was also repealed.

At the same time, Congress added a new provision to chapter 146 of Title 10 regarding depot-level maintenance workloads. Section 2469 now requires that DOD and the military departments use competitive procedures before selecting a new entity, presumably public or private, to perform a depot maintenance workload with a value of \$3 million or more and presently being performed by a DOD depot-level activity.<sup>13</sup>

### **3.5.6.3. Law in Practice**

This section is implemented by DOD Directive 4151.18, "Maintenance of Military Materiel," (August 12, 1992). That Directive states that "it is DOD policy that the DOD Components shall provide an adequate program for maintenance of assigned materiel . . . to (a) meet peacetime readiness and combat sustainability objectives [and] (b) provide for applicable mobilization and surge requirements."<sup>14</sup> The Defense Depot Maintenance Council coordinates depot maintenance activities within DOD and its components.

The Defense Depot Maintenance Council Corporate Business Plan states that "DOD's policy is to maintain the most efficient core logistics capability for performing mission essential depot maintenance in support of the full range of military contingencies" and that "core capability will be used to satisfy a portion of peacetime requirements."<sup>15</sup> That Plan further defines core as:

Core is an integral part of a depot maintenance skill and resource base which shall be maintained within depot activities to meet contingency requirements. It will comprise only a minimum level of mission essential capability either under the control of an assigned

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<sup>11</sup>Pub. L. No. 102-484, §§ 351-354, 106 Stat. 2377-379 (1992).

<sup>12</sup>H. R. Rep. No. 966, 102nd Cong., 2nd Sess. 687 (1992).

<sup>13</sup>Pub. L. No. 484, § 353, 106 Stat. 2378-379 (1992).

<sup>14</sup>H.R. REP. No. 563, 100th Cong., 1st Sess. 232 (1988).

<sup>15</sup>As issued Dec. 1991, at 33.

or jointly determined DOD Component where economic and strategic considerations warrant.<sup>16</sup>

Finally, the DOD Cost Comparison Handbook is used to establish standards of cost comparability among bids in public/private competitions in this area.

With respect to this statute, U.S. Army Tank-Automotive Command notes that this statute should be considered for consolidation with 10 U.S.C. § 2464. That recommendation is based on the fact that this statute's legislative history indicates that the 60%/40% split is guided by the same reservation of "core workload" principle that exists in the core logistics concept.<sup>17</sup>

The Council of Defense and Space Industry Associations (CODSIA) recommended to the Panel that this statute should be repealed in its entirety as there is no justification for an arbitrary statutory limitation on the amount of work that should be withheld from private sector contracting.<sup>18</sup> CODSIA notes that the maintenance of private sector capabilities in this area is just as crucial to an effective maintenance base as are in-house capabilities.<sup>19</sup> The Department of the Army, Office of the Judge Advocate General, also comments that this statute warrants repeal, on the basis that such functions should be competed under standard, A-76 procedures.<sup>20</sup>

#### **3.5.6.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute. The Panel believes that maintenance of an arbitrary standard for in-house, depot-level maintenance by DOD impedes effective management in this area.

In 1990, the Depot Competition Pilot Program initially was limited to one selected Army depot. It was expanded the next year to 4% depot workload. The National Defense Authorization Act for Fiscal Year 1993 repealed this program in its entirety. Competitions are required now by 10 U.S.C. § 2469 in certain instances. Furthermore, in the Appropriations Act, competitions are authorized in almost all cases during FY 93.<sup>21</sup>

However, under the maze of legislation, it remains unclear whether, and to what degree, public/private or public/public competition may occur for unrestricted workload. Rather, the Panel believes that the level of mandatory, in-house depot level maintenance should be explicitly guided by the concept of core that underlies the statutory prescription in 10 U.S.C. § 2464, i.e.,

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<sup>16</sup>*Id.*

<sup>17</sup>Memorandum from Mr. Allan Kalt, Chief, Procurement Law Division, US Army Tank-Automotive Command, to Commander, US Army Materiel Command, dated 1 Sep. 1992.

<sup>18</sup>Memorandum from Council of Defense and Space Industry Associations (CODSIA), to Messrs. Anthony Gamboa and LeRoy Haugh, dated 16 Oct. 1992.

<sup>19</sup>*Id.*

<sup>20</sup>Memorandum from Col. Paul C. Smith, Chief, Contract Law Division, Department of the Army, Office of the Judge Advocate General, to DOD Advisory Panel, dated 14 Sep. 1992.

<sup>21</sup>Pub. L. No. 102-396, § 9095, 106 Stat. 1924 (1992).

that level of maintenance capability necessary to sustain an effective, in-house maintenance base. That level should be determined at the discretion of the Secretary of Defense or military department secretary. Indeed, as noted above, the Defense Depot Maintenance Council uses a parallel core concept to manage depot maintenance within the Department. That same concept is also stated DOD policy as set forth in the relevant DOD Directive.

In its proposed 10 U.S.C. § 24XY, the Panel would require that this core maintenance capability be performed in-house. However, the assignment of in-house performance workload can be determined by competitions between government entities or by direct assignment to such entities. The Panel believes that in-house competitions can increase efficiencies in government activity operations and should be one avenue of workloading available to the Department.<sup>22</sup>

Above that core level, the secretaries should be permitted, but not required, to compete all remaining workload to achieve the best-value performance for the government. Such competition should include public/public, public/private, and private/private competitions. In such competitions, the Panel recommends a requirement that all "bids shall accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities."<sup>23</sup> This requirement attempts to address some of the issues that concerned Congress when it extended the pilot program in 1991 and specifically addresses the issue of the incomparability of bids among and between public and private entities. The details of comparable cost estimation among bids should be established through regulatory guidance, as it is now through the DOD Cost Comparison Handbook.<sup>24</sup>

The Panel also recommends repealing the newly enacted section 2469. The statute requires competitions before changing the performance of depot-level maintenance workloads, valued at \$3 million or more, from a DOD depot activity to a private contractor. The statute may even require competitions before changing performance from one in-house activity to another in house-activity. While in-house competitions may in certain instances increase efficiencies, they should not be the sole method for distributing workload within the Department. The same is true

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<sup>22</sup>In support of this amendment, the Panel notes that DOD Directive 4151.18, cited above, already requires the DOD components to "improve efficiency and effectiveness of DOD depot maintenance operations through depot maintenance interservicing of similar equipment and competition between depot maintenance activities and private entities." *Id.* at 4.

<sup>23</sup>This provision would obviate further requirements as to cost comparability in public/private competitions in National Defense Appropriations Acts for FY 91 and 92. (§§ 8072 and 8120, respectively).

<sup>24</sup>Under the DOD Appropriations Act for FY 1993, cost comparability must now be certified by the Defense Contract Audit Agency (DCAA). Pub. L. No. 102-396, § 9095, 106 Stat. 1924 (1992). A staff member of the Defense Subcommittee, Senate Appropriations Committee, orally reported to a staff member of the Acquisition Law Task Force that this provision was inserted because it had been DOD policy for the DCAA to conduct pre-award audits. Thus, the provision was intended to conform the law to stated DOD policy. However, the Maintenance and Production Directorate, Assistant Secretary of Defense (Production and Logistics), orally reports that this conclusion by the Subcommittee was inaccurate. The DOD Inspector General had, on limited occasion, previously permitted DCAA to conduct pre-award audits, but only upon the request of the contracting officer. The DOD Comptroller is currently seeking an exemption from this Appropriations Act provision. A case is currently pending before the DAR Council to implement the cost requirements associated with depot-level maintenance competitions (DAR Case 91-354).

for public/private competitions. As the statute now reads there is not even a waiver provision for the competition requirement.

Finally, the Panel recommends retention of the current rule that all such competitions be exempt from traditional, A-76 procedures.

#### **3.5.6.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining and clarifying the DOD acquisition process by setting forth one, unitary standard for core functions of the Department, including critical, maintenance base core functions.

### **3.5.7. 10 U.S.C. § 2467**

#### **Cost comparisons: requirements with respect to retirement costs and consultation with employees**

##### **3.5.7.1. Summary of Law**

This section requires DOD to include certain prescribed retirement and disability costs in any cost comparison made under Circular A-76. It also requires DOD employees responsible for making conversion decisions to consult regularly with the civilian employees who will be affected by a decision, including any relevant labor organization.

##### **3.5.7.2. Background of Law**

This section was first enacted by the National Defense Authorization Act for Fiscal Year 1989.<sup>1</sup> The language as adopted originated in the House version of the bill. The House Committee Report contains no language regarding this specific provision.<sup>2</sup>

##### **3.5.7.3. Law in Practice**

This authority is implemented in Title 32, Code of Federal Regulations--National Defense, Subtitle A--Department of Defense, Part 169c, Commercial Activities Program, revised as of July 1, 1991. The requirements are also set forth in the DOD Instruction 4100.33.

The American Federation of Government Employees, Field Services Department, notes with respect to this section that:

It is essential to maintain legislation requiring consultation with employees during development of the performance work statement and the most efficient organization study. These consultations are an important step toward increasing the competitiveness of the in-house bid. . . . [M]anagement publications herald employee participation as a key step in cost reduction.<sup>3</sup>

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<sup>1</sup>Pub. L. No. 100-456, § 331(a), 102 Stat. 1955 (1988).

<sup>2</sup>H.R. REP. No. 563, 100th Cong., 1st Sess. (April 5, 1988).

<sup>3</sup>Letter from Mr. Robert Edgell, Deputy Director, American Federation of Government Employees, AFL-CIO, Field Services Department, to Ms. Theresa Squillacote, dated 26 Aug. 1992.

#### **3.5.7.4. Recommendation and Justification**

##### **Amend and Consolidate**

The Panel would retain the basic cost and consultation requirements of this statute within the consolidated statute 24XX. The Panel recommends amendment of the consultation requirement to vest it in the Secretary of Defense or secretary of the military department. The current requirement that each DOD officer responsible for the contracting decision shall consult with affected employees is both cumbersome and ambiguous. Rather, the Panel would require the Secretary of Defense or of the military department to implement fully the requirement to consult with those affected employees. Similarly, the Panel would state that the requirement include applicable retirement costs in broader terms, leaving it to the regulations to cite the specific, federal employee retirement costs to be included.

#### **3.5.7.5. Relationship to Objectives**

Amendment and consolidation of this statute will further the goal of streamlining and clarifying the DOD acquisition process.

#### **3.5.7.6. Proposed Statute**

Subsection (b) and (c) of the proposed statute 10 U.S.C. § 24XX provides as follows:

(b) **REALISTIC AND FAIR COST COMPARISONS**-- For the purpose of determining whether to contract with a source in the private sector, in contrast with performance by a government source, for the performance of a DOD function on the basis of a cost comparison, the Secretary of Defense or secretary of a military department shall ensure that all costs considered are realistic and fair. At a minimum, such estimated costs must include costs of quality assurance, technical performance monitoring, liability insurance, employee retirement and disability benefits, and all other applicable overhead costs.

(c) **CONSULTATION** - The Secretary of Defense shall ensure that affected civilian employees are consulted and that their views on the development and preparation of any performance work statements or management efficiency studies to be used in the cost comparison are obtained by cognizant DOD officials. In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of Title 5, U.S. Code, consultation with representative of that labor organization shall satisfy the consultation requirement in this subsection. In the case of employees not exclusively represented by a labor organization under section 7111 of Title 5, consultation with appropriate representatives of those employees shall satisfy the consultation requirement of this subsection.

#### **Current Statutes**

The text of the current § 2467, to be repealed and replaced by this proposed subsection, provides as follows:



§ 2467. Cost comparisons: requirements with respect to retirement costs and consultation with employees

**(a) REQUIREMENT TO INCLUDE RETIREMENT COSTS.**

(1) In any comparison conducted by the Department of Defense under Office of Management and Budget Circular A-76 (or any successor administrative regulation or policy) of the cost of performing commercial activities by Department of Defense personnel and the cost of performing such activities by contractor personnel, the Secretary of Defense shall include retirement system costs (as described in paragraphs (2) and (3)) of both the Department of Defense and the contractor.

(2) The retirement system costs of the Department of Defense shall include (to the extent applicable) the following:

(A) The cost of the Federal Employees' Retirement System, valued by using the normal-cost percentage (as defined by section 8401(23) of title 5, United States Code).

(B) The cost of the Civil Service Retirement System under subchapter III of chapter 83 of such title 5.

(C) The cost of the thrift savings plan under subchapter III of chapter 84 of such title 5.

(D) The cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986

(3) The retirement system costs of the contractor shall include the cost of the old age, survivors, and disability insurance taxes imposed under section 3111(a) of the Internal Revenue Code of 1986, the cost of thrift or other retirement savings plans, and other relevant retirement costs.

**(b) Requirement to consult DOD employees.**

(1) Each officer or employee of the Department of Defense responsible for determining under Office of Management and Budget Circular A-76 whether to convert to contractor performance any commercial activity of the Department--

(A) shall, at least monthly during the development and preparation of the performance work statement and the management efficiency study used in making that determination, consult with civilian employees who will be affected by that determination and consider the views of such employees on the development and preparation of that statement and that study; and

(B) may consult with such employees on other matters relating to that determination.

(2)(A) In the case of employees represented by a labor organization accorded exclusive recognition under section 7111 of title 5, United States Code, consultation with representatives of that labor organization shall satisfy the consultation requirement in paragraph (1).

(B) In the case of employees other than employees referred to in subparagraph(A), consultation with appropriate representatives of those employees shall satisfy the consultation requirement in paragraph (1).

(3) The Secretary of Defense shall prescribe regulations to carry out this subsection. The regulations shall include provisions for the selection or designation of appropriate representatives of employees referred to in paragraph (2)(B) for purposes of consultation required by paragraph (1).

### **3.5.8. 10 U.S.C. § 2468**

#### **Military Installations: authority of base commanders over contracting for commercial activities**

##### **3.5.8.1. Summary of Law**

This section provides that the Secretary of Defense shall direct that the commander of each military installation shall have the authority to enter into contracts for performance of commercial activities on that installation. This authority is subject to the authority, direction and control of the Secretary. Commanders must first inventory in-house commercial activities, decide which should be subject to A-76 procedures and solicit competitive proposals for those subject to the process. The Secretary is required to prescribe regulations under which commanders exercise this authority. The authority provided to base commanders by this section expires on September 30, 1993. The section also requires commanders, to the extent practicable, to assist in finding suitable employment for employees displaced by contract.

##### **3.5.8.2. Background of Law**

This section was first enacted by the National Defense Authorization Act for Fiscal Years 1990-91.<sup>1</sup> The language originated in the House version of the bill. The House provision was intended to make permanent a prior authorization act provision (the Nichols Amendment) that required the Secretary of Defense to delegate more authority over such contractors to base commanders.

The Nichols Amendment originated as a floor amendment to the National Defense Authorization Act for FY 1988 and 89.<sup>2</sup> When it was introduced, the amendment sponsor noted that the provision was based on a model installation program previously implemented by DOD and intended to give wide latitude to base commanders to develop new and innovative management techniques.<sup>3</sup> Overall, the amendment was intended to address inadequacies in the DOD contracting out program by putting greater authority in the hands of those closest to the activities and personnel in question.<sup>4</sup>

When this provision was codified, the House Report contained an extensive discussion of DOD contracting practices, based on hearings held earlier that year.<sup>5</sup> The House Committee noted that implementation of Circular A-76 through Executive Order 12615 was greatly accelerating the conversion process, without adequate consideration of management, quality assurance and operational requirements. The Report stated that the A-76 conversion that had

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<sup>1</sup>Pub. L. No. 101-189, § 1131(a)(1), 103 Stat. 1560 (1989).

<sup>2</sup>Pub. L. No. 100-180, § 1111, 101 Stat. 1146 (1987).

<sup>3</sup>133 Cong. Rec. 11891 (May 11, 1987)(remarks by Representative Nichols).

<sup>4</sup>*Id.*

<sup>5</sup>H.R. REP. NO. 121, 101st Cong., 1st Sess. 195-99 (1989).

occurred within the DOD had resulted in some savings and greater efficiencies. However, the Committee noted recent instances (such as the trainer aircraft maintenance functions at Columbus Air Force Base) in which the DOD commercial activities program had raised serious questions about its quality and cost-effectiveness.

In particular, data indicated that the overall effect of the program was to increase defense operation costs. Particular note was made of the costs involved in attempting to administer the A-76 program. Such costs appeared to far exceed the estimated annual savings associated with A-76 conversions. The Committee also noted the significant length of time required to complete such conversion studies, and that O&M budgets were frequently used to pay commercial activity costs that were often greater than the cost studies indicated.

In sum, the House Report stated:

[T]he Committee is concern [sic] that efforts to push the pace and scope of the commercial activities program are not realistic and are likely to result in increased cost, less efficiency and lower quality.

Consequently, the committee recommends approval of section 3441, which would place the Nichols amendment into permanent law and continue the existing delegation of authority over the A-76 program to the base commander. The committee has conducted continuous and careful oversight of the DOD commercial activities program for almost a decade, and finds that the primary problem with the program has been the inability of senior Executive Branch policy makers to recognize the practical limitations of the program. This failure to recognize reality has largely contributed to the widespread dissatisfaction with the A-76 program in the field. . . .

The Nichols amendment recognized the futility of trying to push the pace and scope of the commercial activities program beyond the Department's ability to perform quality cost comparisons that result in cost effective contracts. Above all, it recognized the necessity to have faith in the judgment of base commanders. . . .

The committee recognizes that base commanders exercising this authority are going to be facing tough decisions . . . Nevertheless, the committee continues to believe that the man on the spot should be allowed to use all available management tools, including contracting out, and to make the final decision on A-76 reviews.<sup>6</sup>

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<sup>6</sup>*Id.* at 198-99.

In conference, the Nichols Amendment authority was merely extended through September 30, 1990. The conferees directed the Secretary of Defense to report to the congressional defense committees on the impact of this delegation.<sup>7</sup>

This section was amended in 1990 by the National Defense Authorization Act for Fiscal Year 1991, again extending the base commander authority for a one-year period, until September 30, 1990.<sup>8</sup>

In 1991, this section was amended to extend the authority until September 30, 1993.<sup>9</sup> The House had again sought to make the provision permanent law, while the Senate had sought to repeal this section entirely.<sup>10</sup>

### 3.5.8.3. Law in Practice

This section is implemented by DOD Directive 4100.33, and by Title 32--National Defense, Subtitle A--Department of Defense, Part 169a, Commercial Activities Program, revised as of July 1, 1991.

Numerous parties surveyed recommended repeal of this statute in its entirety. The Department of the Navy, Chief of Naval Operations, Shore Activities Division, notes that, because the A-76 cost comparison process can be disruptive in the short-term, many base commanders elect to avoid conducting such comparisons even when they yield significant savings and management efficiencies in the long-term.<sup>11</sup> That Office states that providing this authority to base commanders undercuts the chain-of-command in this area.<sup>12</sup> Assistant Secretary of Defense (Production and Logistics), Installations, also recommends repeal of this statute as diluting the authority of the Office of the Secretary of Defense and violating the concept of "chain-of-command."<sup>13</sup> The Department of Air Force, Deputy Assistant Secretary (Communications, Computers & Logistics), states with respect to this statute that:

Historically, the A-76 cost comparison process yields significant savings and management efficiencies. Installation commanders may have a different perspective of resource management and decisions may at times not be in the best interest of the total Air Force. In today's draw down environment, it is critical that our senior leadership retain flexibility to make decisions affecting the distribution of available resources in coordination with installation commanders. This approach ensures both installation and Air

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<sup>7</sup>H.R. REP. No. 331, 101st Cong., 1st Sess. 649 (1989).

<sup>8</sup>Pub. L. No. 101-510, §921, 104 Stat. 1627 (1990).

<sup>9</sup>Pub. L. No. 102-190, § 315(a), 105 Stat. 1337 (1991).

<sup>10</sup>H.R. CONF. REP. No. 311, 102nd Cong., 1st Sess. 527 (1991).

<sup>11</sup>Memorandum from Mr. Theodore Fredman, Assistant to the General Counsel (FOIA), Department of the Navy, to Acquisition Law Task Force, dated 14 Sep. 1992.

<sup>12</sup>*Id.*

<sup>13</sup>Memorandum from Mr. David L. Spoeck, Special Assistant, Assistant Secretary of Defense (Production and Logistics), to Acquisition Law Task Force, dated 29 Sep. 1992.

Force-wide requirements are properly considered in the distribution of our limited resources.<sup>14</sup>

#### **3.5.8.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute. The Panel concurs in the belief that this statute undermines "chain-of-command" principles. The Panel agrees that appropriate input by a base commander is necessary to effective decision-making in this area. However, that input should be channeled through the chain-of command so that the final decision will incorporate a broader, management perspective. The Panel believes that this principle is even more important in this era of downsizing when limited resources will be available to accomplish a greater variety of tasks.

#### **3.5.8.5. Relationship to Objectives**

Repeal of this statute will streamline the DOD acquisition process and promote the best interests of the DOD by affording greater management flexibility in the contracting out process.

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<sup>14</sup>Memorandum from Mr. Lloyd K. Mosemann, Deputy Assistant Secretary (Communications, Computers & Logistics), Department of the Air Force, to DOD Advisory Panel, dated 21 Oct. 1992.

### 3.5.9. 10 U.S.C. §§ 4532 and 9532

#### Factories and arsenals: manufacture at; abolition of

##### 3.5.9.1. Summary of Laws

These sections, at subsection (a), authorize the secretaries of the Army and Air Force to have supplies needed for their respective departments made in factories or arsenals owned by the United States, so far as economical. The Army statute, at 10 U.S.C. § 4532(a), states that the Secretary of the Army shall have supplies so manufactured. The Air Force authority, at 10 U.S.C. § 9532(a), states that the Secretary of the Air Force may have supplies so manufactured.

These sections also provide at subsection (b) that the secretaries concerned may abolish any U.S. arsenals considered unnecessary.

##### 3.5.9.2. Background of Laws

The language in subsection (a) was originally enacted in 1920.<sup>1</sup> The legislative history indicates that the provision was intended to cover the case of a factory that had been recently purchased by the government and was then laying idle.<sup>2</sup> The Comptroller General has interpreted this and related legislative history as requiring that government-owned facilities should not be permitted to lay idle if such facilities can produce defense needs at a cost no greater than that offered by private industry.<sup>3</sup> This language as it applied to the Army was expressly retained in Title I of the Army Organization Act of 1950.<sup>4</sup> The House Report on that legislation does not expressly discuss the retention of this language.<sup>5</sup>

Subsection (a) as it applies to the Air Force was initially segregated and made applicable to the Air Force by the National Security Act of 1947. In that legislation, the requirement of subsection (a) was still mandatory. However, the Air Force Reorganization Act of 1951 repealed and replaced pertinent provisions of the National Security Act of 1947.<sup>6</sup> Under that legislation, the word "shall" as used in the Army Arsenal statute was replaced by the word "may," making it permissive for the Air Force to utilize government-owned factories or arsenals. Hearings on an earlier version of this public law contain a dialogue between the House Armed Services Committee chairman and the Air Force Secretary as to this change:

[Secretary]: Now, . . . we are changing 'shall' to 'may,' and I would like to talk about that for one moment . . . . As the language stood

<sup>1</sup>Pub. L. No. 66-242, § 5, 41 Stat. 765 (1920).

<sup>2</sup>59 Cong. Rec. 4156-157 (remarks of Mr. Caldwell).

<sup>3</sup>B-143232, unpublished advisory opinion from Mr. Joseph Campbell, Comptroller General, to Hon. F. Edward Hebert, House Armed Services Committee, dated 15 Dec. 1960.

<sup>4</sup>Pub. L. No. 81-581, § 101, 64 Stat. 264 (1949).

<sup>5</sup>H.R. REP. No. 2110, 81st Cong., 2d Sess. (1950).

<sup>6</sup>Pub. L. No. 82-150, § 101(e), 65 Stat. 326 (1950).

before our change, it meant that we were compelled to manufacture at Government arsenals, . . . , all those supplies which we need which can be manufactured or produced on an economical basis at such arsenals

Now . . . we are in a period of expansion, and one of the policies that we are trying to follow out is to see to it that we have the best possible mobilization base . . . .

We do not fill [factories] to complete capacity. Now, why? Because we want to have a base from which we can expand very rapidly in time of need.

[Chairman]: So that you can make it if it is practical to do it in these United States arsenals; and, if not, you have latitude.

[Secretary]: Yes, sir; that is what we are recommending . . . .<sup>7</sup>

The House Report on this legislation indicated that the change was intended to make the statutory language permissive.<sup>8</sup>

The language at 4532(a) has been interpreted by the Comptroller General as:

- requiring mandatory use of government arsenals and government-owned factories to manufacture or produce all of its needs which could be so manufactured or produced on an economical basis;
- applying to both GOGO and GOCO facilities;
- evincing a congressional intent that government-owned industrial facilities should not be permitted to lie idle if it is possible to use such facilities to produce defense needs at a cost no greater than the comparable private industry cost; and,
- requiring comparison only of actual, out-of-pocket costs from producing at a government-owned facility.<sup>9</sup>

The language at subsections (b) was first enacted by the Army Appropriations Act of 1853 and was retained in subsequent codifications.<sup>10</sup>

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<sup>7</sup>Hearings on H.R. 399 before Subcommittee No. 2 of the House Committee on Armed Services, 82d Cong., 1st Sess. 30 (1951).

<sup>8</sup>See H.R. REP. No. 9, 82d Cong., 1st Sess. (1951).

<sup>9</sup>See Matter of Action Manuf. Co., B-220013 (November 12, 1985), 85-2 Comp. Gen. Proc. Dec., and decisions cited therein.

<sup>10</sup>Army Appropriations Act of March 3, 1853, Revised Statutes, Sec. 1666.



### **3.5.9.3. Laws in Practice**

Section 4532 is implemented within the Department of the Army by "Implementation of Statutory Authorities for Manufacturing by Army Industrial Facilities," Memorandum dated 20 July 1992.

Both the Department of the Army, Office of the Judge Advocate General, and the U.S. Army, Tank and Automotive Command (TACOM), recommend that the Army's authority under 10 U.S.C. § 4532 be amended to give the secretary discretion to manufacture at in-house facilities, rather than the mandatory requirement in the current statute. TACOM notes as follows:

The fact that the Army Arsenal Act is mandatory, the Air Force Arsenal Act is permissive, and the Navy/Marine Corps have no parallel statute at all, also presents a potential for inequitable treatment among the services. In developing TACOM policy for implementation of the Army's Flexible Computerized Integrated Manufacturing (FCIM) initiative, a tri-service, Depot oriented effort to develop state of the art manufacturing capability with Army, Navy and Air Force Depots . . . , it became apparent that participating Depots, regardless of which service, would receive Arsenal Act evaluation (that is, out-of-pocket cost evaluation) for FCIM targeted workload of \$100,000 that had to go through the Arsenal Act make/buy decision process. It is unknown what basis of evaluation will be used by either the Air Force or the Navy in considering Army Depot offers on Air Force or Navy work offered up under this program. This situation makes it apparent that while the Army must extend all the advantages of out-of-pocket cost evaluation to the other services under its Arsenal Act procedures, it is unclear what obligation, if any, exists for the other services to extend the same treatment to the Army on their own acquisitions.<sup>11</sup>

No specific comments were received from the Department of the Air Force with respect to 10 U.S.C. § 9532.

### **3.5.9.4. Recommendation and Justification**

#### **Amend and Consolidate**

The Panel recommends that these authorities be amended and consolidated as set forth below. The Army and Air Force both maintain specialized, in-house manufacturing capabilities. These sections provide authority for the secretaries of those department to workload those activities as needed to maintain adequate in-house manufacturing capabilities.

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<sup>11</sup>Memorandum from Allan S. Kalt, Chief, Procurement Law Division, U.S. Army, Tank and Automatic Command, to Commander, U.S. Army Materiel Command, dated 1 Sep. 1992.

The Panel considered, and rejected, amendment of these sections to track the same requirements for core logistics functions set forth in proposed statute 10 U.S.C. § 24XY. The Panel noted that the in-house manufacturing capability of the DOD is not as substantial as its in-house maintenance capability, and therefore did not warrant the application of a comparable, "core" concept.

The Panel does recommend, however, that the consolidated statute authorize the secretaries to workload manufacturing requirements at their discretion. Thus, the Panel would not maintain the mandatory authority currently set forth in section 4532. As noted in the TACOM comments, the mandatory nature of the Army provision leads to a lack of uniformity between the services in use of in-house industrial facilities and evaluation of offers from such facilities. In the face of reduced defense budgets and corresponding decreases in depot and arsenal workloads, the Army leadership has been confronted with reduced flexibility in managing the industrial base by mandatory application of the Army Arsenal Act. This situation did not exist when sufficient workload existed for depots and arsenals.

To the extent that depots have a manufacturing capacity incident to their maintenance activities, such depots have been construed as factories under the Arsenal Act. As this capacity becomes underutilized, depots have proposed to bid on new manufacturing within their capabilities, and called for out-of-pocket evaluation.<sup>12</sup> To the extent that the Arsenal Act applies and unused manufacturing exists, the Army has no option but to allow the depot to compete on an out-of-pocket basis, a significant advantage over private industry. Moving new manufacturing, traditionally an activity performed by industry, complicates preservation of the private industrial base. It is also anomalous because the main reason for depots is maintenance, not manufacturing.<sup>13</sup> Workloading them with new production may detract from their ability to respond to emergency maintenance requirements.

To a lesser extent, the same can be said of Arsenals which are manufacturing activities. However, the problem has not arisen to any significant extent with Arsenals.

Discretionary authority will allow greater flexibility and avoid "boxing-in" the Army leadership. At the same time, discretionary authority will permit efficient workloading of depots and arsenals.

#### **3.5.9.5. Relationship to Objectives**

Amendment and consolidation of these sections will further the goal of streamlining and simplifying the DOD acquisition process by setting forth a common, manufacturing authority for DOD and its components.

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<sup>12</sup>Letterkenny Army Depot proposed teaming with Rock Island Arsenal for the Army's Paladin program, an upgrade of the M109 howitzer [the Army excluded the Depots under 10 U.S.C. § 2304(c)(3)]; Tooele Army Depot proposed to compete for the Army's 2 and 1/2 ton truck service Life Extension Program [the Depot eventually could not participate because engineering beyond their capability was required]; Tooele Army Depot proposed to compete for the Army's high mobility trailer bug [still under evaluation].

<sup>13</sup>See 10 U.S.C. 2364.

### 3.5.9.6. Proposed Statute

#### Factories and arsenals: manufacture at; ~~abolition of~~

(a) The Secretary of ~~the Army/Air Force~~ ~~[shall]~~ Defense or secretary of a military department may have supplies needed for the Department of Defense and its components ~~the Army/Air Force~~ made in factories or arsenals owned by the United States, ~~so far as these factories or arsenals can make these supplies on an economical basis.~~

(b) The Secretary of Defense or secretary of a military department may abolish any United States arsenal that he considers unnecessary.

### **3.5.10. 10 U.S.C. § 2212**

#### **Contracted advisory and assistance services: accounting procedures**

##### **3.5.10.1. Summary of the Law**

This section requires the Secretary of Defense to require that each military department maintain an accounting procedure to identify and control expenditures for contracted advisory and assistance services. The Secretary of Defense is required to issue regulations identifying those services deemed to be contracted advisory and assistance services and specifically those in direct support of and essential to a weapons system. The section then delineates numerous types of services to be considered by the Secretary. The section requires that DOD budget documents specifically identify the total amount requested for such services, and the amounts relative to each category.

##### **3.5.10.2. Background of the Law**

This section was originally enacted by the DOD Authorization Act of 1986.<sup>1</sup> The House and Senate versions of that bill had contained comparable language on this issue. The section was intended to establish congressional oversight of contracted advisory and assistance services (CAAS) by requiring DOD to define separate categories of these services and to identify them separately in budget exhibits to the Congress. In order to exempt, advisory services in support of major weapon systems from any future CAAS controls, the section required separate accounting of these system-based services and support.

Congress enacted this oversight provision because of the increased role that such contracted services were playing in the development, production and maintenance of weapons and logistics systems, and because of the lack of a clear definition in DOD of the various CAAS types: Specifically,

The conferees believe that this process of defining the services involved in [CAAS] and system services and support should enable the Defense Department to present information and data on its management of services provided by contractors in a manner which will provide each of the services, the Secretary of Defense, and Congress with a uniform system for recording CAAS expenditures and projected spending.<sup>2</sup>

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<sup>1</sup>Pub. L. No. 99-145, § 918, 97 Stat. 690 (1985).

<sup>2</sup>H.R. CONF. REP No. 235, 99th Cong., 2nd Sess. 526 (1985).

### **3.5.10.3. Law in Practice**

This section is implemented by DOD Directive 4205.2, "DOD-Contracted CAAS," (January 27, 1986), by DFARS subpart 237.2, "Service Contracting; Consulting Services" and DFARS section 237.107, "Personal Services Contracts."<sup>3</sup>

The Office of the Director, Defense Procurement recommends repeal of this statute as duplicative of a recently-enacted permanent law provision in the Health and Human Services Appropriations Act for FY 1993.<sup>4</sup> That provision requires the Office of Management and Budget to establish funding for consulting services for each department and agency as a separate object class in each budget annually submitted to the Congress under 31 U.S.C. § 1105.<sup>5</sup> A proposed change to OMB Circular A-11 will implement this new statutory requirement.

### **3.5.10.4. Recommendation and Justification**

#### **Repeal**

The Panel recommends repeal of this statute. The Panel agrees that this statutory provision is duplicated by the provisions of new legislation. The scope of contracted advisory and assistance services for which reporting is required is virtually coextensive under both statutes. In addition, the Panel believes that it is more beneficial for this budgetary reporting requirement to be centrally managed under established OMB procedures. It is redundant to maintain a separate, comparable reporting requirement for DOD.

### **3.5.10.5. Relationship to Objectives**

Repeal of this statute will streamline and simplify the DOD acquisition process by eliminating a DOD-specific requirement that is now required of all federal agencies under another statutory provision.

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<sup>3</sup>Comparable statutory authority, at 41 U.S.C. § 405 (b), is implemented by FAR section 37.2, and OMB Circular A-120, "Guidelines for the Use of Advisory and Assistance Services," (Jan. 4, 1988).

<sup>4</sup>Datafax transmission from Mr. Robert Nemetz, Contracted Advisory and Assistance Services (Director, Defense Procurement) to Ms. Theresa Squillacote, dated 6 Nov. 1992.

<sup>5</sup>Pub. L. No. 102-394, § 512, 106 Stat. 1826 (1992). This provision governs all federal agency budget submittals to the Congress.

### **3.5.11. 10 U.S.C. § 7314**

#### **Overhaul of naval vessels: competition between public and private shipyards**

##### **3.5.11.1. Summary of the Law**

This section compels the Secretary of the Navy to ensure that certain criteria are met in competition between public and private shipyards for the repair, alteration, overhaul, or conversion of naval vessels.

Specifically, the bid of any public shipyard must include the full costs to the United States associated with future retirement benefits of civilian employees and, in a case in which equal access to the Navy supply system is not allowed to public and private shipyards, a pro rata share of the costs of the Navy supply system. For comparability analysis, any bid from a private shipyard must include costs applicable to oversight of the contract by the appropriate Navy supervisor of shipbuilding, conversion, and repair. Lastly, this section mandates that the award be made using the results of the comparability analysis.

##### **3.5.11.2. Background of the Law**

This section was originally enacted by the National Defense Authorization Act for FY 1989.<sup>1</sup> The provision was generated by a 1988 GAO Report reviewing the Navy's cost comparability process in its public/private competitions.<sup>2</sup> That Report concluded that, while the Navy's comparability analysis was designed to satisfy the requirement for certification of comparability of all direct and indirect costs, there were additional costs to the Navy that had not been added to public shipyard proposals for cost comparability purposes. Accordingly, the GAO concluded that the Navy should add to those costs the cost to operate the Navy supply system and the full retirement costs for shipyard civilian personnel.<sup>3</sup> The GAO also concluded that the private sector should include the government's contract and supply system administration costs.<sup>4</sup>

Based on these recommendations, the House proposed the instant statutory provision, and the Senate receded in conference.<sup>5</sup>

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<sup>1</sup>Pub. L. No. 100-456, § 1225 (a)(1), 102 Stat. 2054 (1988).

<sup>2</sup>GAO-NSIAD 88-109, "Navy Maintenance: Competing Vessel Overhauls and Repairs Between Public and Private Shipyards," B-229025, (March 1988).

<sup>3</sup>*Id.*, at 30.

<sup>4</sup>*Id.*

<sup>5</sup>H.R. CONF. REP No. 100-989, 100th Cong., 2d Sess. 2588 (1988).

### **3.5.11.3. Law in Practice**

The Office of Counsel, Naval Sea Systems Command, urges retention of this section because of need to maintain specifically identified cost categories for inclusion, or exclusion, in public bids.<sup>6</sup> That Office notes, for example, that there are unique costs incurred by public shipyards because of naval, industrial base policies. If public shipyards were obliged to include such costs, they would be severely hampered in public/private competitions.<sup>7</sup>

### **3.5.11.4. Recommendation and Justification**

#### **Retain**

The Panel recommends retention of this statute because it maintains fair competition between public and private shipyards. The Panel notes that the proposed statute 24XY provides, at subsection (d), that such bids must accurately disclose all costs properly and consistently derived from accounting systems and practices that comply with laws, policies and standards applicable to those entities. Despite this recommended language, the Panel recommends retention of this Navy-specific cost provision because of unique concerns applicable to naval ship repair. Specifically, naval industrial base policy presents an obstacle to an otherwise level playing field in shipyard public/private competitions.

### **3.5.11.5. Relationship to Objectives**

Retention of this section will promote greater efficiency in DOD acquisition practices and preservation of the shipyard industrial base.

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<sup>6</sup>Datafax transmission from Mr. Theodore Fredman, Assistant to the General Counsel (FOIA), Department of the Navy, to Ms. Theresa Squillacote, dated 8 Dec. 1992.

<sup>7</sup>*Id.*, as supplemented by telephone conversation between Mr. Scott Garner, Office of Counsel, Naval Sea Systems Command, and Ms. Theresa Squillacote, Acquisition Law Task Force, on 6 Jan. 1992.

## **3.6. Industrial Base and Manufacturing Technology Laws**

### **3.6.0. Introduction**

The Panel considered within the scope of its review those laws within Title 10 concerning DOD Industrial Base and Manufacturing Technology policies.<sup>1</sup> However, this area of defense acquisition policy has been the subject of considerable legislative effort in the National Defense Authorization Act for Fiscal Year 1993.<sup>2</sup> That legislation repealed virtually all of these laws and enacted in their place new, and much more detailed, policies regarding the defense technology and industrial base.

The Panel believes that, because this body of legislation is new and untested, it is not feasible to engage in a full-scale analysis of each new statutory section. However, the Panel also believes that it is important to develop a position, albeit a generalized one, in this important area of defense acquisition. Therefore, based on the legislative histories of the repealed statutes, the comments that the Panel received during its survey of those laws, a review of the newly-enacted legislation, and other research, the Panel has developed a generalized comment on the industrial base legislation enacted in the National Defense Authorization Act for Fiscal Year 1993. This comment is guided by the statement of goals and objectives adopted by the Panel.

Essentially, the Panel endorses the overall goal of this legislation, but notes that it contains excessive detail. Also, the Panel recommends that Congress consider an additional policy statement as to the interplay between domestic industrial base issues and international defense trade and cooperation. Finally, the Panel notes that, in this era of downsizing, industrial base issues are increasingly generating antitrust legal and policy issues. While such issues are outside the scope of the Panel's review, they may warrant congressional scrutiny.

This subchapter summarizes the prior existing statutory structure, the newly enacted legislation and its rationale, and then comments on the new legislation, including making specific proposals where relevant.

#### **3.6.0.1. The Prior Existing Statutes**

- Section 2501: Secretary of Defense to guide the military departments on industrial base policies, including analyses of industrial base capabilities, military mobilization standards and commercial substitutes for military supplies.
- Section 2502: Under Secretary of Defense (Acquisition) to establish policies requiring industrial base analysis for major defense acquisition programs, including manufacturing efficiencies, the use of advance technology in the acquisition phases,

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<sup>1</sup>10 U.S.C. §§ 2501 through 2517, except §§ 2504, 2505, 2506 and 2507, relating to Memoranda of Understandings, Offsets, Procurement of Goods which are Other than American, and Miscellaneous Procurement Limitations, which are discussed in Chapter 7 of this Report.

<sup>2</sup>Pub. L. No. 102-484, §§ 4201-4272, 106 Stat. 2658-770 (1992).



and use of acquisition plans that encourage use of technologies that reduce life-cycle costs.

- **Section 2503:** Under Secretary of Defense (Acquisition) to establish an Industrial Base Office to develop and implement programs and policies for defense industrial readiness, for use of advanced manufacturing technology and regulatory improvements, and for worldwide assessment of critical technologies and defense-related manufacturing capabilities.
- **Section 2504:** Secretary of Defense to evaluate the impact of Defense Memoranda of Understanding (MOUs) on industrial base and consult with Secretary of Commerce.
- **Section 2505:** President to establish an offset policy that offset contractual arrangements must consider technology transfer and industrial base issues; prohibits MOUs that would transfer defense technologies and adversely affect U.S. industrial base; U.S. firms may protest technology transfers on that basis.
- **Section 2507:** Miscellaneous domestic source procurement limitations (buses, chemical weapons antidotes, specified valves and machines, carbonyl iron powders, air circuit breakers, and typewriters).
- **Section 2509:** Secretary of Defense to consult with Secretary of Commerce and submit Defense Industrial Base Annual Report to Congress, including analysis of capability of industrial base to meet national security needs, sector financial capability to conduct R&D, to commercialize technologies, and to maintain and expand defense production base.
- **Section 2510:** Secretary of Defense to monitor and report annually on textile industrial base
- **Section 2511-2518:** Secretary of Defense to plan and implement Manufacturing Technology program; specifically, must promote computer-integrated manufacturing, concurrent engineering, subtier defense industries, and manufacturing extension programs.

### **3.6.0.2 National Defense Authorization Act for Fiscal Year 1993: New Industrial Base Legislation**

- **Section 4101:** Sets forth congressional findings with respect to defense conversion, reinvestment and transition assistance. It specifically states that the defense builddown must be structured in a manner that enhances the long-term ability of the U.S. to maintain a strong and vibrant national technology and industrial base.

- Section 4201: States that legislative purpose is to enact policies and requirements relating, inter alia, to the national technology and industrial base that further national security objectives.
- Section 4202: Repeals Chapter 148 of Title 10 (other than 2504 through 2507) and Chapter 149 (other than 2517 and 2518).<sup>3</sup> Enacts new Chapter 148, consisting of 5 subchapters. Renumbers former §§ 2504, 2505, 2506 and 2507 as §§ 2531, 2532, 2533, 2534, respectively.
- Section 4203: Sets forth definition section as first subchapter of new chapter 148. Includes definitions of "dual-use" and "critical technology."
- Section 4211: Sets forth new statement of industrial base policy as 10 U.S.C. § 2501, viz., that the national technology and industrial base must be capable of:

--supplying the force structure as necessary to meet the objectives in the President's national security report, the Secretary of Defense's policy report, and the future years defense program;

--sustaining production, maintenance and repair, and logistics, for various types of military operations;

--maintaining advanced R&D sufficient to ensure technological superiority;

--reconstituting the ability to supply and equip for a full-scale war or national emergency.

The Act also sets forth policy relating to defense reinvestment and conversion and commercial/military integration.

- Section 4212: Establishes, within a new 10 U.S.C. § 2502, a National Defense Technology and Industrial Base Council, consisting of the Secretaries of DOD, Commerce and Energy, to oversee industrial base planning and implementation within the federal sector. The Council is also charged with chairing, initially, the Economic Adjustment Committee.<sup>4</sup>
- Section 4213: Provides, in a new 10 U.S.C. § 2503, for the Secretary of Defense, in consultation with the Council, to establish a program for analysis of the technology

<sup>3</sup>This section also repeals most of Chapter 150 of Title 10. However, those statutes were not included within the scope of the Panel's review.

<sup>4</sup>This Committee was established by the National Defense Authorization Act for FY 1991, Pub. L. No. 101-510, § 4004, 104 Stat. 1849 (1990). The Conference Report for the FY 1993 National Defense Authorization Act states that § 4212 is not intended to create a new bureaucracy, but to promote better coordination among the relevant federal agencies. To that end, the Council is not to establish a new staff but to rely on its own agency resources. H.R. CONF. REP No. 966, 102d Cong., 2d Sess. 878 (1992).

and industrial base. That program must be administered by a federally funded research and development center or private entity, or by the National Defense University. The program must be coordinated with the Critical Technologies Institute. That program must assemble and analyze information, and provide support to the Council.

- **Section 4214:** Provides, in a new 10 U.S.C. § 2504, that the Secretary of Defense shall establish within the National Defense University a Defense Economic Adjustment Center to study conversion and reutilization issues.
- **Section 4215:** Requires the Council, in a new 10 U.S.C. § 2505, to prepare, annually through 1997 and biennially thereafter, a comprehensive assessment of the capability of the national technology and industrial base to attain each of the stated national security objectives. The assessment must include a critical sector economic viability analysis, with reference to the impact of program terminations and reductions on such viability, and a separate critical technology analysis. The assessment shall include considerations of foreign dependency.
- **Section 4216:** Requires,

(a) in a new 10 U.S.C. § 2506, the Council to prepare, annually through 1997 and biennially thereafter, a multiyear defense capability base plan coordinated within the Federal sector. The plan must provide specific guidance for DOD policies to ensure continued viability of each technology and industrial base sector, to reduce foreign source dependency and provide for alternative sources, manage the Defense Industrial Reserve and the DOD Manufacturing Technology program, to develop each critical technology, coordinate DOD financial policies, to encourage the use of commercial products and processes by DOD and DOE, and set forth DOD and DOE programs on conversion, and

(b) in a new 10 U.S.C. § 2440 (the major systems chapter), that major defense acquisition programs include consideration of industrial base issues.

- **Section 4217:** Authorizes the President, in a new 10 U.S.C. § 2507, to collect that data necessary for defense technology, industrial base or conversion analysis.
- **Section 4218:** Requires the Secretary of Defense to issue regulations for collection of industrial base data and for development of plans required under new law. Also sets forth specific requirements for textile and apparel industrial base issues.
- **Section 4219:** Requires that regulations issued by Secretary of Defense must include specified sector role financial capability, impact of DOD reductions, critical technologies analyses, economic viability and foreign dependency. The analytic requirements are set forth in detail in the statute.
- **Section 4220:** Requires that regulations issued by Secretary of Defense as to development of industrial base periodic plan must address specified issues, including

guidance as to manufacturing technology, critical technologies, financial policy, commercial-military integration, and major programs.

- **Section 4221:** Enacts new 10 U.S.C. § 2511 mandating the use of defense dual-use critical technologies partnerships between DOD and private sector entities. Sets forth significant detail as to selection criteria and management techniques.
- **Section 4222:** Enacts new 10 U.S.C. § 2512 mandating the use of commercial-military integration partnerships. Authorizes the Secretary of Defense to enter into contracts or cooperative agreements with eligible firms and nonprofits to establish such partnerships. Sets forth selection criteria and management techniques.
- **Section 4223:** Redesignates former 10 U.S.C. § 2524, relating to critical technologies application centers, as 10 U.S.C. § 2513, and renames such centers as the regional technology alliances assistance program.
- **Section 4224:** Enacts new 10 U.S.C. § 2514, requiring the Secretary of Defense to encourage technology transfer between DOD laboratories and research centers and other entities, consistent with national security objectives, to examine and implement methods to encourage transfer and to establish a program to diversify defense laboratories.
- **Section 4225:** Enacts new 10 U.S.C. § 2515, requiring the Secretary of Defense to establish within the OSD an Office of Technology Transition for the purpose of ensuring that the technology developed for national security purposes is integrated into the private sector.
- **Section 4226:** Enacts new 10 U.S.C. § 2516, establishing a Military-Civilian Integration and Technology Transfer Advisory Board, to ensure effective integration of commercial technologies into defense industries, to ensure transfer of defense technologies to civilian industry, to integrate civilian markets into dual-use technology development strategies, and to ensure that dual use critical technologies are used in carrying out defense reinvestment, diversification and conversion activities. Such Board shall advise the Council.
- **Section 4227:** Redesignates prior 10 U.S.C. § 2525, relating to Office for Foreign Defense Technology Monitoring and Assessment, as new 10 U.S.C. § 2517.
- **Section 4228:** Redesignates prior 10 U.S.C. § 2525, relating to Overseas Foreign Defense Technology Monitoring and Assessment Financial Assistance Program, as new 10 U.S.C. § 2518.
- **Section 4231:** Enacts new 10 U.S.C. § 2521, requiring the Secretary of Defense to establish a National Defense Manufacturing Technology Program to, among other

things, provide centralized guidance and direction on all manufacturing technology matters.

- Section 4232: Transfers prior 10 U.S.C. § 2518, relating to Defense Advanced Manufacturing Technology Partnerships, and redesignates as 10 U.S.C. § 2522.
- Section 4233: Transfers prior 10 U.S.C. § 2517, relating to Manufacturing Extension Programs, and redesignates as 10 U.S.C. § 2523.
- Section 4234: Enacts new 10 U.S.C. § 2524, requiring the Secretary of Defense to establish defense dual-use assistance extension programs to assist DOD-dependent industries in converting to commercial practices.
- Section 4235: Enacts new 10 U.S.C. § 2535, setting forth text of section 2 of the Defense Industrial Reserve Act.

The above legislative sections constitute the disposition, under the National Defense Authorization Act for Fiscal Year 1993, of those prior, industrial base-related statutes initially included in the Panel's review.

### **3.6.0.3. Comment On New Legislation**

#### **Rationale of New Legislation**

The new industrial base legislation originated in the Senate version of National Defense Authorization Act for Fiscal Year 1993. The Senate Report to that bill set forth in detail the underlying rationale for the proposed legislation.<sup>5</sup> That rationale drew heavily on prior testimony and analysis on the defense technology and industrial base by the Office of Technology Assessment (OTA).<sup>6</sup> It also relied on analysis and conclusions in the April, 1992 Report of the House Armed Services Committee Panel on the Structure of the U.S. Defense Industrial Base.<sup>7</sup>

As summarized in the Senate Report,<sup>8</sup> the proposed legislation was intended to address the effect of the defense drawdown on the industrial base. Specifically, the Report noted that, without high volume procurement contracts, defense-dependent companies will no longer be able to recoup R&D investment and would significantly lessen such expenditures. Thus, the nation

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<sup>5</sup>S. REP. NO. 352, 102d Cong., 2d Sess. 222 (1992).

<sup>6</sup>Redesigning Defense: Planning the Transition to the Future U.S. Defense Industrial Base, Office of Technology Assessment, (July 1991) and Building Future Security: Strategies for Restructuring the Defense Technology and Industrial Base, Office of Technology Assessment (June 1992). See also "Statement Before the Subcommittee on Defense Industry and Technology, Armed Services Committee, U.S. Senate," by Jack Nunn, Senior Analyst, International Security and Commerce Program, Office of Technology Assessment, May 14, 1992; and "Statement Before the Defense Policy Panel, Armed Services Committee, U.S. House of Representatives," by Katherine Gillman, May 20, 1992.

<sup>7</sup>Future of the Defense Industrial Base, Report of the Structure of the U.S. Defense Industrial Base Panel of the Committee on Armed Services, House of Representatives, 102d Cong., 2d Sess. (1992).

<sup>8</sup>S. REP. NO. 352, 102d Cong., 2d Sess. 216 (1992).

would lose a significant amount of industry funded R&D, upon which not just defense, but the economy as a whole, relies heavily.<sup>9</sup>

The Senate Report expressly rejected the notion that market forces would be adequate to ensure that the post-Cold War industrial and technology base would meet national security and economic competitiveness needs.<sup>10</sup> In this respect, the proposed legislation adopts the view stated by the OTA that the defense drawdown must be strategically managed.

The Senate Report criticized the DOD for failing adequately to undertake serious technology and industrial base planning, noting that that failure has left the United States ill-equipped to manage the defense drawdown. For example, the Report noted that many commenters had raised the problem of an inadequate, centralized database upon which the Department could effectively conduct sector analyses.<sup>11</sup>

The Report relied upon the OTA concept of "proportional downsizing," i.e., restructuring the base with a new allocation of resources and closer integration among R&D, production and maintenance. In this manner, a high technology edge could be maintained by the U.S. through such strategies as competitive prototyping, rather than fully fielded systems. The Report summarized this distinction as maintenance of warm capacity, rather than a warm production base. This goal would be achieved by greater integration of the civil and military sectors of the economy, and specifically through greatly intensified encouragement and use of dual-use technologies and manufacturing techniques by those private entities previously defense-dependent.<sup>12</sup>

To this end, the Senate bill proposed repeal of the broadly worded statutory guidance on industrial base then contained in Title 10, and enactment of a highly detailed statutory scheme that would establish a Tri-Agency Council (DOD, DOE and Commerce), supported by a federally funded research and development center, to engage in extensive prescribed industrial base assessments with equally extensive annual plans. The legislation also required extensive use of dual use critical and manufacturing technology partnerships between the Department and private entities, and mandated regional programs and field activities to build such partnerships.

In conference, the Senate version was modified and streamlined.<sup>13</sup> The Secretary of Defense's role in providing centralized guidance within the Department on industrial base programming was strengthened and clarified (the new 10 U.S.C. § 2503). The role of the Tri-Agency Council was clarified as being a consulting role; the conference agreement expressly stated that the bill was not intended to create a new bureaucracy. Finally, the detailed description and number of the assessments and plans to be provided was somewhat modified.

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<sup>9</sup>*Id.* at 215-16.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 216-218.

<sup>13</sup>H.R. CONF. REP. NO. 966, 102d Cong., 2d Sess. 874-81 (1992).

## Panel Position on New Legislation

### Endorsement of Goal of New Legislation

Overall, the Panel endorses the direction of the industrial base legislation in the National Defense Authorization Act for Fiscal Year 1993. The Panel bases this endorsement on the consistency between the overall goal of this legislation -- greater integration of the civil and military sectors of the economy through the development of dual use technologies with commercial application -- and the goals and objectives adopted by the Panel.<sup>14</sup>

The Panel recognizes that, in broader terms, the overall competitiveness of our national economy is greatly dependent upon the increased development of commercial technologies, and that the R&D edge to sustain and build such technologies will suffer in the defense drawdown absent a concerted effort by the department to consciously foster their growth.

### Comment On New Legislation

Despite endorsement of the goal of this new legislation, the Panel believes that the new legislation could be improved in the following areas:

#### Excessive Legislative Detail

First, the Panel believes that the detailed nature of this legislation is excessive. In this respect, it differs from the Panel Objective that acquisition laws should identify the broad policy objectives and the fundamental requirements to be achieved. Detailed implementing methodology should be reserved to the acquisition regulations.

The Panel recognizes the purpose behind such detail. The prior laws in this area within Title 10 had merely set forth broad policy objectives. Yet the Congress viewed the department's industrial base management as deficient.<sup>15</sup> The Panel notes as well that in conference there was a reduction in the amount of detail initially contained in the Senate version. Most importantly, the conference agreement retained the Secretary of Defense's broad authority to implement industrial base planning centrally within the Department.

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<sup>14</sup>Specifically, the Panel notes that Objectives 4, 5, 6 and 7, in the introduction to this Report, are furthered, directly or indirectly, by this legislation.

<sup>15</sup>Report to the Congress on the Defense Industrial Base, Department of Defense, Under Secretary of Defense (Acquisition)(Production and Logistics), November, 1991 at p. ES-2 ("Although changes in the industrial base will inevitably occur, this report highlights the fact that -- in all cases examined -- the resultant industrial base will be fully adequate...."). One industry commenter as well noted that "the problem...is the seeming inability or reluctance of the DOD to prioritize the issues addressed by [current] legislation.... Defense industrial base policy appears unfocused.... DOD needs to define realistic industrial base goals." Letter from Mr. Kenneth G. Haug, Manager, Contracts, Martin Marietta Corporation,, to Section 800 Panel, dated 8 July 1992.

## Coordinate with Defense Trade and Cooperation

Second, the Panel recommends that these laws should expressly require the Secretary of Defense, and the supporting Tri-Agency Council, to consider issues of international procurement and arms trade by the DOD in the industrial base assessment and planning. To that end, the Panel suggests an additional policy statement as follows:

(x) **POLICY OBJECTIVES RELATING TO DEFENSE INTERNATIONAL TRADE**--It is the policy of Congress that the United States attain the national defense technology and industrial base objectives set forth above by fully coordinating domestic defense acquisition practices with defense trade and cooperation, under Chapter XX of this title, and foreign military sales and assistance under Title 22 of the U.S. Code.

The Panel would also amend the assessment and planning statutes to expressly require that the same consideration be made by the Council in those areas.<sup>16</sup>

This proposal is based on the increased globalization of the defense industry, both within the Department and within the private sector. In this era of downsizing, many U.S. defense companies hope to use international collaboration to enter foreign markets with higher demand and less regulation. Thus, there is both a flow of defense-related technologies out of the U.S. and an increased reliance on foreign sources by the Department.<sup>17</sup> As one Air Force commenter noted,

The current world political situation and the global economy suggest increased emphasis on internationalization of commerce. Competition will occur on a global basis even among our allies . . . It is confusing to impose restraints on the industrial base while [at] the same time urging co-production, advanced manufacturing technologies and foreign military sale to remain competitive in a world market. When and if a development or technology is transitioned to an ally/customer we should be assured that we are working a next generation development/technology which maintains a leadership position in the international marketplace.<sup>18</sup>

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<sup>16</sup>This recommendation parallels the Panel's recommendation in Chapter 7 of this Report, "Defense Trade and Cooperation," that those statutes pertaining to defense MOUs and cooperative agreements, and domestic preference statutes, be consolidated within a single chapter in Title 10. Several of the industrial base statutes left intact by the National Defense Authorization Act for FY93 (the prior 10 U.S.C. § 2505, 2506 and 2507) have been proposed to be relocated to this Chapter.

<sup>17</sup>See Arming Our Allies: Cooperation and Competition in Defense Technology, Office of Technology Assessment (1990).

<sup>18</sup>Memorandum from Col. K. H. Keiber, Jr., Director of Manufacturing and Quality, HQ Air Force Materiel Command, DCS/Engineering and Technical Management, to DOD Advisory Panel, dated 28 July 1992.



The Panel believes that effective domestic, industrial base analysis must also explicitly address these international trade issues. They are, in effect, "two sides of the same coin."

### **Industrial Base and Antitrust Implications**

Finally, the Panel notes that there is a matter within the area of defense industrial base issues that is beyond the scope of its charter: the interplay of defense industrial base policies and practices and the anti-trust laws. As a result of declining budgets, a number of defense contractors have considered merger, joint venture, teaming arrangements and other means to adjust to decreased business volume.

For example, in recent months, arrangements have been proposed by Alliant Techsystems and Olin Corporation, by General Electric Aerospace Division and Martin Marietta and by General Dynamics and Hughes Missile Division. These types of transactions require analysis by the contracting agencies and, in most instances, the formulation of agency positions in support or opposition to the proposed arrangement. Antitrust laws play a major role in the success or failure of the proposed arrangements. Arrangements which are favorable from a defense industrial base perspective may be objectionable under an antitrust analysis.

Both Congress and DOD are studying defense industrial base issues in order to determine the most orderly and useful way to downsize but preserve critical industrial capabilities. Such studies should address industrial base policies in light of antitrust laws. Congress and DOD should consider legislative relief to permit appropriate downsizing without adverse antitrust implications.

## **3.7. Fuel AND Energy-Related Laws**

### **3.7.0 Introduction**

The laws considered within this subchapter are all statutory provisions that relate to fuel or energy system procurement by the DOD. They are not now currently organized or grouped within Title 10 on that basis.

The Panel's treatment of these sections is straightforward: the implementing DOD offices were contacted to gain information concerning the continued utility of each section and whether any need for amendment existed. Defense Fuel Supply Center (DFSC) and the Office of the Assistant Secretary of Defense (Production & Logistics), Energy Policy Directorate, were the primary relevant DOD offices. With one exception, discussed below, those offices fully concur with the recommendations and supporting rationale set forth in this subchapter.<sup>1</sup> A comment received from a private petroleum industry association also concurred with these recommendations.<sup>2</sup> Finally, the Department of the Air Force, Office of the General Counsel, also supported the Panel's proposed disposition of these statutes.<sup>3</sup>

Some of the sections dealt directly with fuel and petroleum acquisition by DFSC. For example, DFSC sought, and the Panel recommended, amendment of DFSC's authority to waive contract procedures at 10 U.S.C. § 2404 to obtain authority to sell excess petroleum stores and credit those proceeds to applicable appropriations. The Panel also recommended a modification in DFSC's authority to contract for storage and management of fuels to accommodate management-only contracts.

Similarly, DFSC sought repeal of a prohibition on the purchase of Angolan petroleum products. However, this provision was recently modified in the National Defense Authorization Act for FY 1993.<sup>4</sup> Under this modification, the prohibition ceases to become effective upon certification by the President that free and fair elections have been conducted in Angola. As set forth in the individual analysis for this provision, the Panel recognizes that, from an acquisition policy point of view, the prohibition significantly impedes economy and efficiency in petroleum acquisition. However, because of recent congressional action on this issue, the Panel makes no formal recommendation in this area.

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<sup>1</sup>Comments had initially been received from these offices telephonically. However, they subsequently indicated their endorsement of these recommendations by written memoranda. Letter from Ms. Kay Bushman, Associate Counsel, DFSC Office of Counsel, to Ms. Theresa Squillacote, dated 11 December 1992. Letter from Mr. Millard E. Carr, Assistant Director for Energy Policy, Energy Policy Directorate, Office of the Assistant Secretary of Defense (Production & Logistics), to Ms. Theresa Squillacote, dated 15 December 1992. For ease of reference, these supporting memoranda are not cited in each, individual analysis.

<sup>2</sup>Letter from Mr. Urvan R. Sternfels, President, National Petroleum Refiners Association, to Ms. Theresa Squillacote, Acquisition Law Task Force, dated 7 May 1992.

<sup>3</sup>Letter from Mr. John P. Janeczek, Assistant General Counsel (Procurement), Department of the Air Force, to Ms. Theresa Squillacote, Acquisition Law Task Force, dated 4 August 1992.

<sup>4</sup>Pub. L. No. 102-484, § 842, 106 Stat. 2468 (1992).

Other sections were essentially policy-related enactments, mandating environmentally sound acquisition practices by the DOD. In the absence of any significant burden on acquisition practices, these sections were recommended for retention.

Sections 2481, 2483, and 2490 granted authority to sell excess utility services. These sections were not recommended for consolidation into a single section because they were uniquely designed to parallel other, specific legislation.

Finally, the Panel recommends that this body of law be collected within Title 10 into a single chapter dealing exclusively with fuel and energy-related acquisition.

### 3.7.1. 10 U.S.C. § 2388

#### Liquid Fuels, Contracts for Storage

##### 3.7.1.1. Summary of Law

This section provides that the Secretary of a military department may contract for the storage, handling, and distribution of liquid fuels for up to five-year periods, with options to renew for additional five-year periods up to 20 years. It further provides that such contracts must cover facilities approved by the Secretary of Defense for petroleum facilities. Finally, the section provides that such contracts may include an option for purchase of the facility by the United States without regard to limitations in 31 U.S.C. § 3324 (stating that a contract payment may not be more than the value of the article or service, and restricting advances of public money).

##### 3.7.1.2. Background of Law

This law was enacted in 1956 by the Act Authorizing Construction for the Military Departments.<sup>1</sup> The Senate Report indicated that the legislation represented an attempt to provide for the dispersal of emergency fuel stocks outside of areas that would be vulnerable to attack in the event of hostilities.<sup>2</sup> The Report stated that the department had been attempting to develop such a program, but had found that the commercial petroleum storage industry was unwilling to enter into such contracts outside normal commercial areas. This reluctance stemmed from the fact that, under existing laws, leases for such facilities were limited to one-year terms, making their cost, particularly outside commercial areas, unattractive to industry. This law was proposed by DOD, therefore, in order to induce industries to engage in the storage of petroleum outside of their normal storage areas.<sup>3</sup>

##### 3.7.1.3. Law in Practice

The Defense Fuel Supply Center, Office of Counsel (DFSC-G) reports that it continues to utilize the authority at subsection (a) to enter into long-term leasing arrangements for storage of fuels and management of tank farm facilities and that DFSC wishes to retain this authority. The sole issue DFSC-G raises is that it is unable, under this subsection, to enter into contracts solely for contractor management of such facilities on government-owned property. This issue arises because the language of the subsection authorizes contracts for "storage, handling, *and* distribution . . . (emphasis added)." DFSC-G recommends that this language be amended as set forth below to authorize "build-to-lease" contracts. This authority would be useful to the DFSC because of its frequent need to provide for management of individual storage facilities on government property that are not aggregated at tank farms. DFSC-G also notes that, with the present drawdown, it will have too much storage in one place and not enough in another place. If

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<sup>1</sup>Act of Aug. 3, 1956, § 416, 70 Stat. 1018 (1956).

<sup>2</sup>S. REP. NO. 2364, 83th Cong., 1st Sess. 434 (1958).

<sup>3</sup>*Id.*

it can quickly contract for smaller amounts of additional storage, especially at existing government locations, and eliminate other, larger storage facilities, it can realize significant savings.

Also, because DFSC has recently begun purchasing natural gas for DOD, its Office of Counsel suggests the addition of the phrase "natural gas" after the words "liquid fuels" to align the section with its new mission.

DFSC-G recommends that the language of subsection (b) be repealed as obsolete. This subsection essentially requires that storage facilities covered by contracts entered into under this section conform to technical standards prevalent in the early 1950s for hardened underground storage facilities. Such standards are now technically out-of-date and strategically obsolete as well.

With respect to subsection (c), DFSC-G continues to use this authority to exempt these long-term contracts from otherwise applicable fiscal requirements in Title 31. DFSC-G recommends its retention in full.

#### **3.7.1.4. Recommendations and Justification**

##### **I**

**Amend subsection (a) to provide separate authority to contract for storage or handling; add natural gas; vest authority in Secretary of Defense and secretaries of the military departments.**

(a) The Secretary of Defense or secretary of a military department may contract for storage facilities for, or the storage, handling and/or distribution of, liquid fuels or natural gas. Such contracts may be entered into for periods of not more than five years, with option to renew for additional periods of not more than five years each, but not for more than a total of 20 years.

This amendment would facilitate more efficient management of DFSC's role in acquiring fuel and natural gas for DOD by permitting it to contract solely for operation of storage tank facilities, even when not aggregated at a privately-owned tank farm. Such authority is particularly useful in this era of budgetary restrictions.

The Panel would add the term "natural gas" to conform the section to the newly-acquired natural gas mission of DFSC. The Panel would also amend the section to vest the authorities in both the Secretary of Defense and the secretaries of the military departments.

##### **II**

**Repeal subsection (b).**

This subsection should be deleted as authority that no longer serves a valid purpose because it references technical requirements that have become obsolete.

### III

#### Retain subsection (c) in its entirety.

Subsection (c) should be retained in its entirety. It continues to facilitate long-term contracting under this section by exempting such contracts from certain fiscal requirements that would otherwise prohibit such contracting.

#### 3.7.1.5. Relationship to Objectives

Amendment of this statute will promote the best interests of DOD by providing needed flexibility and greater economy and efficiency in contracting for petroleum and natural gas storage and management.

#### 3.7.1.6. Proposed Statute

##### **Liquid fuels and natural gas: contracts for storage, handling, ~~and~~ or distribution**

(a) ~~The Secretary of Defense or secretary of a military department may contract for the storage facilities for, or the storage, handling and/or distribution of, liquid fuels or natural gas. Such contracts may be entered into storage, handling, and distribution of liquid fuels~~ for periods of not more than five years, with options to renew for additional periods of not more than five years each, but not for more than a total of 20 years.

~~(b) This section applies only to facilities that conform to standards prescribed by the Secretary of Defense for protection, including dispersal, and that are in a program approved by the Secretary of Defense for the protection of petroleum facilities.~~

~~(e)~~ (b) A contract under this section may contain an option for the purchase by the United States of the facility covered by the contract at the expiration or termination of the contract, without regard to subsections (a) and (b) of section 3324 of title 31, and before approval of title to the underlying land by the Attorney General.

## **3.7.2. 10 U.S.C. § 2394**

### **Contracts for Energy or Fuel for Military Installations**

#### **3.7.2.1. Summary of Law**

This section authorizes the Secretary of a military department to enter into contracts for up to 30 years when contracting for the development of geothermal energy, or for the operation of energy production facilities on Department or private property. Such contracts may be entered into only after approval by the Secretary of Defense and notification to the congressional committees. The costs of such contracts may be paid from annual appropriations.

#### **3.7.2.2. Background of Law**

This section was first enacted by the Military Construction Authorization Act for FY 1979.<sup>1</sup> The Conference Report indicated that the primary purpose of this section was to permit the military departments to enter into arrangements with contractors, when in the interests of national defense to provide and operate energy production facilities on military property for periods not to exceed 30 years.<sup>2</sup> It was intended to encourage the development of geothermal energy resources where they may exist on military lands. The provision was not intended to apply to lands under the jurisdiction of the Secretary of the Interior or to the development of energy from nuclear or fossil fuel sources.<sup>3</sup>

When the source law was codified in 1982, the Senate Committee Report stated:

Should a public or quasi-public entity propose an energy or fuel production facility to serve a region, the payment of a proportionate share of the capital cost by a military department would be entirely appropriate, just as a military department may contribute to the capital cost of regional water or sewer systems. The use of the authority of this section is not intended to enable a military department to compete with a public or private utility. It is intended to permit the exploration of a wide range of co-generation possibilities so that the conservation of scarce resources may be maximized.<sup>4</sup>

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<sup>1</sup>Pub. L. No. 95-356, § 803(a), 95 Stat. 585 (1978).

<sup>2</sup>S. Rep. No. 1448, 95th Cong., 2d Sess. 61 (1978).

<sup>3</sup>*Id.*

<sup>4</sup>H.R. REP. No. 612, 97th Cong., 2d Sess. 30 (1982).

### **3.7.2.3. Law in Practice**

The Office of the Assistant Secretary of Defense (Production & Logistics), Energy Policy Directorate, reports that this section is relied upon for co-generation third-party contracting within DOD. That Office further states that this program has been very successful. At least ten long-term contracts, avoiding large investment of capital by the Department, are in existence.

The Energy Policy Directorate recommends retention of this section in its entirety and states that no problems exist in the implementation of this statute that would warrant changes.

### **3.7.2.4. Recommendation and Justification**

#### **Retain**

This law should be retained. The goal sought by this statute, the involvement of DOD in the development of geothermal, co-generation facilities remains a valid one. The Department reports that the program generated by this statute has been highly successful.

### **3.7.2.5. Relationship to Objectives**

Retention of this statute will further the best interests of DOD by promoting environmentally and financially sound acquisition practices by the Department.



### **3.7.3. 10 U.S.C. § 2394a**

## **Procurement of Energy Systems Using Renewable Forms of Energy**

### **3.7.3.1. Summary of Law**

This section provides that, when procuring energy systems, the Secretary of a military department shall procure systems that use solar energy or other renewable forms of energy when they are cost effective and suitable to the energy need. The section requires the Secretary of Defense periodically to study the suitability of solar and other renewable energy sources and to develop appropriate guidelines. The section then defines the term "cost effective" for purposes of the statute.

### **3.7.3.2. Background of Law**

This section was originally enacted by a portion of the Military Construction Authorization Act known as the DOD Renewable Energy Utilization Act for FY 1983.<sup>1</sup> That bill was premised upon the belief that national dependence on foreign oil sources threatened the long-term economic and military security of the United States and was particularly harmful to DOD, given the critical importance of energy to virtually all DOD activities. The legislation was intended to provide a mechanism for DOD to participate in the commercialization of solar and other renewable energy technologies by mandating their use within the department when appropriate and cost effective.<sup>2</sup>

The National Defense Authorization Act for Fiscal Year 1991 repealed a congressional reporting requirement contained in the original legislation.<sup>3</sup> The 1992 life cycle costing factor was subsequently amended to conform to that factor used by other federal agencies pursuant to the National Energy Conservation Policy Act (42 U.S.C. § 8254(a)).<sup>4</sup>

### **3.7.3.3. Law in Practice**

This section is implemented in part by DOD Instruction 4170.10 (Energy Management Policy, August 8, 1991). At paragraph 4, that Instruction states that it is DOD policy to minimize energy use while meeting operational mission support requirements. That goal is to be met in part through the use of cost effective and reliable renewable energy sources pursuant to 10 U.S.C. § 2394a.

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<sup>1</sup>Pub. L. No. 97-321, § 801(a)(1), 96 Stat. 1569 (1982). This legislation was originally introduced in 1981, but enacted in the subsequent year.

<sup>2</sup>127 Cong. Rec. 27778-779 (Nov. 17, 1981)(remarks of Rep. Mavroules).

<sup>3</sup>Pub. L. No. 101-510, § 1322(a)(7), 104 Stat. 1671 (1990).

<sup>4</sup>Pub. L. No. 102-25, § 701 (g)(2), 105 Stat. 115 (1991).

The Energy Policy Directorate, Office of the Assistant Secretary of Defense (Production & Logistics), reports that this legislation has resulted in increased use of renewable energy technologies within the department, and particularly of passive solar technology. That Office reports no ongoing problems with this program that might warrant statutory revision. A problem with life cycle costing was corrected in 1992.

#### **3.7.3.4. Recommendation and Justification**

##### **Retain**

This law should be retained. The law continues to serve the valid purpose of promoting the use of renewable energy sources within the department when appropriate and cost effective. DOD continues to consume a significant portion of federal fuel purchases. As one of the largest single consumers of fuel purchased by the Federal government, it is appropriate to maintain specific legislation aimed at DOD and designed to encourage its use of renewable energy sources.

#### **3.7.3.5. Relationship to Objectives**

Retention of this statute will serve the best interest of DOD by providing greater flexibility in the acquisition and use of energy sources.

### **3.7.4. 10 U.S.C. § 2398**

## **Procurement of Gasohol as Motor Vehicle Fuel**

### **3.7.4.1. Summary of Law**

This section provides that the Secretary of Defense shall contract to purchase domestically produced alcohol or alcohol-gasoline blends to operate DOD motor vehicles when feasible and consistent with overall defense needs. The section requires the Secretary of Defense to purchase an alcohol-gasoline blend whenever the Secretary contracts for unleaded gas for non-DOD vehicles. Bids for such contracts shall include a request for bids on domestic content alcohol-gasoline blends. Finally, the section requires the Secretary of Defense to review all exemptions to gasohol purchase requirements and to report the results to the congressional defense committees.

### **3.7.4.2. Background of Law**

This section was originally enacted by the DOD Authorization Act for FY 1980.<sup>1</sup> The Conference Report indicated that the provision was designed to encourage the use of alcohol and alcohol blends as a fuel in military motor vehicles.<sup>2</sup>

The National Defense Authorization Act for Fiscal Years 1992-93 amended this section to provide for the mandatory gasohol purchase whenever taxed unleaded gasoline is purchased. It also provided for the exemption review.<sup>3</sup>

A similar provision at 42 U.S.C. § 8871 provides that:

The President shall, by executive order, require that motor vehicles which are owned or leased by Federal agencies and are capable of operating on gasohol shall use gasohol where available and in reasonable quantities.

### **3.7.4.3. Law in Practice**

This section is implemented by Executive Order 12261, "Gasohol in Federal Motor Vehicles," January 5, 1981 and Defense Energy Policy Memorandum 88-5, "Gasohol Acquisition, Handling and Use," October 13, 1988. Under the latter memorandum, various exemptions from gasohol purchases are available to the military departments and defense agencies using gasoline.

This gasohol purchase requirement has recently been studied by the DOD. In a March 1992 report to the congressional defense committees on the use of gasohol, the Assistant

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<sup>1</sup>Pub. L. No. 96-107, § 815, 93 Stat. 817 (1979).

<sup>2</sup>H.R. CONF. No. 546, 96th Cong., 2d Sess. 721 (1979).

<sup>3</sup>Pub. L. No. 102-190, § 841(a), 105 Stat. 1448 (1991).

Secretary of Defense (Production & Logistics) reported that, in 1990-91, 3.6% of Federal gasoline requirements were met by using gasohol. However, after reviewing the exemptions granted (some 2,200 in that year), the DOD concluded that all blanket exemptions would be terminated, and that future specific exemptions would be granted only after greater scrutiny by the reviewing authority.

DFSC Office of Counsel and the Energy Policy Directorate, Assistant Secretary of Defense (Production & Logistics) recommend retention of this statute.

#### **3.7.4.4. Recommendation and Justification**

##### **Retain**

This law should be retained. The statute continues to serve the valid purpose of promoting the use of gasohol as a substitute for the purchase of unleaded gasoline. Although arguable parallel legislation exists in Title 42, the provisions of this section are more narrowly tailored to meet the specific needs of the DOD. For example, this section provides the Secretary of Defense with greater discretion to determine the feasibility of gasohol use in light of overall defense needs than that which exists at 42 U.S.C. § 8871.

In addition, the recent legislative action in this area and the internal DOD review indicate that this program has not become sufficiently established within DOD practices as to warrant repeal or revision.

#### **3.7.4.5. Relationship to Objectives**

Retention of this statute will serve the best interest of DOD by providing greater flexibility in the acquisition and use of energy sources.

### **3.7.5. 10 U.S.C. § 2404**

## **Acquisition of Petroleum, Authority to Waive Procedures**

### **3.7.5.1 Summary of Law**

This section provides that the Secretary of Defense may waive the application of any contract formation law or procedure for the purchase of petroleum when market conditions have adversely affected or will soon adversely affect the purchase of petroleum and the waiver will facilitate the acquisition of petroleum. The waiver may be made for a single contract, a subcontract or for a class of contracts.

Under this section, the Secretary of Defense may also acquire petroleum by exchange of petroleum or its derivatives.

### **3.7.5.2. Background of Law**

This section was originally enacted by the DOD Authorization Act for FY 1985.<sup>1</sup> It was intended to facilitate the acquisition of petroleum in an emergency and to provide flexibility to enable the DOD to respond to changes in market conditions.<sup>2</sup>

### **3.7.5.3. Law in Practice**

As implemented by DOD Instruction 4220.8 (Dec. 20, 1985), and DOD Instruction 4170.10 (August 8, 1991), the authority conferred by this provision is treated as exceptional authority to be exercised only when market conditions have or are expected to have an adverse effect on DOD's ability to acquire petroleum.

The Secretary of Defense's waiver authority under this statute has been delegated to the Assistant Secretary of Defense (Production and Logistics). The Director of the Defense Logistics Agency (DLA) may exercise this authority for single contracts in limited circumstances.

Defense Fuel Supply Center, Office of Counsel (DFSC-G) reports that the waiver authority in this statute was exercised by the Assistant Secretary during Operation Desert Shield to exempt certain petroleum purchases from Trade Agreements Act requirements that prohibit purchases from GATT non-signatories, and from CAS requirements. The Director, DLA, also utilized this authority during Operation Desert Shield to exempt a specific, Shell Oil contract from the prohibition on purchase of petroleum processed from Angolan crude oil.

DFSC-G also reports that their agency makes extensive use of the exchange authority provided at subsection (c). DFSC-G notes, however, that numerous situations have arisen in

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<sup>1</sup>Pub. L. No. 98-525, § 1234(a), 98 Stat. 2604 (1984).

<sup>2</sup>H.R. CONF. REP No. 1080, 98th Cong., 2d Sess § 1231 (1984).

which broader exchange authority would have contributed to greater economy and efficiency in the management and acquisition of fuel and other energy sources. Specifically, DFSC-G would like this exchange authority to be broadened to encompass petroleum-related services (such as storage) and natural gas products. DFSC acquired its current, natural gas mission after this section was originally enacted.

DFSC would also like direct authority to sell excess petroleum products in its inventory. DFSC cites instances in which the administrative burden and cost inefficiencies associated with an exchange would be greater than the resultant savings and less cost-efficient than a sale.

For example, DFSC has had quantities of leaded motor gasoline in Europe that it was unable to use or advantageously exchange in Europe because of restrictions on the use of leaded fuel currently being enacted throughout Europe.

Further, in some areas DFSC maintains oversupplies of fuel that, while still usable, is inefficient because the cost of long-term storage is high and no exchange is possible with a local entity. Specifically, in Florida, DFSC is holding approximately 22,000 barrels of aviation fuel which it could advantageously sell, but not exchange, to a local entity. DFSC has contracted to exchange this fuel, but at less advantageous terms than its sale would have provided.

DFSC estimates that it would utilize authority to sell approximately twice annually, but also expects that its use of such authority would increase greatly during the impending military build down.

The Assistant Secretary of Defense (Production & Logistics), Energy Policy Directorate, concurs in this recommended amendment.

#### **3.7.5.4. Recommendation and Justification**

##### **Amend to provide authority to sell**

The waiver authority set forth in this section should be retained. It continues to serve a valid purpose by providing DOD with the flexibility necessary to adapt its petroleum purchases to market conditions. This authority is particularly important for fuel purchases because of the critical role of that product in military readiness. The use of this authority during Operation Desert Shield clearly demonstrates that fact.

Further, the section should be amended as proposed by the DFSC. The amendment would bring the authority up to date by encompassing the DFSC's natural gas mission within the statute's exchange authority. Also, the additional language at the new, proposed subsection (e) authorizing the Secretary of Defense to sell petroleum when in the public interest would encourage economy and efficiency within fuel management and acquisition by permitting DOD to sell excess or outdated inventory when it is more economical and efficient than exchanging such products.

### **3.7.5.5. Relationship to Objectives**

Amendment of this statute will serve the best interests of DOD by providing greater flexibility in petroleum purchasing by the DOD.

### **3.7.5.6. Proposed Statute**

#### **§ 2404 Acquisition of petroleum: authority to waive contract procedures**

(a) The Secretary of Defense may, for any purchase of petroleum, waive the application of any provision of law prescribing procedures to be followed in the formation of contracts, prescribing terms and conditions to be included in contracts, or regulating the performance of contracts if the Secretary determines-

(1) that petroleum market conditions have adversely affected (or will in the near future adversely affect) the acquisition of petroleum by the Department of Defense; and

(2) the waiver will expedite or facilitate the acquisition of petroleum for Government needs.

(b) A waiver under subsection (a) may be made with respect to a particular contract or with respect to classes of contracts. Such a waiver that is applicable to a contract for the purchase of petroleum may also be made applicable to a subcontract under that contract.

(c) The Secretary of Defense may acquire petroleum or petroleum-related services by exchange of petroleum or petroleum derivatives related sources.

(d) In this section, the term "petroleum" means natural or synthetic crude, blends of natural or synthetic crude, blends of natural or synthetic crude, and products refined or derived from natural or synthetic crude or from such blends, and natural gas.

(e) The Secretary of Defense may sell petroleum that is in inventory if the Secretary determines that the sale would be in the public interest. Proceeds from such a sale shall be credited to authorized accounts. Funds so credited are available for obligation for the same period as the funds in the account so credited.

### **3.7.6. 10 U.S.C. § 2481**

#### **Utilities and services; sale, expansion**

##### **3.7.6.1. Summary of Law**

This law provides that the Secretary of a military department or designee may sell to purchasers, within or in the immediate vicinity of a military department activity, various public utilities and related services when no local source is available and when the sale is in the national or public interest. The section further provides that receipts from such sales shall be credited to the applicable appropriation and that minor expansions of existing systems may be made to accommodate such sales.

##### **3.7.6.2. Background of Law**

This law was originally enacted by the 1947 Act Permitting the Secretaries of the Navy and War to Supply Utilities to Persons in Vicinity of Naval or Military Activities.<sup>1</sup> The legislative provision had been initially proposed by the Secretary of the Navy because previously existing authority for such sales was both temporary and too restrictive. The desire for such permanent authority was motivated by the restrictive housing conditions existing after World War II when greater housing opportunities in remote areas were being sought.<sup>2</sup>

##### **3.7.6.3. Law in Practice**

The Assistant Secretary of Defense (Production & Logistics) and various military department offices such as the Army Housing and Engineering Office, the Army Litigation Center, and the Army Energy Policy Directorate report that this statute is currently relied upon by DOD to provide exactly the type of service originally envisioned -- the provision of utility and related services to private residents in remote areas where such services are otherwise unavailable. These Offices further report that the statute operates adequately to meet its intended purpose and that no statutory revisions are needed.

##### **3.7.6.4. Recommendation and Justification**

#### **Retain**

This law should be retained in its entirety. It continues adequately to serve a valid purpose and the authority to sell such services is not expressly available under any other statute.

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<sup>1</sup>Pub. L. No. 80-211, ch. 394, 61 Stat. 675 (1947).

<sup>2</sup>S. REP. NO. 463, 80th Cong., 1st Sess. 1-3 (1947).



### **3.7.6.5. Relationship to Objectives**

Retention of this statute promotes the objective of economy and efficiency within the acquisition process by permitting the sale to the public of excess utility and related services as needed.

### **3.7.7. 10 U.S.C. § 2483**

#### **Sale of electricity from alternate energy and cogeneration production facilities**

##### **3.7.7.1. Summary of Law**

This section provides that the Secretary of a military department may sell to public or private utility companies electrical energy generated from alternate or cogeneration type production facilities under the jurisdiction of that department. Such sales shall be made under regulations consistent with the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>1</sup> The section provides that proceeds from such sales shall be credited to the applicable appropriation.

##### **3.7.7.2. Background of Law**

This law was enacted by the Military Construction Authorization Act of 1985.<sup>2</sup> The relevant conference and committee reports for that Act do not directly discuss this provision.

##### **3.7.7.3. Law in Practice**

The Office of Counsel, Army Engineering and Housing Support Center, and Army Litigation Center/Regulatory Law Office report that this law functions as a companion statute to the PURPA. The PURPA was designed to require public and private utility companies to purchase excess energy from cogeneration facilities operated by independent power producers. This statute complements that Act by authorizing DOD components to sell to these same entities excess energy from similar facilities under military jurisdiction. These offices also report that this statute is extensively relied upon by the military departments to support the sale of excess energy produced by alternative energy and cogeneration facilities under their jurisdiction. Without this authority, these offices maintain that they would be unable to enter into such contracts.

##### **3.7.7.4 Recommendation and Justification**

###### **Retain**

This law should be retained in its entirety. It continues to serve a valid purpose by encouraging environmentally sound acquisition practices within the utility industry and by affording the Department the opportunity to achieve cost savings through the proceeds of excess energy sales. In addition, this same authority is not provided by any other law. Although 10 U.S.C. § 2481 does authorize the sale of "electric power" to purchasers, that statute was not intended to authorize the sale of excess energy from cogeneration facilities. For example, 10 U.S.C. § 2481 does not reference energy produced by alternate energy or cogeneration

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<sup>1</sup>Pub. L. No. 95-617, § 712, 92 Stat. 3117 (1978).

<sup>2</sup>Pub. L. No. 98-407, § 810(a), 98 Stat. 1523 (1984).

production facilities, as referred to in this section. The term "purchasers" in 10 U.S.C § 2481 was intended to mean private residents, not public or private utility companies. Moreover, this section, unlike 10 U.S.C § 2481, states that a military department Secretary may authorize a contractor to sell, thus accommodating Government-owned, contractor-operated facilities. Finally, this section expressly directs that implementing regulations be consistent with the PURPA. Based on these distinctions, it is clear that this law was intended to accomplish a specific policy objective in accord with the PURPA by authorizing the sale of excess energy from cogeneration facilities. Therefore, this statute is not subsumed by the provisions of 10 U.S.C. § 2481.

#### **3.7.7.5. Relationship to Objectives**

Retention of this statute promotes the objective of economy and efficiency within the acquisition process by providing authority for the sale of excess energy from cogeneration facilities.

### **3.7.8. 10 U.S.C. § 2490**

#### **Utility services: furnishing for certain buildings**

##### **3.7.8.1. Summary of Law**

This section provides that DOD appropriations may be used to provide utility services for private buildings and recreational buildings on military reservations.

##### **3.7.8.2. Background of Law**

This law was originally enacted by the DOD Authorization Act for Fiscal Year 1986.<sup>1</sup> The conference and committee reports for that legislation do not contain any reference to this particular provision.

##### **3.7.8.3. Law in Practice**

The Army Housing and Engineering Office, Office of Counsel, and the Army Litigation Center, Regulatory Law Office, report that this statute is currently relied upon by DOD components to provide utility services on a nonreimbursable basis to private entities, such as fast-food restaurants, that lease space on a military reservation and that are otherwise without direct access to such utility services. This law is also used to provide nonreimbursable utility services to nonappropriated fund activities located on military reservations. The ability to provide nonreimbursable utilities to these types of entities is needed in order to facilitate their business operations on military reservations. Without this law, DOD components would be unable to provide utility services on a nonreimbursable basis.

##### **3.7.8.4. Recommendation and Justification**

###### **Retain**

This law should be retained in its entirety as it continues to serve a valid purpose within the Department. Additionally, this authority is not provided by any other statutory provision.

##### **3.7.8.5. Relationship to Objectives**

Retention of this section promotes the best interests of DOD by providing a means of assisting commercial facilities and services and nonappropriated fund activities on military reservations.

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<sup>1</sup>Pub. L. No. 99-190, § 101(b), 99 Stat. 1185 (1985).

### **3.7.9. 10 U.S.C. § 2690**

#### **Fuel sources for heating systems**

##### **3.7.9.1. Summary of Law**

This statute provides, at subsection (a), that the primary fuel source to be used in any new heating system constructed on military department lands must be the source that is most cost effective over its life cycle.

The statute also provides, at subsection (b), that heating systems at military installations in Europe may not be converted from coal to oil or any other energy source unless the conversion is required by the host government or is cost effective. Notice of the conversion must first be submitted to Congress.

##### **3.7.9.2. Background of Law**

As originally enacted in 1980, this section provided that new gas or oil heating systems could not be constructed on military department lands except in rare and unusual cases.<sup>1</sup> A comparable requirement had been set forth in DOD appropriations bills for many years.<sup>2</sup>

In 1986, this section was amended by the National Defense Authorization Act for Fiscal Year 1987.<sup>3</sup> At that time, there was an increasing concern in the Federal Republic of Germany over the environmental impact of the continued use of coal at U.S. facilities there. (Extant DOD appropriation law then prohibited U.S. facilities in Germany from converting from coal to local sources of heat). The House version of the bill had contained a provision that would have directed the military to convert from coal to local heat in Germany. The Senate version, which was ultimately enacted, prohibited the military from converting in Europe from coal to any other source unless required by the host government or unless life cycle cost effective.

##### **3.7.9.3. Law in Practice**

The Energy Policy Directorate, Assistant Secretary of Defense (Production & Logistics), reports that this provision adequately serves the Department's interests and is not harmful to the economic use of energy sources in Europe.<sup>4</sup>

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<sup>1</sup>The Military Construction Authorization Act for FY81, Pub. L. No. 96-418, §§ 806 and 807, 94 Stat. 1749 (1980).

<sup>2</sup>S. Rep. No. 915, 96th Cong., 2d Sess. 4 (1980).

<sup>3</sup>Pub. L. No. 99-661, § 1205(a)(1), 100 Stat. 3971 (1986).

<sup>4</sup>Letter from Mr. Jeffrey Jones, Director, Energy Policy Directorate, Assistant Secretary of Defense, (Production and Logistics), to Mr. Donald Freedman, Acquisition Law Task Force, dated 28 May 1992.

#### **3.7.9.4. Recommendation and Justification**

##### **Retain**

This section should be retained in its entirety. At subsection (a), the military departments are afforded the opportunity to use fuel sources that are deemed most cost effective. This current version of the law promotes economy and efficiency in the acquisition of heating systems within DOD. At subsection (b), this statute sets forth various requirements on the conversion of established heating systems in Europe. This provision is not directly related to the acquisition of heating systems by the Department but rather deals with the management of systems that are already in place. Therefore, this subsection is outside the scope of the Panel's review.

#### **3.7.9.5. Relationship to Objectives**

Retention of subsection (a) of this statute promotes the best interests of DOD by permitting it to convert to gas or oil heating systems when cost effective and by otherwise authorizing the use of the most cost effective heating systems on military department lands.

**3.7.10. Public Law Number 99-661, § 316; Public Law Number 102-484, § 842**

**Prohibition on Purchase of Angolan Petroleum Products from Companies Producing Oil in Angola;**

**Purchase of Angolan Petroleum Products**

**3.7.10.1. Summary of Law**

Section 316 of Public Law 99-661 prohibits the Secretary of Defense from entering into contracts with a company for the purchase of petroleum products originating in Angola if that company is engaged in the production of petroleum products in Angola. The section also provides, however, that the Secretary of Defense may waive the limitation when in the best interest of the United States.

Section 842 of Public Law 102-484 provides, however, that this prohibition shall cease to be effective on the date on which the President certifies to Congress that free, fair and democratic elections have taken place in Angola.

**3.7.10.2. Background of Law**

This law was enacted by the National Defense Authorization Act for 1987.<sup>1</sup> The conference report stated that the prohibition was intended to prevent DOD from indirectly furnishing financial support to the Marxist government in Angola.<sup>2</sup> The conferees were concerned, however, that an outright prohibition would have a detrimental effect on the readiness of U.S. armed forces stationed in the Middle East and part of Africa. The waiver authority was intended to grant the Secretary the flexibility to procure such petroleum products when necessary for readiness purposes.<sup>3</sup>

Based on recent political developments in Angola, the prohibition was modified as set forth above. Specifically, elections were held in Angola on September 29 and 30, 1992, under United Nations auspices. Issues were subsequently raised regarding the conduct of the elections. In addition, a second round of presidential balloting is planned. However, on October 27, 1992, the United Nations envoy certified that "with all deficiencies taken into account, the elections held on 29/30 September can be considered to have been generally free and fair." <sup>4</sup>

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<sup>1</sup>Pub. L. No. 99-661, §316, 100 Stat. 3726 (1986).

<sup>2</sup>S. CONF. REP. No. 583, 99th Cong., 2d Sess (1986).

<sup>3</sup>*Id.*

<sup>4</sup>Statement of Miss Margaret J. Ansten, Special Representative of the Secretary-General for Angola, dated 27 Oct. 1992.

### **3.7.10.3. Law in Practice**

Section 316 is implemented by DFARS 225.702, 225.703 and 225.704. Under those regulations, the Secretary of Defense or designee may waive the Angola restriction when in the best interest of the Government.<sup>5</sup> The Secretary of the department involved may approve an exception for other than small purchases after obtaining the advice of the Assistant Secretary of Defense (International Security Affairs) (ASD(ISA)).<sup>6</sup> Further, the advice of ASD (ISA) is not needed for emergency purchases or when supplies are not available from another source and substitute supplies are not acceptable.<sup>7</sup>

In practice, the Defense Fuel Supply Center (DFSC) reports that section 316 significantly limits effective competition in DOD fuel acquisition. That Office notes, for example, that Chevron USA and Shell Oil, two major refiners with production facilities in Angola, cannot bid to supply DOD requirements from certain refineries because they use Angolan crude oil in those refineries. Further, Chevron cannot currently bid to supply oil from its Philadelphia refinery and has been unable to compete in major fuel supply contracting actions in the DFSC Posts, Camps and Stations program and bulk fuel programs as a result.

In addition, Shell Oil cannot bid from its Norco, Louisiana refinery in the DFSC bulk fuel program. Competition in the upcoming conversion of the DFSC bulk fuels program to use of Kerojet (JP-8) will be hindered because several major suppliers of that fuel use Angolan crude.

Finally, DFSC recently had to disseminate special notices to over 1500 different activities in seven states and the District of Columbia to notify DOD activities not to purchase fuel at Chevron stations for a 3-month period under the Government National Credit Card program. This restriction resulted from Chevron's temporary need to use Angolan crude oil at its Port Arthur, Texas refinery.

In response to these problems, DFSC Office of Counsel recommends repeal of section 316. Initially, the Office of the Secretary of Defense, International Security Affairs (OSD/ISA), concurred in that recommendation. However, that Office has recently changed its recommendation in light of the new public law provision conditionally suspending section 316 upon certification of free and fair elections.

### **3.7.10.4. Recommendation and Justification**

#### **No Action**

The Panel notes that the section 316 prohibition creates a substantial burden for fuel procurement, thereby negatively affecting the national defense. The law was intended to prevent defense petroleum procurement from indirectly aiding a country that supported international terrorism.

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<sup>5</sup>DFARS, 48 C.F.R. § 225.703.

<sup>6</sup>DFARS, 48 C.F.R. § 225.703(a)

<sup>7</sup>DFARS, 48 C.F.R. § 225.703(a).



**3.7.10.5. Relationship to Objectives**

Repeal of this statute would serve the best interests of DOD insofar as purchases of fuel are concerned. However, the Panel believes that recent congressional action sets the stage for negating the impact of the statute, which will achieve this objective.

## **3.8. Fiscal Statutes**

### **3.8.0. Introduction**

The Panel considered within the scope of its review numerous statutes, primarily located within Chapter 131 of Title 10, that relate to DOD fiscal authority and budgetary procedures.

Of these statutes, those that dealt with exemptions for various DOD expenditures from anti-deficiency requirements were deemed directly related to DOD acquisition and recommended for retention. The individual analyses for these sections are set forth herein. The Panel considered amendment and consolidation of these statutes into one Title 10 section that would contain all antideficiency laws relevant to the department. However, there was concern that consolidation might alter the legal affect of these exemptions. Therefore, the Panel decided not to alter these statutes in any respect.

The Panel determined that a number of the other fiscal and budgetary Title 10 statutes were not directly related to the DOD acquisition process and hence were outside the scope of the Panel's charter. However, fiscal and budgetary laws do affect the manner in which the DOD can acquire goods and services. Further, many of these sections lent themselves to consolidation or relocation to another section of Title 10.<sup>1</sup> Therefore, because of the arguably close relationship between these types of statutes and the acquisition process, individual analyses of each of these statutes are also set forth in this chapter. The Panel formally recommends no action for each of these laws, but notes that Congress may wish to consider the proposed disposition set forth in each analysis.

Finally, this subchapter also includes a recommended amendment to address the "M" account issue at 31 U.S.C. § 1552a, in order to deal with significant problems arising with both the DOD and its contractors when funds properly obligated on existing contracts are cancelled by operation of law.

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<sup>1</sup>Many of these laws evolved out of the National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 578 (1949), and were part of that effort to broaden the authority of the Secretary of Defense within the Department. See, e.g., 10 U.S.C. §§ 2203 through 2209.

### **3.8.1. 41 U.S.C. § 11 (Revised Statutes, Sec. 3732)**

#### **The Food and Forage Act**

##### **3.8.1.1. Summary of Law**

Section 3732(a) of the Revised Statutes, known popularly as the Food and Forage Act, provides 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, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies which, however, shall not exceed the necessities of the current year.

Section 3732(b) requires that a report be submitted to the Congress when such authority is exercised.

##### **3.8.1.2. Background of Law**

The Food and Forage Act was initially enacted in 1861 by "The Act Making Appropriations for Sundry Civil Expenses for 1862."<sup>1</sup> In conference, the House version of this provision was adopted and included other language relating to the advertising requirements for government contracts.<sup>2</sup>

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<sup>1</sup>H.R. CONF. REP. No. 895, 33d Cong., 1st Sess., (1921).

<sup>2</sup>Cong. Globe, March 2, 1861. The full text of the provision as originally passed provided that:

That all purchases and contracts for supplies or services in any of the departments of the Government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles, or performance of the service, shall be made by advertising a sufficient time previously, for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places, and in the manner in which such articles are usually bought and sold, or such services engaged between individuals. No contract or purchase shall hereafter be made, unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters or transportation; which, however, shall not exceed the necessities of the current year.

The DOD Appropriations Act for 1967 added the reporting requirement without explanation.<sup>3</sup> The Coast Guard Authorization Act for 1985 and 1986 added the exception for the Coast Guard, when not operating as a service in the Navy.<sup>4</sup> The reports for that legislation do not contain discussion of this amending provision.

### **3.8.1.3. Law in Practice**

The DOD Office of General Counsel states The Food and Forage Act authorities "have been used numerous times in the recent past to cover situations where emergent military necessities dictated their use. The most recent use of these statutes was in connection with Operation Desert Storm/Desert Shield where their use formed one of the fundamental building blocks in manning, operating, and maintaining the United States forces."<sup>5</sup> Because of the unique nature of this statute and the applicability of the exemptions solely to DOD, that Office recommends against any change to the statute.<sup>6</sup>

DOD Directive 7220.8 implements the Food and Forage Act exemptions and sets forth specific and narrowly-drawn circumstances in which that authority may be utilized as to the purchase of fuel.

The Defense Fuel Supply Center, Office of General Counsel, did not report any specific instances where the authority of the Food and Forage Act had been expressly utilized.

### **3.8.1.4. Recommendation and Justification**

#### **Retain**

The Panel recommends retention of this section in its entirety. This law is useful because it permits DOD to incur budgetary deficiencies for specified military expenses while responding to military necessities, within a calendar year. The recent use of these anti-deficiency exemptions during Operation Desert Storm/Desert Shield demonstrates the continued utility of this statute and supports the Panel's recommendation to retain.

### **3.8.1.5. Relationship to Objectives**

Retention of this statute promotes the best interests of the DOD by affording needed budgetary flexibility during military emergencies.

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<sup>3</sup>Pub. L. No. 89-687, § 612(e), 80 Stat. 993 (1966).

<sup>4</sup>Pub. L. No. 98-557, § 17(e)(1), 98 Stat. 2868 (1984).

<sup>5</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General), Department of Defense, to Counsel, Acquisition Law Task Force, dated Mar. 2 1992.

<sup>6</sup>*Id*

## **3.8.2. 41 U.S.C. § 11a**

**(Act of June 30, 1921. Sec. 1)**

### **3.8.2.1. Summary of Law**

This section authorizes the Secretary of the Army to incur obligations for fuel to meet the requirements for one year without regard to the current fiscal year and using funds appropriated for the fiscal year in which the contract is made or for the subsequent fiscal year.

### **3.8.2.2. Background of Law**

This language was originally enacted by the Army Appropriation Act of 1922 and was based on a request of the Army Quartermaster General for such authority.<sup>1</sup> During hearings on this legislation, a representative of that office stated:

I would like to explain [the request for this authority]. The reason for asking for that was so that I can make contracts for fuel at the time that the commercial firms make their contract with the wholesalers, that is in March or the 1st of April. At that time they have an agreement with the miners, there is an agreement between the miners and the operators at which the wages are settled for a year and the operators are in a position to make the very best price to the Government for coal. Heretofore, we have been unable to make contracts for any time beyond the fiscal year, and by getting this provision enacted into law it will enable us to make contracts for 12 months, and from the time that the wage scale is settled for the year. In that way we can get the very best rates on coal.<sup>2</sup>

The term "fuel" used in this provision has since been interpreted by the GAO as including gasoline and other petroleum products.<sup>3</sup>

### **3.8.2.3. Law in Practice**

There is no direct, regulatory implementation of this authority.

The Defense Fuel Supply Center, Office of General Counsel, did not report any specific instances where the authority present at 41 U.S.C. § 11a had been expressly utilized by that

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<sup>1</sup>Pub. L. No. 67-27, ch. 33 § 1, 42, Stat. 78(1921).

<sup>2</sup>Hearings, Before the Senate Comm. on Appropriations, 67th Cong., 2nd Sess. 137 (Feb. 13, 1921), (statement of Gen. Rogers).

<sup>3</sup>28 Comp. Gen. 614 (Letter to the Secretary of the Army dated April 22, 1949).

Office. However, that Office strongly urges retention of this authority because of the critical nature of fuel and related products during any national emergency.

#### **3.8.2.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this statute in its entirety. This law is useful because it permits DOD to incur budgetary deficiencies for fuel without regard to the current fiscal year. This authority remains desirable because of the critical nature of fuel and other petroleum products during a military or other national emergency.

#### **3.8.2.5. Relationship to Objectives**

Retention of this statute promotes the best interests of the DOD by affording needed budgetary flexibility during military emergencies.

### 3.8.3. 10 U.S.C. § 2201(b) and (c)

#### Excepted Expenses

##### 3.8.3.1. Summary of the Laws

Subsections (b) and (c) of this statute exempt the costs of airborne alerts and the costs of any increases in active duty military personnel from section 3732(a) of the Revised Statutes (41 U.S.C. 11(a)). That law, also known as the Food and Forage Act, provides in relevant part that no government contract may be made absent an appropriation adequate to fulfill it.

##### 3.8.3.2. Background of the Laws

The language of subsection (b) was initially contained in the House version of the DOD Appropriation Bill of 1960.<sup>1</sup> The House committee report stated its belief that airborne alerts would be necessary as a deterrent and in order to protect strategic forces.<sup>2</sup> However, no funds were then specifically programmed for airborne alerts. Therefore, the Committee included this language for the stated purpose of "giving the President authority to incur a deficiency in Air Force funds at any time he feels it necessary to maintain an airborne alert."<sup>3</sup> The Committee then also included the congressional reporting requirement.

The language contained in subsection (c) initially appeared in the House version of the DOD Appropriation Bill for 1962.<sup>4</sup> Again, the stated intent was to permit the Secretary of Defense "to incur deficiencies in the appropriations chargeable with any, or all, costs incident to an increase in military personnel."<sup>5</sup> That Report also stated that "[t]his authority is similar to that which has been provided in subsection (b) of the section and in the appropriation acts for fiscal years 1960 and 1961 in the case of airborne alert costs."<sup>6</sup>

Both of these freestanding provisions were made permanent law by the DOD Appropriations Act for 1986.<sup>7</sup> They were codified in Title 10 in 1988.<sup>8</sup>

##### 3.8.3.3. Law in Practice

With respect to 10 U.S.C. § 2201(b) and (c), the DOD Office of General Counsel states "that these authorities have been used numerous times in the recent past to cover situations where emergent military necessities dictated their use. The most recent use of these statutes was in

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<sup>1</sup>Pub. L. No. 86-166, § 612, 73 Stat. 366 (1959).

<sup>2</sup>H.R. REP. No. 408, 86th Cong., 1st Sess. 17 (1959).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 87-144, § 612, 75 Stat. 365 (1961).

<sup>5</sup>H.R. REP. No. 653, 87th Cong., 1st Sess. 43 (1961).

<sup>6</sup>*Id.*

<sup>7</sup>Pub. L. No. 99-190, § 101(b), 99 Stat. 1204 (1985).

<sup>8</sup>Pub. L. No. 100-370, § 1(d)(1)(a), 102 Stat. 841 (1988).

connection with Operation Desert Storm/Desert Shield where their use formed one of the fundamental building blocks in manning, operating, and maintaining the United States forces."<sup>9</sup> That Office further recommends no change or consolidation of these anti-deficiency exemptions with any other, pertinent anti-deficiency laws because of their unique applicability to DOD.<sup>10</sup>

There is no direct, regulatory implementation of this statute.

#### **3.8.3.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this section in its entirety. This law is useful because it permits DOD to incur budgetary deficiencies while responding to specified, military emergencies. The recent use of this authority during Operation Desert Storm/Desert Shield demonstrates the continued utility of this section and supports the Panel's recommendation to retain.

#### **3.8.3.5. Relationship to Objectives**

Retention of this statute promotes the best interests of DOD by affording needed budgetary flexibility during military emergencies.

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<sup>9</sup>*Supra* note 5.

<sup>10</sup>*Id.*



### **3.8.4. 10 U.S.C. § 2201(a)**

#### **Apportionment of funds: authority for exemptions**

##### **3.8.4.1. Summary of the Law**

Subsection (a) exempts funds appropriated for military functions from section 1512 of Title 31 (formerly section 3679 of the Revised Statutes). Section 1512 of Title 31 requires that all appropriated funds be apportioned monthly in order to avoid the necessity for a supplemental appropriation.

##### **3.8.4.2. Background of the Law**

The language of subsection (a) was first contained in the DOD Appropriations Act for 1951.<sup>1</sup> The language was inserted into the bill by a floor amendment during the Senate debates.<sup>2</sup> The original language of that amendment had provided that:

Appropriations and contract authority contained in this chapter shall not be subject to the provisions of subsections (c) to (i), inclusive, of section 3679 of the Revised Statutes, as amended by section 1111 of this Act, during the existence of an emergency affecting the national security.

This amendment was reported in disagreement in the Conference Report. Section 630 of that Act ultimately provided that:

During the current fiscal year, appropriations, fund and contract authorizations, available for military functions under the Department of Defense, shall not be subject to the provisions of sub-section (c) of section 3679 of the Revised Statutes, as amended by section 1211 of this Act.<sup>3</sup>

In 1951, the language of subsection (a) was amended by the DOD Appropriations Act for 1952 to provide that "the President may exempt appropriations" from the apportionment requirements.<sup>4</sup> The House Committee Report noted that, by changing 'shall' to 'may,' "the proposed language makes the exemption discretionary rather than automatic."<sup>5</sup>

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<sup>1</sup>Pub. L. No. 81-759, § 630, 64 Stat. 896 (1950).

<sup>2</sup>96 Cong. Rec. 11645 (1950).

<sup>3</sup>As indicated, this same appropriation bill also amended section 3679 of the Revised Statutes to insert the present day apportionment requirement. In so amending, the House authors noted that the anti-deficiency law by itself did not accommodate the modern, more complex budget procedures and that apportionment would serve to eliminate the constant need for supplemental appropriations.

<sup>4</sup>Pub. L. No. 82-532, § 626, 65 Stat. 1413 (1951).

<sup>5</sup>H.R. REP. No. 5054, 82 Cong., 1st Sess., sec. 626 (1950).

This language was omitted from the 1953 DOD Appropriation Act. However, it was reinserted in the 1954 DOD Appropriation Act in the House version.<sup>6</sup> In its discussion of the apportionment requirements at section 3679 of the Revised Statutes, the House Committee noted that the nation's defensive position would soon be reviewed by the Joint Chiefs of Staff, a review that might result in the immediate need for greater appropriations than those that were then being recommended by the Committee.<sup>7</sup> The House Report stated that:

the Committee feels that the Administration will respect the findings as they are reported by the Joint Chiefs, and the time element involved should result in negligible, if any delay. As to the interim period, attention is called to [the provision] which permits the President to exempt Department of Defense funds from the anti-deficiency law. Should developments demand it, all available funds could be obligated and expended within thirty days, if that were possible.<sup>8</sup>

As this 1954 House report indicates, this exemption was intended to provide a greater degree of flexibility to DOD by permitting the expenditure of funds in advance of apportionment.

#### **3.8.4.3. Law in Practice**

The DOD Office of General Counsel states with regard to this authority that "the provisions of section 2201 of Title 10, United States Code . . . are of vital importance to the Department. They have been used numerous times in the recent past to cover situations where emergent military necessities dictated their use. The most recent use of these statutes was in connection with Operation Desert Shield/Desert Storm, where their use formed one of the fundamental building blocks in manning, operating and maintaining the United States forces."

There is no other authority that permits the President to exempt DOD expenditures from apportionment requirements when in the national interest.

#### **3.8.4.4. Recommendation and Justification**

##### **No action**

The flexibility afforded by this section in the rate of expenditure of DOD-appropriated funds remains useful and is not provided by any other statutory authority. This authority was utilized by the department during Operation Desert Storm/Desert Shield, and it is likely that such authority would again be needed in any future military emergency. However, this section does not present any core acquisition issues and has only an indirect relationship to contracting.

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<sup>6</sup>Pub. L. No. 83- 179, § 623, 67 Stat. 604 (1953).

<sup>7</sup>H.R. REP. No. 680, 83rd Cong., 1st Sess. 3-5 (1953).

<sup>8</sup>*Id.*, at 5.

**3.8.4.5. Relationship to Objectives**

**Action on this statute would not specifically promote the objectives of the Panel.**

### **3.8.5. 10 U.S.C. § 2203**

#### **Budget estimates**

##### **3.8.5.1. Summary of the Law**

This section provides that the DOD budget shall be prepared and administered in such form and manner as prescribed by the Secretary of Defense. It further provides that the budgets of the military departments shall be uniform so far as practicable. Finally, it requires that the department budget include line-item information on materiel readiness and contractor employee working hours.

##### **3.8.5.2. Background of the Law**

This section was enacted by the National Security Act Amendments of 1949.<sup>1</sup> The section was intended to mandate the gradual implementation of cost-of-performance budgeting; that is, budgeting based on functions, activities and projects instead of on individual sources of appropriations.<sup>2</sup>

The institution of performance budgeting was intended to strengthen congressional control over DOD expenditures and appropriations otherwise hindered by appropriation-based budgeting. The Senate Report stated: "The multiplicity of sources from which operational funds are now derived makes it practically impossible, in activities of any magnitude, to estimate in advance with any reasonable degree of certainty the cost of performance or operation of an identifiable activity or program. These difficulties prevent accurate and reliable cost accounting and thus deprive budget planners and the Congress of any real guide to the costs of project or budget programs."<sup>3</sup>

In 1982, section 2203 was amended to require that each submitted DOD budget include data analyzing the effect of the requested appropriations on materiel readiness requirements.<sup>4</sup> No legislative history is available for this amendment.

In 1986, section 2203 was amended again to require that each budget include data, in the same form as utilized for federal employees, on the number of contractor employees working on DOD contracts during the fiscal year for that budget.<sup>5</sup> The amendment was intended to provide Congress with information to improve its ability to judge the merits of decisions to contract out workload and services and the impact of such decisions on the DOD civilian work force.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 87-651, § 207(a), 76 Stat. 520 (1949).

<sup>2</sup>S. REP. NO. 366, 87th Cong., 2d Sess. 142, 43 (1949).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 97-295, § 1(1), 96 Stat. 1290 (1982).

<sup>5</sup>Pub. L. No. 99-661, § 311, 100 Stat. 3851 (1986).

<sup>6</sup>H.R. REP. NO. 99-718, 99th Cong., 2d Sess. 118 (1986).

### 3.8.5.3. Law in Practice

The provisions of this section duplicate, in part, law set forth elsewhere within the U.S. Code. That is, Title 31 of the U.S. Code already requires all executive agencies to utilize cost-of-performance budgets. Section 1108(b)(1) of Title 31 requires that:

"[t]he head of each agency shall prepare and submit to the president each appropriation request for the agency. . . . Agency appropriation requests shall be developed from cost-based budgets in the way and at times prescribed by the President. The head of the agency shall use the cost-based budget to administer the agency and to divide appropriations or amounts.

However, with respect to this provision of law, the DOD Office of General Counsel maintains that "the provisions of this section are . . . far broader than the provisions of section 1108 of Title 31, United States Code." This statute provides specific authority to the Secretary of Defense to prescribe the form, content, and manner of preparation of the Department of Defense budget. It forms the cornerstone of the planning, programming, and budgeting system of the department. This flexibility to address Department of Defense requirements in a concise manner should be retained."<sup>7</sup>

Arguably, the Secretary of Defense already retains implicit authority to direct the planning, programming, and budgeting system of the department. Section 113(b) of Title 10 provides that "The Secretary . . . has authority, direction, and control over the Department of Defense." With respect to budget authority, section 113 further provides in part, at subsection (g)(1), that:

The Secretary of Defense, with the advice and assistance of the Chairman of the Joint Chiefs of Staff, shall provide annually to the heads of Department of Defense components written policy guidance for the preparation and review of the program recommendations and budget proposals of their respective components . . . .

### 3.8.5.4. Recommendation and Justification

#### No Action

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

Congress should consider whether this law warrants repeal. The requirement for cost-based budgeting already exists elsewhere within the U.S. Code. Further, it is doubtful that line-

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<sup>7</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General) Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

item information on materiel readiness and contractor employees is necessary for each submitted budget when this information may be gathered on an as-needed basis.

Congress may also wish to consider whether, to state more definitively the Secretary of Defense's authority over the DOD budgetary system, section 113(g) could be amended to add, as subsection (g)(3), the following language:

The Secretary of Defense, subject to the authority and direction of the President, shall direct the budgetary system of the Department of Defense and its components, including prescribing the form and manner of the budget estimates of the Department of Defense and its components. Appropriations made available to the Department of Defense or its components are available for obligation only under scheduled rates of obligations that have been approved by the Secretary of Defense. This section does not prohibit the Department of Defense from incurring a deficiency that it has been authorized by law to incur.

This recommendation is based on the premise that broad statements of the Secretary of Defense's authority, when required, should be contained within one section of Title 10 that delineates the entire scope of the Secretary of Defense's authority.

#### **3.8.5.5. Relationship to Objectives**

Action on this statute will not specifically further any of the Panel's objectives.

### 3.8.6. 10 U.S.C. § 2204

#### Obligation of appropriations

##### 3.8.6.1. Summary of the Law

This section states that the Secretary of Defense may obligate appropriated funds only under preapproved scheduled rates, for the purpose, as stated, of preventing overdrafts or deficiencies.

##### 3.8.6.2. Background of the Law

This section was originally enacted by the National Security Act Amendments of 1949.<sup>1</sup> The section repeats the requirement set forth at section 1512 of Title 31, that all appropriations be apportioned in order to prevent the incurrence of a deficiency. However, the Senate report acknowledged that then-current methods of apportionment, under which apportionments were centrally approved by the Bureau of the Budget, were inadequate to prevent the incurrence of deficits. Under those procedures, the Bureau of the Budget did not have any direct check or control over what the agencies reported to it. Hence, Congress enacted a specific apportionment requirement for DOD.<sup>2</sup> Congress stated, however, that it meant to maintain those statutes permitting the incurrence of deficits in expenditures for fuel, subsistence, and transportation (41 U.S.C. § 11(a)) and when necessary for the national defense (section 3732 of the Revised Statutes).<sup>3</sup>

##### 3.8.6.3. Law in Practice

The DOD Office of General Counsel maintains, with respect to this section:

This statute does far more than repeating [sic] the apportionment requirement of section 1512 of title 31. It provides the Secretary of Defense with the authority to control and manage the execution of the Department's budget by controlling rates of obligations. It gives him the authority to centrally manage budgetary execution. . . . [I]his enactment and placement in title 10 reflects the unique requirements and demands of managing a Department of the size and complexity of the DOD. Its continuation is still necessary and of vital importance to the Department not only with respect to the procurement appropriations but with respect to all DOD appropriations.<sup>4</sup>

<sup>1</sup>Pub. L. No. 87-651, § 207(a), 76 Stat. 506, (1948).

<sup>2</sup>S. REP. NO. 366, 87th Cong., 2d Sess. §406 (1948).

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General) Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

#### **3.8.6.4. Recommendation and Justification**

##### **No Action**

The authority set forth within this statute remains valuable because it is the only statutory authority that expressly permits the Secretary of Defense to maintain control over the rate of expenditure of DOD appropriations. This section does not present any core acquisition issues and has only an indirect relationship to contracting.

However, the Congress may wish to consider whether this section should be repealed and the authority relocated to 10 U.S.C. § 113 as the section that encompasses all broad statements of the Secretary of Defense's authority. The proposed amendment to 10 U.S.C. § 113 is set forth in the analysis for 10 U.S.C. § 2203.

#### **3.8.6.5. Relationship to Objectives**

Action on this statute will not specifically further any of the Panel's objectives.



### **3.8.7. 10 U.S.C. § 2205**

#### **Availability of reimbursements**

##### **3.8.7.1. Summary of the Law**

This section permits reimbursements made to DOD or its components by other executive agencies, by DOD components, or by any department or organization for services rendered or supplies furnished to be credited directly to authorized accounts.

##### **3.8.7.2. Background of the Law**

This section was originally enacted by the National Security Act Amendments of 1949.<sup>1</sup> It was intended to simplify procedures under the Economy Act by permitting the crediting to authorized accounts of reimbursements and sums paid for supplies furnished or for services rendered between the military departments.<sup>2</sup> This section eliminated the then-present necessity, under the Economy Act, of establishing working-fund advance accounts to accommodate the interchange of supplies and services between the military departments. The section was thus ultimately designed to facilitate the integration of DOD.<sup>3</sup> The section was restated to more clearly reflect its purpose when codified in 1962.<sup>4</sup> Minor language changes were made in 1980.

##### **3.8.7.3. Law in Practice**

The DOD Office of General Counsel maintains that this section is necessary for the administration of a department of the size and organizational and operational complexity of the DOD.<sup>5</sup>

Currently, Title 31 still requires that advance payments for interagency orders must be credited to advance, working fund accounts. Section 1536(a) of Title 31 provides:

An advance payment made on an order under section 1535 of this title is credited to a special working fund that the Secretary of the Treasury considers necessary to be established. Except as provided in this section, any other payment is credited to the appropriation or fund against which charges were made to fill the order.

The last sentence of this section, however, permits interagency reimbursements other than advance payments to be credited directly to the agency whose funds were used to fill an order.

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<sup>1</sup>Pub. L. No. 81-216, ch. 412, § 408, 63 Stat. 590 (1949).

<sup>2</sup>S. REP. No. 366, 81st Cong., 1st Sess., 410 (1949).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 87-651, § 207(a), 76 Stat. 520 (1962).

<sup>5</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General) Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

#### **3.8.7.4. Recommendation and Justification**

##### **No Action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

However, the Panel notes that this law continues to promote the desired goal of integration of operations within DOD by permitting the executive agencies within DOD to receive payments, including advance payments, for goods and services provided to each other without complying with Treasury Department procedures.

This section partially duplicates the authority set forth in the last sentence of 31 U.S.C. § 1536(a), which permits direct reimbursements for payments on interagency orders. However, absent this section, there is no other law that permits DOD executive agencies directly to receive advance payments for goods or services that it provides to other executive agencies.

#### **3.8.7.5. Relationship to Objectives**

Action on this statute will not specifically further any of the Panel's objectives.

### **3.8.8. 10 U.S.C. § 2206**

#### **Disbursement of funds of military department to cover obligations of another agency of Department of Defense**

##### **3.8.8.1. Summary of the Law**

This law permits the Secretary of Defense to authorize a disbursing official of one department to disburse funds on behalf of another.

##### **3.8.8.2. Background of the Law**

This section was enacted by the National Security Act Amendments of 1949.<sup>1</sup> It was intended to provide for greater economy and efficiency within DOD, as well as greater integration among the military departments, by making the disbursing and accounting facilities of one department available to the other departments, particularly in areas where the work load of a separate facility is insufficient to warrant the maintenance of separate facilities.<sup>2</sup>

##### **3.8.8.3. Law in Practice**

This section is implemented by DOD Directive 7300.4, "Appointment of Disbursing Agents and Responsibility for Entrusted Funds."

It is not clear that the Secretary of Defense would have this authority absent this section. Section 125(a) of Title 10 does provide that "the Secretary of Defense shall take appropriate action (including the transfer, reassignment, consolidation, or abolition of any function, power or duty) to provide more effective, efficient, and economical administration and operation, and to eliminate duplication, in the Department of Defense . . ." except those duties that are vested by law. Under section 3321 of Title 31, the authority of a disbursing official to disburse funds may only be delegated by the Secretary of the Treasury; hence, it is authority that is vested by law. Therefore, it is not clear that the Secretary of Defense would retain authority, under section 125 of Title 10, readily to consolidate interservice disbursing authority in one official.

The only other authority within the U.S. Code permitting interagency disbursing within DOD limits that authority to situations where it is specifically requested by the Secretary of the Treasury. After stating the general rule that only the Secretary of the Treasury or his delegate may designate disbursing officials, section 3321 of Title 31 further provides that:

(c) The head of each of the following agencies shall designate personnel of the agency as disbursing officials. . . .

(2) military departments of the Department of Defense.

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<sup>1</sup>Pub. L. No. 81-216, ch. 412, § 409, 63 Stat. 590 (1948).

<sup>2</sup>S. REP. NO. 366, 81st Cong., 1st Sess. 411 (1949).

(d) on request of the Secretary and with the approval of the head of an executive agency referred to in subsection (c) of this section, facilities of the agency may be used to assist in disbursing public money available for expenditure by another executive agency.

The Department of the Treasury, Office of General Counsel, was unable to provide additional information as to the use of the DOD exception set forth in this statute in its disbursing practices.

With regard to section 2206, the DOD General Counsel maintains that it is necessary for the efficient administration of the DOD.<sup>3</sup>

#### **3.8.8.4. Recommendation and Justification**

##### **No Action**

The authority granted to the Secretary of Defense by this section remains useful and continues to serve the valid purpose of integrating DOD administration. However, this section does not present any core acquisition issues and has only an indirect relationship to contracting.

Nonetheless Congress may wish to consider amending 31 U.S.C. § 3321 (c) and (d), relating to DOD disbursement authority, as set forth below, to add this specific DOD authority. The latter recommendation, amending the Title 31 provision, would seem the preferable alternative because it keeps all statutory authority specifically relating to DOD disbursing authority within one statutory provision and within that portion of the U.S. Code dealing generally with executive agency disbursement procedures.

#### **3.8.8.5. Relationship to Objectives**

Action on this statute would not directly further any of the Panel's objectives.

#### **3.8.8.6. Proposed Statute**

##### **§ 3321. Disbursing authority in the executive branch**

(a) Except as provided in this section or another law, only officers and employees of the Department of the Treasury designated by the Secretary of the Treasury as disbursing officials may disburse public money available for expenditure by an executive agency.

(b) For economy and efficiency, the Secretary may delegate the authority to disburse public money to officers and employees of other executive agencies.

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<sup>3</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General) Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

(c) The head of each of the following executive agencies shall designate personnel of the agency as disbursing officials to disburse public money available for expenditure by the agency:

(1) United States Marshal's Office

(2) ~~military departments of the Department of Defense~~ the Department of Defense and its components (except for disbursements for the departmental pay and expenses in the District of Columbia).

(d)(1) The Secretary of Defense may authorize disbursing officials of Department of Defense components to make disbursements on behalf of other Department of Defense components and to charge those disbursements to the appropriate appropriation of that department or agency;

(2) on request of the Secretary and with the approval of the head of an executive agency referred to in subsection (c) of this section, facilities of the agency may be used to assist in disbursing public money available for expenditure by another executive agency.

### **3.8.9. 10 U.S.C. § 2208**

#### **Working Capital Funds**

##### **3.8.9.1. Summary of the Law**

This section authorizes the use of, and provides overall guidance on, the operation of working capital funds within the DOD.

##### **3.8.9.2. Background of the Law**

Working capital funds were first authorized by the National Security Act Amendments of 1949.<sup>1</sup> Section 407 of that Act provided that the Secretary of Defense may establish funds in DOD to finance inventories of supplies, materials, and equipment as designated (stock funds) and to provide working capital for industrial- and commercial-type activities of the Department (industrial funds). The Conference Report indicated that Congress contemplated that materials with a high obsolescence factor, or semicapital items, would not be included in that designation. The Secretary was empowered to provide capital for such funds by capitalizing inventories on hand and by the transfer of unexpended surplus appropriations, provided that no deficiency was incurred thereby.<sup>2</sup>

The funds were to be charged with the costs of supplies acquired or services consumed. Conversely, the funds were to be reimbursed from available appropriations for supplies furnished or services rendered, including any applicable administrative expenses.<sup>3</sup>

The Secretary of Defense was also authorized to issue regulations governing the operations of such funds. The original section expressly permitted that any such implementing regulations could permit, as otherwise authorized by law, the sale to non-DOD purchasers or users of services or goods produced by the funds. In 1982, this section was amended, without comment, to permanently authorize the sale of supplies in working capital fund inventories to contractors for use in performing DOD contracts.

The stated purpose of the section was more "effectively to control and account for the costs of the programs and work performed, to provide adequate, accurate and current cost data which can be used as a measure of efficiency, and to facilitate the most economical administration and operation of the military departments."<sup>4</sup> The report noted that numerous contemporary studies had commented on the lack of adequate cost accounting under current procedures, which supervised only the allotment of specific appropriations rather than overall programs with

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<sup>1</sup>Pub. L. No. 81-216, ch. 412, §11, 63 Stat. 587 (1949).

<sup>2</sup>S. CONF. REP. NO. 366, 81st Cong., 1st Sess. 407 (1949).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 25.

numerous sources of appropriations. The establishment of stock and industrial funds was intended to eliminate that problem.<sup>5</sup>

These funds would also enhance economy and efficiency in other ways. With stock funds, raw material could be purchased during favorable market conditions, manufactured directly into end items and then purchased at cost. Such accounts would also promote standardization in procurement and storage, "thus facilitating interservice utilization and balancing of stock."<sup>6</sup> Carrying stock items in a single inventory would reduce overall inventory requirements by permitting the reissuance of unused or returned stock.

The DOD Authorization Act for FY84 amended this section to require direct, annual authorization of appropriations to DOD working capital funds beginning in 1985.<sup>7</sup> The House report noted that extraordinary requirements had recently been imposed on Department of Defense working capital funds.<sup>8</sup> These demands required increasingly large, direct appropriations and increasing reassignment of amounts from operation and maintenance accounts to the funds. The report also stated the Committee's belief that the magnitude of these direct appropriations, not now subject to annual authorization, justifies the requirement for annual authorization ". . . to provide a sound basis for coherent, overall oversight of the operation and maintenance accounts and to establish . . . comprehensive review of readiness consideration associated with ongoing and proposed initiatives involving Department of Defense capital working funds."<sup>9</sup> The Senate receded to the House provision without comment.

The DOD Authorization Act for FY85 further amended this section to require that a set percentage of payments received in a fiscal year by the working capital funds be reinvested for capital equipment.<sup>10</sup> This Act also added a provision permitting the sale of large caliber cannons, gun mounts, or recoil mechanisms produced by a working capital-funded Army arsenal to a person outside DOD for use in performing a contract with a U.S. agency or friendly foreign government and under certain enumerated restrictions.<sup>11</sup> Both of these amendments originated in the House bill.

With regard to the requirement of capital reinvestment, the House Committee reported that the provision was an attempt to deal with increasing obsolescence of capital equipment at industrially funded DOD activities.<sup>12</sup> The Committee noted that DOD had developed the Asset Capitalization Program for the express purpose of providing for the future replacement of capital equipment by including the cost of such replacement in prices charged to the customer. However, the House Committee also reported that, while it strongly supported this program, the program had suffered from limited appropriations and inconsistent oversight. Accordingly, the House bill

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<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Pub. L. No. 98-94, §1204, 97 Stat. 683 (1983).

<sup>8</sup>H.R. REP. No. 107, 98th Cong., 1st Sess. (1983).

<sup>9</sup>*Id.*

<sup>10</sup>Pub. L. No. 98-525, §305, 98 Stat. 2513 (1984).

<sup>11</sup>*Id.*

<sup>12</sup>H.R. REP. No. 691, 98th Cong., 2nd Sess. (1984).

mandated set levels of reinvestment into the capital equipment of industrially funded activities. The conferees ultimately limited the reinvestment requirements for a three-year period.<sup>13</sup>

The amendment adding the provision regarding the sale of certain articles produced by working capital-funded Army arsenals was designed to conform section 2208 to section 30 of the Arms Export Control Act.<sup>14</sup> That section authorized the sale to certain U.S. entities of defense items from certain government arsenals for incorporation into items destined for commercial export to friendly foreign countries. However, it did not address those items assembled in an industrially funded facility using both private and government parts. This amendment was solely intended to ensure that all defense items, whether manufactured in a private or in a government plant, receive the same treatment under the Arms Export Control Act.

The National Defense Authorization Act for Fiscal Year 1991 further amended this section to require that purchases of certain articles manufactured at Army arsenals be made by advance, incremental funding.<sup>15</sup> The National Defense Authorization Act for Fiscal Year 1992 also amended this section to authorize the sale of items of equipment from Army working capital-funded industrial activities in certain circumstances.<sup>16</sup>

### **3.8.9.3. Law in Practice**

The DOD Office of General Counsel states with regard to this provision:

The provisions of this statute contain essential authority for the Secretary of Defense to manage and control both existing and any future working capital funds of the Department. It is the authority, for instance, under which the Defense Business Operations fund could have been established, at least in significant part, in the absence of Congressional action. It could serve as the basis for the establishment of any future working capital funds of the Department which might be considered to be necessary. This statute provides the authority for the Department of Defense to manage its commercial and industrial operations in a sound manner and its continuation is of great importance to the Department.<sup>17</sup>

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<sup>13</sup>H.R. CONF. REP No. 1080, 98th Cong., 2nd Sess. 831 (1984).

<sup>14</sup>H.R. REP. No. 691, 98th Cong., 2nd Sess. (1984).

<sup>15</sup>Pub. L. No. 101-510, § 801, 104 Stat. 1 88 (1990).

<sup>16</sup>Pub. L. No. 102-190, § 137, 105 Stat. 1212 (1991)..

<sup>17</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General), Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.



#### **3.8.9.4. Recommendation and Justification**

##### **No Action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting. Rather, it relates primarily to DOD working capital fund operations.

#### **3.8.9.5. Relationship to Objectives**

Action on this statute would not specifically promote any of the Panel's objectives.

### **3.8.10. 10 U.S.C. § 2209**

#### **Management funds**

##### **3.8.10.1. Summary of the Law**

This section provides that management funds may be established and operated by the military departments to finance DOD operations that involve two or more appropriations but where the costs cannot immediately be charged to those appropriations.

##### **3.8.10.2. Background of the Law**

The management funds established by this section were generated by the Navy's experience, in the early 1940s, with its Naval Procurement Fund and with its Naval Supply Account since the early 1900s.

The National Security Act Amendments of 1949 established comparable funds for all the military departments, identifying all of these funds, including the then-existing Navy fund, as Management Funds.<sup>1</sup> "Management funds, as distinguished from working-capital funds, are not continuing or revolving funds. They constitute an allotment of money to a common pool for a special purpose only. They thus provide a management tool for economical and efficient administration of specific joint operations, or operations requiring the support of two or more appropriations, where the costs of the operations are not susceptible of immediate distribution as charges against such appropriations."<sup>2</sup> Along with the adoption of the performance-based budget and use of working-capital funds, the initiation of Management Funds was deemed integral to the modernization of the military departments.

As amended, the Funds granted initial corpora to be augmented by subsequent appropriations. The Secretary of Defense was required to approve each individual account established by the Funds. The Funds were authorized to incur expenses for materials other than stock and for personal and contractual services, provided that all expenditures were properly chargeable to available appropriated funds. All such expenditures would then subsequently be reimbursed by the relevant appropriation.

##### **3.8.10.3. Law in Practice**

The DOD Office of General Counsel states that "the provisions of this statute, relating to the management funds of the Department, should be retained on the same basis that section 2208 should be retained."<sup>3</sup>

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<sup>1</sup>Pub. L. No. 81-216, ch. 402, §11, 63 Stat. 588 (1949).

<sup>2</sup>S. REP. NO. 366, 81st Cong., 1st Sess. 32 (1949).

<sup>3</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General), Department of Defense, to Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

#### **3.8.10.4. Recommendation and Justification**

##### **No Action**

It is clear that the continued use of these funds is necessary for the efficient administration of the department. In addition, the section provides authority to finance a DOD operation by using funds from two or more separate appropriations, and specifically provides for advance payments based on estimated costs in such operations. It does not appear that this same fiscal authority is present elsewhere in the U.S. Code. However, this section does not present any core acquisition issues and has only an indirect relationship to contracting. Rather, it relates primarily to DOD management fund operations.

#### **3.8.10.5. Relationship to Objectives**

Action on this statute would not specifically further any of the Panel's objectives.

**Proceeds of sales of supplies: credited to appropriations**

**3.8.11.1. Summary of the Law**

This section provides, at subsection (a), that DOD appropriations may be credited with the proceeds of the disposals of supplies that are not financed by funds established under section 2208. At subsection (b), this section provides that obligations may be incurred against anticipated reimbursements to stock funds, as determined by the Secretary of Defense and with presidential approval, as necessary to maintain planned operations for the next year.

**3.8.11.2. Background of the Law**

The legislative history of this section is obscure. The actual language of this section originated in the Senate version of the FY54 DOD Appropriations Act.<sup>1</sup> It appears that this language was inserted in response to a provision in the initial House version of that bill. The House Committee Report had noted that reimbursements from other agencies within and outside DOD for supplies from working capital funds were being directed to other, operating accounts, and that therefore excessive funding existed in these accounts.<sup>2</sup> The Committee noted that, contrary to legislative intent, these receipts were generally not used to replace the items that had been sold out of the working capital funds.<sup>3</sup> Instead, these receipts were being used to purchase other items and these purchases were not subject to congressional review. The Committee also reported that the problem was compounded by inadequate accounting procedures within DOD. Because these reimbursements from stock fund purchases to other accounts were not separately reported under then-current procedures, no one could ascertain the extent to which planned appropriations would actually increase the obligating authority of these other accounts.<sup>4</sup>

Therefore, the House version proposed to repeal all individual legislative authority for certain identified operating accounts and to extend the use of working capital stock funds. The Committee reported, however, that the same problem of overcapitalization and inadequate accounting existed with the stock funds and that procedures must be installed to correct this problem.

The Senate version of the 1954 Appropriation Act omitted the House language and included instead the language of this section as it appears today. The language was included in the final bill. Neither the Senate Committee nor the Conference Report contained any explanation of this language.

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<sup>1</sup>Pub. L. No. 83-179, ch. 305, § 645, 67 Stat. 357 (1953).

<sup>2</sup>H.R. REP. 680, 83rd Cong., 1st Sess. 10-11 (1953).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

It appears that the Senate language was inserted to address the concern with overcapitalization being raised by the House Committee. As a compromise, rather than eliminating the overfunded operating accounts, the first proviso in the Senate language prohibited the crediting to DOD appropriations of any proceeds from working capital stock fund sales. Thus, Congress would not be faced with the problem, identified by the House Committee, of not knowing the extent to which proceeds from sales from § 2208 accounts were augmenting other accounts. Nonetheless, the second proviso in the Senate language permits the incurrence of obligations against anticipated reimbursements made directly to the funds, as necessary to maintain normal operations for the next year. By permitting, within the level of planned operations, the utilization of capital raised by the working capital funds, the second proviso preserves the ability of the working capital funds to promote economy and efficiency, as intended when such funds were initially authorized.

### **3.8.11.3. Law in Practice**

With respect to this section, DOD Office of General Counsel states:

The provisions of subsection (a) of this section provide the basis for a significant number of the Department's reimbursable programs. The provisions of subsection (b) of this section provide the basis for the incurring of obligations by stock funds in order to maintain sufficient operating inventories in anticipation of sales and reimbursements. These provisions are of extreme importance to the execution of programs within the Department of Defense.<sup>5</sup>

### **3.8.11.4. Recommendation and Justification**

#### **No Action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

However, the Panel notes that the purpose of this section remains valid. Subsection (a) ensures that the working capital funds will not be subject to an additional depletion of funds by having reimbursements allocated to other funds within DOD. That remains a legitimate concern. Specifically, the 1983 amendment to section 2208 requiring annual authorization of appropriations to working capital funds was based on evidence of the ever-increasing drain upon such funds. The 1985 amendment to section 2208, requiring set levels of reinvestment, was similarly based on evidence of the lack of adequate funding to the Asset Capitalization Program for industrial funds. These amendments indicate the existence of a concern with chronic under capitalization of these funds.

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<sup>5</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General, Department of Defense, to Counsel, Acquisition Law Task Force, dated 3 Mar. 1992.

Subsection (b) ensures that the working capital funds will be able to meet their intended goal of promoting greater efficiency by authorizing the incurrence of obligations against anticipated reimbursements to such funds for the next fiscal year.

Since, both of these subsections specifically address operations of stock funds established pursuant to 10 U.S.C. § 2208, they may warrant relocation to that section.

#### **3.8.11.5. Relationship to Objectives**

Action on this statute would not specifically further any of the Panel's objectives.

### **3.8.12. 10 U.S.C. § 2211**

#### **Reimbursement for equipment, material or services furnished members of the United Nations**

##### **3.8.12.1. Summary of the Law**

This section provides that reimbursements from United Nations members for equipment or supplies furnished in joint military operations may be credited directly to appropriate DOD appropriations as are proceeds from foreign military sales under 22 U.S.C. § 2392(d).

##### **3.8.12.2. Background of the Law**

This section was originally enacted by the Second DOD Supplemental Appropriation Act of 1951.<sup>1</sup> At that time, DOD maintained a practice of requesting from countries participating in joint United Nations military operations reimbursement for property or services rendered. This section was intended to make permanent this practice and to credit relevant appropriations in order to secure the earliest possible replenishment of military stock.<sup>2</sup>

##### **3.8.12.3. Law in Practice**

With respect to this section, DOD Office of General Counsel maintains: "As a separate statute dealing with assistance furnished under conditions other than those covered by [10 U.S.C. § 2345 and 22 U.S.C. § 2392(d)], it should be continued as a separate authority. Moreover, it is basically an accounting statute, again potentially affecting every appropriation of the Department."<sup>3</sup>

In addition, the authority contained in this section is not duplicated by any other statutory authority. While 22 U.S.C. § 2392(d) provides that "reimbursement shall be made to any United States Government agency, from funds available for use under . . . this chapter" for assistance furnished by that agency to foreign countries, that authority applies specifically to foreign military sales. In addition, section 2345 of Title 10, providing that any credits accrued from providing logistic support or supplies to NATO allies under this chapter shall be liquidated every 3 months and paid directly to the entity providing such support, applies solely to reimbursements received pursuant to NATO cross-servicing agreements. Finally, 10 U.S.C. § 2205, permitting reimbursements to DOD accounts from inter or intra-agency agreements, applies to U.S. government agencies and does not encompass reimbursement from entities such as UN members.

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<sup>1</sup>Pub. L. No. 81-911, ch. 1213, § 703 64 Stat. 1235 (1951).

<sup>2</sup>H.R. REP. No. 3193, 81st Cong., 2d Sess. 892 (1950).

<sup>3</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General, Department of Defense, to Counsel, Acquisition Law Task Force, dated 3 Mar. 1992.

#### **3.8.12.4. Recommendation and Justification**

**No action**

This section remains useful authority that is not duplicated by any other statutory provision. However, it does not present any core acquisition issues and has only an indirect relationship to contracting.

#### **3.8.12.5. Relationship to Objectives**

Action on this statute will not specifically promote any of the Panel's objectives.



### **3.8.13. 10 U.S.C. § 2217**

#### **Comparable budgeting for common systems**

##### **3.8.13.1. Summary of the Law**

This section requires the Secretary of Defense, in the annual DOD budget, to identify common procurement weapon systems among the Services and to identify and explain variations in procurement unit costs for these systems.

##### **3.8.13.2. Background of the Law**

This section was enacted by the National Defense Authorization Act of 1987.<sup>1</sup> The provision originated in the House version of the bill. The House Committee Report indicates that this provision was based on the wide discrepancy found among the services in the budgeted unit costs of certain common weapon system procurements.<sup>2</sup> The section was intended to encourage greater economy and efficiency by promoting standardization among the services in unit costs for common procurement and by requiring a justification when such standardization is not present.<sup>3</sup>

##### **3.8.13.3. Law in Practice**

The DOD Office of the Comptroller (Investment), reports that this section is complied with by means of an exhibit attached to the annual DOD budget that sets forth the required information. That Office further reports that this exhibit essentially repeats procurement unit cost information already contained in the budget pursuant to the procurement section of the DOD Budget Guidance Manual. The exhibit does contain some explanatory material not otherwise present in the budget. However, the explanatory material in the exhibit is generally not extensive because there are very few situations in which significant differences exist in comparative unit costs. Based on the above, the Office of the Comptroller (Investment) recommends repeal of this section as a statutory reporting provision that is administratively cumbersome and that provides little meaningful oversight information to the Congress.

The General Accounting Office, Office of the General Counsel, notes with respect to this provision that the inclusion of unit cost information in the budget does not ensure that unit cost variations are, or could be, easily identified in the budget as it is in a separate exhibit prepared specifically for that purpose.<sup>4</sup>

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<sup>1</sup>Pub. L. No. 99-661, § 955, 100 Stat. 3953 (1986).

<sup>2</sup>H.R. REP. No. 718, § 904, 99th Cong., 2nd Sess. 926 (1986).

<sup>3</sup>*Id.*

<sup>4</sup>Memorandum from Mr. Gary Keplinger, Associate General Counsel, General Accounting Office, to Mr. Anthony Gamboa and Mr. LeRoy Haugh, dated 25 June 1992.

The DOD Office of General Counsel states that it has "no strong views on this provision one way or the other."<sup>5</sup>

#### **3.8.13.4. Recommendation and Justification**

##### **No action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

Congress may wish to consider, however, whether this section should be repealed as an example of excessive legislative detail. The requirement provides little benefit to the Congress while imposing yet another administrative burden on DOD. The Panel notes that the information regarding weapon system unit costs are already provided in the annual budget. Thus, Congress is already able to identify significant variations in unit costs in comparable systems. In addition, in recent years this report has contained little explanation for variations because significant variations have not existed. Finally, even absent this statutory provision, Congress can request such explanations on a case-by-case basis.

#### **3.8.13.5. Relationship to Objectives**

Action on this statute would not specifically promote any of the Panel's objectives.

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<sup>5</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General), Department of Defense, General Counsel, Acquisition Law Task Force, dated 3 Mar. 1992.

### **3.8.14. 10 U.S.C. § 2309**

#### **Allocation of Appropriations**

##### **3.8.14.1. Summary of the Law**

This section permits reallocation of appropriated funds between agencies. It states that appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurements by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury. A disbursing official of the allotting agency may make any disbursement chargeable to an allotment upon receipt of a voucher certified by an officer or civilian employee of the procuring agency.

##### **3.8.14.2. Background of the Law**

This law was originally enacted by the Act to Facilitate the Procurement of Supplies and Services by the Departments of the Army, Navy and Air Force, the Coast Guard and the National Advisory Committee for Aeronautics.<sup>1</sup> The House Committee Report indicated that the purpose of the bill was to make available contracting authority conferred by that bill for the purchase of supplies for other departments and agencies of the federal government.<sup>2</sup>

##### **3.8.14.3. Law in Practice**

There appears to be no direct, regulatory implementation of this section.

##### **3.8.14.4. Recommendation and Justification**

###### **No Action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

##### **3.8.14.5. Relationship to Objectives**

Action on this statute will not specifically promote any of the Panel's objectives.

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<sup>1</sup>Pub. L. No. 80-413, ch. 65, § 10, 62 Stat. 25 (1948).

<sup>2</sup>H.R. REP. No. 109, 80th C. g., 1st Sess. 5 (1947).

### **3.8.15. 10 U.S.C. § 2395**

#### **Availability of appropriations for procurement of technical military equipment and supplies**

##### **3.8.15.1. Summary of Law**

This section provides that funds appropriated to DOD for technical military equipment and supplies are available until spent.

##### **3.8.15.2. Background of Law**

This language was originally enacted in 1950 by the Act Authorizing the Composition of the Army and Air Force.<sup>1</sup> The original version provided that:

Moneys appropriated to the Departments of the Army, Navy, or Air Force for procurement of technical military equipment and supplies, the construction of public works, and for research and development, including moneys appropriated to the Department of the Navy for the procurement, construction and research and development of guided missiles, which are hereby authorized for the Department of the Navy, shall remain available until expended unless otherwise provided in the appropriation Act concerned.<sup>2</sup>

The House version of that bill had provided that moneys appropriated to the Army for procurement of materials and facilities, including guided missiles, would remain available for obligation during the fiscal year when appropriated and for 5 years thereafter and that Army and Air Force R&D money will remain available until expended. The House Committee Report stated that this provision:

is highly desirable because of the often necessarily great intervals of time which elapse between the obligation of funds and the completion of deliveries under a contract . . . . The majority of Army research and development projects are long-range in nature. Upon initiation of a project it may be estimated that completion will require 3 years. Subsequent estimates may extend the period by several more years. The results are unpredictable and do not lend themselves to a predetermined time schedule. For this reason, any arbitrary time limit for expenditure of appropriations may jeopardize a worth while project whose continuation depends on a subsequent year's appropriation. Civilian contractors, particularly

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<sup>1</sup>Pub. L. No. 82-604, H.R. 1437, July 10, 1950. See H.R. CONF. REP No. 2322, 82nd Cong., 1st Sess. 28 (1950).

<sup>2</sup>*Id.*

educational institutions and nonprofit foundations, are reluctant to accept long-range projects and hire highly qualified personnel when there exists the possibility of cancellation prior to completion.<sup>3</sup>

The House Committee also reported, with respect to the Air Force language, that the language was necessary to ensure that the appropriations provided by Congress to carry out the purposes of the legislation remain available to achieve that purpose. The language also would ensure that appropriations and contract authority would be available for reobligation whenever adjustment of requirements necessitates adjustment of procurement programs.<sup>4</sup>

The Senate version essentially set forth the enacted language. The House accepted the Senate version but added the specific language relevant to the Navy.<sup>5</sup>

In 1956, the section was codified into Title 31. In 1971, the language was amended to provide that R&D funds would be available for two successive fiscal years.<sup>6</sup> The limitation was added to conform this authority to the prior year's DOD Appropriations Act.<sup>7</sup> It was specifically intended to encourage more timely and effective use of R&D funds and to provide a significant improvement in Congressional control of DOD spending.<sup>8</sup> Technical language changes were made at that time as well.

In 1982, this section was amended and relocated into Title 10 as section 2394.<sup>9</sup> The two-year limitation on R&D funds was separated out into the current 10 U.S.C. § 2351. The remaining language was then clarified, such as omitting the Navy guided missile authorization, and the "unless otherwise provided" clause, as unnecessary.

In 1986, the section was redesignated as the current section 2395.<sup>10</sup>

### 3.8.15.3. Law in Practice

With respect to this provision, DOD Office of General Counsel states in part that:

in recent years, it has provided a statutory basis and justification for making the procurement appropriations available for a period of three years and for making the research, development, test, and evaluation appropriations available for a period of two years. It is a useful statute and should be retained. It has been relied upon in numerous cases when questions have arisen concerning the authority for multiyear appropriations, such as the procurement

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<sup>3</sup>H.R. REP. NO. 64, pp. 8-9.

<sup>4</sup>*Id.* at 11.

<sup>5</sup>H.R. CONF. REP. NO. 2322, 82nd Cong., 1st Sess. 2, 6-7. (1950).

<sup>6</sup>Pub. L. No. 92-156, § 712, 85 Stat. 424 (1971).

<sup>7</sup>S. REP. NO. 447, 92 Cong., 1st Sess. 89 (1971).

<sup>8</sup>*Id.*

<sup>9</sup>Pub. L. No. 97-258, § 2(6), 96 Stat. 1053 (1982).

<sup>10</sup>Pub. L. No. 97-295, § 1, 96 Stat. 1291 (1986).

appropriations, and when attempts have been made to shorten the period of availability of those appropriations. . . . The provisions of 10 U.S.C. § 2202(b) apply generally to all appropriations of the Department 'except as otherwise provided by law.' 10 U.S.C. § 2395 is such a law falling within the exception recognized in section 2202(b).<sup>11</sup>

As noted, the authority in this section functionally relates to 10 U.S.C. § 2351 (setting forth a two-year limitation on RDT&E funds) and to 10 U.S.C. § 2202(b) (enacted in 1987 and setting forth a three-year limitation on all funds appropriated for any DOD program, project or activity unless a contract has been entered into and except as otherwise provided by law).

There are no published Comptroller General decisions discussing this statutory provision.

#### **3.8.15.4. Recommendation and Justification**

##### **No action**

This section does not present any core acquisition issues and has only an indirect relationship to contracting.

The Panel notes, however, that, for the same reasons set forth in the House report to the initial version of this authority, it remains desirable to have no-year funding authority available to the Department when funds are not otherwise expressly limited. Further, this authority is not superseded by any other statutory provision. The DOD Office of General Counsel notes that the language of this section is not superseded by 10 U.S.C. § 2202(b) because it falls within the "except otherwise provided by law" proviso set forth in that section.<sup>12</sup> Thus, section 2395 does provide multiyear authority for funds for DOD technical military supplies and equipment when such authority is not clearly provided by or limited by public law or another statutory provision. This section also buttresses the multiyear availability of funds if other, public law authority is ambiguous or if attempts are made to limit the availability of multiyear funds.<sup>13</sup>

#### **3.8.15.5. Relationship to Objectives**

Action on this statute would not specifically promote any of the Panel's objectives.

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<sup>11</sup>Memorandum from Mr. Tom G. Morgan, Office of Deputy General Counsel (Fiscal and Inspector General), Department of Defense General Counsel, Acquisition Law Task Force, dated 2 Mar. 1992.

<sup>12</sup>In any event, the Panel has recommended repeal of section 2202(b) as obviated by annual authorization and appropriation legislation. See chapter 3.9.1.4. of this Report

<sup>13</sup>This section is not required, however, to establish the two-year availability of R&D funds as that availability is already established by 10 U.S.C. § 2351.

## **3.8.16. 31 U.S.C. § 1552**

### **Procedure for appropriation accounts available for definite periods**

#### **3.8.16.1. Summary of Law**

This section provides that, on September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose.

#### **3.8.16.2. Background of Law**

This section was originally enacted in 1955.<sup>1</sup> It was codified into Title 31 in 1982.<sup>2</sup> As originally enacted, the section provided that each appropriation account available for a definite period shall be closed by transferring the obligated balance to an appropriation account of the agency responsible for the obligation. Unobligated balances were to revert to the Treasury. When the head of an agency decided that part of a withdrawn, unobligated balance was required to pay obligations, that part could be restored to the appropriate account. That withdrawal was accounted for and reported as of the fiscal year in which the appropriation concerned expired for obligation. The obligated balance of an appropriation made available for obligation under a discontinued appropriation was eventually merged into the account to which the transferred amount had been credited.

The "M" account legislation was the result of a combined initiative by the GAO, the Bureau of the Budget (now OMB) and the Department of Treasury. The law allowed appropriations to remain available for payment of Government obligations for an indefinite period of time. The original appropriations lost their identity after a number of years by being merged into a single appropriations account.<sup>3</sup> The purpose of the law was to simplify and streamline the Federal Government's system for paying obligations. The provision allowing the use of expired unobligated budget authority to cover unforeseen upward adjustments to contracts enabled an agency to expedite payments by utilizing funds already appropriated to it. This authority eliminated the need to continually ask Congress for a reappropriation of funds.<sup>4</sup> Agencies could use this money to fund: (1) cost overruns on cost-type procurements; (2) changes within the scope of a contract; and (3) other actions that were not considered a new procurement.

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<sup>1</sup> Appropriations -- Fiscal Management, Pub. L. No. 84-798, ch. 727, 70 Stat. 754 (1955).

<sup>2</sup> Pub. L. No. 97-258, § 1, 96 Stat. 935 (1982).

<sup>3</sup> Hence, the phrase "M Account" developed to refer to these accounts.

<sup>4</sup> Nat. Asso. of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977)(law as intended to improve efficiency of government accounting procedures by permitting agencies to adjust amounts of obligations which proved insufficient because of errors, unforeseen cost increases, or other underestimates in original award without resort to new appropriations).

The section was amended in its entirety by the National Defense Authorization Act of FY 1991.<sup>5</sup> The Senate version of the bill would have repealed this section, and other, related sections within this chapter of Title 31, and substituted an entirely new statutory regime to govern the availability of appropriation accounts. The House bill had contained a more limited version pertaining only to the DOD. The House receded with an amendment that amended existing law to preserve several aspects of the Senate version. The Conferees stated:

The conferees note that this provision is an extremely important legislative initiative. It would first and foremost provide clear and concise rules that will govern appropriation accounts. It would close all accounts available for a definite period and cancel any remaining obligated or unobligated balances five years after the period of availability of those accounts. In the case of appropriation accounts available for an indefinite period, such accounts would be closed and thereafter not be available for obligation or expenditure when it is determined that the purposes for which the account was made have been carried out, and when no disbursement is made against the accounts for two consecutive years.<sup>6</sup>

The new law thus directs the phase-out of the "M" accounts by the end of FY 1993. By that date, all lapsed fund appropriations will have been closed and no further obligation or payment will be made against those appropriations. The law further provides that all appropriation accounts will be canceled on September 30 of the 5th fiscal year after the period of availability for obligation of a fixed appropriation ends, and on September 30th of each fiscal year thereafter.

### **3.8.16.3. Law in Practice**

In the past decade, the "M" accounts and surplus accounts have grown substantially.<sup>7</sup> Along with this growth, the number and dollar volume of transactions on those accounts also multiplied.

However, the mandated cancellation of no-year appropriations after a five-year period has several significant, negative effects.

First, performance of some contracts simply is not completed by the end of the five-year period. The required cancellation of funds would terminate performance of these contracts, as well.

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<sup>5</sup>Pub. L. No. 100-510, § 1405, 104 Stat. 1676 (1990).

<sup>6</sup>H.R. CONF. REP No. 923, 101 Cong., 2d Sess. 663 (1990).

<sup>7</sup>Merged surplus accounts refers to those surplus, unobligated amounts remaining in accounts prior to being merged. See generally U.S. GAO, *Lapsed Accounts: Army, Navy, and Air Force "M" and Merged Surplus Authority Account Balances*, GAO/NSIAD-90-170 (May 1990).



Second, there are frequently situations where, although work is completed prior to cancellation of funds, related contract administration matters are not. Determination of overhead rates may last a considerable period of time beyond completion of contract work. Further, contract claims are rarely settled within a five-year period after initial appropriations of funds. This new law may pressure contracting officers to settle claims prematurely in order to fall within five-year funding period. Conversely, contracting officers may be tempted to delay settlement when funding would adversely impact current appropriations.<sup>8</sup>

The Air Force Logistics Command and Air Force Systems Command (now combined as the Air Force Materiel Command) have noted significant problems with this law. Those Offices maintain a number of large, complex contracts with performance periods in excess of eight years.<sup>9</sup> These contracts are generally priced on a fixed price incentive or cost reimbursement basis and cannot be repriced or closed without a DCAA audit of actual costs and final determination of overhead rates. These audits alone may take five years to complete. Because the contractor's costs are audited after performance is otherwise complete, such contracts may not be closed for eight to fifteen years beyond their inception. Consequently, under the current law, obligated but unexpended funds will usually have been lost before contract completion or closure can be accomplished. Approximately \$334 million in closed appropriations have already been lost as of 6 March 1991, and many more will be lost by September 1993. The Air Force will have to use current appropriations to replace these losses in order to satisfy its older but continuing contract obligations. Resort to current appropriations will be at the expense of new programs budgeted for the current year.

#### **3.8.16.4. Recommendation and Justification**

##### **Amend**

**Amend section 1552(a) to provide that accounts need not be canceled on the 5th fiscal year after the period of availability for obligation of a fixed appropriation ends, if the Secretary determines that amounts are required for contracts that are not yet closed and annually thereafter notifies Congress as to the balances remaining in each fixed appropriation account whether obligated or unobligated.**

The Panel recommends that this section be amended to provide that appropriations will not be canceled if the Secretary determines that amounts are required for contracts that are not yet closed and annually thereafter notifies Congress as to the balances remaining in each fixed appropriation account whether obligated or unobligated.

The current law results in the cancellation of appropriations that may be properly obligated on a contract or otherwise become necessary for a contract administration matter but

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<sup>8</sup>After the five year period, older contracts may be funded with current appropriations of the same type as the original, not to exceed one percent of the current or supplemental appropriation.

<sup>9</sup>The following summary is obtained in part from a draft, Air Force legislative proposal in this area.

have not yet been disbursed. The Panel believes that it is not necessary to the underlying Congressional purpose to cause appropriated funds to be canceled. This cancellation creates, at least temporarily, a deficiency and certainly creates possible hardship to the contractor because of deferred payments.<sup>10</sup> The proposed recommendation would except such obligated or unobligated funds from the five-year rule. Thus, money properly obligated on a contract or necessary for contract closeout could be used to finalize all actions that remain open on existing contracts such as to complete unfinished work, closeout costs, and settle contract claims.

### **3.8.16.5. Relationship to Objectives**

Amendment of this statute as proposed will preserve meaningful congressional oversight over the funding process, as originally intended, while permitting the DOD the sufficient fiscal latitude to properly administer contracts.

### **3.8.16.6. Proposed Statute**

#### **Procedure for appropriation accounts available for definite periods**

(a) On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose; provided that such funds as the Secretary of Defense or secretary of the military department concerned determines are required for payment under contracts that are not closed shall not be canceled. At the end of each fiscal year, the agency shall notify Congress as to the obligated and unobligated balances remaining in each such fixed appropriation account with respect to open contracts and shall cancel all amounts not required for such contracts.

(b) Collections authorized or required to be credited to an appropriation account, but not received before closing of the account under subsection (a) or under section 1555 of this title shall be deposited in the Treasury as miscellaneous receipts.

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<sup>10</sup>Deferred claim payments also result in substantial accrual of interest payment liability by the Government.

## **3.9. Miscellaneous**

### **3.9.0. Introduction**

This subchapter sets forth individual analyses for those laws, primarily located within Title 10, that do not readily fall within the topics of any of the other subchapters. It includes a provision, section 2202, relating to the Secretary of Defense's authority to issue regulations governing the supply system. That provision has been modernized. An antiquated system of procurement for experimental aviation, not currently in use within the DOD, has been recommended for repeal (Chapter 135 -- sections 2271 through 2279). Section 2385, exempting arms and ammunition from federal tax, is recommended for amendment to include another line item -- heavy wheeled vehicles. This addition is intended to reduce administrative costs and burden associated with compliance with the federal tax levy on such vehicles. Section 2401, authorizing long-term leasing of naval vessels or aircraft, is recommended for retention as the section continues adequately to serve a valid, oversight function. However, a related public law provision limiting vessel leasing to 18 month periods is recommended for repeal as inhibiting economy and efficiency in the acquisition process. Three sections relating to acquisition of services or supplies by DOD entities from nonappropriated fund entities are recommended for retention (sections 2422, 2423, 2424). These, and other sections, are discussed in greater detail within this subchapter.

### 3.9.1. 10 U.S.C. § 2202

#### Obligation of funds: limitation

##### 3.9.1.1. Summary of the Law

This statute provides, at subsection (a), that an officer or agency of the DOD may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicating or overlapping operations or functions.

At subsection (b), the statute expressly states that, except as otherwise provided by law, the availability for obligation of funds appropriated for any program, project, or activity of the DOD expires at the end of the three-year period beginning on the date that such funds initially become available for obligation unless before the end of such period the Secretary of Defense enters into a contract for such program, project, or activity.

##### 3.9.1.2. Background of the Law

Subsection (a) was originally enacted by the Defense Appropriations Act for FY53.<sup>1</sup> The Senate Committee Report to that legislation indicated that the provision was part of an overall effort to centralize and integrate supply management within the DOD. The provision was intended to impose an affirmative duty upon the Secretary of Defense to establish a program, through implementing regulations, to eliminate duplication and inefficiencies within the defense supply system.<sup>2</sup> As envisioned by the Congress, that program would involve, for example, the integration of maintenance facilities to serve all department requirements within a given area and the procurement, distribution, and maintenance of common-use items on a uniform basis. The report suggested that such a program would best be implemented by civilian personnel unencumbered by loyalty to a particular service.<sup>3</sup>

Subsection (b) was added by the National Defense Authorization Act for Fiscal Years 1988-89.<sup>4</sup> The language originated as a floor amendment to the House version of the bill. The House bill, as amended on the floor, had contained an additional provision that prohibited the Secretary of Defense from obligating any appropriated amount for any activity in excess of the amount needed to carry out that activity. That provision was deleted in conference without explanation.<sup>5</sup> There is no legislative history to accompany that amendment.

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<sup>1</sup>Pub. L. No. 82-488, §638, 66 Stat. 630 (1952).

<sup>2</sup>S. REP. NO. 1861, 82nd Cong., 2nd Sess. 9-10 (1952).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 100-180, § 1202, 101 Stat. 1153-54 (1987).

<sup>5</sup>H.R. CONF. REP. No. 446, 100th Cong., 2nd Sess. 812 (1987).

### 3.9.1.3. Law in Practice

#### Subsection (a):

10 U.S.C. § 2202(a) provides a basis for all DOD acquisition-related directives. For example, DOD Directive 4000.8, "Basic Regulations in the Military Supply System," states that:

"(a) All Department of Defense Directives and Instructions which deal with procurement, production, cataloging, standardization, warehousing, distribution, maintenance, disposal, transportation of supplies or equipment, or related supply management or traffic management functions are regulations prescribed by the Secretary of Defense in compliance with Title 10, U.S. Code 2202.

(b) All regulations, procedures, and instructions of the Military Departments and all other DOD Components dealing with the subject enumerated in paragraph (a) of this section shall have the force and effect of regulations prescribed by the Secretary of Defense in compliance with 10 U.S.C. § 2202 to the extent that they are not inconsistent with DOD Directives and Instructions."

Subsection (a) also mandates that regulations be prescribed for the purpose of achieving an integrated, centralized supply system. To that end, subpart 208.70 of the DFARS establishes the DOD Coordinated Acquisition Program. Coordinated acquisition is defined there as acquisition by contracting activities within the continental United States, and by a Unified Commander at any location, of certain supplies to satisfy the requirements (including overseas requirements) of all departments. It also includes acquisition by agreement between departments or other agencies.<sup>6</sup> The Coordinated Acquisition program includes the purchase of commodities that are assigned to a single military department by the Deputy Assistant Secretary of Defense (Logistics) for management, including acquisition, under the Integrated Materiel Management Program. The Coordinated Acquisition program also applies to commodities assigned to the DLA or GSA for centralized acquisition.<sup>7</sup> However, the requiring department may also at its option purchase locally virtually any DLA or GSA centrally-managed, commercially available item. Local purchase must be in the best interest of the Government in terms of quality, timeliness, and cost. The item cannot be a mandatory centralized acquisition as described in 208.7100-1. For certain stock items, a local purchase can be made only if a statement of the local purchase advantage is made and approved.<sup>8</sup>

<sup>6</sup>DFARS, 48 C.F.R. § 208.7001.

<sup>7</sup>DFARS, 48 C.F.R. § 208.7000. "The primary objective of coordinated acquisition is to obtain for the Government maximum economy through the consolidation of requirements and the elimination thereby of competitive purchases among the Departments." *Id.* at 208.7003-6.

<sup>8</sup>DFARS, 48 C.F.R. § 208.7100-2. For other, internal DOD regulations regarding centralized acquisition, see:

Directive 4000.19, "Interservice, Interdepartmental, and Interagency Support," Oct. 14, 1980.

Directive 4115.1, "DOD-GSA Interagency Procurement,"

Directive 4140.14, "Local Procurement from GSA Federal Supply Schedule or National Buying Program"

Directive 4140.5, "Local Procurement from GSA Stores Depot"

Directive 5105.22, "DLA Authority to Enter Into Logistic Supply and Services Agreements with Other Agencies,"

Finally, with respect to subsection (a), we note that this provision historically was cited by the Secretary of Defense as the authority for establishing the Armed Services Procurement Regulation Committee (now the DAR Council) under the then cognizant office, the Assistant Secretary of Defense (Production & Logistics), to issue the Armed Services Procurement Regulation (now the Defense Federal Acquisition Regulation /supplement (DFARS)).

Overall, no significant comments were received from the military departments regarding this statute. The Sundstrand Corporation recommends retention of subsection (a) and repeal of subsection (b). The latter recommendation is based on the fact that the period for obligation of funds is now generally covered in individual authorization and appropriations acts.

#### **3.9.1.4. Recommendations and Justification**

##### **I**

#### **Amend subsection (a)**

As noted above, subsection (a) is relied upon within the Department of Defense as the statutory authority for all acquisition-related regulations issued by the Secretary of Defense, his delegate, or the secretary of a military department. Such authority does not appear to be subsumed within any broader grant of authority to the Secretary of Defense elsewhere in Title 10. The subsection is thus essential to a wide-ranging system of acquisition regulations.

However, this subsection, on its face, is not a grant of authority to the Secretary of Defense to issue regulations. Rather, the statute states that the DOD may obligate funds only under prescribed regulations. Thus, the statute textually is a restriction on authority to obligate. In this manner, there is a conflict between the historical utilization of this statute by the department and its facial meaning.

To resolve that conflict, we recommend that the subsection be amended to delete the latter two sentences and to amend the first sentence to more clearly state its role as the statutory basis for the Secretary's authority to issue regulations guiding the defense supply system.

##### **II**

#### **Repeal subsection (b)**

The Panel recommends repeal of this subsection as redundant of funding limitations that are routinely set forth in annual authorization and appropriations legislation.

#### **3.9.1.5. Relationship to Objectives**

Disposition of this statute as set forth above will further the goal of streamlining the DOD acquisition process.

### 3.9.1.6. Proposed Statute

#### § 2202. Obligation of funds: limitation

~~(a) The Secretary of Defense shall issue regulations to be followed by all agencies of the Department of Defense for the procurement, production, warehousing or distribution of supplies and related functions. Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions.~~

~~(b) Except as otherwise provided by law, the availability for obligation of funds appropriated for any program, project, or activity of the Department of Defense expires at the end of the three-year period beginning on the date that such funds initially become available for obligation unless before the end of such period the Secretary of Defense enters into a contract for such program, project, or activity.~~

## **3.9.2. 10 U.S.C. Chapter 135, §§ 2271-2279**

### **Encouragement of Aviation**

#### **3.9.2.1. Summary of Laws**

All of these sections set forth an acquisition system designed exclusively for the procurement of aircraft, aircraft parts and accessories. This system includes a specific provision for the procurement of experimental aircraft and equipment, and for certain design rights for patent holders as against the government.

These sections are grouped together for analysis because all of them have virtually the identical legislative history. However, the sections individually provide as follows:

- **Section 2271:** This section sets forth a specific, sealed bid procedure for aeronautical design competition. It provides for mandatory advertisement of aeronautical design competitions, and for evaluation of submitted designs by a board appointed by the Secretary of the relevant military department. That evaluation can be based on any objective merit system set forth in the solicitation, not just price. The Board recommends a winning design to the Secretary, whose decision is final. Any reasonable showing of an error in the merit determination is submitted to an arbitral board, whose findings must also be approved by the Secretary.
- **Section 2272:** Under this section, the department Secretary is authorized to contract with a design competition winner for the design and/or the manufacture of the design. The Secretary is also authorized to contract with a design competition winner for the design and/or the manufacture of the design. The secretary is also authorized to divide contracts for a manufactured item to combine different features of submitted designs.
- **Section 2273:** This section provides that any executive or military department may construct any item according to any winning design after completed purchase of that design or any severable part of it without further compensation to the design winner. However, this section also provides that the winner may apply for a patent on any aspect of the designed item originated by him. Such a patent holder has exclusive rights under it against all persons except the United States or its vender. Finally, the section provides a cause of action in the U.S. Claims Court for any person who believes that an aeronautical design is being used or has been incorporated in an item by or for the government without just compensation.
- **Section 2274:** This section authorizes the Secretary to buy experimental aeronautical designs or items as necessary for developmental purposes as well as follow-on quantity procurements of the same item.



- **Section 2275:** Under this section, the Secretary is authorized to enter into any aviation contract under this chapter with the lowest responsible bidder. The Secretary's actions as to contract award, interpretation or administration are reviewable only by the President, relevant Federal court or as provided for by the contract.
- **Section 2276:** This section subjects the manufacturing plant and books of any contractor furnishing an aviation item under this chapter to inspection and audit by any executive department designee. The section also provides for civil and criminal penalties against any individual who attempts to deprive the government of full and free competition under this chapter or of any audit necessary to disclose contract cost.
- **Section 2277:** Under this section, any appropriations designated for aviation procurement may be used to purchase aeronautical designs and to pay for any related arbitration costs.
- **Section 2278:** This section authorizes the Army and Air Force Secretaries to purchase sample aircrafts from unsuccessful bidders.
- **Section 2279:** This section restricts access, by alien employees of contractors under this chapter, to plans or specifications for the contracted item as well as to the work under construction. This section also limits the participation of such individuals in trials under the contract.

### **3.9.2.2. Background of the Laws**

All of these sections were originally enacted by the 1926 Act to Increase the Efficiency of the Air Corps.<sup>1</sup> These sections were initially introduced as an amendment to the Senate version of this bill during floor debates. The initial Senate amendment had provided for a wholesale exemption from competitive bidding requirements for aviation design and manufacturing contracts. The amendment sponsor stated that the amendment was being offered in response to investigation that had been conducted the previous year by a Special House Committee on Aviation (the Lambert Committee). In those investigations, the Lambert committee had concluded that:

the aviation industry in the United States has dwindled and that the principal causes of the weakness of the industry are, among others, first, lack of continuity in Government orders; second, losses on Government contracts, both experimental and production; third, failure to recognize and protect design rights; and fourth, a destructive system of competitive bidding.<sup>2</sup>

<sup>1</sup>Pub. L. No. 34-798, ch. 721, § 10(i), 44 Stat. 788 (1926)

<sup>2</sup>Debates of the Senate Special House Committee on Aviation, 67 Cong. Rec. 10495 (June 3, 1926), (statement of Senator Bingham).

In conference with the House, this amendment was modified into the current version of the law, providing for an adapted sealed bid procedure where selection could be based on merit factors other than price. The House version, however, did expressly retain authority for noncompetitive procurement of aviation designs when necessary for developmental purposes. This provision was intended to encourage the development of aviation design, but without a wholesale exemption from competition.<sup>3</sup>

Subsequently, in hearings held in 1947 on the Armed Services Procurement Act (ASPA), an Air Force representative testified that the Air Force had not used this procedure since at least 1941.<sup>4</sup> The ASPA did expressly retain this statute. However, it did so solely for the purpose of preserving it as an alternative means of aviation design procurement until the procedures authorized by the ASPA had gone through a trial and error period.<sup>5</sup>

In 1971, the Comptroller General discussed the legislative history of these provisions in an unpublished, advisory opinion to the then-Chairman of the House Armed Services Committee. The Comptroller General concluded that these provisions were not applicable to the procurement of aircraft or aircraft parts, and recommended that the Congress consider their repeal as "dead letter law."<sup>6</sup>

### **3.9.2.3. Laws in Practice**

The system of procurement set forth in this chapter apparently has not been used in the last forty years. The Navy Office of General Counsel, Army Aviation Command Counsel's office, and the Air Force Office of General Counsel informally report that this procedure is not now currently used in aviation procurement by those services.<sup>7</sup>

### **3.9.2.4. Recommendation and Justification**

#### **Repeal**

These sections should be repealed in their entirety as obsolete laws. The procedures established by this chapter are not now used by the aviation buying commands surveyed, nor have they been used since prior to World War II.

### **3.9.2.5. Relationship to Objectives**

Repeal of these statutes promotes the goal of streamlining the DOD acquisition process by removing a series of obsolete provisions.

<sup>3</sup>H.R. REP. No. 1527, 39th Cong., 2nd Sess. (1926).

<sup>4</sup>House hearings on H.R. 1366, Feb. 4, 1947, p. 545.

<sup>5</sup>*Id.*

<sup>6</sup>Letter from Elmer B. Staats, Comptroller General of the United States, to Hon. L. Mendel Rivers, Chairman, House Armed Services Committee, B- 168664 (unpublished)(1971).

<sup>7</sup>These offices have so reported in informal, telephone conversations with Acquisition Law Task Force staff in November of 1991.

### **3.9.3. 10 U.S.C. 2314**

#### **Laws inapplicable to agencies named in section 2303 of this title**

##### **3.9.3.1. Summary of the Law**

This section exempts the Secretaries of Defense, Army, Navy, Air Force, and Transportation, and the Administrator of NASA from the advertising requirements of R.S. 3709 (41 U.S.C. § 5) and from the one-year bar on stationery or supply contracts at R.S. 3735 (41 U.S.C. § 13) in their procurement of property or services.

##### **3.9.3.2. Background of the Law**

This section was originally enacted by An Act to Facilitate Procurement of Supplies and Services by the Departments of the Army, the Navy and the Air Force, the Coast Guard, and the National Advisory Committee on Aeronautics and for other purposes.<sup>1</sup> The Senate Committee Report to that legislation stated that the bill was intended to repeal the listed statutes insofar as they apply to the named agencies.<sup>2</sup>

##### **3.9.3.3. Law in Practice**

There is no direct, regulatory implementation of this statute. No comments were received regarding this statute.

##### **3.9.3.4. Recommendation and Justification**

###### **Retain**

The Panel recommends that this statute be retained. This statute continues to serve a useful purpose by exempting the Secretaries of Defense, Army, Navy Air Force, and Transportation, and the Administrator of the NASA from the advertising requirements of R.S. 3709 and from the one-year bar on stationery or supply contracts at R.S. 3735.

Repeal of those Revised Statute sections would obviate this statute. However, the advertising requirements of R.S. 3709, codified at 41 U.S.C. § 5, still apply to procurement by the Congress and the judiciary. That statute thus continues to serve a valid purpose. Therefore, there is a continuing need for this statute in order to exempt DOD from those Revised Statute sections and avoid any conflict between the Revised Statute sections and the competition requirements of the CICA.

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<sup>1</sup>Pub. L. No. 80-413, § 116, 62 Stat. 25 (1948).

<sup>2</sup>S. REP. NO. 571, 80th Cong., 1st Sess. 32 (1947).

### **3.9.3.5. Relationship to Objectives**

**Retention of this statute will further the best interests of DOD by exempting the named agencies from the advertising and other requirements of the cited Revised Statute sections.**

### **3.9.4. 10 U.S.C. § 2369**

#### **Product evaluation activity**

##### **3.9.4.1. Summary of the Law**

Subsection (a) declares that the Secretary of Defense acting through the Under Secretary of Defense for Acquisition shall establish a program for the supervision and coordination of product evaluation activities within the DOD.

Subsection (b) declares that the Secretary of each military department and the head of each Defense Agency may, subject to supervision and coordination by the Under Secretary of Defense for Acquisition, establish and conduct appropriate product evaluation activities. The purpose of each product evaluation activity is to evaluate products developed by private industry independent of any contract or other arrangement with the United States in order to determine the utility of such products to the DOD.

Subsection (c) delineates cost sharing policies as a condition to conducting an evaluation of any product under this section. The producer of the product shall be required to pay one half of the cost of conducting such evaluation. For product development proposed by a small business concern (within the meaning of section 3 of the Small Business Act (15 U.S.C. § 632)), the Secretary of Defense may pay up to 85 percent of the cost of product evaluation if the small business concern agrees to a not-for-profit contract.

##### **3.9.4.2. Background of the Law**

This section was originally enacted by the National Defense Authorization Act for Fiscal Year 1989.<sup>1</sup> The language originated in the Senate version of the bill. The Senate Committee Report indicated that the legislation was in response to efforts by private industry to develop products for potential use by the military departments. The Report noted that these efforts were not adequately coordinated with the government.<sup>2</sup> In conference, the House receded with an amendment clarifying that the provision was not intended to establish a separate office to administer this activity. Rather, the DOD was to set up a user point of contact for each potential product to approve the potential usefulness of that product.<sup>3</sup>

##### **3.9.4.3. Law in Practice**

It appears that this statute has never been implemented within the DOD.

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<sup>1</sup>Pub. L. No. 100-456, § 842(2), 102 Stat. 2026 (1988).

<sup>2</sup>S. REP. NO. 100-326, 100th Cong., 2nd Sess. 114 (1988).

<sup>3</sup>H.R. CONF. REP. NO. 100-989, 100th Cong., 2nd Sess. 434-435 (1988).

The Council of Defense and Space Industry Associations (CODSIA) recommends the retention of the statute and a recommendation to the Congress that it direct the department to implement this program.

#### **3.9.4.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that this statute be repealed. Since the statute has never been implemented, there is no basis to evaluate it. However, the Panel believes that the goals of this statute are adequately addressed by the DOD nondevelopmental item and commercial programs.

#### **3.9.4.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process by removing an unnecessary statutory requirement.

### **3.9.5. 10 U.S.C. 2384a.**

#### **Supplies: economic order quantities**

##### **3.9.5.1. Summary of the Law**

Subsection (a)(1) declares an agency shall procure supplies in such quantity as (a) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (b) does not exceed the quantity reasonably expected to be required by the agency. Subparagraph (a)(2) declares the Secretary of Defense shall take paragraph (1) into account in approving rates of obligation of appropriations under section 2204 of this title.

Subsection (b) specifies that each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

##### **3.9.5.2. Background of the Law**

This section was originally enacted by the National Defense Authorization Act for Fiscal Year 1985.<sup>1</sup> The language first appeared in the Senate version of the bill. The Senate Committee Report indicated that the provision was based upon a failure of the military departments to order spare parts in economic order quantities, and further noted that this failure has played a major factor in excessive prices for spare parts.<sup>2</sup> The House version of the bill had merely contained a policy statement in favor of economic order quantities. The House receded in conference.

##### **3.9.5.3. Law in Practice**

There is no direct, regulatory implementation of this statute.

Defense Logistics Agency (DLA) recommends repeal of this statute as no longer serving any useful purpose. DLA notes that it would continue to procure economic order quantities when appropriate in this absence of this statute as sound management practices.<sup>3</sup> The Sundstrand Corporation recommends that the statute be retained, noting that it was originally drafted with the support of industry and provides an alternative to high priced spare parts when the Government is soliciting limited quantities.

<sup>1</sup>Pub. L. No. 98-525 § 1233(2), 98 Stat. 2600 (1984).

<sup>2</sup>S. REP. NO. 500, 98th Cong., 2nd Sess. 251 (1984)

<sup>3</sup>Telephone conversation between Mr. Gary Quigley, Deputy General Counsel, DLA, with Acquisition Law Task Force, September, 1992.

No other comments regarding this statute were received from the military departments and other parties surveyed.

#### **3.9.5.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute. The statute was initially enacted to address a specific problem regarding spare parts pricing that arose in the 1980s. Currently, however, this statute mandates the type of sound, management practices that should not require legislative fiat.

#### **3.9.5.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process and specifically will further the goal of affording DOD acquisition managers the opportunity to exercise their discretion in managerial practices.



### **3.9.6. 10 U.S.C. § 2385**

#### **Arms and ammunition: immunity from taxation**

##### **3.9.6.1. Summary of the Law**

This statute prohibits imposing a tax on the sale or transfer of firearms, pistols, revolvers, shells, or cartridges when such articles are bought with funds appropriated for a military department.

##### **3.9.6.2. Background of the Law**

This section was originally enacted by the National Defense Appropriations Act for FY51.<sup>1</sup> The Report to that legislation merely stated that the provision was intended to exempt the purchase of these items from a specified, extant federal tax levy.

##### **3.9.6.3. Law in Practice**

There are no regulations directly implementing this statute.

The Office of the Judge Advocate General, Department of the Army, recommends that this statute be amended to add heavy wheeled vehicles as one of the items that are immune from federal tax.<sup>2</sup> The current federal excise tax of 12% applies to all highway vehicles of more than 33,000 lbs. The anticipated savings from eliminating the administrative burden of complying with the federal tax levy on the five-ton truck alone is estimated at \$114,302,000 to \$194,718,000. In support of this proposal, the Army notes, for example, that the federal excise tax creates administrative burdens when delivery destinations for vehicles change, as occurred during Operation Desert Shield/Desert Storm and as is anticipated during future force reductions. These changes cause contract modifications and changes in financial obligations. Exemption of the federal excise tax on military vehicles would, it is contended, eliminate the de-obligations and searches for additional funds to obligate when shipping changes occur. It would also save considerable personnel hours that are currently expended in contract management and execution.

No other entities of DOD have suggested any further line item additions to this statute.

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<sup>1</sup>Pub. L. No. 78-124, § 812, 64 Stat. 1236 (1950).

<sup>2</sup>Datafax transmission from Mr. Larry R. Rowe, Chief, Tax and Property Law Team, Department of the Army, Office of the Judge Advocate General, dated 5 Nov. 1992.

#### **3.9.6.4. Recommendation and Justification**

##### **Amend**

The Panel recommends that this statute be amended to add heavy wheeled vehicles and trailers as one of the items exempt from federal tax. This class of vehicles is a single item whose addition to this statute as a federal tax-exempt item could result in significant savings to the government, both financially and in man-hours. Exemption will eliminate incongruity of Congress appropriating funds to pay truck manufacturers for excise taxes which are then returned to the United States.

#### **3.9.6.5. Relationship to Objectives**

Amendment of this statute would further the goals of the Panel by providing for optimum use of appropriations.

#### **3.9.6.6. Proposed Statute**

##### **Arms and ammunition: immunity from taxation**

No tax on the sale or transfer of firearms, pistols, revolvers, shells, or cartridges, or heavy wheeled vehicles and trailers may be imposed on such articles when bought with funds appropriated for a military department.

### **3.9.7. 10 U.S.C. § 2387**

#### **Procurement of table and kitchen equipment for officers' quarters: limitation on**

##### **3.9.7.1. Summary of the Law**

This statute provides that DOD appropriations may not be used to supply or replace table linen and kitchen dishes or utensils for officers' quarters on shore. It does not apply to field or temporary messes, fleet, air, or submarine bases and landing forces or expeditions.

##### **3.9.7.2. Background of the Law**

This statute was originally enacted by the DOD Appropriations Act for FY 1956.<sup>1</sup> The Report to that bill stated merely that this law had been in DOD Appropriations Acts for many years and was now made permanent law.<sup>2</sup>

##### **3.9.7.3. Law in Practice**

In the Department of the Army, this statute is implemented by AR 210-50, para. 10-15, under which a command may furnish certain household items, but not linen and tableware. Special command positions, however, are entitled to allowances for these items. In the Department of the Air Force, this statute is implemented by a Table of Allowances that is used to define what items will be purchased to support officer housing. Purchase requests for items listed in this statute are not approved unless they appear on the Table of Allowances.

Both the Office of the Judge Advocate General, Department of the Army, and the Operational Contracting Division, Deputy Assistant Secretary (Contracting) for Assistant Secretary of the Air Force (Acquisition), report that the limitation in this statute does not unduly hamper the acquisition process.

##### **3.9.7.4. Recommendation and Justification**

###### **Retain**

The Panel recommends that this statute be retained. Although the legislative history does not indicate the express congressional intent behind this statute, it appears that it was intended to function as a guard against pilferage. Thus, the statute continues adequately to serve a valid purpose. The services report that this statute does not unduly impede the acquisition process.

<sup>1</sup>Pub. L. No. 84-157, § 614, 69 Stat. 317 (1955).

<sup>2</sup>H.R. REP. No. 493, 84th Cong., 1st Sess. 2 (1955).

### **3.9.7.5 Relationship to Objectives**

Retention of this statute furthers the objective of ensuring that acquisition laws promote financial and ethical integrity.

### **3.9.8. 10 U.S.C. § 2389**

#### **Contracts for the procurement of milk: price adjustments; purchases from the Commodity Credit Corporation**

##### **3.9.8.1. Summary of Law**

Paragraph (a) of this section states under regulations prescribed by the Secretary of Defense, any contract for the procurement of fluid milk for beverage purposes which was being performed on or after March 1, 1966, may be amended to provide a price adjustment for losses incurred by a contractor because of increased prices paid to producers for such milk as a result of action by the Secretary of Agriculture on or after March 1, 1966, increasing the price of milk. A price adjustment shall not be made unless it has been determined by the department that (1) such amount is not included in the contract price; (2) the contract does not otherwise contain a provision providing for an adjustment in price; and (3) the contractor will suffer a loss, not merely a diminution of anticipated profit, under the contract because of such increases in producer prices.

Paragraph (b) of this section declares that (1) funds appropriated to the DOD may be used to purchase for enlisted members milk made available to the DOD under section 202 of the Agricultural Act of 1949 (7 U.S.C. § 1446a), and (2) the cost of milk so purchased (as determined by the Secretary of Defense) shall be included in the value of the commuted ration of enlisted members.

##### **3.9.8.2. Background of Law**

This statute was originally enacted by the Act Providing for Price Adjustments in DOD Contracts for the Procurement of Milk.<sup>1</sup> The bill was intended to provide relief for those defense contractors required to pay higher prices to milk producers because of federally-mandated increases in producer milk prices.<sup>2</sup>

##### **3.9.8.3. Law in Practice**

There appears to be no regulatory implementation of this section. CODSIA recommends repeal of subsection (a) as outdated. No other party surveyed submitted comments with respect to this section.

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<sup>1</sup>Pub. L. No. 89-696, § 1(1), 80 Stat. 1056 (1966).

<sup>2</sup>H.R. REP. No. 2185, 89th Cong., 2nd Sess. 1-7 (1966).

#### **3.9.8.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this statute. The authority set forth was intended to address a specific, historical problem concerning federally-mandated increases in producer milk prices and is clearly outdated.

#### **3.9.8.5. Relationship to Objectives**

Repeal of this statute will further the goal of streamlining the DOD acquisition process by removing an obsolete law.

### 3.9.9. 10 U.S.C. § 2401

#### **Requirement for Authorization by Law of Certain Contracts Relating to Vessels and Aircraft.**

##### 3.9.9.1. Summary of Law

Section 2401 of Title 10 of the U.S. Code authorizes the Secretary of a military department to enter into a contract for a long-term lease, charter, or service contract for a naval vessel or aircraft, providing for a substantial termination liability, as long as the following statutory requirements are met.

- **Requirement for Authorization by Law.** The Secretary of a military department, if specifically authorized by law, may lease, charter, or sign an agreement to provide services accompanying a contract to lease or charter a naval vessel or aircraft.
- **Notification of Congressional Committees.** The statute requires that the Committees on Armed Services and Appropriations of the Senate and House of Representatives be notified of the issuance of a request for proposal (RFP) for a long-term lease, charter, or service contract on a naval vessel or aircraft. In addition, the statute requires that the Secretary of a military department provide in a timely manner a detailed description of the terms of the proposed lease or charter. The Secretary must also justify entering into the proposed contract rather than purchasing the vessel or aircraft that is to be leased or chartered.
- **Funding Restrictions.** The statute further provides that no funds will be appropriated for the long-term lease or charter of a naval vessel, or for the lease of a naval vessel or aircraft which provides for a substantial termination liability, unless funds for such leases have been specifically authorized by Congress.
- **Indemnity Prohibition.** Furthermore, the statute shall not apply to any lease or charter agreement entered into by the DOD before September 24, 1983. In addition, the statute states that no funds appropriated pursuant to the authorization contained in the statute may be used to pay attorneys fees in connection with such leases or charters or to indemnify any person for money owed as a result of liability arising under the Internal Revenue Code of 1954.<sup>1</sup>

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<sup>1</sup>Prior to the enactment of section 2401, lease agreements signed by the Navy contained very favorable terms for lessors and charterers. For example, under the 25-year leases the Navy signed for vessels prior to 1983, the lessors received--

investment tax credits, . . . accelerated depreciation deductions, and should the IRS rule against any of these tax benefits, . . . the Navy contract guarantees the tax benefits. If the IRS against the investor, the Navy will pay the extra tax bill, the lawyer fees and the court costs.

- **Long-term lease or Charter Defined.** The statute defines a long-term lease or charter as an agreement for a period of five years or longer, or more than one-half the useful life of the vessel or aircraft. Leases or charters for less than five years with an option to renew or extend, which can extend the lease beyond five years or longer, are considered long-term leases or charters. Under certain circumstances, where the lessor or charterer is entitled to an investment tax credit or depreciation, a lease or charter of three years or longer will be considered to be a long-term lease or charter.
- **Substantial Termination Liability.** The statute provides that a substantial termination liability exists if the United States has to pay 25% or more of the value of the vessel or aircraft under lease or charter if the lease or charter is terminated. The statute also provides that substantial termination liability exists if the amounts of the termination liability and the costs attributable under the contract to capital-hire is more than one-half the price of the leased or chartered vessel or aircraft.
- **Request and Financial Analysis.** The statute further requires that any request submitted to Congress for authorization to contract for a long-term lease or charter of a naval vessel or aircraft, or for a lease or charter of a naval vessel or aircraft that provides for a substantial termination liability on the part of the United States, must contain: (1) a financial analysis from the Secretary of Defense comparing the cost of the lease or charter with the cost of direct procurement of the vessel or aircraft, and (2) a summary of the amount of tax revenue that will be lost to the government as a result of the lease or charter.
- **Review and Evaluation of Financial Analysis.** The statute furthermore requires that the financial analysis submitted by the Secretary of Defense be reviewed by the Director of the Office of Management and Budget and the Secretary of the Treasury and that the results of their review be reported to Congress not later than 45 days after the request and analysis are submitted to Congress.
- **Capital-Hire Portion of the Cost.** In addition, the statute requires that the Secretary of Defense include the capital-hire portion of the cost of a lease or charter of the vessel or an aircraft within the request for procurement and that such amount shall be reflected in the appropriate procurement account in the request.
- **Guidelines.** The statute also provides that the Director of the Office of Management and Budget and the Secretary of the Treasury are jointly to issue guidelines for determining under what circumstances the DOD may use lease or charter arrangements for aircraft and naval vessels rather than directly procuring such vessels and aircraft.



- Funding Restriction. The statute when enacted also restricted the amount of funds that can be used by the DOD during fiscal year 1984 for long-term leases or charters.<sup>2</sup>
- Maritime Propositioning of Ships Exception. Last, the statute when it was enacted made clear that nothing in this provision shall impede or affect the ability of the Navy to proceed to acquire the use of the TAKX Maritime Propositioning Ships and the T-5 tankers in accordance with leases entered into before the date of enactment of this act.<sup>3</sup>

### 3.9.9.2. Background of Law

- Enactment and Amendments. Section 2401 of Title 10 was enacted on September 24, 1983 as part of the DOD Authorization Act, 1984.<sup>4</sup> A minor amendment in 1984 was made to section 2401 redesignating certain clauses and striking a sentence providing for guidelines to be issued by October 31, 1984.<sup>5</sup> A minor amendment also was made to section 2401 in 1987 changing references to the Internal Revenue Code of 1954 to the Internal Revenue Code of 1986.<sup>6</sup>
- Purposes. In September 1982, the Navy signed long-term leases for "13 maritime propositioned ships--known as TAKX[s]--and 5 T-5 Tankers to be chartered by the Department of the Navy."<sup>7</sup> At the time "[t]hese lease contracts [were signed, they were determined to be] clearly in the national interest."<sup>8</sup> Indeed, the "[u]rgency of the requirement for the TAKX[s] was such that only a lease program provided the opportunity for the timely acquisition of these assets without major disruption of the Navy's shipbuilding program."<sup>9</sup>

"For this reason," Senator Cohen noted, section 2401 "includes a provision that makes clear that action is not being taken that would impede or affect the ability of the Navy to acquire 13 TAKX[s] and 5 T-5 tankers through the long-term charter arrangements negotiated by the Navy."<sup>10</sup> As noted, this part of the Historical and Statutory Notes no longer appears in 10 U.S.C. § 2401 (1992 Supp.).

The Office of Counsel for the Military Sealift Command is responsible for the 13 military propositioned ships that are part of the Navy's lease program. It was this group that was involved

<sup>2</sup>This provision now appears in the Historical and Statutory Notes portion of the statute.

<sup>3</sup>This section no longer appears in either the text of section 2401 or in the Historical and Statutory Notes portion of the statute.

<sup>4</sup>Pub. L. No. 98-94, § 1202(a)(1), 97 Stat. 679 (1983).

<sup>5</sup>Pub. L. No. 98-525, § 1232(a), 98 Stat. 2600 (1984).

<sup>6</sup>Pub. L. No. 100-26, § 2(a)(1), 101 Stat. 282 (1987).

<sup>7</sup>*Supra.* note 1 at 19271-272. The TAKX program . . . provide[s] forward deployed, floating depots of equipment and supplies to support three brigade-size Marine air ground task forces. The T-5 tankers which are point-to-point, non-combatant, clean petroleum carriers will replace five aging T-5 tankers in the current inventory." *Id.*

<sup>8</sup>*Id.* at 19272.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

initially in leasing naval vessels rather than purchasing them outright. As Representative Pickle noted in 1983:

The 'privatization' of the TAKX maritime repositioning program had two principal economic effects, both negative.

First, as shown by the Joint Committee on Taxation, the lease option will cost taxpayers approximately 12 percent more than purchasing the ships, and second, the leasing transaction enabled the Navy to shift about 30 percent of the cost of procurement from its budget to the Treasury's budget in the form of lost tax revenues.<sup>11</sup>

Not only was the Navy pursuing this type of "privatization," but other agencies were involved in the same kind of business dealings which resulted in considerable tax losses to the government.

When the practice of leasing and chartering vessels and aircraft became known, Representative Bonior of Michigan questioned the wisdom of the practice. "Much of the cost," he noted, "is . . . hidden from view because it shows up in a loss to the Treasury, rather than a direct cost."<sup>12</sup>

Senator Cohen of the Subcommittee on Sea Power and Force Projection of the Senate Committee on Armed Services expressed similar concern "about the absence of adequate congressional oversight of these leasing arrangements" and "about the impact of these leases on the operation and maintenance account which has traditionally been the source of funding for these leases."<sup>13</sup>

After studying the issue, the Subcommittee on Sea Power and Force Projection recommended adding section 2401 to S. 675 (1) to "substantively tighte[n] congressional control over long-term leases by the DOD;"<sup>14</sup> (2) to "provide standard guidance to agencies on lease-versus-buy decisions;" and (3) to "insure that the total costs to the U.S. Government are fully considered, by both the executive branch and the Congress, in making lease decisions."<sup>15</sup>

c. General Accounting Office Report. The recommendations of the Subcommittee were consistent with the recommendations contained in a Report issued by the General Accounting Office on June 28, 1983.

d. Lease versus Purchase. Senator Metzenbaum underscored Congress' concern because it is apparent that "long-term leases are more expensive than outright purchases."<sup>16</sup> Senator

<sup>11</sup>124 Cong. Rec. H 1388 (March 18, 1983) (Remarks of Rep. Pickle).

<sup>12</sup>124 Cong. Rec. H 206 (January 31, 1983) (Remarks of Rep. Bonior).

<sup>13</sup>124 Cong. Rec. 19271 (July 14, 1983) (Remarks of Sen. Cohen).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 19272.

Metzenbaum's concern is shared by the Department of the Treasury, the Joint Tax Committee, and the Subcommittee on Seapower.

### 3.9.9.3. Law in Practice

There are no specific FARs, DFARs, CFRs, or Navy Supplement regulations implementing this statute. Subsection (f) of section 2401 provides that the "Director of the Office of Management and Budget and the Secretary of the Treasury shall jointly issue guidelines for determining under what circumstances the DOD may use lease or charter arrangements for aircraft and vessels rather than directly procuring such aircraft and vessels." 10 U.S.C. § 2401 (f) (1992 Supp.).

Guidelines to the DOD covering Lease or Charter Arrangements for Aircraft and Naval Vessels were issued by the Office of Management and Budget and the Department of the Treasury on October 31, 1984. The guidelines "provide that long-term leasing should not be used as an alternative to direct DOD purchase and ownership unless leasing has been shown, by a lease-versus-buy analysis, to be less expensive to the government than direct purchase."<sup>17</sup> The guidelines "set forth general policy directives, and a more detailed set of technical rules, to be used in making this analysis."<sup>18</sup>

The Department of the Navy, Military Sealift Command, Office of Counsel works with section 2401 and states that it is useful because it provides for congressional review of decisions made by the military departments to lease rather than purchase naval vessels and aircraft.<sup>19</sup> That Office suggests that the provisions of the section may be too restrictive and that it limits the options of the military departments to respond quickly to needs that can be filled by a lease or charter rather than contracting for something to be built.

That Office recommends, however, that this statute be amended to permit six year leasing arrangements in order to correspond the period to the now-current six year planning cycle of the DOD.<sup>20</sup>

The Assistant Secretary of the Air Force (Acquisition), Deputy Assistant Secretary (Contracting), Operational Contracting Division, notes that the requirements set forth in this statute are appropriate, given the major investment that such contracts represent.<sup>21</sup> That Office questions, however, whether the detailed lease versus buy guidance currently set forth in the statute is warranted, when such comparisons are usually set forth in implementing regulations.<sup>22</sup>

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<sup>17</sup>Letter from David A. Stockman, Director of the Office of Management and Budget to Casper W. Weinberger Secretary of Defense, dated Nov. 1, 1984.

<sup>18</sup>*Id.*

<sup>19</sup>Memorandum from Mr. Richard Haynes, Chief Counsel, Department of the Navy, Military Sealift Command, Office of Counsel, to Ms. Theresa Squillacote, dated 17 Nov. 1992.

<sup>20</sup>*Id.*

<sup>21</sup>Memorandum from Department of the Air Force, Assistant Secretary (Acquisition), Assistant Deputy Assistant Secretary (Contracting), to Ms. Theresa Squillacote (attachments) dated 9 Nov. 1992.

<sup>22</sup>*Id.*

#### **3.9.9.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained. The Panel would not amend this statute to conform the statute to the six-year planning cycle currently in use at DCD as no value-added is perceived in such a proposition. Further, because the costing formula set forth in the statute was designed to address a specific problem with termination liability in such leases, the Panel would not seek to amend the statute in that respect, either.

This section was enacted in 1983 to close a major loophole in the defense budgeting process whereby the Navy and other services were using operation and maintenance funds to lease ships and planes instead of purchasing them with investment accounts. Not only do lease, charter, and service contracts often cost the government more in the long run, but before the enactment of section.2401, they also resulted in a large amount of revenue lost to the government because of the tax shelters that lessors and charterers could take advantage of when filing their federal tax returns.

Section 2401 closed these loopholes and introduced congressional oversight to this aspect of the budgeting process. For this reason, it continues adequately to serve a valid purpose and warrants retention.

#### **3.9.9.5. Relationship to Objectives**

Retention of this statute will further the goal of ensuring financial integrity in the DOD acquisition process.

**3.9.10. 10 U.S.C. § 2402**

**Prohibition of contractors limiting subcontractor sales directly to the United States**

**3.9.10.1. Summary of Law**

This statute states that each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractor will not enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States.

**3.9.10.2. Background of Law**

This section was originally enacted by the DOD Authorization Act for FY85.<sup>1</sup> Comparable language was included in both the House and the Senate versions of that bill. The Committee Reports merely reiterated the requirements of the provision.

**3.9.10.3. Law in Practice**

This statute is implemented by FAR 3.503 and by the mandatory contract clause set forth at FAR 52.203-6.

Counsel of Defense and Space Industry Associations (CODSIA) recommends retention of this statute, noting that it was written to ensure that prime contractors do not use their leverage to prevent subcontractors from selling directly to the government.

**3.9.10.4. Recommendation and Justification**

**Amend to delete requirement for contract clause**

The Panel recommends that this statute be amended to state that the Secretary of Defense shall ensure that subcontractors are not unreasonably precluded from making direct sales to the government. This type of policy statement should not be cast as yet another mandatory contract clause. Rather, we recommend that this section be recast as a statement of policy.

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<sup>1</sup>Pub. L. No. 98-525, § 1234(2), 98 Stat. 2601 (1984).

### **3.9.10.5. Relationship to Objectives**

Amendment of this statute will further the goal of streamlining the DOD acquisition process, and provide management flexibility to the Secretary of Defense.

### **3.9.10.6. Proposed Statute**

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

**(a) ~~The Secretary of Defense shall issue regulations to ensure that Each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractors will not-~~**

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

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

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

### **3.9.11. 10 U.S.C. § 2421**

#### **Plantations and farms: operation, maintenance and improvement**

##### **3.9.11.1. Summary of Law**

This statute provides that appropriations for the subsistence of members of the Army, Navy, Air Force, or Marine Corps are available for expenditures to operate, maintain or improve farms or plantations outside the United States but within the jurisdiction of those departments, in order to provide fresh fruits and vegetables to the armed forces. The section expressly states that it does not authorize the purchase of land. Excess crops may be sold. Further, only U.S. nationals hired pursuant to this authority are entitled to the U.S. employment benefits. Finally, the statute provides that such farms or plantations should be operated by a private contractor as far as practicable. The military department secretary must first determine that such a contract is unreasonable before utilizing military personnel.

##### **3.9.11.2. Background of Law**

This section was originally enacted by the Act to Provide for the Management and Operation of Naval Plantations Outside the United States.<sup>1</sup> The legislative history contains no relevant discussion of this authority. However, the original authority was to expire 6 months after termination of World War II. Therefore, in 1947, the Navy sought, and Congress granted, an amendment to this statute to make to authority permanent law.<sup>2</sup> The House Committee Report to that legislation noted that the Navy then maintained two farms under this authority, one in Puerto Rico and another in the West Indies, and stated:

Both these farms are considered to be justified both economically and from a military viewpoint. The existence of an immediate and continuous supply of perishable foods is felt to be an important element of base defense and the source of supply provided by these farms reduces imports, saves transportation charges, and reduces shipping space necessary to supply the bases. Furthermore, these farms provide a variety of fresh fruits and vegetables which would not otherwise be available and to which our forces are accustomed and entitled if possible. This source of supply is at no greater cost to the Government than would be the case with purchases of similar products made at a continental activity.<sup>3</sup>

<sup>1</sup>Pub. L. No. 78-377, ch. 306, 58 Stat. 1 (1944).

<sup>2</sup>Pub. L. No. 80-149, ch. 188, 61 Stat. 234 (1947).

<sup>3</sup>H.R. REP. No. 142, 80th Cong., 1st Sess. 1259-60 (1947).

The Report further noted that any private contractor operating such a facility would in any event be entirely dependent on Navy facilities for many services. Thus, it was deemed advantageous to keep the option for operation by military personnel.<sup>4</sup>

This section was codified in 1956 and the authority extended to the remaining, listed services.

### **3.9.11.3. Law in Practice**

The Office of the Assistant Secretary of the Air Force (Acquisition) reports that it has no policy concerns regarding this statute.<sup>5</sup> It is unaware whether the Air Force, or any other DOD activities maintain plantations or farms that would require this authorizing statute. Similarly, the Navy Office of General Counsel reports that no information is available regarding utilization of this authority by the Navy.<sup>6</sup>

However, the Office of the Judge Advocate General, Department of the Army, recommends that this provision be retained.<sup>7</sup> Based on a survey that office conducted of command counsels worldwide, the Eighth Army notes that the statute provides flexibility in obtaining fresh produce for troops overseas. In many countries in which future military contingencies may arise, human manure is used as fertilizer. Local produce thus can contain active bacteria that can cause severe illness. This statute therefore provides authority for the Army to provide alternative sources of produce for armed forces personnel.

There is no direct, regulatory implementation of this statute.

### **3.9.11.4. Recommendation and Justification**

#### **Retain**

The Panel recommends that this statute be retained. While it is not relied upon by all the military departments, it enables the Army to address a potentially serious health hazard for troops overseas. Thus, the statute adequately serves a valid purpose and should be retained.

### **3.9.11.5. Relationship to Objectives**

Retention of this statute will promote the best interests of the DOD without otherwise hindering the acquisition process.

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<sup>4</sup>*Id.*

<sup>5</sup>Memorandum from Mr. Robert H. Shipping, Asst. Deputy Asst. Secretary (Contracting), Department of the Air Force, Office of the Assistant Secretary, to Counsel, Acquisition Law Task Force, dated 27 Oct. 1992.

<sup>6</sup>Memorandum from Mr. Theodore Fredman, Assistant to the General Counsel, Department of the Navy, Office of the General Counsel, to Advisory Law Panel, dated 14 Oct. 1992.

<sup>7</sup>Memorandum from Col. Maurice O'Brien, Chief, Contract Law Div., Department of the Army, Office of the Judge Advocate General, to Advisory Law Panel, dated 1 May 1992.



### **3.9.12. 10 U.S.C. § 2422**

#### **Bakery and dairy products: procurement outside the United States**

##### **3.9.12.1. Summary of Law**

This statute provides that the Secretary of Defense may authorize any DOD element that purchases bakery and dairy products for armed forces use to buy such products from Army and Air Force exchange services, located outside the U.S. and in operation before July 1, 1986, using noncompetitive procedures.

##### **3.9.12.2. Background of Law**

This statute was originally enacted by the National Defense Authorization Act for FY 1987.<sup>1</sup> The relevant reports contain no direct discussion of this section.

##### **3.9.12.3. Law in Practice**

Under DAR Cases 89-303 and 304, the DAR Council elected not to implement this law on the basis that the statute permits, but does not require, noncompetitive procurement of these materials. Further, the DAR Council noted that the statute does not prescribe any unique procedures that would distinguish this noncompetitive procurement from any other noncompetitive procurement.

However, the Office of the Judge Advocate General, Department of the Army, reports that this statute is currently relied upon by various Army commands<sup>2</sup> to purchase bakery and dairy products from service exchanges in foreign countries with substandard sanitation requirements and with products that would not otherwise satisfy military personnel preferences. It urges retention of this statute. The Operational Contract Division, Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), reports that this statute is not currently utilized by the Air Force. That Office also notes that independent authority to use the exchanges is limited under relevant Comptroller General decisions.<sup>3</sup> The Department of the Navy reports that it currently relies upon this statute as authority to purchase goods and services overseas.

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<sup>1</sup>Pub. L. No. 99-661, § 312(a), 100 Stat. 3851 (1986).

<sup>2</sup>Those commands are Southern Command, the Community and Family Support Center, and the Army and Air Force Exchange Service.

<sup>3</sup>Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures, 58 Comp. Gen. 94 (1978), 78-2 CPD P353 (FPASA does not apply to contracts with nonappropriated fund instrumentalities; sole-source procurement with a NAFFI permissible only when impracticable to obtain services elsewhere).

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#### **3.9.12.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained. It serves a valid purpose within DOD by affording the military departments authority to purchase noncompetitively supplies and services from non-appropriated fund instrumentalities where such authority would otherwise be limited. Moreover, this statute is recently enacted by the Congress and thus there is insufficient practical experience with this statute to warrant recommending repeal. However, the Panel suggests that the Congress consider consolidation of this statute with the authorities set forth at 10 U.S.C. § 2423 and 10 U.S.C. § 2424 into a single statute.

#### **3.9.12.5. Relationship to Objectives**

Retention of this statute furthers the goal of maintaining acquisition statutes that promote the best interests of the DOD.

### **3.9.13. 10 U.S.C. § 2423**

#### **Laundry and dry cleaning services: procurement from facilities operated by the Navy Resale and Services Support office**

##### **3.9.13.1. Summary of Law**

This statute provides that the Secretary of Defense may authorize a DOD element to contract, using noncompetitive procedures, with a laundry and dry cleaning facility operated by the Navy Resale and Services Support Office, for laundry and dry cleaning services for troops located outside the U.S. It applies to such facilities that began operation before October 1, 1989.

##### **3.9.13.2. Background of Law**

This law was originally enacted by the National Defense Authorization Act for FY 1990 and 1991.<sup>1</sup> The language originated in the House version of the bill. The House Report indicated that such naval laundry plants were built with capacity to support the appropriated fund activities, and that removing the government work load from these plants would risk significant capacity deficits that would jeopardize the resale operation.<sup>2</sup> Therefore, these operations were added to the list of exchange activities that can do work for the U. S. government on a reimbursable basis.

In conference, the Senate receded with an amendment limiting such authority to naval plants located outside the U.S.<sup>3</sup>

##### **3.9.13.3. Law in Practice**

Under DAR Cases 89-303 and 304, the DAR Council elected not to implement these laws on the basis that the statute permits, but does not require, noncompetitive procurement of these materials. Further, the DAR Council noted that the statute does not prescribe any unique procedures that would distinguish this noncompetitive procurement from any other noncompetitive procurement.

The Office of the Judge Advocate General, Department of the Army, reports that this statute is not currently relied upon by the Army. The Operational Contracting Division, Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), reports that this statute is not currently utilized by the Air Force. That Office also notes that independent authority to use the exchanges is limited under relevant Comptroller General decisions.<sup>4</sup> The

<sup>1</sup>Pub. L. No. 101-189, § 323(a), 103 Stat. 1414 (1989).

<sup>2</sup>H.R. REP. No. 121, 101st Cong., 1st Sess. 229 (1989).

<sup>3</sup>H.R. CONF. REP. No. 331, 101st Cong., 1st Sess. 1019 (1989).

<sup>4</sup>Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures, 58 Comp. Gen. 94 (1978), 78-2 CPD P353 (FPASA does not apply to contracts with nonappropriated fund instrumentalities; sole-source procurement with a NAFI permissible only when impracticable to obtain service elsewhere).

Department of the Navy reports, however, that several naval commands<sup>5</sup> currently rely upon this statute as authority to purchase such services overseas, and refers specifically to a laundry service operation in Naples, Italy that relies upon this statute to generate an adequate workload.

#### **3.9.13.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained in its entirety. It serves a valid purpose within DOD by affording the military departments authority to purchase noncompetitively laundry and dry cleaning services from non-appropriated fund instrumentalities overseas where such authority would otherwise be limited. Moreover, this statute has been recently enacted by the Congress and thus there is insufficient practical experience with this statute to warrant recommending repeal. However, the Panel suggests that the Congress consider consolidation of this statute with the authorities set forth at 10 U.S.C. § 2422 and 10 U.S.C. § 2424 into a single statute.

#### **3.9.13.5. Relationship to Objectives**

Retention of this statute furthers the goal of maintaining acquisition statutes that promote the best interests of the DOD.

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<sup>5</sup>Naval Supply Systems Command and the Navy Exchange Services Command have reported to the Navy Office of General Counsel regarding this statute.

### **3.9.14. 10 U.S.C. § 2424**

#### **Procurement of supplies and services from exchange stores outside the United States**

##### **3.9.14.1. Summary of Law**

This section provides that the Secretary of Defense may authorize a DOD element to contract noncompetitively with a military department exchange store located outside the U.S. for supplies or services for use by armed forces located outside the U.S. Such contracts may not exceed \$50,000, and must involve stock supplies that are regularly sold by the store.

##### **3.9.14.2. Background of Law**

This statute was originally enacted by the National Defense Authorization Act for FY 1990 and 1991.<sup>1</sup> The language originated in the House version of the bill. The House Report indicated that the authority was intended to reduce procurement administrative costs and decrease reliance upon foreign supplies.<sup>2</sup> The report noted that the authority permitted expeditious replenishment of commercial type items and services needed at reasonable prices. In conference, the Senate receded without amendment.

##### **3.9.14.3. Law in Practice**

Under DAR Cases 89-303 and 304, the DAR Council elected not to implement this law on the basis that the statute permits, but does not require, noncompetitive procurement of these materials. Further, the DAR Council noted that the statute does not prescribe any unique procedures that would distinguish this noncompetitive procurement from any other noncompetitive procurement.

The Office of the Judge Advocate General, Department of the Army, reports that this statute is currently relied upon by various Army commands<sup>3</sup> to purchase items that are not locally available or not available at a reasonable price. It notes that this authority was utilized during Operation Desert Storm and urges retention of this statute. The Operational Contracting Division, Deputy Assistant Secretary (Contracting), Assistant Secretary of the Air Force (Acquisition), reports that this statute is not currently utilized by the Air Force. That Office also notes that independent authority to use the exchanges is limited under relevant Comptroller General decisions.<sup>4</sup> The Department of the Navy reports that several of its commands<sup>5</sup> currently rely upon this statute as authority to purchase goods and services overseas.

<sup>1</sup>Pub. L. No. 101-189, § 324(a), 103 Stat. 1414 (1989).

<sup>2</sup>H.R. REP. No. 121, 101st Cong., 1st Sess. 230 (1989).

<sup>3</sup>Those commands are Southern Command and the U.S. Army in Europe.

<sup>4</sup>Obtaining Goods and Services from Nonappropriated Fund Activities through Intra-Departmental Procedures, 58 Comp. Gen. 94 (1978), 78-2 CPD P353 (FPASA does not apply to contracts with nonappropriated fund

#### **3.9.14.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained in its entirety. It serves a valid purpose within the DOD by affording the military departments authority to purchase noncompetitively supplies and services from non-appropriated fund instrumentalities where such authority would otherwise be limited. Moreover, this statute was recently enacted by the Congress and thus there is insufficient practical experience with this statute to warrant recommending repeal. However, the Panel suggests that the Congress consider consolidation of this statute with the authorities set forth at 10 U.S.C. § 2422 and 10 U.S.C. § 2423 into a single statute.

#### **3.9.14.5. Relationship to Objectives**

Retention of this statute furthers the goal of maintaining acquisition statutes that promote the best interests of the DOD.

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instrumentalities; sole-source procurement with a NAFFI permissible only when impracticable to obtain service elsewhere).

<sup>5</sup>Naval Supply Systems Command and the Navy Exchange Services Command have reported to the Navy Office of General Counsel regarding this statute.

### **3.9.15. 31 U.S.C. § 712**

#### **Investigating the use of public money**

##### **3.9.15.1. Summary of Law**

This statute provides that the Comptroller General shall investigate all matters related to the receipt, disbursement and use of public money and estimate the cost to the United States government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations that the Comptroller General considers desirable.

##### **3.9.15.2. Background of Law**

This section was codified by the Act to Revise, Codify and Enact Without Substantive Change Certain General and Permanent Laws, Related to Money and Finance as Title 31, U.S. Code, Money and Finance.<sup>1</sup> It was originally enacted by the Act of June 10, 1921. No legislative history on that law is available.

##### **3.9.15.3. Law in Practice**

The General Accounting Office (GAO), Office of General Counsel, reports that it views this statute as authority to engage in its fiscal investigatory activities, but not as a mandate to regularly engage in the listed activities.<sup>2</sup> It recommends retention of this statute.

##### **3.9.15.4. Recommendation and Justification**

###### **No Action**

The Panel considers this section not primarily related to the DOD acquisition process and recommends no further action with respect to this law.

##### **3.9.15.5. Relationship to Objectives**

Action on this statute will not specifically promote any of the Panel's objectives.

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<sup>1</sup>Pub. L. No. 97-258, § 1, 97 Stat. 889 (1982).

<sup>2</sup>Telephonic conversation between Mr. James Hinchman, General Counsel, GAO, and Mr. LeRoy Haugh, on 30 Oct. 1992.

## **3.9.16. Public Law Number 101-165 § 9081**

### **DOD Appropriations for Fiscal Year 1990**

#### **3.9.16.1. Summary of the Law**

This section provides that no funds available to the DOD during the current fiscal year [fiscal year 1990] and thereafter may be used to enter into any contract with a term of eighteen months or more. It also provides that no such funds may be used to extend or renew any contract for a term of eighteen months or more, for any vessel, aircraft, or vehicles, through a lease, charter, or similar agreement without previously having been submitted to the Committees on Appropriations of the House of Representatives and the Senate in the budgetary process.

The section further provides that any contractual agreement which imposes an estimated termination liability (excluding the estimated value of the leased item at the time of termination) on the Government exceeding 50 per centum of the original purchase value of the vessel, aircraft, or vehicle must have specific authority in an appropriation Act for the obligation of 10 per centum of such termination liability.

#### **3.9.16.2. Background of the Law**

This section was enacted by Section 9081 of the DOD Appropriations Act for FY90.<sup>1</sup>

This language originated in the Act Making Further Continuing Appropriations for the DOD for FY85.<sup>2</sup> It was continued in annual DOD appropriations acts and was made permanent law in 1989.

The 18-month lease restriction resulted from congressional reaction to the off-budget financing of the Navy's MPS and T-5 tanker programs specifically, and to government leasing practices in general. Congress objected to government leasing programs because they were being increasingly used by government departments and agencies to obtain the long-term use of assets outside the budget process that traditionally had been the subject of direct purchase procurements within the budget process. These types of programs contributed to the deficit but were beyond congressional control or oversight in the budget process.<sup>3</sup>

#### **3.9.16.3 Law in Practice**

There is no direct, regulatory implementation of this restriction.

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<sup>1</sup>Pub. L. No. 101-165, § 9081, 103 Stat. 1147 (1989).

<sup>2</sup>Pub. L. No. 99-190, 99 Stat. 1183 (1985).

<sup>3</sup>Datafax transmission from Mr. Richard P. Knutsen, Office of Counsel, Military Sealift Command, Department of the Navy, to Ms. Theresa Squillacote, dated 17 November 1992.



With respect to this provision, the Department of the Navy, Military Sealift Command (MSC), Office of Counsel seeks repeal of this permanent law provision.<sup>4</sup> It bases that recommendation on its contention that the statute now serves solely to inflate charter costs, rather than serving as a valid oversight provision.

MSC regularly charters privately owned tonnage to fulfill the strategic sealift mission of ocean transportation of DOD materials and supplies. MSC forecasts its need for ships in the basis of research program needs and cargo information and forecasts available from other DOD components. Because of the volatile nature of the ship charter market, MSC estimates that \$30 million per year could be saved if it was able to charter ships up to five years, rather than for 17 month periods.

Currently, MSC charters vessels for a 17 month firm charter period, with two 17 month options. Although this results in a 4.25 year charter period, only the first 17 months can be made firm. The 17 month firm period often prohibits MSC access to reflagged or upgraded private charters because the cost of reflagging, conversion or upgrade has to be amortized over such a short period. Thus, the charter rates are driven higher than they would be if MSC could offer a longer firm period.

Longer term charters would not only allow owners of vessels that need reflagging or upgrading to be made available to MSC at reasonable rates, but would also induce other owners to propose more reasonable charter rates because they would be insulated from the volatility of the market for longer periods of time.

#### **3.9.16.4 Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this permanent law provision. The oversight concerns underlying this statute are adequately addressed by the five-year lease restrictions set forth at 10 U.S.C. § 2401. Moreover, this statute demonstrably inhibits economy and efficiency within the DOD acquisition process. Based on that rationale, the Panel recommends repeal of this statute in its entirety.

#### **3.9.16.5 Relationship to Objectives**

**Repeal of this statute will further the best interests of the DOD acquisition process.**

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<sup>4</sup>Memorandum from Mr. Richard Haynes, Chief Counsel, Department of the Navy, Military Sealift Command, to Ms. Theresa Squillacote, dated 17 Nov. 1992.

**Chapter 4  
SocioEconomic, Small Business  
and Simplified Acquisition Thresholds**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

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<b>4. SOCIOECONOMIC LAWS, SMALL BUSINESS, AND SIMPLIFIED ACQUISITION THRESHOLD .....</b>	<b>1</b>
<b>4.0. Introduction.....</b>	<b>1</b>
<b>4.1. Simplified Acquisition Threshold.....</b>	<b>9</b>
4.1.0. Introduction .....	9
<b>4.2. Labor and Equal Opportunity.....</b>	<b>25</b>
4.2.0. Introduction .....	25
4.2.1. 10 U.S.C. § 7299 .....	29
4.2.2. 18 U.S.C. § 4082 .....	31
4.2.3. 19 U.S.C. § 2516 .....	33
4.2.4. 22 U.S.C. § 2755 .....	35
4.2.5. 29 U.S.C. § 793 .....	37
4.2.6. 38 U.S.C. § 4212 .....	41
4.2.7. 40 U.S.C. §§ 270a et seq.....	43
4.2.8. 40 U.S.C. § 276a et seq.....	49
4.2.9. 41 U.S.C. §§ 35 - 45 .....	57
4.2.10. 41 U.S.C. § 47 .....	65
4.2.11. 41 U.S.C. § 258 .....	67
4.2.12. 41 U.S.C. §§ 351 - 358 .....	69
4.2.13. 41 U.S.C. § 701 .....	75
4.2.14. 42 U.S.C. § 1701 .....	79
<b>4.3. Small and Disadvantaged Business Preferences .....</b>	<b>81</b>
4.3.0. Introduction .....	81
4.3.1. 10 U.S.C. § 2322 .....	85
4.3.2. 10 U.S.C. § 2392 .....	87
4.3.3. 10 U.S.C. §§ 2411-2418 .....	89
4.3.4. 15 U.S.C. § 631 et seq. ....	91
4.3.5. 25 U.S.C. § 1544 .....	115
4.3.6. 41 U.S.C. § 417a.....	117
<b>4.4. Protection of the Environment .....</b>	<b>119</b>
4.4.0. Introduction .....	119
4.4.1. 33 U.S.C. § 1368 .....	121
4.4.2. 42 U.S.C. § 7606 .....	125
4.4.3. 42 U.S.C. § 6962 .....	129

<b>4.5. Miscellaneous Statutes.....</b>	<b>133</b>
<b>4.5.0. Introduction.....</b>	<b>133</b>
<b>4.5.1. 10 U.S.C. § 7341.....</b>	<b>135</b>
<b>4.5.2. 10 U.S.C. § 7342.....</b>	<b>137</b>
<b>4.5.3. 10 U.S.C. § 7343.....</b>	<b>139</b>
<b>4.5.4. 10 U.S.C § 7345.....</b>	<b>141</b>
<b>4.5.5. Public Law Number 101-511 § 8034.....</b>	<b>143</b>
<b>4.5.6. Public Law Number 101-511 § 8057.....</b>	<b>145</b>
<b>4.5.7. Public Law Number 101-511 § 8067.....</b>	<b>147</b>

## **4. SOCIOECONOMIC LAWS, SMALL BUSINESS, AND SIMPLIFIED ACQUISITION THRESHOLD**

### **4.0. Introduction**

This chapter sets forth the Panel's recommendations on those socioeconomic policies of the United States which apply to DOD. One of the mandates in the Panel's charter was to eliminate those statutes which were unnecessary to the buyer-seller relationship.<sup>1</sup> Under this criterion, few, if any, of the statutes discussed in this chapter would be retained. However, the proliferation of socioeconomic statutes applicable to DOD -- 114 such statutes (either separate sections of the U.S. Code or specific sections of various public laws) were reviewed by the Panel -- shows that the defense acquisition system reflects a balance between the requirements of efficiency or streamlining and the dictates of larger national goals. In short, the requirements of the common defense have always been balanced by the necessity to promote the general welfare. Each defense dollar is expected to perform double duty: not only satisfying the primary purpose for which it was authorized but contributing as well to the objectives of full, fair, and equal employment opportunity, proper utilization of the defense industrial base, promotion of small business and minority business, and protection of the environment.

The Panel's approach to socioeconomic legislation was to assume that the socioeconomic choices made by the Congress reflect its considered judgment that the bulk of DOD contract dollars should be subject to the full panoply of existing socioeconomic legislation. No attempt was made to assess whether the social goals fostered by socioeconomic legislation were or were not "correct." The "correctness" of the policy choice was taken as a given. In addition, the fact that a particular statute created impediments to efficient procurement was not considered to be a reason in and of itself to recommend repeal. Accordingly, the Panel focused its recommendations on streamlining certain parts of the existing statutes and in suggesting exemptions from socioeconomic laws in areas in which they were creating serious problems for DOD acquisition. The major points of this analysis are discussed in the subchapter introductions in this chapter and in Chapter 8.

Many of those points resulted from a process of extensive consultation between the Panel and a wide variety of people and organizations with strong interests in socioeconomic issues affecting DOD. Its scheduled meetings allowed the Panel to establish working relationships with many individuals from both Governmental and private organizations who personified a diverse range of experience and expertise. They typically included representatives from: the staffs of the Senate Small Business Committee, the Small Business Administration, and various offices of Small and Disadvantaged Business Utilization; the U.S. Chamber of Commerce and the Small Business Legislative Council; the Associated Builders and Contractors, and the National Association of Minority Business. TRIAD, a coalition of three major trade associations that has long been recognized as a key forum for the discussion of DOD small business and minority contracting issues, not only sponsored presentations by Panel members but mobilized their own membership to support Panel research objectives. Notices in the Federal Register also helped to

<sup>1</sup>Pub. L. No. 101-510 § 800, 104 Stat. 1587.

develop mailing lists that eventually totaled more than 100 correspondents, many of whom provided useful comments responding to various socioeconomic "strawman proposals" prepared for the Panel's review. These ongoing communications put the Panel into direct contact with an even wider variety of organizations and individuals -- including installation contracting officials, environmental specialists, and concerned citizens. Finally, the Panel held a public comment session on socioeconomic laws that was duly advertised in the Federal Register and convened on Capitol Hill on July 31, 1992.

Aided by these extensive contacts and comments, the Panel succeeded in identifying four major areas in which significant amendments to existing socioeconomic laws seemed required: acquisition of commercial items; purchases from and sales to foreign countries; small purchase acquisitions; and small business regulation generally. After reviewing the socioeconomic laws, the Panel makes the following major recommendations.

## I

### **Congress Should Enact a New, Comprehensive Structure for Acquisition of Commercial Items.**

The Panel was told that the application of socioeconomic regulatory requirements unique to defense contractors created significant barriers to the entry of companies which might otherwise compete for defense contracts. For example, The Boeing Company commented:<sup>2</sup>

... [a] contractor's choices are limited to spreading these costs [of socioeconomic and regulatory legislation] over its commercial sales (and thus becoming less competitive commercially) or absorbing the costs out of profits. Neither choice provides an incentive to do business with the U.S. Government. As a result, each Government contract-unique requirement should be viewed as the potential cause of yet another U.S. commercial contractor deciding not to compete for the sale of its commercial products to the Government.

The flow-down of socioeconomic restrictions to subcontractors, the Panel learned, also immensely complicates subcontract administration, disturbs existing buyer-seller relationships at the subcontractor level, and creates its own barriers to entry.

In light of these concerns, and the need for increasing civil-military integration, the Panel recommends a new, structured approach to commercial item acquisition, which is covered in Chapter 8 of this Report.

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<sup>2</sup>Letter from Judy Morehouse, Director, Government Business Relations, The Boeing Company, to F. Whitten Peters dated Dec. 3, 1992.

## II

### **Congress Should Enact a New, Comprehensive Structure for Domestic Trade and Cooperation.**

In reviewing laws relating to domestic preferences, the Panel reached the conclusion that domestic preference legislation should not be reviewed as "socioeconomic" legislation, but as trade regulation and that such consideration required a comprehensive approach covering four areas: domestic preferences; defense industrial base and national security concerns; foreign treaties, trade agreements, and memoranda of understanding; and laws regulating sales of defense products to foreign Governments. As a result, the Panel created a defense trade working group which coordinated the analysis in all of these areas and reported this effort as Chapter 7 of this Report.

## III

### **Congress Should Enact a New, Comprehensive Structure for Smaller Purchases.**

The Panel found that there is no common approach to the implementation of socioeconomic policy. Some socioeconomic statutes apply to virtually all contracts, while others have thresholds. Where there are thresholds, they vary widely and without any apparent purpose. In addition, even as the small purchase threshold has increased from \$1000 in 1947 to \$25,000 today, thresholds in socioeconomic and regulatory statutes originally set to exempt small purchases have not been raised, with the result that many complex regulations now apply to the vast majority of contracts. Finally, the Panel was told by many witnesses that the application of socioeconomic policies to low-value contracts greatly increases the administrative costs of awarding and administering those contracts -- particularly when a statute calls for reporting information back to the contracting activity -- without much countervailing benefit to social goals. In order to restore the original concept that smaller contracts would be governed by simpler procedures and regulations, and to restore the cost-benefit balance between regulation and practicality, the Panel recommends in subchapter 4.1. a new uniform simplified acquisition threshold of \$100,000, below which simplified contracting procedures would be used.

## IV

### **Congress Should Enact a Comprehensive Chapter in Title 10 Setting Out All Socioeconomic Laws -- And Particularly Small Business Laws -- That Apply To DOD.**

Because existing socioeconomic laws represent such a hodgepodge, and because many of the laws affecting DOD are not even codified, the Panel recommends that Congress consider the adoption of a new chapter of Title 10 which would collect existing socioeconomic policy -- especially the small and minority business legislation that is today scattered in authorization and appropriation acts -- and would create a structure for future laws. Because of the press of time,

the Panel did not attempt to draft legislation for this proposed chapter although it did make limited recommendations in the small business area on a "stand alone" basis.<sup>3</sup>

The Panel believes that a comprehensive new chapter should do the following things:

**Enumerate the laws applicable to DOD.** -- The public laws reviewed by the Panel suggest a pattern in which annual defense authorization or appropriations acts regularly become the preferred vehicles for the imposition of new socioeconomic requirements on DOD. While adding new and often complex statutory requirements in uncodified law is itself a problem, this legal regime is complicated by two factors: Old laws are seldom repealed and they inevitably spawn an even greater number of regulations, an effect which amplifies the "ad hocness" of the statutes.<sup>4</sup> Because it is far easier to pass a law than to repeal one, it is also difficult to coordinate a comprehensive approach to key problem areas.

Whatever the reason, statutes passed in response to issues of concern in World War I or the Great Depression linger on, regardless of whether the original need continues. A good example of this is the Walsh-Healey Act which, when it was passed in 1933, addressed very real problems in the workplace. Half a century later, however, this Act continues to require clauses in every contract awarded by the Federal Government -- even though the labor hour and workplace safety provisions central to its purpose have long since been superseded by laws of more general applicability. Until the laws are enumerated, however, it is very difficult to determine which laws are no longer necessary, which conflict with others, and which in combination have impacts that no one anticipated or desired.

A single section detailing the socioeconomic requirements levied on DOD would also clarify the policy choices which must be made in the more austere defense budget environment that is just ahead. Clearly, understanding what the law is today is fundamental to decision-making on whether present or future programs represent added value to DOD and the taxpayer. As presently constituted, however, the diversity of socioeconomic statutes is such that it is difficult to make such assessments.

**Create a uniform theory of flow down of socioeconomic laws to subcontractors.** -- Some requirements of existing law flow down to subcontractors, while others do not, often without any apparent rationale. A consistent theory of flow down is required, especially since today many policies that flow down are not consistent with standard commercial practice or the laws generally applicable to U.S. business.

**Streamline requirements.** -- The 114 socioeconomic statutes which were reviewed for their impact upon defense procurement represent a jumble of requirements imposed upon the DOD from multiple sources with varying degrees of relevance, validity, and importance to the

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<sup>3</sup>See subchapter 4.3. of this Report.

<sup>4</sup>In the labor area alone, for example, a 1988 study by the Logistics Management Institute found 38 separate thresholds affecting Government contracts, many of them the direct result of statutory requirements. See 2 Logistics Management Institute, *Reforming Acquisition Regulations: Revising Dollar Thresholds*, Report AL714R3, September, 1988, Bethesda, MD, pp. 85-113 [LMI Study].



national interest or the national defense. Some reflect key national policies, while others suggest more transitory intentions. The accumulation of an ever-expanding body of laws and regulations has a pernicious effect on both the Government and its suppliers, the most obvious of which is cost. Simply stated, it costs both sides money to maintain the personnel and procedures needed to prepare the countless reports, statistics, and administrative actions needed to ensure compliance. The reduction of these overhead costs is thus a common interest, both for a defense establishment that is rapidly being reduced and for Government contractors who must compete effectively for, and with, diminished resources. While each socioeconomic law may have been passed with the best of intentions and the purest of motives, the cumulative effect has been to create significant barriers to commercial-military integration.

While the necessity of streamlining the socioeconomic statutes is clearly driven by urgent requirements to reduce costs and to promote more effective integration between the commercial and Governmental marketplaces, there is another reason to take a more unitary view of defense capabilities. Changes in the international security environment and correspondingly reduced defense spending will clearly compel a wide range of future strategic choices. Because of their immediate flow-down to subcontractors and suppliers in every state of the Union, defense contracts have long been a convenient and effective vehicle for implementing new social policies, from the labor protections of the Depression to the small business policies of the present. However, reductions in the defense budget mean that it is no longer possible to use DOD to fund a large array of worthy social programs. Therefore it is vital that those strategic choices include a clear determination of the additional burdens that the defense acquisition system should be expected to bear. Such a determination is essential in ensuring that the fundamental balance between the bottom-line efficiency of that system and its support of larger national goals has been adjusted to take account of future challenges.

The ability to make such unblinking assessments, as well as the streamlining of the relevant statutes, would be considerably enhanced if a new chapter detailing the socioeconomic requirements pertaining to the Defense Department were added to Title 10 of the U.S. Code. Although justifiable on purely administrative grounds, the consolidation of those requirements under a single statutory heading is a solution that some would consider radical, if for no other reason than that difficult jurisdictional questions might be raised among various congressional committees. However, the Panel believes that this step is warranted for two reasons.

First, there needs to be a single authoritative source for determining all the socioeconomic requirements which pertain to DOD. The unique scope of defense procurement -- which accounted for \$140.1 billion in 1991<sup>5</sup> -- is itself an argument which strongly supports consolidation.<sup>6</sup> There is also a practical argument to be made for encouraging a unity of view among a divergent community of Government policy makers and administrators, as well as their suppliers.

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<sup>5</sup>Table 1, Directorate for Information Operations and Reports, DOD PRIME CONTRACT AWARDS, SIZE DISTRIBUTION FISCAL YEAR 1991, p. 16 (this table does not include contract actions below \$25,000, which amounted to \$13.8 billion in 1991).

<sup>6</sup>U.S. DEPT OF DEFENSE, *DEFENSE 92*, September/October, 1992 (Washington: USGPO, 1992), p. 21.

Second, socioeconomic requirements levied on DOD should reflect reasoned policy choices and not the time-compressed decisions that frequently attend the passage of annual defense appropriations and authorization acts. Not only are the socioeconomic requirements contained in many of these acts passed with insufficient consideration, but there is some confusion over the legal standing of these provisions once appropriations have been expended. Consolidation into a new section of the U.S. Code would encourage the drafting of legislation based on a comprehensive view of the acquisition system.

**Balance the Desire to Legislate Against the Practicalities of a Decreasing DOD Workforce.** -- The Panel believes that balancing the socioeconomic requirements to be supported by DOD against the limits of its decreasing manpower is a critical issue. For example, a recent study by the Merit Systems Protection Board documented the fact that the Government's 31,000 contracting officers are hard-pressed even today to administer a procurement system characterized by a "potentially counterproductive growth in Federal procurement policy and procedures."<sup>7</sup> Despite the demands of increasingly complex legislation, currently planned budget decrements will reduce the defense acquisition work force. With fewer contract administrators and auditors available, DOD clearly needs to be able to focus the efforts of these specialists on contracts which carry the greatest number of dollars -- and a concomitantly higher degree of risk to the Government -- and the most important social programs.

The statistics in Table I below demonstrate a key fact of life in DOD contracting: There is an inverse relationship between the number of dollars expended in a contract and the number of contract actions. Because of this, it may be possible to eliminate vast amounts of work with small adjustments in statutes without losing the major thrust of a socioeconomic program. Such balancing is essential in light of the austere DOD budgets of the future.

**Reduce contractual implementation of laws.** -- In the past, many socioeconomic statutes have been implemented by contract clauses, with the result that most violations of statute are also breaches of contract. At the same time, many breaches will also be crimes or will result in false claims -- all of which are both crimes and civil wrongs punishable by stiff statutory penalties.

There is a fundamental irrationality about this sort of regulatory scheme, since there are usually no actual contractual damages from the breach. For example, seldom does a single breach of VietNam veterans preference provisions<sup>8</sup> give rise to termination of a contract. Moreover, in most cases of breach, what is really required is not a remedy in the Armed Services Board of Contract Appeals, but some assurance that a contractor will comply in the future with some ability to remove from federal contracting those companies who repeatedly fail to comply with mandated policy.

Accordingly, the Panel recommends that any comprehensive review of socioeconomic policy give serious consideration to replacing the doctrine of "enforcement through contract

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<sup>7</sup>U.S. Merit Systems Protection Board, *Work Force Quality And Federal Procurement: An Assessment*, Washington, DC, July, 1992, p. lii.

<sup>8</sup>38 U.S.C. § 4212.

clauses" with a mechanism, such as suspension and debarment, which gives the Government the power needed to obtain compliance through direct enforcement. Since most socioeconomic policy is in fact -- and is intended to be -- implemented on a company-by-company basis and not a contract-by-contract basis, regulation through contract clauses is both burdensome and off the mark. More straightforward methods of obtaining compliance would: avoid the enormous clutter found in contemporary Government contracts, ease the burden on a shrinking contracting work force, and reduce barriers to commercial-military integration. It could also place enforcement responsibilities into the hands of administrators whose job it is to obtain compliance with Government policies and who are trained in obtaining the types of administrative agreements through which compliance can be both attained and maintained.

**TABLE I**  
**DOD PRIME CONTRACT ACTIONS BY SIZE: FY 1991**  
**(Contracts Over \$25,000; Dollar Amounts In Millions)**

SIZE IN DOLLARS BY CONTRACT		TOTAL		PERCENT	
		NUMBER	\$AMOUNT	NUMBER	\$AMOUNT
25,000-	49,999	65,482	2,043	28.6	1.6
50,000-	99,999	58,549	3,643	25.5	2.9
100,000-	199,999	38,689	4,802	16.9	3.8
200,000-	299,999	17,329	3,676	7.6	2.9
300,000-	499,999	17,492	5,859	7.6	4.6
500,000-	999,999	14,339	8,281	6.3	6.6
1,000,000-	1,999,999	8,150	9,269	3.6	7.3
2,000,000-	2,999,999	3,044	5,828	1.3	4.6
3,000,000-	4,999,999	2,351	8,156	1.1	6.5
5,000,000-	9,999,999	1,938	11,605	0.8	9.2
10,000,000-	or more	1,755	63,134	0.8	30.0

Source: DOD (Washington Headquarters Services, Directorate for Information Operations & Reports)

## **4.1. Simplified Acquisition Threshold**

### **4.1.0. Introduction**

As shown by the figures at Table 1, the DOD contracting work force spends much of its time on a large number of smaller contracts. This is a problem which has occurred despite long-standing efforts by Congress and DOD to simplify acquisition procedures for small-dollar contracts in order to reduce administrative costs and to speed procurement. Today, there is probably no single area of acquisition law where there is a greater potential to reduce costs than in small-dollar contracts while retaining the management controls needed for the accountability of public funds.

In 1947, Congress established a "small purchase threshold" at \$1000 with the passage of the Armed Services Procurement Act of 1947. The Federal Property and Administrative Services Act (passed in 1948) established the same threshold levels for civilian agencies at the time that the General Services Administration was established. Subsequent increases in the level of the small purchase threshold have primarily come about as Congress gradually recognized the effects of inflation upon small-dollar value purchases. In 1958, for example, Pub. L. No. 85-800 raised the threshold to \$2,500, a level which held constant for almost twenty years. In 1978, Pub. L. No. 95-507 raised the level to \$10,000, but inflationary pressures led to the passage of Pub. L. No. 99-500 in 1986, which brought the threshold to its present level of \$25,000 and provided for a regular periodic review.

Since 1947, Congress has enacted other legislative requirements which -- as shown throughout this study -- have increased the complexity of the defense procurement process. Because Congress has usually recognized the need to balance the benefits of the legislation with the potential for adverse impacts on the economy and efficiency of the procurement process, much of this legislation was deliberately drafted to have minimal impact upon small purchases. Congress usually accomplished this by setting a "floor" so that the requirements of the new law would not apply to contracts written at dollar values below the existing statutory "ceiling" for simplified acquisitions. Although the "ceiling" for simplified acquisitions was regularly adjusted to account for the declining purchasing power of the dollar, the "floors" for applying these other statutory requirements did not keep pace. As a result -- and contrary to the original intent of Congress -- the requirements of these statutes were gradually applied to formerly simplified acquisitions. Procedures originally intended to expedite the economic acquisition of small-dollar value items and services are now subject to a wide array of relatively complex and costly administrative steps, solicitation provisions, and contract clauses. Compliance with each of those provisions adds to the administrative overhead of both the Government and its suppliers, while also adding barriers to commercial-military integration.

#### **4.1.0.1. Key Elements**

The Panel believes that the best way to streamline smaller purchases is to create a new, uniform "simplified acquisition threshold" at a level of \$100,000 (adjusted every fifth year for

inflation) to replace the current small purchase threshold defined in 41 U.S.C. § 403(11) and, further, to amend 10 U.S.C. § 2304(g) to provide for simplified purchase procedures for contracts whose value is less than the new threshold. In addition, the Panel recommends extending the current small business reservation established by 15 U.S.C. § 644(j) up to the simplified acquisition threshold. By substituting a uniform threshold for today's many differing thresholds, contracting officers will not have to turn to a labyrinth of regulations, as they do today, to determine whether (and which) simplified procedures can be used. In addition, as DOD budgets decline, contracting offices will be able to conserve on contract administration resources and devote greater effort to contracts over \$100,000, through which over 90% of DOD's acquisition funds are spent. Finally, small businesses will be free from legislation that imposes unique contract requirements which require special skills to understand and often substantial expense to implement.

In recommending a simplified acquisition threshold of \$100,000, the Panel is not recommending or implying that all purchases of supplies or services below that threshold would be treated the same. Rather, the Panel is recommending a level below which the FAR and the DFAR would prescribe a range of simplified procedures that would vary by dollar value in terms of such factors as the amount (and documentation) of competition required, the formality and detail of price reasonableness documentation, and the contracting form to be used. Part 13 of FAR and DFAR provide a range of such procedures appropriate to the wide variety of simplified acquisitions, ranging from small imprest fund or credit card purchases to those in the upper ranges for which wider competition and more structured processes would be required by regulation.

The Panel's recommendation consists of four parts.

## I

### Establish a Simplified Acquisition Threshold at \$100,000.

The small purchase threshold was set at \$25,000 in 1986. Nonetheless, the Panel recommends that it be increased to \$100,000. Any particular level is, of course, somewhat arbitrary. The Panel recommends \$100,000 for several reasons.

First, the Panel reviewed available procurement statistics, which show that across a number of statutory programs, a \$100,000 threshold will remove from complex regulations over 50% of contract actions above \$25,000 while deregulating only 5% of DOD expenditures. In addition, adoption of a \$100,000 threshold will mean that some 98% of all DOD contract actions can be accomplished under simplified procedures. Thresholds above \$100,000 begin to impact more significantly on the amount of spending that would be released from complex regulation, although an argument could certainly be made -- and has been made by the executive branch in some cases -- for a higher threshold. On the other hand, stopping at a threshold of \$50,000 would only free about half as many contract actions from complex regulations as the \$100,000 threshold.

Second, recent Congressional actions establishing "floors" for the application of procurement laws have selected \$100,000 as the floor.<sup>1</sup>

Third, statements received by the Panel from several DOD agencies suggested that as a practical matter, as contract staffs are cut back as part of the overall defense "build-down," it will be difficult for contracting officers to spend much time on contracts below \$100,000.

Fourth, it seemed unlikely to the Panel that any company would actually be willing to spend the money to make fundamental changes in the way it does business in return for a sale of \$100,000 or less. This may be particularly true of small businesses, which are the preferred recipients of contracts of this size. Indeed, the Panel members are all familiar with anecdotal evidence showing that many small businesses never gain actual knowledge of, understand, or implement the "boilerplate" that is today inserted into smaller contracts.

Fifth, it appears that the great majority of contracts above \$25,000 and below \$100,000 are awarded on the basis of competition, which makes such contracts good candidates for reduced contractual requirements.

Sixth, a \$100,000 threshold was authorized for Operations Desert Shield and Desert Storm for overseas purchases and proved essential to the rapid mobilization of U.S. and Allied forces. The Panel understands that the major objection to use of the \$100,000 threshold for domestic purchases was the impact of such a threshold on small and minority businesses. As set out more fully below, the Panel has recommended statutory changes to protect the interests of small and minority businesses in receiving smaller contracts on a priority or set-aside basis. This, the Panel hopes, will remove the principal objection to use of the \$100,000 threshold for domestic acquisition.

Finally, as stated at the outset of this Chapter, the Panel approached its review of socioeconomic legislation with the presumption that each socioeconomic program created by Congress is important and should be implemented to the greatest extent consistent with reasonably efficient procurement procedures. At the same time, the Panel was mindful that its enabling legislation directed it to consider how procurement could be streamlined. The Panel believes that adoption of the \$100,000 threshold continues the Government's commitment to socioeconomic (and other regulatory) programs, reduces the barriers to small and small disadvantaged business participation in Government contracting, and streamlines the defense acquisition system.

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<sup>1</sup>See 10 U.S.C. § 2397c(a)(1), 41 U.S.C. § 423(e)(7), and the Byrd Amendment, 31 U.S.C. § 1352 note.

## II

### Adjust Existing Statutory Floors to Not Less Than \$100,000.

The Panel identified some 30 laws imposing contract clauses which currently require action by a contracting officer or a Government contractor on contracts at various values below \$100,000.<sup>2</sup> The Panel makes two different recommendations with respect to such laws.

One group of laws (set out in Table II below) should continue to apply to simplified purchases, but should not require implementation in contracts. Examples of this type of law are prohibitions against gratuities or the hiring of certain debarred individuals. This set of laws, like criminal law, is binding whether or not clauses appear in a contract. The reason for removing the clauses is to permit smaller transactions to be handled by credit card, electronic data interchange, or other simplified means where there may be no "contract" in the classic sense of a paper document within which to place the clauses. Indeed, one of the greatest barriers to the implementation of credit card purchasing for smaller DOD contracts is the need to have a paper contract which contains clauses mandated by, for example, the Walsh-Healey Act or Exec. Order No. 11246. This recommendation is not without statutory precedent. When Congress passed recent legislation on procurement integrity<sup>3</sup> and lobbying,<sup>4</sup> Congress imposed restrictions on all contractors but did not require contractual coverage below \$100,000.

A second group of laws (set out in Table III below) is not self-executing, but applies only if implemented by contract clause. Examples are the Service Contract Act<sup>5</sup> and the Davis-Bacon Act.<sup>6</sup> As to these laws, the Panel recommends that the statutory floor below which the law does not apply be set as the simplified acquisition threshold (i.e., \$100,000 as adjusted for inflation). The reason for increasing these thresholds is to reduce the amount of paperwork required to award the contract and monitor its performance, to speed the award of smaller contracts, and to reduce costs of performance by the private sector -- which will hopefully lead to reductions in the price of smaller contracts. In this regard, the DOD Directorate for Contract Policy and Administration advised the Panel that the lead time for procurements above the small purchase threshold averages four to six months, while the lead time below the threshold averages one-month. In addition, a number of DOD agencies advised the Panel that cutbacks in defense manpower will, as a practical matter, make monitoring smaller contracts very difficult. The threshold recommended here will remove more than 50% of contract actions over \$25,000 from currently applicable law but impact only a very small percentage of total DOD spending. The Panel therefore believes that the \$100,000 threshold will conserve contract administration

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<sup>2</sup>The statutes and clauses are set out in Tables II and III below. In addition, Exec. Order No. 11246 requires contracts above \$10,000 to contain specified affirmative action and anti discrimination clauses.

<sup>3</sup>41 U.S.C. § 423; *see id.* § 423(e)(7).

<sup>4</sup>The "Byrd Amendment," section 319 of the Department of the Interior and Related Agencies Act for Fiscal Year 1990, 31 U.S.C. § 1352 note.

<sup>5</sup>41 U.S.C. §§ 351-58.

<sup>6</sup>40 U.S.C. §§ 276a to 276a-7.

resources, allowing agencies to focus management efforts on high-value contracts while limiting any impact on socioeconomic programs.<sup>7</sup>

### III

#### Reserve Purchases Under the Simplified Acquisition Threshold For Small Business.

At present, all purchases below the small purchase threshold are reserved by statute (15 U.S.C. § 644(j)) for small business so long as there is a reasonable expectation that at least two small businesses will compete for the contract and can be competitive on price and quality. By regulation, contracts above the small purchase threshold can be set aside (totally or partially) for small business or small disadvantaged businesses,<sup>8</sup> again so long as there is a reasonable expectation that two or more responsible offerors will bid for the work and reasonable price and quality will result.<sup>9</sup> The Panel was advised by the DOD Office of Small and Disadvantaged Business Utilization that thousands of DOD contracts between \$25,000 and \$100,000, totaling in the hundreds of millions of dollars, are today set aside by regulation for small business or small disadvantaged business. The Panel believes it is appropriate to continue existing practice as the small purchase threshold is raised to \$100,000, and therefore recommends raising the statutory small business reservation in 15 U.S.C. § 644(j) to \$100,000 as well.

In recommending that the small business reservation be raised, the Panel is aware that today, many DOD contracts between \$25,000 and \$100,000 are awarded pursuant to section 8(a) of the Small Business Act (15 U.S.C. § 637(a)) or under the predecessors to 10 U.S.C. § 2323 (and related Public Laws).<sup>10</sup> It has therefore drafted amendments to 15 U.S.C. § 644(j) that permit set-asides of DOD contracts below \$100,000 to minority and small disadvantaged businesses to continue. The Panel stresses that the purpose of this amendment is to ensure that the enlarged small business reservation does not interfere with current practice. In addition, it is not the Panel's intention to "exempt" awards under the 8(a) program or section 2323 from the simplified purchase procedures authorized for contracts below \$100,000; to the contrary, the Panel believes that simplified procedures should be used to the maximum extent practical for all contracts under \$100,000 including those awarded under set-asides.

Finally, the Panel notes that section 801 of the National Defense Authorization Act for Fiscal Year 1993<sup>11</sup> has added a requirement<sup>12</sup> that the Secretary of Defense "provide guidance to Department of Defense Personnel on the relationship among" the set-aside programs created under section 8(a) of the Small Business Act, section 15 of the Small Business Act (15 U.S.C. §

<sup>7</sup>For a fuller examination of the \$100,000 floor, see the separate statutory discussion for each statute listed in Table III.

<sup>8</sup>See 10 U.S.C. § 2323 (1992).

<sup>9</sup>See FAR subpart 19.5; DFARS subpart 219.5. There are some restrictions on the types and levels of contracts that can be set aside. See, e.g., 10 U.S.C. § 2855 (architect-engineer contracts above \$85,000 cannot be set aside); DFARS 219.502-1, 219.502-2-70(b).

<sup>10</sup>Formerly the "section 1207 program." See Pub. L. No. 102-484, § 801, 106 Stat. 2315, 2442 (Oct. 23, 1992).

<sup>11</sup>Pub. L. No. 102-484, 106 Stat. 2315, 2442 (Oct. 23, 1992).

<sup>12</sup>10 U.S.C. § 2323(e)(5)(C), added by Pub. L. No. 102-484, § 801(C)(5), 106 Stat. 2443 (1992).



644), and section 2323 of Title 10. It is the Panel's recommendation that allocation of DOD contracts below the simplified acquisition threshold be made pursuant to such regulations and not be made by statute in order to permit the Secretary to meet the various socioeconomic participation goals levied on DOD.

#### IV

##### **Simplify and Modernize Contract Notice Procedures.**

In order to ensure broader public access to streamlined procurement opportunities, the Panel recommends increased use of electronic procurement notice and contracting methods. Current notice requirements are set by section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416). This provision requires DOD contracting offices to post public notices of any solicitation expected to exceed \$5,000 (\$10,000 for civilian agencies) and to advertise procurements above the small purchase threshold in the Commerce Business Daily (CBD).

The Panel recommends a series of amendments.<sup>13</sup> First, it recommends that the threshold for synopsis in the CBD be raised to the simplified acquisition threshold. This change alone should substantially decrease procurement lead times for smaller purchases.

Second, the Panel recommends that all solicitations above \$10,000 be posted locally, preferably through the use of electronic bulletin boards, 800-numbers or other methods of electronic advertising. When the synopsis threshold is raised to \$100,000, it is critical to small business that an effective, low-cost, and efficient replacement be found. Physical posting of a paper notice at a local contracting office does not fill this bill. There are, even today, however, a number of efforts within DOD to aggressively promote the use of electronic notice and contracting methods. Accordingly, the Panel has recommended that section 416 be amended by addition of a new subsection (e) which will require the Administrator for Federal Procurement Policy to develop uniform regulations to establish widespread notification of opportunities below the simplified acquisition threshold. Given the speed with which electronic technologies change, it would be inappropriate to legislate the form such notice must take. Instead, the Administrator is charged with phasing in electronic methods as the technology required becomes reasonably available to both Government and the business community. In promulgating regulations, the Administrator must carefully assess the costs and availability of this "re-tooling" on potential offerors, especially small businesses. In addition, nothing in the proposed amendment prevents the Administrator from imposing CBD notice requirements below the simplified acquisition threshold if required to provide adequate notice to small business until electronic notice can be properly implemented.<sup>14</sup>

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<sup>13</sup>See section 1.2.9. of this Report for a full discussion of 41 U.S.C. § 416.

<sup>14</sup>It is the Panel's hope that the Administrator would encourage contracting offices to move to electronic notice and contracting by reducing procurement lead times for solicitations that are posted electronically.

#### **4.1.0.2. Simplified Acquisition Threshold: Effect on Contract Price and Reporting**

A key concern with increasing the simplified acquisition threshold to \$100,000 is its potential effect on DOD's ability to award contracts at reasonable prices. In 1991, there were \$5.6 billion dollars awarded in contract actions between the levels of \$25,000 and \$100,000. Competition was used in 84.7% of those actions to establish contract prices. In the remaining 15.3% (valued at \$0.8 billion, or 0.6% of the \$126 billion in contracts awarded by DOD in 1991) price analysis was the primary method used to establish the reasonableness of the costs factored into these contracts.<sup>15</sup> Because there is little reason to expect these relative percentages to change if the threshold for simplified acquisition procedures is raised to \$100,000, the historical record suggests two things: that competition will continue to be the primary tool used to establish the reasonableness of DOD contract prices; and, where competition is impractical, that DOD contract personnel have the analytical tools to determine the fair market value for these Government purchases. Therefore, increasing the simplified acquisition threshold to \$100,000 should have little, if any, impact on the contract prices negotiated by DOD.

A second concern in raising the simplified acquisition threshold to \$100,000 is its effect on contract reporting requirements. Section 19 of the Office of Federal Procurement Policy Act (41 U.S.C. § 417) requires each executive branch agency to establish and maintain for a period of five years a detailed record of all procurements other than small purchases. The Panel therefore faced the question of what to recommend for reporting contracts between the present small purchase level of \$25,000 and the proposed level of \$100,000. Representatives of the small business community were concerned about a potential loss of visibility for contract actions between these levels, while contract analysts voiced the same reservations over any discontinuity in the reporting of statistics at any range above the \$25,000 level. Senior officials of DOD assured the Panel, however, of their desire to monitor management performance by continuing current contract reporting procedures at \$25,000. Given those assurances, there should be no loss of either policy visibility or statistical control by the adoption of the simplified acquisition threshold at the \$100,000 level.

#### **4.1.0.3. Simplified Acquisition Threshold: Conforming Amendments**

After discussions with the Office of Federal Procurement Policy, the Panel reached the conclusion that the same considerations that warrant the creation of a simplified acquisition threshold for DOD also warrant creation of the same threshold for civilian agencies. Accordingly, the Panel recommends that the simplified acquisition threshold be implemented primarily by amending the Office of Federal Procurement Policy Act and by making conforming amendments to various sections of Title 10 rather than by implementing this threshold as part of Title 10. The amendments necessary to implement the threshold for DOD acquisitions are given immediately below:

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<sup>15</sup>DOD Directorate for Information Operations and Reports, DOD Prime Table 4, Contract Awards, Size Distribution, See p. 4-5, note 5.

#### 4.1.0.3.1. Definitions

The Panel recommends that section 4(11) of the Office of Federal Procurement Policy Act, 41 U.S.C. § 403(11), be repealed in its entirety and replaced with the following:

(11) the term "simplified acquisition threshold" means \$100,000, adjusted on October 1 of each year divisible by 5 to the amount equal to \$100,000 in constant fiscal year 1990 dollars (rounded to the nearest \$1,000).

The Panel further recommends that the definition of "small purchase threshold" found in 10 U.S.C. § 2302(7) be replaced with a cross-reference to "simplified purchase threshold" as defined in 41 U.S.C. § 403(11).<sup>16</sup> A full discussion of proposed amendments to section 2302 can be found in section 1.1.2 of this Report.

#### 4.1.0.3.2. Authority for Simplified Procedures

Today, DOD has authority in 10 U.S.C. § 2304(g) to create and use simplified purchase procedures up to the small purchase threshold. The Panel recommends that section 2304(g) be amended to substitute the phrase "simplified purchase procedures" for the phrase "small purchase 1.procedures." A full discussion of the required changes to section 2304 can be found in section 2.1. of this Report.

#### 4.1.0.3.3. Notice

Today, notice of contract opportunities is governed by two sets of statutory provisions, one in the Small Business Act and one in the Office of Federal Procurement Policy Act. The panel proposes consolidating the notice provisions into a single provision in the Office of Federal Procurement Policy Act. To do this, sections 8(e), 8(f), and 8(g) of the Small Business Act (15 U.S.C. §§ 637(e)-637(g))<sup>17</sup> should be repealed and replaced by a new section 637(e) as follows:

<sup>16</sup>The Panel has recommended that section 2302(7) also allow DOD, during contingency operations, to issue simplified contracts for acquisitions up to twice the value of the simplified acquisition threshold if those contracts are to be performed abroad.

<sup>17</sup>(e)(1) Except as provided in subsection (g)--

(A) an executive agency intending to--

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed the small purchase threshold; or

(ii) place an order, expected to exceed the small purchase threshold, under a basic agreement, basic ordering agreement, or similar arrangement,

shall furnish for publication by the Secretary of Commerce a notice described in subsection (f); and

(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f)--

(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed \$10,000, but not to exceed the small purchase threshold; and

(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed the small purchase threshold; and (C) an executive agency awarding a contract

for property or services for a price exceeding the small purchase threshold, or placing an order referred to in clause (A)(ii) exceeding the small purchase threshold, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

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

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

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that--

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(f) Each notice of solicitation required by subparagraph (A) or (B) of subsection (e)(1) of this section shall include--

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number, or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that--

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which a qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency; and

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

(g)(1) A notice is not required under subsection (e)(1) of this section if--

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

(B) the proposed procurement would result from acceptance of--

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under section 638 of this title;

(C) the procurement is made against an order placed under a requirements contract;

(D) the procurement is made for perishable subsistence supplies; or

(E) the procurement is for utility services, other than telecommunication services, and only one source is available.

(2) The requirements of subsection (a)(1)(A) of this section do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or paragraph (2), (3), (4), (5), or (7) of section 2304(c) of Title 10.

#### **(e) Procurement Notice**

Publication, notification, and availability requirements for solicitations leading to the award of contracts for property and services are those set forth in section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416).

In addition, section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416) should be amended as set out in section 1.2.9. of this Report.

#### **4.1.0.4. Small Business Reservation**

Today, all acquisitions below the small purchase threshold are reserved for small business so long as two or more small businesses are capable of providing the supplies to be acquired at a fair price and with the required quality. As discussed above, the Panel recommends that this reservation be extended to cover all purchases not exceeding the simplified acquisition threshold while ensuring that contracts between \$25,000 and \$100,000 remain available for award under section 8(a) of the Small Business Act (15 U.S.C. § 637(a)), under the small disadvantaged business program authorized by 10 U.S.C. § 2323<sup>18</sup> (formerly known as the section 1207 program) and under section 712 of Pub. L. No. 100-656 (which creates a special category of "emerging small businesses").<sup>19</sup> Accordingly, the Panel recommends the following amendment to section 15(j) of the Small Business Act, 15 U.S.C. § 644(j):

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(3) The requirements of subsection (a)(1)(A) of this section shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

<sup>18</sup>This provision was added by section 801 of the National Defense Authorization Act, *supra* note 9.

<sup>19</sup>102 Stat. 3890 (1988).

(j) Each contract for the procurement of goods and services which has an anticipated value not in excess of the ~~small-purchase~~ simplified acquisition threshold and which is subject to small simplified purchase procedures prescribed by 10 U.S.C. 2304(g) or 41 U.S.C. 253(g) shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased; provided, however, that nothing in this subsection shall be construed as precluding the award of contracts with a value not in excess of the simplified acquisition threshold under the authority of section 8(a) of this Act (15 U.S.C. 837(a)), section 2323 of Title 10 or under section 712 of Public Law 100-656. In utilizing these procedures, contracting officers shall, wherever circumstances permit, choose a method of payment which minimizes paperwork and facilitates prompt payment to contractors.

#### 4.1.0.5. Exemptions

As in the case of commercial item procurement,<sup>20</sup> the Panel was told by a number of commentators that various contract clauses interfered greatly with the practical implementation of simplified purchase procedures. The problem clauses implement statutes which have no threshold for application, or whose threshold is less than \$100,000.<sup>21</sup> Accordingly, the Panel recommends that a new section 29 be added to the Office of Federal Procurement Policy Act as 41 U.S.C. § 424, which does two things. First, it eliminates the requirement to incorporate contract clauses in simplified contracts, which would otherwise be required by the self-enforcing statutes set out in Table II below. Second, it imposes a uniform \$100,000 floor on each of the statutes set out in Table III below.<sup>22</sup>

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<sup>20</sup>See Chapter 8 of this Report.

<sup>21</sup>In addition, Exec. Order No. 11246, which requires extensive clauses to be inserted in any contract greater than \$10,000, was cited as an impediment to simplified purchasing. The Panel urges the Secretary of Defense to seek appropriate modification of this Executive Order. Various free trade agreements provide for a domestic preference up to amounts of \$25,000 or \$50,000. (See 19 U.S.C. § 2518 note.) When some of these were negotiated, the intent appears to have been to align the ceiling for domestic preferences to the small purchase threshold. The Panel notes that such an alignment, if it was intended, will be removed by the Panel's recommendations and will have to be restored, if that is desired, by amendments to various free trade agreements.

<sup>22</sup>The Panel did not attempt to analyze statutes applicable only to civilian agencies that might create impediments to efficient small purchase practices.

**TABLE II**  
**STATUTES TO BE RETAINED BUT NOT TO BE IMPLEMENTED BY CONTRACT CLAUSE**

Statute	Regulation(s)	Code <sup>23</sup>	Description of Statute or Regulations
10 U.S.C. § 2207	52.203-3	3	Gratuities
10 U.S.C. § 2306(b)	52.203-5	3	Covenant against contingent fees.
10 U.S.C. § 2397b	52.203-7000	4	Prohibition on Compensation to certain former DOD employees.
10 U.S.C. § 2402	52.203-6	3	Prohibits primes from entering into any agreement with subcontractor which prevents subcontractor from selling any item or process directly to U.S.
22 U.S.C. § 2370	52.225-11	3	Prohibition on assistance to certain countries.
31 U.S.C. § 1352 note	52.203-11; -12	3	Byrd Amendment
41 U.S.C. § 22	52.203-1	3	Officials not to benefit
41 U.S.C. § 35-45		3	Walsh-Healey Public Contracts Act <sup>24</sup>
41 U.S.C. § 57	52.203-7	2,3,6	Anti-Kickback Act; prohibits payments from any subcontractor to any prime or any employee of the prime; violation voids contract.

<sup>23</sup>The codes in this column mean the following:

1. Requires contractor to provide information or report.
2. Requires contractor to establish procedures or prepare and retain records, but does not require a report unless a violation occurs.
3. Requires no action other than compliance with statute.
4. Individual required to report; contractor not required to report.
5. Representation/certification/notification by contractor required.
6. Contractor required to request authority to take designated action(s).
7. Requires modification of contractors business methods or systems.

<sup>24</sup>The Panel has recommended that the Walsh-Healey Act be repealed. See section 4.2.3. of this Report.

**TABLE III**  
**STATUTORY EXEMPTION FOR CONTRACTS UNDER \$100,000**

Statute	Regulation(s)	Code	Description of Statute or Regulations
10 U.S.C. § 2313	15,106.1 , - 2,52.215-1,-2	1,2,7	See the discussion at section 2.3.2 of this report
10 U.S.C. § 2384(b)	217.7300 252.217-7026	1	Requires disclosure of actual manufacturer of component parts.
10 U.S.C. § 2393	52.209-5 and -6	5	Prohibits prime contractor from doing business with debarred or suspended subcontractors.
10 U.S.C. § 2397 <sup>25</sup>	252.203-7000	3, 4	Reports by former DOD employees.
10 U.S.C. § 2397a <sup>26</sup>	252.203-7000	3, 4	Reporting of employment contacts by DOD employees.
10 U.S.C. § 2397c <sup>27</sup>	252.203-7000	4	Prohibition on Compensation to Former DOD Employees.
10 U.S.C. § 2408	252.203-7001	3	Prohibition of employment of persons convicted of fraud.
10 U.S.C. § 2506 <sup>28</sup>	25.1 and 25.2	3	DOD variant of Buy American Act using component test to identify "American" product.
10 U.S.C. § 2507 <sup>29</sup>	25.1 and 25.2	3	Section 2507 contains specific U.S. source restrictions applicable to the acquisition of identified products.
10 U.S.C. § 2631	252.247-7022, -7023, -7024	5 6 5	Requires transportation of items by sea in US Flag vessels.
18 U.S.C. § 874; 40 U.S.C. § 276(e)	52.203-7	2	Anti-kickback procedures
18 U.S.C. § 4082(c)(2); Pub. L. No. 89-176	52.222-3	3	Use of convict labor.
29 U.S.C. § 793	52.222-36	3, 7	Rehabilitation Act of 1973; requires affirmative action to employ and advance handicapped individuals. Act applies to companies with 50 or more employees or annual US contracts of \$50,000 or more.
38 U.S.C. § 4212	52.222-35; 52.222-37	3, 7	Affirmative action for disabled and VietNam Era Veterans; Reports of employment of Viet nam era veterans
40 U.S.C. § 276a to § 276a-7	22.400	1, 7	Davis-Bacon Act
40 U.S.C. §§ 327- 333; 28 U.S.C. § 1499	22.300; 52.222-4	3, 7	Work Hours and Safety Act of 1962; Overtime compensation

<sup>25</sup>This provision does not apply below the small purchase threshold today. See 10 U.S.C. § 2307(a)(1). It should be amended to exempt contracts below the simplified acquisition threshold.

<sup>26</sup>This provision does not apply below the small purchase threshold today. See 10 U.S.C. § 2307a(a)(1), incorporating by reference *id.* § 2397(a)(1). It should be amended to exempt contracts below the simplified acquisition threshold.

<sup>27</sup>This section today applies only to contracts greater than \$100,000. See 10 U.S.C. § 2397c(a)(1). The reference in the statute to "\$100,000" should be changed to "simplified acquisition threshold."

<sup>28</sup>The Panel has recommended changing from the component test for compliance with the Buy American Act and 10 U.S.C. § 2506 to the "substantial transformation" test used by the Trade Agreements Act. If this amendment is made, then there is no need to exempt simplified purchases from compliance. See generally Chapter 7 of this Report.

<sup>29</sup>The Panel has recommended repeal of most of the source restrictions contained in 10 U.S.C. § 2507. If the Panel's recommendations are adopted, then there is no need to exempt simplified purchases from this section. See generally Chapter 7 of this Report.



41 U.S.C. § 10a -10d <sup>30</sup>	25.1 and 25.2	3, 7	Buy-American Act
41 U.S.C. § 351- 358	52.222-40; -41; -42	1, 2, 7	Service Contract Act
41 U.S.C. § 423	52, 203-8	3	Procurement Integrity <sup>31</sup>
41 U.S.C. § 701	52.223-5; -6	3, 7	Drug Free Workplace- certifications. This section requires employers to establish drug-free awareness programs and to report any convictions by their employees for drug-related offenses.
46 U.S.C. § 1241(b)	52.247-64	1.7	Preference for US Flag Vessels; requires 50% or more of gross tonnage of materials and equipment procured under government contracts be transported in US-flag vessels.

The text of the proposed new section 29 to the Office of Federal Procurement Policy Act is as follows:

**Section 29 [41 U.S.C. 424] SIMPLIFIED ACQUISITION PROCEDURES.--**

(a) Purchases made and contracts awarded with a value that is not in excess of the simplified acquisition threshold, shall be exempt from the following laws:

[list set out above in Table III]

(b) Unless otherwise determined by the Administrator, for contracts awarded with a value that is not in excess of the simplified acquisition threshold, no contract clauses shall be required to implement the following laws:

[list set out above in Table II]

(c) The exemptions set out in subsections (a) and (b) shall be effective notwithstanding any other provision of law hereafter enacted unless such other provision specifically refers to and amends this section.

**4.1.0.6. Reporting of Contract Actions**

Section 19 of the Office of Federal Procurement Policy Act (41 U.S.C. § 417) requires each executive agency to maintain a computer file of basic data about contract awards, (other than small purchases) including the recipient of the contract, the contract amount, and the nature of products or services obtained by the Government. This requirement is implemented in FAR Subpart 4.6. Several DOD agencies, including the Office of Small and Disadvantaged Business Utilization, and a number of industry groups commented that the floor for reporting should not be

<sup>30</sup>See notes 28 and 29 above.

<sup>31</sup>The reporting provisions of this section do not apply below \$100,000. See 41 U.S.C. § 423(c)(7). The Panel recommends that "\$100,000" be changed to "simplified acquisition threshold."

raised to \$100,000, since information about awards between the current floor and \$100,000 is very important to understanding the impact of Government spending on small, disadvantaged, and minority businesses. In addition, the Panel was told that it is important to be able to compare data across years, and that comparability requires retaining the current \$25,000 floor. No one identified any problems with the \$25,000 floor. Nonetheless as discussed in section 2.5.10. of this Report, the Panel believes that reporting between \$25,000 and \$100,000 should be controlled by regulation rather than statute. Accordingly, the Panel has recommended conforming 41 U.S.C. § 417 to the simplified acquisition threshold.

#### **4.1.0.7. Miscellaneous**

Section 8(d) of the Small Business Act, 15 U.S.C. § 637(d), relating to small business subcontracting plans, should be amended to change the exemption for contracts under the "small purchase threshold" to an exemption for contracts under the "simplified acquisition threshold."

Section 8(h) of the Small Business Act, 15 U.S.C. § 637(h), should be deleted since, after the amendment to sections 8(e) through 8(g), this section is duplicative of 10 U.S.C. § 2304(f) and 41 U.S.C. § 253(f).

Section 8(i) of the Small Business Act, 15 U.S.C. § 637(i), should be repealed since it duplicates section 18 of the Office of Federal Procurement Policy Act, 41 U.S.C. § 416.

Section 8(j) of the Small Business Act, 15 U.S.C. § 637(j) should be renumbered as section 8(g) of that Act.

Section 19(a) of the Office of Federal Procurement Policy Act, 41 U.S.C. § 417(a), should be amended as follows:

- (a) Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements other than simplified acquisitions, in such fiscal year.

## 4.2. Labor and Equal Opportunity

### 4.2.0. Introduction

In its review of the labor statutes pertaining to defense procurement, the Panel proceeded upon the assumption that many of these laws reflect fundamental rights and protections that the Congress has properly guaranteed to the American worker. Over the years, these laws have created an infrastructure of requirements which are binding on all employers, including DOD and its suppliers. However, most of these national policies do not have a particular impact upon defense acquisition and for that reason were not considered as part of this review. For example, the review completed during this study showed that the Fair Labor Standards Act (40 U.S.C. § 328-333) prescribes common criteria for wages and overtime that apply equally to workers in the public and private sectors. The Panel concentrated instead on those statutes which single out DOD or which, because of their unique requirements, place an unusual burden upon the defense procurement system.

Of the labor laws that were considered, only three appeared to create such burdens: the Davis-Bacon, Service Contract, and Walsh-Healey Acts. It should be noted that, although these are "prevailing wage" statutes that do not single out DOD, *per se*, they apply to a wide range of defense contracts involving, respectively, construction, service, and manufactured goods. Although Davis-Bacon and Walsh-Healey were passed during the Great Depression, they have become legislative landmarks, surviving periodic attempts at repeal or reform. Critics have, for example, regularly pointed out that the two thousand dollar threshold imposed by Davis-Bacon is a living anachronism, and that the Labor Department ceased issuing Walsh-Healey wage rate determinations in 1963. Although the 1965 passage of the Service Contract Act is comparatively recent, its success at implementing prevailing wage rates has been no better. In fact, the General Accounting Office (GAO) has, in successive reports, urged the repeal of both the Davis-Bacon and Service Contracts Act, arguing that they are hard to administer and that they inflate the costs of Government contracts.<sup>1</sup>

The evidence gathered by the Panel is consistent with these GAO findings. A 1988 study by the Logistics Management Institute identified thirteen separate thresholds directly or indirectly linked to Davis-Bacon requirements, while four others reflected those of the Walsh-Healey Act.<sup>2</sup> Compliance with these laws means that each DOD contract to which these thresholds pertain, the two thousand dollar level of Davis-Bacon being especially inclusive, must contain one or more of the required regulatory clauses. This proliferation of clauses is one of the reasons why Government contracts typically devote far more pages to regulatory compliance provisions than to the "statement of work" which actually prescribes the tasks to be performed. Contract administrators in DOD, as well as the private businesses and corporations that execute Government contracts, bear the burden of carrying out the procedures specified in each one of these clauses. In the case of labor statutes, these clauses mandate record-keeping requirements

<sup>1</sup>See, respectively, U.S. General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, GAO/HRD 79-18, April 27, 1979; and *The Congress Should Consider Repeal of the Service Contract Act*, GAO/HRD 83-4, Jan. 31, 1983.

<sup>2</sup>LMI Study, *op. cit.*, pp. 92-99.

for employee hours, wages, and other certifications that are especially burdensome. Inevitably, these costs must be passed along to the taxpayer -- who not only pays the salary of the DOD contract administrator but the overhead of the Government contractor, which must either recover its expenses or go out of business.

The linkage between thresholds and contract clauses is one of the reasons why the Panel is suggesting the new approach of the simplified acquisition threshold discussed above. The application of this threshold to the labor laws would provide a common floor of \$100,000 in place of the wide variations that currently prevail -- \$2,000 for Davis-Bacon and \$2,500 for the Service Contract Act, for example. For Davis-Bacon, the elevated threshold would streamline 52.5% of DOD contract actions above \$25,000 while affecting only 7.0% of the dollars; for the Service Contract Act, 57.3% of the actions would be streamlined while 7.8% of the contract dollars would be affected.<sup>3</sup>

The Panel's principal recommendations on the Davis-Bacon and Service Contract Acts were consequently formulated with the overriding objective of elevating their thresholds to a common level of \$100,000. DOD's administrative overhead can thereby be reduced and precious management resources used more productively -- all while minimizing the economic impact of these reforms in the marketplace. In taking this position, the Panel specifically rejected the advice of those who urged either higher threshold levels or the outright repeal of both these laws. Because the issues associated with these alternatives have become so well entrenched over the years, it seems unlikely that more ambitious proposals can attract the ground swell of popular support which would be a prerequisite for sweeping congressional action.

In contrast, the Panel accepted the recommendations of many people who urged the repeal of the Walsh-Healey Act. This statute is one that has gradually outlived whatever usefulness it may once have had, its major provisions having been whittled away by the passage of more progressive legislation over the years. While its repeal would eliminate unnecessary contract clauses and streamline the acquisition process, it should be emphasized that those provisions of Walsh-Healey which grant expanded procurement opportunities for the blind and severely handicapped (41 U.S.C. §§ 46-48c, also known as the Javits-Wagner-O'Day Act) would be preserved under the Panel's recommended changes.

Among the other benefits of the consolidated threshold would be a common framework for the application of a number of socioeconomic laws. Title 41 U.S.C. § 701, for example, is a law which mandates that any business holding a Federal contract worth more than \$25,000 must certify that it maintains a drug-free workplace. Title 38 U.S.C. § 4212 requires any business entering into a certain class of Federal contracts worth more than \$10,000 must take affirmative action to employ and promote VietNam era veterans and special disabled veterans. Both these laws promote highly commendable social objectives: but the inconsistencies in these and other thresholds not only compound the difficulties of contract administration noted above, they also act as barriers to the integration of commercial and defense procurement. The Panel believes that consolidating these obligations through the application of a single, consistent threshold of

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<sup>3</sup>Source: OSD, Directorate for Information Operation and Reports, *DOD Prime Contract Awards, Size Distribution*, FY 1991, p. 16.

\$100,000 will balance the requirements of a streamlined acquisition process with the need for policies which promote larger national objectives.

The general need to consolidate a number of labor-related requirements at the \$100,000 level also led to the Panel's recommendations concerning the Miller Act ( 40 U.S.C. § 270a, *et seq.*). This law protects the Government against non-performance and related liabilities by imposing a bond requirement on prime contractors performing Federal construction projects exceeding \$25,000. The need for greater uniformity in contract administration led to the Panel's proposed amendment of the Miller Act, which would adjust this threshold to \$100,000. In presenting this recommendation, however, the Panel carefully considered a number of comments which strongly suggested that it was in the best interests of the Government to retain the present threshold. Because most contracts between \$25,000 and \$100,000 are primarily for remodeling, maintenance, and repair work, these contracts are often awarded to smaller contractors, which as a group are thought by many to be less financially stable than larger contractors. Raising the threshold to \$100,000, it was suggested, would expose the Government to a greater degree of financial risk in the event of default. The Panel concluded, however, that the potential cost savings from more uniform contract administration outweighed this risk. Not only have a number of states gone to the same threshold recommended here, but the record of default on construction contracts suggests that other safeguards are working well. While the Panel has no doubt concerning the appropriate level of the Miller Act threshold, it suggests that Congress may well wish to approach that goal through the intermediate step of either a test program or a study designed to monitor the application of the streamlined acquisition procedures recommended here.<sup>4</sup>

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<sup>4</sup>The Panel also reviewed various equal opportunity statutes, but found no evidence of an undue burden on DOD. The Civil Rights Act of 1964, for example, is landmark legislation that has been at the core of the nation's social policy for almost a generation. Its requirements do not single out defense contractors or other such suppliers of services to the Government. In the intervening years, moreover, this statute has been reinforced by countless others at the state and local level, many of which impose far more stringent reporting and compliance requirements on commercial companies operating within their jurisdictions -- including defense contractors. The procurement process is more significantly affected by the affirmative action and related requirements imposed by Exec. Order No. 11246, issued by President Johnson on September 24, 1965. Exec. Order No. 11246 imposes both nondiscrimination and affirmative action requirements on federal contractors receiving contracts of \$10,000 or more. In addition, it mandates a series of clauses that must be included in every contract. The LMI study found that the \$10,000 threshold level was generally too low and this Panel agrees with their assessment. *Id.* pp. 101-109, esp. pp. 108-109. The LMI study also noted that some of the provisions with \$10,000 thresholds are no longer needed such as a "Certification of Nonsegregated Facilities" and recommended their repeal. As a matter of policy, the Panel chose not to address Executive Orders or to offer draft statutes to amend or repeal such Orders. Accordingly, while the Panel urges that Exec. Order No. 11246 be conformed to the simplified acquisition threshold, it offers no legislative proposal on this subject.

## **4.2.1. 10 U.S.C. § 7299**

### **Contracts: Application of Public Contracts Act**

#### **4.2.1.1. Summary of the Law**

This section states that the Walsh-Healey Public Contracts Act (41 U.S.C. §§ 35-45) shall apply to each contract for the construction, alteration, repair, or equipping of a naval vessel unless the President determines the requirement is not in the interest of national defense.

#### **4.2.1.2. Background of the Law**

When this section was enacted in 1940, Congress intended ship contracts to be subject to Walsh-Healey as originally enacted and not as modified by subsequent amendments.<sup>1</sup> Congressional intent was changed in 1958 by Pub. L. No. 85-747 to include the amendments to Walsh-Healey and to apply them to Federal contracts for shipbuilding and repair.<sup>2</sup>

#### **4.2.1.3. Law in Practice**

It is clear from the existence of this law that Congress intended ship repair and construction be governed by Federal labor law, but not the Davis-Bacon Act or the Service Contract Act. According to the Naval Sea Systems Command (NAVSEA), in the absence of 10 U.S.C. § 7299, the Davis-Bacon Act or the Service Contract Act would arguably apply to contracts for ship repair. NAVSEA recommends that the Walsh-Healey Act continue to apply to ship repair and construction because it believes that Walsh-Healey is less of an administrative and financial burden than either Davis-Bacon or the Service Contract Act.<sup>3</sup>

#### **4.2.1.4. Recommendation and Justification**

##### **Amend**

Since the Panel recommends the repeal of Walsh-Healey in DOD contracts, the Panel recommends an amendment to this section which states that neither the Davis-Bacon Act nor the Service Contract Act apply to contracts for ship construction, repair, maintenance, or alteration.

#### **4.2.1.5. Relationship to Objectives**

Amendment of this section will eliminate provisions that are unnecessary for the establishment and administration of the buyer and seller relationship.

<sup>1</sup>Act of July 30, 1936, ch. 881, 49 Stat. 2036.

<sup>2</sup>Act of Aug. 25, 1958, Pub. L. No. 85-747, 72 Stat. 839.

<sup>3</sup>Telephone interview with the Naval Sea Systems Command (May 26, 1992).

#### 4.2.1.6 Proposed Statute

Each No contract for the construction, alteration, furnishing, or equipping of a naval vessel shall be is subject to the ~~act entitled "An act to provide conditions for the purchase of supplies and the making of contracts by the United States and for other purposes," approved June 30, 1936 (commonly referred to as the "Walsh-Healey Act") (41 U.S.C. §§ 35-45); the Davis-Bacon Act (40 U.S.C. §§ 276a et seq.) or the Service Contract Act (41 U.S.C. §§ 351-358), as amended; unless the President determines that such requirement is in the interests of national defense.~~

## **4.2.2. 18 U.S.C. § 4082**

### **Commitment to Attorney General**

#### **4.2.2.1. Summary of the Law**

This section established the Attorney General's power to designate the place and type of confinement for persons convicted of an offense against the United States. This section remains in effect for persons who are incarcerated prior to the effective date of the Sentencing Reform Act of 1987 and governs work release programs for such prisoners.

#### **4.2.2.2. Background of the Law**

Exec. Order No. 325A, originally issued by President Theodore Roosevelt in 1905, prohibited the use of convict labor in the performance of Federal contracts.<sup>1</sup> In 1936, this prohibition was codified in section 1(d) of the Walsh-Healey Public Contracts Act.<sup>2</sup> In 1973, however, President Nixon issued Exec. Order No. 11755, which permitted the use of both state and Federal prisoners in the performance of Federal contracts under specified conditions.<sup>3</sup> Exec. Order No. 11755 is referenced in 18 U.S.C. § 4082.

In 1979, the use of prison labor on Federal contracts was sanctioned by an amendment to the Walsh-Healey Act which allowed convict labor if the requirements of 18 U.S.C. § 1761(c) were met. These requirements outline what compensation must be paid in connection with prison work.

#### **4.2.2.3. Law in Practice**

The U.S. Code contains two sections which regulate prison labor in Federal facilities. In addition to the extant provisions, current law permits the purchase of goods from Federal prison industries as well as goods made by Federal and state prisoners (inside and outside of prison) under the circumstances described in 18 U.S.C. § 1761, which establishes the guidelines for the manufacture, transportation, and importation of prison goods.

#### **4.2.2.4. Recommendation and Justification**

##### **Retain**

The Panel does not propose to change the substance of current law on convict labor and prison industries. Therefore, it is necessary to retain this provision in order to continue the effect

<sup>1</sup>Executive Order 11755, 39 Fed. Reg. 779 (1973).

<sup>2</sup>Act of June 30, 1936, ch. 881, 49 Stat. 2036 (1936).

<sup>3</sup>See generally 39 Fed. Reg. 779 (1973).



of current law. The Panel has recommended an amendment replacing the Walsh-Healey Act which continues the prohibition on the use of convict labor on government contracts.<sup>4</sup>

#### **4.2.2.5 Relationship to Objectives**

Retention of this law will ensure the continuing financial and ethical integrity of defense procurement programs.

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<sup>4</sup>See section 4.2.9 of this Report.

### **4.2.3. 19 U.S.C. § 2516**

#### **Labor surplus area studies**

##### **4.2.3.1. Summary of the Law**

This section required the President to prepare a report assessing the economic impact on employment of waiving the Buy American Act in the procurement of products produced in labor surplus areas.

##### **4.2.3.2. Background of the Law**

This section was added as part of Pub. L. No. 96-39 on July 26, 1979.<sup>1</sup>

##### **4.2.3.3. Law in Practice**

The report referred to in this section was part of an effort to encourage procurement from labor surplus areas.

##### **4.2.3.4. Recommendation and Justification**

###### **Delete**

This section should be deleted from Title 19 because the mandated report was a one time requirement and was submitted to Congress on July 1, 1981.

##### **4.2.3.5. Relationship to Objectives**

Deletion of this section will eliminate an unnecessary law and thereby streamline the body of defense related acquisition laws.

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<sup>1</sup>Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

#### **4.2.4. 22 U.S.C. § 2755**

### **Discrimination prohibited if based on race, religion, national origin or sex**

#### **4.2.4.1. Summary of the Law**

This is an omnibus statute, passed in 1976, that expressly prohibits the U.S. and its agencies from entering into commercial contracts with any country the laws or policies of which prevent any U.S. person, "from participating in the furnishing of defense articles or defense services under this chapter on the basis of race, religion, national origin or sex." As a practical matter this law prohibits any foreign country from demanding that members of minority groups be prohibited from working on defense articles destined for their country.

#### **4.2.4.2. Background of the Law**

This section was passed as part of Pub. L. No. 94-329 signed into law on June 30, 1976<sup>1</sup> and is implemented at FAR 252.225-7028 which reiterates the above policy. FAR 225.7308(b) directs that this policy statement be included in contracts with foreign governments.

#### **4.2.4.3. Law in Practice**

The policy of nondiscrimination embodied in this section is made part of the contractual agreements reached between the U.S. and foreign countries who are purchasing defense articles or services. It notifies those countries that all U.S. citizens, regardless of their race, religion, national origin, or sex may work in the manufacture of defense articles or services supplied to their country. During the Persian Gulf conflict, for example, these provisions were successfully followed despite the unique religious strictures adhered to by various U.S. allies in that region.

#### **4.2.4.4. Recommendation and Justification**

##### **Retain**

Retention of this statute will promote the U.S. policy of nondiscrimination based on race, religion, national origin, or sex. It also sends a clear signal to other nations that U.S. sales and commercial transactions will follow this principle.

#### **4.2.4.5. Relationship to Objectives**

Retention of this statute will promote the financial and ethical integrity of DOD and the overseas contracting process.

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<sup>1</sup>International Security Assistance Act of 1976, Pub. L. No. 94-329, 90 Stat. 729.

#### **4.2.5. 29 U.S.C. § 793**

### **Employment under Federal contracts**

#### **4.2.5.1. Summary of the Law**

This statute states that any party contracting with the United States for property or services in excess of \$10,000 must take "affirmative action" to employ and advance handicapped individuals. This provision must be a part of each contract with the United States in excess of the above amount.

A handicapped individual who believes that a contractor has not complied with this statute may file a complaint with the Department of Labor and that department shall promptly take such action as the facts and circumstances warrant.

The Secretary of Labor may waive the requirements of this law, in whole or in part, if the facilities of the contractor or subcontractor "are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract. . . ." Such a waiver must be requested by the contractor or subcontractor.

#### **4.2.5.2. Background of the Law**

This statute was passed as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, which was signed into law on October 21, 1986. The House bill, passed in lieu of the Senate bill, was approved by the House on October 2, 1986 after consideration by the House Committee on Education and Labor.

The Rehabilitation Act Amendment of 1992, Pub. L. No. 102-973, raised the contract threshold of 29 U.S.C. § 793 from the previous figure of \$2,500 to the current \$10,000.

Although this statute is cited in the text of the recently passed Americans with Disabilities Act (ADA), Pub. L. No. 101-336, there is no language in the ADA which is duplicative of the provisions of 29 U.S.C. § 793.<sup>1</sup>

#### **4.2.5.3. Law in Practice**

Responsibility for implementing the provisions of this statute has been delegated to the Director of the Office of Federal Contract Compliance Programs, Department of Labor (OFCCP). According to H.R. Rep. No. 99-571, "Equal employment opportunity and affirmative action requirements for contract compliance cover all aspects of employment, including recruitment, hiring, training, seniority, promotion, and fringe benefits."<sup>2</sup>

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<sup>1</sup>Telephone interview with the Senate Subcommittee on Disability Policy (Dec. 2, 1992).

<sup>2</sup>H.R. Rep. No. 99-571, p. 3481.

FAR 52.222-36 specifically references 29 U.S.C. § 793 and contains the clause that must be inserted into Government contracts in excess of \$10,000. FAR 52.222-36 also directs the contractor to post notices stating the contractor's obligation to take affirmative action to employ and advance qualified handicapped individuals and to notify each labor union or representative of workers with which it has a collective bargaining agreement that it is bound by the provisions of 29 U.S.C. § 793.

According to the Senate Subcommittee on Disability Policy, the term "affirmative action" in 29 U.S.C. § 793 does not impose any quotas on employers or any continuing demonstration of compliance. Problems are handled on case-by-case basis when allegations of violations occur.<sup>3</sup>

#### **4.2.5.4. Recommendations and Justification**

**Amend to raise the threshold from \$10,000 to the simplified acquisition threshold (\$100,000) and create an exemption for commercial items.**

In its recommendations concerning the Simplified Acquisition Threshold, the Panel has recommended a uniform threshold of \$100,000 for the operation of socioeconomic requirements.<sup>4</sup> In its recommendations concerning the acquisition of commercial items, the Panel has recommended a number of statutory changes designed to facilitate DOD's access to the commercial marketplace.<sup>5</sup> The intent of the proposed amendment is to make this statute consistent with those recommendations.

#### **4.2.5.5. Relationship to Objectives**

Amending this statute to conform to the \$100,000 threshold for socioeconomic requirements would facilitate DOD's purchase of commercial products and services while also maintaining the substance of the important social policy of employing handicapped individuals.

#### **4.2.5.6. Proposed Statute**

##### **§ 793. Employment under Federal contracts**

**(a) Amount of contracts or subcontracts; provisions for employment and advancement of qualified individuals with handicaps; regulations**

**Any contract, except a contract for commercial items as defined in 10 U.S.C. 2302, in excess of the simplified acquisition threshold, entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and**

<sup>3</sup>Telephone interview with the Senate Subcommittee on Disability Policy (Dec. 2, 1992).

<sup>4</sup>See section 4.1. of this Chapter.

<sup>5</sup>See Chapter 8 *infra*.

advance in employment qualified individuals with handicaps as defined in section 706(8) of this title. The provisions of this section shall apply to any subcontract other than a subcontract for commercial items as defined in 10 U.S.C. 2302 in excess of the simplified acquisition threshold, entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the U.S. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

## **4.2.6. 38 U.S.C. § 4212**

### **Veterans' employment emphasis under Federal contracts**

#### **4.2.6.1. Summary of the Law**

Subsection (a) of this law states that in any contract of \$10,000 or more entered into by any department or agency for the procurement of personal property and nonpersonal services there shall be a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment special disabled veterans and VietNam era veterans.

The section also provides that veterans who believe that any contractor has failed to comply with this law may file a complaint with the Secretary of Labor. The Secretary shall also submit an annual report on the number of complaints filed, the actions taken, and the resolutions thereof.

Each contractor to whom subsection (a) applies must report annually on the number of employees who are disabled or VietNam era veterans.

#### **4.2.6.2. Background of the Law**

This law was enacted by Pub. L. No. 92-540<sup>1</sup> and subsequently amended six times. The most recent amendment in 1991 (Pub. L. No. 102-83) redesignated section 2012 of Title 38 as this section, 38 U.S.C. § 4212.<sup>2</sup>

#### **4.2.6.3. Law in Practice**

This law is essentially an affirmative action program to promote the hiring of VietNam era and disabled veterans. Each contractor to whom this section applies must list all of its suitable job openings with the local employment service office, and the employment office must give such veterans priority in referral to job openings.

#### **4.2.6.4. Recommendation and Justification**

##### **Amend**

According to the Office of Contract Policy and Administration for the Undersecretary of Defense for Acquisition, this law presents no practical problems for DOD because its enforcement responsibility falls on the Department of Labor. In the event a violation of this section is alleged in regard to a defense contract, DOD simply passes this information to the Department of Labor for investigation and disposition.

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<sup>1</sup>VietNam Era Veterans' Readjustment Assistance Act of 1972, Pub. L. No. 92-540, 86 Stat. 1074.

<sup>2</sup>Department of Veterans' Affairs Codification Act of 1991, Pub. L. No. 102-83, 105 Stat. 378.

Although this law is scheduled to expire in 1994, the Panel recommends that this section be amended to conform with its proposals concerning the simplified acquisition threshold of \$100,000 and the commercial items exemption. This amendment would make this statute consistent with the recommended threshold for other socioeconomic statutes affecting DOD procurement.

#### **4.2.6.5. Relationship to Objectives**

Amending this statute will promote the Panel's objectives of consistency and simplification of procurement laws while establishing a balance between an efficient procurement process and socioeconomic policies.

#### **4.2.6.6. Proposed Statute**

##### **§ 4212. Veterans' employment emphasis under Federal contracts**

(a) ~~Any contract, except a contract for commercial items as defined in 10 U.S.C. 2302, whose value is more than the simplified acquisition threshold in the amount of \$10,000 or more entered into by any department or agency for the procurement of personal property and non-personal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. In addition to requiring affirmative action to employ such veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the President shall implement the provisions of this section by promulgating regulations which shall require that (1) each such contractor undertake in such contract to list immediately with the appropriate local employment service office all of its suitable employment openings, and (2) each such local office shall give such veterans priority in referral to such employment openings.~~



## 4.2.7. 40 U.S.C. §§ 270a et seq

### The Miller Act

#### 4.2.7.1. Summary of the Law

The Miller Act protects the Federal Government and designated persons furnishing material and labor on Federal construction projects exceeding \$25,000 by requiring the prime contractor to post a performance bond in favor of the United States and a payment bond in favor of those in privity of contract with the prime or with a subcontractor.<sup>1</sup>

#### 4.2.7.2. Background of the Law

A traditional remedy given to those who furnish labor and materials on construction projects is a lien on the project until such time as they are paid in full. If payment is not made, persons owed money on the project could foreclose on their "mechanics liens," with the result that the project would be sold and the proceeds used to make payment. However, laborers and material men could not perfect liens against Federal property to secure payments due on particular projects.<sup>2</sup> As a result, the sole protection afforded these subcontractors might arise from contractual provisions under which the contracting officer could withhold final payment on the contract until the prime contractor paid its debts.

To ameliorate the plight of persons providing labor and materials on Federal projects, but who had not been paid,<sup>3</sup> Congress passed the Heard Act of 1894.<sup>4</sup> This law required contractors to execute a single bond that would assure both performance of the contract and payment of parties who supplied material or labor on Federal projects. Insofar as the bond protected the United States, it was apparently viewed as a traditional method of doing business on construction projects. However, the bond was unusual in providing for the payment of labor and materials. In this respect, the bond was intended by Congress to be a substitute for state law mechanics lien rights.<sup>5</sup> A party which furnished labor or material on a Federal project could now sue on the prime contractor's bond in the name of the United States if the contractor did not pay "promptly."

As amended in 1905,<sup>6</sup> however, the Heard Act provided that the Government's right to sue on the bond was superior to the rights of material men and laborers. If the Government decided to sue, it had the right to satisfy its claims up to the full amount of the bond. Thus, while unpaid suppliers could intervene, their claims took second place to those of the Government and

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<sup>1</sup>The protections of the Act do not extend to persons contracting with subcontractors at or below the second tier. *J.W. Bateson Co. v. United States ex rel. Board of Trustees*, 434 U.S. 586 (1978).

<sup>2</sup>*United States ex rel. Hill v. American Surety Co.*, 200 U.S. 197, 203 (1906).

<sup>3</sup>"[I]n many cases person or persons entering into contracts with the United States for the building of public buildings are wholly insolvent at the time or at the completion of such work, and thereby persons furnishing material or labor are without remedy." H.R. Rep. No. 97, 53d Cong., 1st Sess. 1 (1893).

<sup>4</sup>28 Stat. 278, ch. 280 (1894).

<sup>5</sup>See, e.g., *J.W. Bateson, supra*, at 203.

<sup>6</sup>33 Stat. 811, ch. 778 (1905) (repealed 1935).

might well not be satisfied. In addition, if the Government did not sue, the Act required workers to wait until six months after final contract settlement to file actions.<sup>7</sup>

In 1935, the Miller Act<sup>8</sup> repealed the Heard Act. The new law was a response to subcontractor complaints that the Heard Act was cumbersome and that it unduly delayed the collection of money otherwise due.<sup>9</sup> The Miller Act required a prime contractor to post two bonds: a performance bond for the protection of the Government<sup>10</sup> and a payment bond for the protection of laborers and subcontractors. The payment bond was intended to "assure payments as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract."<sup>11</sup> The amount of the payment bond depends on the price of the awarded contract.<sup>12</sup>

The use of separate bonds under the Miller Act prevents the subordination of subcontractors' claims to Government claims when a contractor fails to perform fully. Additionally, under the Miller Act, unpaid subcontractors (and those in privity with subcontractors) may file suit 90 days after providing the final labor or material on the project, instead of waiting until the contractor has completed the project.<sup>13</sup>

#### 4.2.7.3. The Law in Practice

The provisions of the Miller Act relating to performance bonds appear to be effective, reasonably well understood, and infrequently litigated. On the other hand, there has been substantial litigation over the scope of the persons protected by the payment bond. Although the Act required the payment bond to cover those furnishing materials or labor on Federal construction projects, the Supreme Court has on several occasions held that the actual coverage of the payment bond is less broad than coverage language would suggest.

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<sup>7</sup>*Id.* at 812.

<sup>8</sup>49 Stat. 793-94, ch. 642 (1935), *codified as amended*, at 40 U.S.C. §§ 270a-f (1988).

<sup>9</sup>H.R. Rep. No. 1263, 74th Cong., 1st Sess., 1 (1935). A letter from the Treasury Department incorporated in this report indicated that in many instances several years elapsed after the completion of work before suppliers were able to file suit. *Id.* at 1-2.

<sup>10</sup>This bond assures "performance and fulfillment of the contractor's obligations under the contract." (FAR 28.001(f)) A performance bond generally will be 100% of the contract price unless the contracting officer determines a lesser amount will protect the interest of the government. (FAR 28.102-2(a)(1))

<sup>11</sup>FAR 28.001(e). The Supreme Court has held that the Miller Act extends only to first-tier subcontractors and parties in privity of contract with such a subcontractor. *J. W. Bateson Co., supra*, 434 U.S. at 594. For a party to be a Miller Act "subcontractor," the party must have a contract with the prime contractor and must perform a specific portion of the labor or material requirement for the prime contractor. *See, e.g., Clifford F. MacEvoy v. United States ex rel. Calvin Tompkins Co.*, 332 U.S. 102, 109 (1944).

<sup>12</sup>For contracts \$1 million or less, the bond must be 50% of the contract price. If the contract price is greater than \$1 million but no more than \$5 million, the law requires a bond for 40% of the contract price. For all contracts over \$5 million, the offeror must furnish a \$2.5 million bond. (40 U.S.C. § 270a(a)(2) (1982); *see also* FAR 28.102-2(b)(1))

<sup>13</sup>40 U.S.C. § 270b(a) (1982). Claimants must file suit in federal court in the district in which they performed the contract. A material man or laborer must initiate an action within one year of its providing the last supply or service for the project. *Id.* at § 270b(b).

The last significant case construing the scope of coverage of the payment bond is *J.W. Bateson Co. v. United States ex rel. Board of Trustees*, 434 U.S. 586 (1978). In that case the Court held that the payment bond ran in favor of persons and companies having a direct contract with the prime contractor and to those having a direct contract with a "subcontractor." The concept of a "subcontractor" is not defined in the Act itself, but, the Court held, is to be construed in the custom of the construction trades as one to whom the prime contractor has delegated a specific portion of the work to be performed by the prime, as opposed to mere suppliers or material men. Two Justices dissented in *Bateson*, arguing that persons at any level who furnished material or labor on the project should be covered by the payment bond.

The only controversial aspect of the Miller Act appears to be its threshold. In July, 1992, the Administrator for Federal Procurement Policy proposed an amendment to the Miller Act raising its threshold from \$25,000 to \$100,000 and offering the following rationale:

It will result in increased competition for Government contracts and, therefore, lower prices by facilitating access to newly emerging or small disadvantaged companies that may have difficulties obtaining bonds. It will also improve the efficiency of Federal construction contracting . . . by reducing the paperwork burden and costs incurred by both the Government and business firms.<sup>14</sup>

Although the Congress did not act on this proposal, it remains a contentious issue. The Panel received written comments opposing elevation of the Miller Act threshold to the simplified acquisition threshold (discussed above in Chapter 4.1.) from the National Association of Surety Bond Producers,<sup>15</sup> the American Surety Association,<sup>16</sup> the American Insurance Association,<sup>17</sup> the Associated General Contractors of America,<sup>18</sup> and twelve insurance or underwriting firms.

In general, the points made by these correspondents were as follows:

- Because the Miller Act permits the transfer of risk from the Government to surety companies, increasing its threshold means a concomitant increase in the risk borne by the Government.
- The increased risk to the Government would force Federal contracting officers to become increasingly burdened with the pre-qualification of contractors performing under the threshold -- a service now performed by surety companies.

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<sup>14</sup>Letter, Administrator of the Office of Federal Procurement Policy to the Hon. Dan Quayle, President of the Senate, dated July 20, 1992.

<sup>15</sup>Letter from J. Martin Huber, National Association of Surety Bond Producers dated Dec. 11, 1992.

<sup>16</sup>Letter from Meg Nagle, American Surety Association dated Dec. 14, 1992.

<sup>17</sup>Letter from Lynn M. Schubert, American Insurance Association, dated Dec. 14, 1992.

<sup>18</sup>Letter from John R. Gentile, Associated General Contractors of America, dated Dec. 11, 1992.

- Because Federal contracts are not subject to lien laws, subcontractors and suppliers would be left without payment protection in the event of default. They would therefore be less likely to bid on DOD contracts or, if they did, would demand increased financial protection.

A government agency which made similar arguments was the Naval Facilities Engineering Command (NAVFAC), which stated that contracts between \$25,000 and \$100,000 are primarily awarded for maintenance, repair, and remodeling. These contracts usually go to smaller contractors which, as a group, tend to be less financially stable than larger contractors. As defense budgets are reduced, NAVFAC pointed out, the number of contracting officers will also be reduced, with the result that the monitoring of smaller contracts will become more difficult.<sup>19</sup>

#### 4.2.7.4. Recommendation and Justification

**Amend to raise the threshold of the Miller Act from its current level of \$25,000 to the level specified for the simplified acquisition threshold.**

This amendment raises the Miller Act to the simplified acquisition threshold (currently set at \$100,000) proposed by the Panel.<sup>20</sup>

Although it carefully considered the objections outlined above, the Panel believed that the additional risk to the Government in the \$25,000 to \$100,000 range was less than the value of establishing a uniform acquisition threshold for DOD. The \$100,000 threshold is the cornerstone of the Panel's effort to establish uniformity and simplicity in the DOD procurement process, in order to reduce overhead for both the Government and its suppliers. While the Panel agrees with NAVFAC that currently programmed personnel reductions will reduce DOD's ability to monitor small contracts using current practices, this is precisely the rationale for the streamlined procedures discussed above in Chapter 4.1. The Panel also determined that the issues surrounding its recommendation on the Miller Act did not warrant an exception. There are, for example, currently three states (Florida, Virginia, and Alaska) which have already established a \$100,000 threshold, while four others (Arizona, Colorado, Maine, and Michigan) have a \$50,000 threshold.<sup>21</sup> Those precedents, as well as the impact of inflation since the establishment of the Miller Act threshold in 1978, also suggest that the \$25,000 level in defense construction contracting has become an anomaly.

While the problem of defaults and attendant risk to the Government is an important issue, the Panel notes the statement by the Administrator for Federal Procurement Policy who, in introducing the threshold adjustment noted above, also pointed out that only nine defaults had

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<sup>19</sup>Information received by letter from Naval Facilities Command.

<sup>20</sup>See Chapter 4.1., *supra*.

<sup>21</sup>Table, "Contract Size Under Which Contract Surety Bonds Are Excluded," National Association of Surety Bond Producers.

occurred in the 8,000 Federal construction contracts awarded during FY91.<sup>22</sup> Additional protections against defaults are also built into current procedures under which progress payments on construction contracts require certifications that all subcontractors and materialmen have been paid or will be paid in accordance with subcontract agreements.<sup>23</sup> Government contracting officers are also expected to help reduce the risk of default by performing their own responsibility determinations, considering the past performance of a firm in making contract awards. The Small Business Administration (SBA) also has been provided authority to exempt a limited number of participants under the 8(a) program from Miller Act requirements.<sup>24</sup> A March, 1992, study provided to the General Accounting Office by the SBA, indicated that no DOD construction projects conducted under this program had defaulted.<sup>25</sup> This record is attributed to the careful review of potential participants in the waiver program by the SBA and the limited number of waivers that have been granted.

Although the SBA fully supported the Administration's 1992 initiative to raise the Miller Act threshold to \$100,000, Administrator Patricia Saiki initially noted some of the same concerns expressed to this Panel. In order to address those issues, she suggested a two-step process, beginning with an elevation of the threshold to make it consistent with inflation since 1978.

Once this is done, however, we would recommend that a study be conducted to ascertain whether the concerns I have raised are justified before a further increase to \$100,000 is adopted. The study I am suggesting could determine what protection has been afforded requiring surety bonds on the contracts in question and whether the benefit of such protection outweighs the costs to the government. The study could also take advantage of the experience gained as a result of increasing the threshold by the rate of inflation to obtain hard data on which to base a determination of the appropriate level for the threshold.<sup>26</sup>

While the Panel believes the evidence supports a \$100,000 threshold for the Miller Act, it concurs with the thought that Congress may well wish to approach that goal through the intermediate step of either a test program or a study designed to monitor the application of the streamlined acquisition procedures recommended here.

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<sup>22</sup>Letter, Administrator of the Office of Federal Procurement Policy to the Hon. Dan Quayle, President of the Senate, dated July 20, 1992

<sup>23</sup>1 U.S.C. § 3903 (b) (1) and FAR 52.232-5.

<sup>24</sup>15 U.S.C. § 636 (13)(D).

<sup>25</sup>Letter from William Fisher, Small Business Administration to James Charlifue, General Accounting Office dated March 2, 1992, subject: Miller Act Exemptions

<sup>26</sup>Letter from Patricia Saiki, Administrator, Small Business Administration to Hon. Richard G. Darman, Director, Office of Management & Budget, dated April 30, 1992. Although the SBA initially advocated this two-step process, their final position reflected support for the Bush Administration initiative (note 14, *supra*) which advocated the \$100,000 threshold.

#### **4.2.7.5. Relationship to Objectives**

Amendment of this statute is consistent with the Panel's objectives concerning the need to balance the requirements between an efficient process with full and open access to the procurement system.

#### **4.2.7.6. Proposed Statute**

Add a new section 40 U.S.C. § 270g to the Miller Act as follows:

270g. Sections 270a through 270f of this title shall not apply to contracts with a value less than the simplified acquisition threshold.

4.2.8. 40 U.S.C. § 276a *et seq.*

**Davis-Bacon Act**

4.2.8.1. Summary of the Law

The Davis-Bacon Act<sup>1</sup> was enacted in 1931 to protect the wages of local construction workers. It covers each contract in excess of \$2,000 for the construction, alteration, or repair of a public building or other public works to which the United States is a party or in which the U.S. shares financing. The law requires that the wages (including fringe benefits) to be paid to various classes of laborers or mechanics engaged in such contracts are those determined by the Secretary of Labor to be prevailing on projects of a similar character in the area where the work is to be performed.

4.2.8.2. Background of the Law

The Davis-Bacon Act was passed at the height of the Great Depression in response to congressional concerns that local labor would be unable to compete with less costly labor brought in by unscrupulous contractors anxious to undercut local firms in the competitive bidding process for federal contracts. Because those contracts represented a high proportion of the limited job opportunities then available for construction workers, Congress acted to set a wage floor based on local standards for similar work.<sup>2</sup> In its original form, the Act provided that, for contracts over \$5,000 for the construction, repair, or alteration of any Federal building, the Secretary of Labor was to require each contractor to pay not less than the "prevailing wage" to the "corresponding classes of laborers or mechanics" employed on similar projects in the city, town, village, or other civil subdivision of the state in which the buildings were located.<sup>3</sup> Although the Secretary's determinations were conclusive, the Act provided him with no authority either to determine those wages or to enforce them, and contractors readily circumvented the law's intent.<sup>4</sup>

In response to these concerns, Congress passed amendments to the Davis-Bacon Act in 1935 which had dramatic effects. First, the Secretary of Labor was authorized to determine prevailing wages in advance of bid solicitation and to require that those determinations be publicly posted. That measure was specifically intended to provide contractors with a known wage standard for use in the competitive bidding process. Second, the Act was extended to cover painting and redecoration, two notable oversights from the original statute. Third, the contract threshold was lowered to \$2,000. Fourth, the scope of the Act was extended to cover such Federal construction projects as highways and dams. Fifth, contractors were required to pay workers weekly and in full. Sixth, enforcement provisions, such as set-asides, contract

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<sup>1</sup>40 U.S.C. § 276a *et seq.* (1988).

<sup>2</sup>74 Cong. Rec. 6510 (Feb. 28, 1931).

<sup>3</sup>Act of March 3, 1931, ch. 411, 46 Stat. 1494 (1931).

<sup>4</sup>A.J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON ACTS," THE WALSH-HEALEY ACT, AND THE SERVICE CONTRACT ACT, NO. 27 LABOR RELATIONS AND PUBLIC POLICY SERIES 31-33 (U. Pa. 1985).

terminations, blacklisting, and right to recovery actions by employees were added. Finally, the President was given the authority to suspend the Act in the event of a national emergency.<sup>5</sup>

In 1934, Congress also enacted a law which is closely related to Davis-Bacon, the Copeland Anti-Kickback and False Statements Acts, which regulates payroll deductions on Federal or federally assisted construction. This law prohibits anyone, under penalty of fine or imprisonment, from inducing an employee to "give up any part of the compensation to which he is entitled under his contract of employment." It further authorizes the Secretary of Labor to make "reasonable regulations" to further the purposes of the Act, a grant of authority which the Department of Labor uses to require all contractors on Federal construction projects to submit and certify weekly payroll reports detailing daily hours, wage rates, total earnings, and any deductions.<sup>6</sup>

Although the Davis-Bacon Act was further amended on four occasions, the Act itself has remained virtually unchanged since 1935 except for gradual expansions in its coverage. The most recent amendments in 1964, for example, defined wages to include fringe benefits, such as medical, life, and accident insurance as well as pension, unemployment, and retirement benefits.<sup>7</sup> While the socioeconomic factors which existed at the time of the Act's passage have receded into history, its longevity in the face of periodic attempts at repeal or reform has made it into a virtual landmark. A 1979 General Accounting Office study -- which strongly urged that Davis-Bacon be repealed -- found that no fewer than 77 laws were linked to the Act, bringing a large number of otherwise unrelated programs under its purview.<sup>8</sup>

#### 4.2.8.3. Law in Practice

The Davis-Bacon Act applies to virtually all DOD contracts for construction, repair, redecoration, or renovation through FAR 22.407(a). That section requires the insertion of a clause in all solicitations and contracts in excess of \$2,000 for construction within the United States which defines the wage, classification, workplace practice, and reporting requirements under the Davis-Bacon and Copeland Acts.<sup>9</sup>

The effect of the Davis-Bacon Act on Federal construction has been a recurring public policy issue as well as the subject of an impressive number of Government and private studies. While these studies have often generated heated debates that are seldom detached from constituency interests and institutional agendas, there are four areas relevant to this study where there is some degree of consensus. First, application of the Act to Federal construction projects clearly adds to their cost. Second, effective administration of the Act is difficult, if not impossible. Third, reporting and record keeping requirements under the Act are onerous. Fourth, application

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<sup>5</sup>Act of Aug. 30, 1935, ch. 825, 49 Stat. 1011.

<sup>6</sup>See 40 U.S.C. § 276(c) (1988).

<sup>7</sup>Act of July 2, 1964, Pub. L. No. 88-349, 78 Stat. 238 (1965).

<sup>8</sup>GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE REPEALED 125-30 (1979).

<sup>9</sup>See FAR 52.222-6, 52.222-8.



of the Davis-Bacon Act may also serve as an impediment to small and minority business participation in Federal construction contracting.<sup>10</sup>

These studies and the strong convictions they generated were largely consistent with the range of opinions received by the Panel in response to its request for public comment. On one end of the spectrum there were recommendations for outright repeal of the Davis-Bacon Act from a number of executive branch agencies, including the Defense Logistics Agency<sup>11</sup> and the Air Force Materiel Command.<sup>12</sup> Other groups, such as the Coalition to Reform the Davis-Bacon Act,<sup>13</sup> the Associated Builders & Contractors,<sup>14</sup> and the American Society of Civil Engineers<sup>15</sup> generally supported repeal but also recommended elevating the threshold to levels ranging from \$500,000 to as much as \$1,000,000. At the other end of the spectrum, however, the Department of Labor strongly opposed any approach to Davis-Bacon Act reform that was not uniformly applicable to all government agencies. Additionally it stated, "Changes in the application of labor standards . . . must be based on the Administration's overall assessment of the desirability and need for such changes. In this regard, the Administration plans to submit a legislative proposal to Congress shortly to raise the Davis-Bacon Act (DBA) dollar threshold and to prohibit artificially splitting projects for the purpose of avoiding DBA coverage."<sup>16</sup>

In answer to its repeated requests for public comments, the Panel received a number of responses which described local problems caused by compliance with Davis-Bacon and other labor levels. The contracting director at Fort Campbell, Kentucky, supported outright repeal of the Davis-Bacon, Walsh-Healey, and Service Contract Acts, and added:

. . . our experience causes us to question Davis-Bacon wage surveys. Fort Campbell straddles the Tennessee-Kentucky line and a contractor must pay one rate to a worker on the Tennessee side, while 50 feet away across the Kentucky line, he must pay this same worker a much higher rate . . . Contractors argue that Davis-Bacon permits equal competition, and yet, most non-local contractors hire workers in the local community, and therefore local wages prevail for all contractors. Local contractors will always have one

<sup>10</sup>See, e.g., A.J. THIEBLOT, *supra* note 4, at 10; U.S. DEP. OF LABOR, FINAL REGULATORY IMPACT AND REGULATORY FLEXIBILITY ANALYSIS ON DAVIS-BACON RELATED REGULATIONS; CONGRESSIONAL BUDGET OFFICE, MODIFYING THE DAVIS-BACON ACT: IMPLICATIONS FOR THE LABOR MARKET AND THE FEDERAL BUDGET; FRAUNDORF, FARRELL & MASON, EFFECT OF THE DAVIS-BACON ACT ON CONSTRUCTION COSTS IN NON-METROPOLITAN AREAS OF THE UNITED STATES (OREGON STATE UNIVERSITY (CORVALIS) JANUARY 1982) ; 4 PRIVATE SECTOR SURVEY ON COST CONTROL, REPORT ON MANAGEMENT OFFICE SELECTED ISSUES: WAGE SETTING LAWS: IMPACT ON FEDERAL GOVERNMENT (1984); S.G. Allen, *Much Ado About Davis-Bacon: A Critical Review and New Evidence*, J. LAW & ECON. (Oct. 1983); A.J. THIEBLOT, JR., THE DAVIS-BACON ACT, 10 LABOR RELATIONS & PUBLIC POLICY SERIES (U. Pa. 1975); W.E. Williams, *Freedom to Contract: Blacks and Labor Organizations*, 2 GOV. UNION REV. 28 (1981).

<sup>11</sup>Letter from Defense Contract Management Command, Defense Logistics Agency, p. 13.

<sup>12</sup>Letter from Headquarters Air Force Materiel Command (July 17, 1992).

<sup>13</sup>Letter from the Coalition to Reform the Davis-Bacon Act (July 15, 1992).

<sup>14</sup>Letter from the Associated Builders & Contractors, Inc (July 15, 1992).

<sup>15</sup>Letter from the American Society of Civil Engineers (July 15, 1992).

<sup>16</sup>Letter from the U.S. Department of Labor (July 14, 1992).

competitive advantage as their mobilization costs are lower. Elimination of these laws would allow us to focus on the quality of work rather than also having to focus so diligently on administrative compliance with the legislation. If we insist on quality workmanship, contractors will have to hire skilled workers and will have to pay accordingly.<sup>17</sup>

#### 4.2.8.4. Recommendations and Justification

##### I

#### Increase Coverage Threshold to the Simplified Acquisition Threshold (\$100,000).

The current threshold of \$2,000 was placed in the statute in 1935 and has not been subsequently modified. The concurrent expansion of the Act's coverage, the continued use of a 1935 dollar threshold with no relevance in 1992, and the Act's subsequent expansion to additional areas of Government through related laws have all resulted in its application to virtually all DOD construction contracts. Raising the threshold would have the effect of eliminating Davis-Bacon coverage of a large number of small contracts, while preserving the Act's applicability to a majority of DOD construction dollars.<sup>18</sup> While the Administration supports raising the threshold to \$250,000,<sup>19</sup> the Panel believes that adopting the simplified acquisition threshold (\$100,000) would streamline and simplify the procurement process for a large number of small contracts as well as facilitate government contracting in the construction area. Equally important, the \$100,000 level for Davis-Bacon would be consistent with the simplified acquisition threshold being recommended as a general procurement practice by the Panel. Such an exemption might also allow the Department of Labor to conduct an increased number of site surveys, rather than relying on more general area surveys, so that wage scales could be more accurately based on local wage data and conform more closely to the original intent of the Act. Finally, by exempting small contracts from the Act's burdensome regulatory requirements, two major obstacles to small and minority business participation in federal construction would be removed: mandated use of wage scales (which do not always conform to local wage scales) and weekly reporting requirements.

<sup>17</sup>Letter from Leslie H. Carroll, Director of Contracting, Fort Campbell, Kentucky (June 12, 1992)

<sup>18</sup>According to data supplied by the Federal Procurement Data Center on prime construction contracts above the small purchase threshold (\$25,000), the proposed \$100,000 threshold would have exempted from coverage 52.5% of the Davis-Bacon covered contracts awarded in FY91. However, the threshold would only have exempted 7% of Federal prime construction contract spending in FY91. Figures for other thresholds that have been suggested are:

Threshold	% Contracts Excluded	% Spending Excluded
\$250,000	72%	14.3%
\$1,000,000	93%	62.7%

<sup>19</sup>See Statement of the Hon. Colin McMillan, Assistant Secretary of Defense for Production and Logistics, submitted to the Labor Standards Subcommittee of the House Education and Labor Committee on June 16, 1992, for its Hearing on H.R. 1987.

The Panel received strong support for this recommendation from the Aerospace Industries Association;<sup>20</sup> the Defense Logistics Agency (Directorate of Contracting and the Defense Construction Supply Center);<sup>21</sup> the Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition;<sup>22</sup> and the Assistant Secretary of the Air Force for Acquisition.<sup>23</sup>

## II

### Modify Weekly Reporting Requirements.

Reporting requirements mandated on Davis-Bacon projects, as noted above, are onerous. They drive up the cost of Federal construction by requiring contractors to submit volumes of information on a weekly basis, a requirement which is of marginal utility to either the Federal Government or the employees it is presumably intended to benefit. The Panel believes that an appropriate reporting mechanism should permit contractors to submit certified payroll data at the beginning, midpoint, and end of the period covered by a construction contract or subcontract, but at least quarterly for those being executed over longer terms. In addition to this requirement, employers should ensure that all employees are continuously apprised of the correct rates of pay, including benefits and applicable deductions, and of avenues for recourse if pay is incorrect. Finally, the contractor should be required to submit the final certified payroll at least 60 days prior to seeking final payment on a contract in order to give all employees an opportunity to make claims before final payout and release of bonds.

## III

### Issue Comprehensive Davis-Bacon Wage Schedules Annually Per Locality.

As a result of the heavy burden placed upon the Department of Labor in the administration of the Davis-Bacon Act, particularly in the area of wage surveys and determinations, the Panel believes that issuing a single comprehensive annual wage scale covering all labor classifications in a given locality would stabilize wages on ongoing contracts awarded during the relevant year. Today, it is possible for a contractor to have wage scales for different classes of labor being adjusted at different times during the year, with a concomitant increase in record keeping and administration. Issuing a wage scale for each site covering all trades at a single time each year would also reduce bid preparation costs and expedite contract awards.<sup>24</sup> Finally, an annual

<sup>20</sup>Letter from Aerospace Industries Association (July 27, 1992).

<sup>21</sup>Letter from Defense Contract Management Command, Defense Logistics Agency, p. 13 (July 30, 1992).

<sup>22</sup>Memorandum from the Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition (July 26, 1992).

<sup>23</sup>Letter, from Ira L. Kemp, Associate Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force for Acquisition. This letter also reflected the view of Air Force contracting authorities who pointed to significant problems with Department of Labor regulations implementing Davis-Bacon (July 10, 1992).

<sup>24</sup>This point was specifically addressed in a letter (dated July 27, 1992) submitted to the Panel by the Aerospace Industries Association (AIA). While supporting the elevation of the Davis-Bacon threshold, AIA also noted the difficulties associated with differing wage rates for the same type of work. "There is a time lag from issuance of the wage determination to the time the prime contract is updated. In the meantime, subcontracts must be issued to keep

determination would greatly reduce the potential for bid amendments required to cover changing Davis-Bacon wage rates. Annual issuance of a Comprehensive Wage Schedule would not require statutory changes, but would require changes in Department of Labor regulations.

#### **4.2.8.5. Relationship to Objectives**

Repeated attempts to repeal or reform the Davis-Bacon Act have been unsuccessful. The changes recommended here will give little comfort to either side of what has become an almost theological debate; indeed, commentators from all sides have found fault with the position espoused here since it gives neither management nor labor a total and unequivocal victory.

However, as defense budgets are sharply cut back, more attention must be paid to pragmatic concerns: DOD simply will not have enough money to permit funds to be squandered on unnecessary weekly reports and on cumbersome wage-setting procedures which cause administrative waste on all sides. Something must give somewhere. It is the Panel's strong recommendation that Congress create a simplified acquisition threshold, initially set at \$100,000, under which contracts and contracting procedures can be unified and streamlined. As shown by the figures on the Davis-Bacon Act (see note 11, below), the simplified threshold will greatly reduce the costs of administering and performing small contracts while exempting from social programs a very small percentage of otherwise covered spending.

The amendments proposed here will greatly facilitate DOD acquisition process in the areas of military construction and family housing, while enhancing opportunities for small and minority business participation in federal construction. Cost savings should also be realized through the combined effects of exempting small contracts from Davis-Bacon coverage, decreasing administrative reporting burdens, and reducing the uncertainty of wage rate determinations. All of these things are consistent with two of the principal goals of the Panel: streamlining the acquisition process and protecting the best interests of DOD.

The proposed changes to the Davis-Bacon Act would establish a balance between an efficient procurement process and socioeconomic policies.

#### **4.2.8.6. Proposed Statute**

276a(a). The advertised specifications for every contract in excess of the simplified acquisition threshold \$2000 to which the United States or the District of Columbia is a party . . . .

276c The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly at the beginning, midpoint and end of the period covered by the contract or subcontract, but not less

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the work going, and the subcontracts must comply with the rates cited in the prime contract" (p.7). The Panel believes that an annual wage rate determination would help to alleviate this problem.

frequently than every calendar quarter, a statement with respect to the wages paid each employee during the preceding week corresponding reporting period.

4.2.9. 41 U.S.C. §§ 35 - 45

**Walsh-Healey Public Contracts Act**

4.2.9.1. Summary of the Law

The Walsh-Healey Act applies to contracts entered into by "any executive department, independent establishment or other agency or instrumentality of the United States (or the District of Columbia) for the manufacture or furnishing of materials, supplies, articles, and equipment in excess of \$10,000."<sup>1</sup> Specifically, the Walsh-Healey Act requires contractors providing those items to:

- represent that they are a manufacturer or a regular dealer in the materials, supplies, articles, or equipment described above;<sup>2</sup>
- agree that all employers working under the contract be paid at least the minimum wage as determined by the Secretary of Labor;<sup>3</sup>
- agree that no employee shall work in excess of 40 hours a week unless paid at time and one-half in compliance with the Fair Labor Standards Act;<sup>4</sup>
- agree not to use convict labor or persons under the age of 18;<sup>5</sup> and
- agree that no part of such contract will be performed in work places that are unsanitary, hazardous, or dangerous.<sup>6</sup>

The scope of Walsh-Healey is also limited in various ways.<sup>7</sup> For example, it does not apply to Government purchases of perishables, agricultural, or farm products. Also exempted is carriage of freight or personnel by common carriers or where published tariff rates exist.

The Walsh-Healey Act further states that it does not apply to "purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market."<sup>8</sup> However, the Secretary of Labor has placed narrow interpretation on the open market exemption. In 1963, the Secretary issued a determination that it would apply only "where the public exigency requires

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<sup>1</sup>41 U.S.C. § 35.

<sup>2</sup>*Id.* at § 35(a).

<sup>3</sup>*Id.* at § 35(b).

<sup>4</sup>*Id.* at § 35(c).

<sup>5</sup>*Id.* at § 35(d).

<sup>6</sup>*Id.* at § 35(e).

<sup>7</sup>*Id.* at § 43.

<sup>8</sup>*Id.* at § 43.

immediate delivery of the goods" or if the purchase authorization contains the "express language" of the statute to buy "in the open market."<sup>9</sup>

Walsh-Healey's penalty clauses provide for both liquidated damages and cancellation of contracts. In addition to being liable to employees for wage underpayments, the violator is also liable in the amount of \$10 a day for each convict or underage person knowingly employed.<sup>10</sup> Violators may also be debarred from receiving Government contracts for a period of three years.<sup>11</sup>

#### 4.2.9.2. Background of the Law

The Walsh-Healey Act was part of a package of New Deal legislation enacted in response to the Great Depression and the unprecedented economic dislocation that existed in the 1930s. Walsh-Healey was introduced in the Senate by David I. Walsh (D-Mass.) and in the House by Arthur D. Healey (D-Mass.) in mid-1935 and was signed into law by President Roosevelt on June 30, 1936.<sup>12</sup> The Act sought to provide worker protection that had not previously existed in order to alleviate two major problems faced by workers during the depression: (1) the number of hours worked per week, and (2) minimum wages. However, as shown below, the protections provided by Walsh-Healey have been superseded by subsequent legislation and congressional action.

- **Work hours limitations:** With unemployment at record levels it was vitally important to set a ceiling on the number of hours employees could work. Preventing employees from working long hours would thereby increase employment opportunities for the unemployed, a crucial consideration at a time when the unemployment rate hovered around 20%. Walsh-Healey imposed such a limitation: a 40 hour work week and an 8 hour work day for Federal workers covered under the Act.<sup>13</sup>

However, the passage of the Fair Labor Standards Act of 1938<sup>14</sup> permitted overtime beyond 40 hours a week if time and one-half was paid. Walsh-Healey was amended in 1942 to adopt this provision, so that a major component of the original Act was very short lived. Action in the 99th Congress went still further. Pub. L. No: 99-145, the National Defense Authorization Act for Fiscal Year 1986, repealed the eight hour workday limitation of Walsh-Healey and established a standard 40 hour work week, with overtime pay in excess of that amount. This had the effect of

<sup>9</sup>U.S. Dep. of Labor, 2 Walsh-Healey Public Contracts Act, Rulings and Interpretations, 13 (1939); U.S. Dep. of Labor, 3 Walsh-Healey Public Contracts Act, Rulings and Interpretations, 3-7 (1963).

<sup>10</sup>41 U.S.C. § 36.

<sup>11</sup>*Id.* at § 37.

<sup>12</sup>Congressional Research Service Report for Congress: *The Walsh-Healey Public Contracts Act of 1936 and the Issue of Overtime Pay* 8 (March 12, 1986).

<sup>13</sup>*Id.* at 1.

<sup>14</sup>*Id.* at 3.

replacing the Walsh-Healey work hours limitations with the simple 40 hour work week of the Fair Labor Standards Act, making the work hours provisions of Walsh-Healey irrelevant.

- **Minimum wages:** Minimum wages were also a crucial consideration at the time Walsh-Healey was signed into law. Prior to this Act, only the Davis-Bacon Act and the National Industrial Recovery Act, later declared unconstitutional, had established minimum wage standards.<sup>15</sup>

Walsh-Healey established prevailing minimum wages "for persons employed on a similar work or in the particular or similar industries or groups of industries."<sup>16</sup> The act directs the Secretary of Labor to determine the prevailing minimum wage based on "the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished."

However, between 1937 and 1963 only 61 prevailing rate decisions were made, and in 1963, the Department of Labor (DOL) ceased issuing Walsh-Healey wage determinations altogether.<sup>17</sup> This cessation resulted from a court case holding that raw wage data collected by the DOL had to be released to the public if requested.<sup>18</sup> The Secretary of Labor refused to release information that had been provided confidentially, and the court therefore struck down the DOL wage determinations. Since that time the only minimum wage protection afforded supply contractor employees has been provided by the Fair Labor Standards Act which established a national minimum wage.

- **Child Labor:** The Walsh-Healey Act also prohibited the United States from purchasing goods made with child labor.<sup>19</sup> This prohibition, like the work hours provisions, was also largely superseded by the Fair Labor Standards Act, which contains its own prohibition of "oppressive child labor" in any facility that ships goods in interstate commerce.<sup>20</sup>

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<sup>15</sup>*Id.* at 5-6.

<sup>16</sup>Armand J. Thiebolt, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State "Little Davis-Bacon Acts," The Walsh-Healey Act, and the Service Contract Act*, No. 27 *Labor Relations and Public Policy Series 318* (U. of Pa., 1985).

<sup>17</sup>*Id.* at 226.

<sup>18</sup>*Wirtz v. Baldor Electric*, 337 F.2d 518 (D.C. Cir. 1964).

<sup>19</sup>41 U.S.C. § 35(d) prohibits labor by any male under age of 16 and of any "female person" under the age of 18.

<sup>20</sup>*See* 29 U.S.C. § 212. This section prohibits the shipment in commerce of goods made with "oppressive child labor" defined as labor provided by anyone under the age of 16. In addition, the Secretary of Labor is given authority to regulate labor by workers 16 to 18 and to provide by regulation exemptions permitted persons 14 to 16 to work in other than manufacturing and mining.



- **Convict Labor:** The convict labor provisions of Walsh-Healey have also become largely irrelevant over time. Prohibitions against the use of convict labor have a long history in Federal procurement. Exec. Order No. 325A, issued by President Theodore Roosevelt in 1905, prohibited the use of convict labor in the performance of Federal contracts.<sup>21</sup> In 1936, this prohibition was codified in section 1(d) of the Walsh-Healey Act. In 1973, however, President Nixon issued Exec. Order No. 11755,<sup>22</sup> which permitted the use of both state and Federal prisoners in the performance of Federal contracts under specified conditions.<sup>23</sup> In 1979, the use of prison labor on Federal contracts was sanctioned by an amendment to the Walsh-Healey Act<sup>24</sup> that resulted in the following language:

[41 U.S.C. § 35](d) . . . no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, *except that this section, or any other law or executive order containing similar prohibitions against the purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of section 1761(c) of title 18, United States Code . . . [amendment in italics].*

Section 1761 of Title 18, as amended in 1979, prohibited the transportation in interstate or international commerce of any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners unless the convict labor was furnished as part of an approved Federal or state work release program.<sup>25</sup> Prior to 1987, the U.S. Code contained two

<sup>21</sup>39 Fed. Reg. 779 (1973).

<sup>22</sup>See generally 39 Fed. Reg. 779 (1973).

<sup>23</sup>See generally *id.*

<sup>24</sup>Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 827(b), 93 Stat. 1215.

<sup>25</sup>This section provides as follows:

(a) Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State.

(c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who—

(1) are participating in one of not more than 50 non-Federal prison work pilot projects designated by the Director of the Bureau of Justice Assistance; and

other sections that regulated prison labor in Federal facilities. The first was 18 U.S.C. § 4082 which regulated labor outside of a prison facility. This section is one of many that were superseded by the Sentencing Act of 1987.<sup>26</sup> The new section 4082 has no provisions relating to prison labor.<sup>27</sup> The second convict labor provision is 18 U.S.C. § 4122 which defines and establishes prison industries and specifically permits those industries to sell to the Federal Government.

#### 4.2.9.3. Law in Practice

The Walsh-Healey Act has no current effect on prevailing minimum wage rates. As noted above, the Department of Labor has not issued wage rate determinations since 1963 and has no plans to do so. Therefore, this provision of Walsh-Healey is permanently moribund.

The original Walsh-Healey limitations on work hours, a 40 hour week and an 8 hour day, are also no longer in effect. The 40 hour work week limitation was repealed by amendment in 1942 and the remaining 8 hour day limitation was repealed in 1985 by Pub. Law No. 99-145. Thus, the work limitations of Walsh-Healey have been completely superseded.

Except for convict labor prohibitions, the remaining provisions of the Walsh-Healey Act are also without effect. The prohibition of child labor has been replaced by the Fair Labor Standards Act, and the "safe and sanitary workplace" provisions have been expressly superseded by the Occupational Safety and Health Act. Finally, while 18 U.S.C. § 1761 makes it a crime to transport goods made with unapproved convict labor in interstate and international commerce, only the Walsh-Healey Act prohibits the purchase of such goods by the United States. In order to remove any possible gap in the regulation of convict labor, the Panel recommends that 41 U.S.C. § 35 be amended as discussed below.

The Panel sought public comments on the proposal to repeal the Walsh-Healey Act. Many comments were received, with virtually every commentor agreeing that the Act performed no meaningful function.<sup>28</sup> Among those who recommended repeal of the Walsh-Healey Act were the Defense Logistics Agency,<sup>29</sup> the U.S. Army Depot Systems Command,<sup>30</sup> the Department of

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(2) have, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, ....

<sup>26</sup>Pub. L. No. 100-182, 101 Stat. 1266 (1987).

<sup>27</sup>However, under the effective date provisions of the Sentencing Reform Act, the old section 4082 remains in effect for persons incarcerated prior to Nov. 1, 1987.

<sup>28</sup>Some commentors noted that the Walsh-Healey definition of "manufacturer" and "regular dealer" are used in the Small Business Act and regulations issued thereunder. In that context, the definitions may have some usefulness in excluding agents of large businesses from obtaining the advantages of small business status for their principals. However, this function can be readily retained by adding appropriate definitions to the Small Business Act and regulations. Some also suggested that the Act kept "brokers" out of Government contracting. What a broker is, however, and why one should be kept out of Government contracting was never explained. Moreover, the standard prohibition against contingent fees coupled with required responsibility determinations should preclude any problem with brokering however defined.

<sup>29</sup>Letter from Defense Contract Management Command, Defense Logistics Agency, pp. 13-14 (July 30, 1992).

the Navy,<sup>31</sup> the Department of the Air Force,<sup>32</sup> and the Aerospace Industries Association.<sup>33</sup> While not specifically addressing Walsh-Healey, the Department of Labor noted its general opposition to any erosion of labor protection laws provided to workers on Government contracts.<sup>34</sup>

#### 4.2.9.4. Recommendation and Justification

##### Repeal

The continued existence of Walsh-Healey cannot be justified. In the 56 years since its enactment, all of its major provisions have either been repealed or superseded by subsequent Congressional action applicable to all companies in the United States without regard to whether such companies are Government contractors. Nonetheless, Government contractors must ritually declare in each and every Federal bid or proposal that they are a "manufacturer" or "regular dealer" of the products being acquired.<sup>35</sup> Streamlining of the procurement code requires the repeal of such meaningless rituals.

#### 4.2.9.5. Relationship to Objectives

Repeal of the Walsh-Healey Act will eliminate a law that is unnecessary for the establishment of the buyer-seller relationship and thereby streamline the defense acquisition process.

#### 4.2.9.6. Proposed Statute

In order to preserve the convict labor prohibitions of the Act, which appear to be the only portion of the Act with any continuing vitality, the Panel proposes that 41 U.S.C. § 35 be completely stricken out as written and replaced with the following language:

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<sup>30</sup>Letter from Deputy Chief of Procurement, Headquarters, US Army Depot Systems Command, Chambersburg, PA (July 13, 1992).

<sup>31</sup>In a letter dated June 26, 1992, the Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition noted: "This act has had no positive benefit on employees in many years. The administrative burden is almost zero although a problem does arise from time to time regarding whether a contractor is a regular dealer or manufacturer. We concur that the Walsh-Healey Act should be repealed."

<sup>32</sup>Memorandum from Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force for Acquisition (SAF/AQC), Att. 2, p. 2. This memorandum also noted: "The Air Force also concurs in the recommendation to repeal the Walsh-Healey Act. This act has had no positive effect on employees in many years." (May 29, 1992).

<sup>33</sup>Letter from Aerospace Industries Association, p. 6 (July 27, 1992).

<sup>34</sup>Letter received from the Department of Labor (July 14, 1992).

<sup>35</sup>See FAR 22.602, 22.608-1, 52.222-19.

**41 U.S.C. § 35 Prohibition on Convict Labor and Prison Goods**

No agency of the United States shall purchase any goods, wares or merchandise whose transportation in interstate commerce, or whose importation, is prohibited by 18 U.S.C. § 1761.

The suggested change keeps the substance of current law on convict labor and prison industries which permits the purchase of goods from Federal prison industries as well as goods made by Federal and state prisoners, inside or outside of prison, under the circumstances described in 18 U.S.C. § 1761.

## **4.2.10. 41 U.S.C. § 47**

### **Duties and Powers of the Committee**

#### **4.2.10.1. Summary of the Law**

Section 41 U.S.C. § 47 establishes the duties and powers of the Committee for the Purchase from the Blind and other Severely Handicapped. The Committee is empowered to make rules and regulations to promote the purchase of commodities and services from the blind and other severely handicapped.

#### **4.2.10.2. Background of the Law**

This section, as well as 41 U.S.C. § 46, is part of the Javits-Wagner-O'Day Act signed into law on June 23, 1971.<sup>1</sup>

#### **4.2.10.3. Law in Practice**

This law authorizes the Committee for the Purchase from the Blind and Other Severely Handicapped, an independent Federal Agency, to direct the Government to procure specific commodities and services from nonprofit agencies employing persons who are blind or have other severe disabilities. DOD routinely purchases commodities and services from such organizations. During Operation Desert Storm, for example, nonprofit agencies employing disabled persons dramatically increased both the number of employees and their working hours to supply items ranging from eating utensils to desert camouflage helmet covers.

#### **4.2.10.4. Recommendation and Justification**

##### **Retain**

This section should be retained. Nonprofit agencies employing blind and severely disabled persons have proven to be reliable and responsible producers of commodities and services for DOD. The Javits-Wagner-O'Day Act program also reduces the administrative burden on the DOD contracting staff, while promoting the important social objective of fully utilizing the abilities of people, regardless of their physical challenges.

#### **4.2.10.5. Relationship to Objectives**

Retention of this section promotes full and open access to the procurement system, including products made by the severely disabled. This recommendation is consistent with the Panel's goals of streamlining the acquisition process and reducing the administrative burden.

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<sup>1</sup>Act of June 23, 1971, Pub. L. No. 92-28, 86 Stat. 77.

## **4.2.11. 41 U.S.C. § 258**

### **Laws applicable to contracts**

#### **4.2.11.1. Summary of the Law**

This section states that no contract shall be exempt from the Acts commonly known as Davis-Bacon (40 U.S.C. § 276a *et seq.*) and Walsh-Healey (41 U.S.C. § 35 *et seq.*) "solely by reason of having been awarded after using procedures other than sealed bid procedures," if those Acts are "otherwise applicable . . . to such purchases and contracts."

#### **4.2.11.2. Background of the Law**

This section became effective July 1, 1949, with the passage of the Property and Administrative Services Act of June 30, 1949, which established Government policy on procurement.<sup>1</sup>

#### **4.2.11.3. Law in Practice**

The purpose of this section is to enforce the uniform applicability of Walsh-Healey and Davis-Bacon which apply to all Federal construction and manufacturing contracts above \$2,000 and \$10,000, respectively.

#### **4.2.11.4. Recommendation and Justification**

##### **Repeal**

Both of these Acts are enforced regardless of how the purchases and contracts were created, sealed bid or otherwise. Therefore, this section is unnecessary and should be repealed.

#### **4.2.11.5. Relationship to Objectives**

Repeal of this section will eliminate an acquisition law that is unnecessary for the establishment and administration of the buyer and seller relationship in procurement.

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<sup>1</sup>Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377.

## 4.2.12. 41 U.S.C. §§ 351 - 358<sup>1</sup>

### The Service Contract Act

#### 4.2.12.1. Summary of the Law

The Service Contract Act applies to Federal contracts in excess of \$2,500 if the principal purpose of the contract is to furnish services in the United States through the use of service employees. The Act requires that contractors pay service employees the minimum wage prevailing in the locality and provide specified minimum fringe benefits. It also prohibits employment under hazardous or unsanitary conditions. Lastly, it provides sanctions to punish violations, vesting enforcement and regulatory powers in the Secretary of Labor.

#### 4.2.12.2. Background of the Law

In 1965, Congress passed the Act to fill the gap left by the Walsh-Healey Act which covered workers in supply contracts, and the Davis-Bacon Act which covered construction workers.<sup>2</sup> Congress intended the Act to protect blue collar service workers, having determined that, without the Act's provisions, Government contractors would depress wages in unskilled occupations while competing for public contracts awarded to the lowest bidder.<sup>3</sup> Despite apparently good intentions, the Act is vague and has been troubled by programmatic and interpretive difficulties.

Congress attempted to strengthen and clarify the Act in 1972. The most noteworthy amendment required that successor contractors pay service employees wages and fringe benefits no lower than those to which the predecessor contractor was committed to pay by a collective bargaining agreement. This change attempted to deal with the problems created by the fact that service contracts turn over rapidly.<sup>4</sup>

In 1976, a Florida district court found that Congress had meant to limit the Act's coverage to blue-collar workers doing jobs similar to "wage board" classifications defined for Federal service.<sup>5</sup> In response to this judicial limitation of the Act's application, Congress amended the Act again. The new amendment defined "service employee" as any person working on a Government service contract other than bona fide executives, administrators, and professionals, and reiterated that services include any operations, other than those specifically exempted from the original Act that do not result in a physical product.

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<sup>1</sup>The Panel separately considered 41 U.S.C. § 354, which provides for debarment of persons violating the Service Contract Act. The Panel took no action on this provision since it was peripheral to the work of the Panel.

<sup>2</sup>Armand J. Thieblot, Jr., *Prevailing Wage Legislation: The Davis-Bacon Act, State "Little Davis-Bacon" Acts, The Walsh-Healey Act and the Service Contract Act*, 229-30 (hereafter Thieblot).

<sup>3</sup>*Id.* at 231-32.

<sup>4</sup>*Id.* at 237.

<sup>5</sup>*Federal Electric Corp. v. Dunlop*, 419 F.Supp. 221 (MD Fl 1976).

#### 4.2.12.3. Law in Practice

Despite the congressional amendments and later regulatory changes by the Department of Labor (DOL), programmatic and interpretive uncertainties make implementation of the Act difficult. These uncertainties are, at least in part, the result of the Act's vagueness in key areas, the most significant of which may be its failure of the Act to define "locality."<sup>6</sup> That term is key in any determination of what prevailing wage rate should apply on a given contract. At least three possible definitions have been suggested: the location of the work to be performed, the location of the contractor's principal place of business, and the location of the contracting agency. The courts<sup>7</sup> have not resolved the issue, and DOL regulations are cumbersome and inefficient.

Another area of concern is the classification of contracts and employees covered by the Act. As originally passed, the Act protected service workers engaged in work such as building maintenance, laundry service, or window washers. It is often difficult to distinguish between a supply contract and a service contract, however. While the courts tended to interpret the Act narrowly, DOL began to interpret the Act broadly and expanded the protections of the Act to clerical and technical workers outside of the original protected group.<sup>8</sup> The 1976 amendment helped clarify the issue but many uncertainties were not resolved until the mid-1980s when the Reagan administration adopted regulatory changes. The regulatory changes excluded from coverage services performed as part of a contract whose principal purpose was not the provision of services. A still unresolved issue, however, is the application of the Act to clerical and nonexempt technical personnel of service firms.

The 1972 amendment required that successor contractors pay service employees wages and fringe benefits no lower than those to which the preceding contractor was committed by a collective bargaining agreement. The purpose of the amendment was to prevent individual wage busting.<sup>9</sup> Critics argue that this provision mandates the continuation of union wages, regardless of local labor conditions. Litigation, however, has revolved around the question of how far beyond wages and fringe benefits a successor contractor is required to go to comply with the Act.<sup>10</sup>

Another serious deficiency of the Act has been its inconsistent enforcement. The Act requires that DOL make wage and fringe benefit determinations for contracts over \$2,500. DOL has consistently failed to meet this requirement. In 1972, for example, the Commission on Government Procurement concluded that in the period 1968-70, DOL issued the required determinations for only about 35% of covered contracts.<sup>11</sup> The Commission also concluded that DOL wage determinations were made improperly and that the Act was anti-competitive.<sup>12</sup> In a

<sup>6</sup>Thieblot at 240-47.

<sup>7</sup>See, e.g., *Descomp Inc. v. Sampson*, 377 F. Supp. 254 (D. Del. 1974) and *Southern Packaging & Storage Corp. v. US*, 618 F.2d 1088 (4th Cir. 1980).

<sup>8</sup>See, e.g., *Federal Electric Corporation v. Dunlop*, and *Descomp Inc. v. Sampson*, *supra*.

<sup>9</sup>Thieblot at 255.

<sup>10</sup>See, e.g., *Trinity Services, Inc. v. Marshall*, 493 F.2d 1250.

<sup>11</sup>REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 120-22, (Dec. 1972) [Hereafter *Commission Report*].

<sup>12</sup>*Commission Report* at 121.



compliance review published in 1978, the General Accounting Office (GAO) found that many DOD agencies failed to comply with the Act and that procurement personnel were uncertain about the Act's application.<sup>13</sup> The Commission report and the GAO review both noted that DOL lacked the personnel to make the required determinations. GAO also concluded that DOL had no effective system to monitor compliance, and that enforcement was uneven and limited essentially to the investigation of complaints.

A third GAO report, issued in 1983, concluded that DOL had been unable to administer the Act efficiently or effectively.<sup>14</sup> The 1983 report, like the 1972 report of the Commission, concluded that the Act is inflationary to the Government and reiterated the concerns over the administration of the Act that were noted in its 1978 and 1982 reports. GAO concluded that the Act costs the Government approximately \$500 million a year in additional costs. GAO also concluded that it would be impractical and very costly for DOL to administer the Act in a manner that would ensure accurate and equitable service wage determinations. For these and other reasons, the GAO report recommended that Congress repeal the Act, suggesting as well that changed administrative procedures and the Fair Labor Standards Act could provide comparable protections to service employees.<sup>15</sup>

The Commission on Government Procurement reached a similar conclusion about DOL's difficulty in implementing the Act. The Commission found that DOL rarely made the required wage determinations for small-dollar amounts and noted DOL's claim that it did not have sufficient personnel to make appropriate determination and often lacked adequate data. Given DOL's inability to meet its obligation under the Act, the Commission recommended an increase of the threshold. The Commission stated that a more realistic threshold of approximately \$10,000 would eliminate unproductive delay in waiting for wage determinations and, in its opinion, still leave most service contract employees protected.<sup>16</sup> The Commission's overall conclusion was that the "cost and administrative effort required by the social and economic programs that are imposed on low-dollar procurements cannot be justified by the results achieved."<sup>17</sup>

The Aerospace Industries Association expressed its support for the recommendations discussed below,<sup>18</sup> as did the Defense Contract Management Command (DCMC), an element of the Defense Logistics Agency. DCMC also noted that the Service Contract Act is difficult to administer and enforce with smaller companies and on small dollar contracts.<sup>19</sup> The office of the Assistant Secretary of the Air Force for Acquisition noted: "While we strongly support a higher dollar value threshold . . . it is fair to say that our experience with the SCA indicates that many of the problems associated with it have their genesis not in the act itself, but in DOL's implementation. . . ." The problems cited by the Air Force included tardiness in issuing wage

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<sup>13</sup>GENERAL ACCOUNTING OFFICE REVIEW OF COMPLIANCE WITH LABOR STANDARDS FOR SERVICE CONTRACTS BY THE DEFENSE AND LABOR DEPARTMENTS (Jan. 19, 1978).

<sup>14</sup>Excerpts from GAO Report, *The Congress Should Consider Repeal of the Service Contract Act*, FEDERAL CONTRACTS REPORT, Feb. 7, 1983.

<sup>15</sup>*Id.* See also *Commission Report*.

<sup>16</sup>*Commission Report* at 121.

<sup>17</sup>*Id.* at 122.

<sup>18</sup>Letter from the Aerospace Industries Association, p. 7 (July 27, 1992).

<sup>19</sup>Letter from the Defense Contract Management Command, Defense Logistics Agency, p. 15 (July 30, 1992).

determinations and retroactive modification of contract clauses.<sup>20</sup> Many of these same points were echoed by the office of the Assistant Secretary of the Navy for Research, Development, and Acquisition: "It cannot be denied that DOL's rules, regulations, implementations, and operating procedures applicable to the SCA are, to contracting agencies, onerous in the extreme."<sup>21</sup> Both these offices recommended the creation of an ad hoc committee from DOL and all affected contracting agencies in order to review these regulations and procedures with a view toward their revision. In its comments to the Panel, the DOL advocated the continuing need for a uniform approach to be applied to all Government contracting activities. It opposed the Panel's recommendations for that reason: ". . . the proposal would virtually repeal the application of current law to DOD service contracts and thereby deny the benefits and protections of this law to employees, many of whom are low skilled and low paid."<sup>22</sup>

#### **4.2.12.4. Recommendation and Justification**

##### **Amend**

The Panel recommends that Congress exempt all contracts (DOD and civilian agencies) of less than the simplified acquisition threshold from the provisions of the Service Contract Act. The new threshold would exempt 57.3% of DOD contract actions above \$25,000 but would affect only 7.8% of the dollar value of DOD contracts, reducing paperwork and delay in the DOD procurement process. Further, in light of GAO's conclusion that the Act is inflationary, the proposed higher threshold has a potential to reduce the costs of DOD procurement.

#### **4.2.12.5. Relationship to Objectives**

The proposed changes would streamline the DOD procurement process by reducing paperwork and unnecessary delay. These recommendations are clearly consistent with the Panel's overall goal of streamlining the DOD procurement process.

#### **4.2.12.6. Proposed Statute**

The Panel proposes that 41 U.S.C. § 351 be amended as follows:

##### **§ 351. Required contract provisions; minimum wages**

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia, in excess of \$2,500, other than contracts for commercial items as defined in 10 U.S.C. § 2302 or contracts whose value is less than the simplified acquisition threshold, and except as provided in section 356 of this title, whether negotiated or advertised, the

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<sup>20</sup>Letter from the Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force for Acquisition (SAF/AQC), p. 2 (May 29, 1992).

<sup>21</sup>Letter from the Office of the Assistant Secretary of the Navy for Research, Development, and Acquisition (June 26, 1992).

<sup>22</sup>Letter from the U.S. Department of Labor (July 14, 1992).

principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following: \*\*\*.

## 4.2.13. 41 U.S.C. § 701

### Drug-free work place requirements for Federal contractors

#### 4.2.13.1. Summary of the Law

This law requires entities awarded contracts in excess of \$25,000 to certify they will provide a drug free workplace by:

- posting notices that drug possession, distribution, or use is prohibited in the work place;
- imposing penalties for violations; and
- making drug free status a condition of employment and offering drug abuse assistance.

For failing to comply with the requirements of this section, contractors may be suspended or may be debarred for a period not to exceed five years. The Government may also suspend contract payments or terminate a contract because of violations.

#### 4.2.13.2. Background of the Law

This section was introduced by the 100th Congress in H.R. 4719 by Congressman Jack Brooks, referred to the Committee on Government Operations, and became law under Pub. L. No. 100-690 in November, 1988.<sup>1</sup> The Committee noted that while the extent of drug abuse in the workplace is not fully known, drug impaired workers greatly increase safety risks, diminish productivity, and create the possibility of defective products. During testimony before the Committee, the Chamber of Commerce asserted that 65% of employees entering the workplace have used illegal substances and that drug users in the workplace are four times more likely to be involved in an accident while at their job. The Associated General Contractors of America testified at Committee hearings that perhaps 23% of all U.S. workers use drugs on the job.<sup>2</sup> The Committee sought to use "the powerful weapon of Federal funding" to encourage employers to maintain a drug-free environment to the best of their ability. Representative Harold Volkmer stated in hearings that this law "is Government-wide, it is uniform in its application, it is systematic in that it utilizes existing agencies, structures, and processes of Government to achieve our stated goals."<sup>3</sup>

According to the Office of Federal Financial Management at the Office of Management and Budget (OMB), Congress perceived the \$25,000 threshold as a way of exempting small

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<sup>1</sup>Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, H.R. REP. NO. 829, 100th Cong., 2d Sess. (1988).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

business from the requirements of this section. This amount was tied to the small purchase threshold but is not scheduled to rise if that threshold rises.<sup>4</sup>

#### **4.2.13.3. Law in Practice**

This statute seeks to create a drug free work environment and provide substance abuse assistance consistent with the overall national policy. This law is also implemented in the FAR 23.500. The Office of Federal Financial Management at OMB maintains no statistical data on the effectiveness of this law, but the anecdotal evidence is positive. According to one source, "this law has raised the consciousness of companies that were not aware of a problem."<sup>5</sup>

#### **4.2.13.4. Recommendation and Justification**

**Amend this section by replacing the current \$25,000 threshold with the simplified acquisition threshold.**

The Panel recommends a uniform, across-the-board simplified acquisition threshold of \$100,000 to relieve small businesses from onerous reporting requirements, to establish consistency, and to reduce Government paperwork. While the Panel recognizes the unique and serious problem of drug abuse, a uniform threshold for all socioeconomic requirements will greatly unburden the contracting process and lead to substantial cost savings in both the public and private sectors. Therefore, the Panel recommends that this section be amended to conform to that uniform threshold of \$100,000.

#### **4.2.13.5. Relationship to Objectives**

This section, amended to provide for a threshold of \$100,000, will conform to the Panel's objectives of streamlining the acquisition process while maintaining the important policy objective of promoting drug-free work places.

#### **4.2.13.6. Proposed Statute**

##### **§ 701. Drug-free workplace requirements for Federal contractors**

##### **(a) Drug-free workplace requirement**

##### **(1) Requirement for persons other than individuals**

No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 403(8) of this title, for the purposes of being awarded a

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<sup>4</sup>Telephone interview with the Office of Federal Financial Management at the Office of Management and Budget (Mar. 27, 1992).

<sup>5</sup>*Id.*

contract for the procurement of any property or services of a value of ~~\$25,000 or more in excess~~  
of the simplified acquisition threshold from any Federal agency unless such person has certified  
to the contracting agency that it will provide a drug-free workplace by--

(A) ...

## **4.2.14. 42 U.S.C. § 1701**

### **Compensation for injury or death resulting from war-risk hazard**

#### **4.2.14.1. Summary of the Law**

This section extends death and disability benefits to civilian employees or any employee engaged on an overseas defense contract whose injury or death results from war or "war risk hazard."

#### **4.2.14.2. Background of the Law**

This section was originally signed into law on December 2, 1942.<sup>1</sup> It was subsequently amended several times, most recently by Pub. L. No. 98-426 in 1984 which substituted references to sections of the Longshore and Harbor Worker's Compensation Act for sections of the Longshoremen's and Harbor Worker's Compensation Act. These references have been translated to sections of Title 33 in the U.S. Code and required no change in the text.<sup>2</sup>

#### **4.2.14.3. Law in Practice**

This law extends death and disability benefits to overseas workers employed by the United States or by a contractor of the United States who are killed or injured from a war-risk hazard. The program is administered by the Division of Federal Employees Compensation at the U.S. Department of Labor. The benefits extended under this law are stated in subsection (b)(1). The intent of 42 U.S.C. § 1701 is to provide overseas workers with compensation similar to that provided by state Governments to domestic workers. According to the House Committee on Education and Labor, this law provided critically needed protection to the many workers employed by DOD and DOD contractors during Operations Desert Shield and Desert Storm.<sup>3</sup>

#### **4.2.14.4. Recommendation and Justification**

##### **No Action**

In its review the Panel found that, while this statute is tangentially related to DOD acquisition, it does not present any core acquisition issues, nor does it have more than an indirect relationship to contracting. Therefore, the Panel finds that it is not appropriate for further consideration.

#### **4.2.14.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

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<sup>1</sup>Act of Dec. 2, 1942, ch. 668, §101, 56 Stat. 1028

<sup>2</sup>See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639.

<sup>3</sup>Telephone interview with the House Committee on Education and Labor (Nov. 24, 1992).

## 4.3. Small and Disadvantaged Business Preferences

### 4.3.0. Introduction

One of the most important areas that was examined by the Panel concerned the relationship between the defense procurement system and those laws which the Congress has enacted in order to promote the interests of small business, especially those businesses which are both small and disadvantaged. There is no question that congressional attention to those interests represents a long-term commitment which reaches virtually every community across the nation. In FY91, for example, DOD awarded \$25.9 billion in prime contracts to small businesses, or 20.6% of the total of all defense contracts. Of that figure, \$4.4 billion, representing 3.5%, went to minority small business firms.<sup>1</sup> These figures demonstrate that the Small Business Act clearly has a major effect on DOD acquisition policy, an effect which has been magnified by a succession of defense authorization and appropriations acts mandating specific actions by DOD to support various small business programs.

In assessing the impact of these requirements, however, the Panel was mindful that another congressionally-chartered body, the U.S. Commission on Minority Business Development, had been formed in 1989 with the broader mandate of examining the operations and policies of the Small Business Administration, as well as assessing the general state of the minority small business community nationwide. The Commission's final report, issued in September, 1992, will clearly have a major influence upon future discussions of minority business issues.<sup>2</sup> Despite the differences in our respective charters -- as well as the time and other resources devoted to them -- this Panel has reached a number of general conclusions which parallel those of the Commission.

First, the Panel concluded that the current policies governing the DOD role in small business are the result of a patchwork of laws lacking a coherent framework and clearly stated objectives. These laws are highly volatile, sometimes changing within the same legislative session and always creating confusion and uncertainty for administrators, contracting officers, and (perhaps more importantly) the small business community. The lack of clearly stated objectives also makes it difficult for administrators in both the Small Business Administration and DOD to implement the laws properly and to issue the appropriate regulatory guidance. We therefore recommend that Congress replace the current patchwork of small business laws with a comprehensive and coherent program with clearly stated objectives.

Second, the Panel has concluded that Congress needs to look more closely at ways to augment its efforts to help small business, especially minority business. Current legislative directives place great emphasis on reallocating Federal procurement dollars to small and small disadvantaged businesses through the use of goals and preferences. While this approach has been successful at increasing the small business share of Government business, particularly in DOD, it

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<sup>1</sup>Source: DOD, Office of Small and Disadvantaged Business Utilization.

<sup>2</sup>U.S., Commission on Minority Business Development, *Final Report*, (Washington, DC: USGPO, September, 1992).



has created problems as well. Among the difficulties most often noted: the frequent need to "fine tune" legislative programs, resulting in the volatility noted above; ever-increasing numbers of reports and certifications that add to the administrative overhead of both the Government and its suppliers; and continued expressions of dissatisfaction among the intended beneficiaries of these programs.

While access to procurement opportunities represents an important component of public policy, this emphasis often comes at the expense of two other equally significant needs of small and small disadvantaged business -- access to capital and access to training and management support. Despite the fact that the existing statutes prominently mention such needs, these neglected legs of the "triad" of support to small and small disadvantaged businesses have never been more important. While those issues have been more fully addressed by the Commission on Minority Business Development, their overall findings are consistent with the Panel's observations on small businesses seeking to do business with DOD.<sup>3</sup>

Despite the problems caused by the frequent changes in the legislation aimed at helping small business, DOD has made a commendably far-reaching effort to implement both the letter and the spirit of the laws. The Offices of Small and Disadvantaged Business Utilization throughout DOD have been the focal points of this effort as well as an important forum for the exchange of information on small business issues. The Panel also received a number of comments from the small business community suggesting that these efforts could be further enhanced by creation of a DOD advisory committee on small business. Appointed under the provisions of the Federal Advisory Committee Act, this group would be composed of distinguished leaders from the Government and private-sector small business community who could provide continuing advice to the Secretary of Defense on small business issues affecting DOD. Such a panel would also be useful in exploring possibilities for future DOD initiatives on small business as well as providing outside perspectives on emerging policy issues. The Panel recommends that the next Secretary of Defense consider the appointment of a DOD advisory committee on small business.

Because of these general conclusions about the need for a comprehensive overhaul of the laws broadly applying to small business, the Panel took a conservative approach to its recommendations for more specific statutory changes. However, our research in this area has led us to take positions on several key issues that affect defense-related small businesses. We note, for example, that the recently-passed DOD Authorization Act for 1993 (Pub. L. No. 102-484) contains in section 804 a provision which modifies the Certificate of Competency procedures for small businesses doing business with the Department. Because this section applies only to DOD contracts, it effectively burdens small businesses with two different sets of statutory requirements. Because such dual procedures add no value and much confusion to the contracting process, we recommend that Congress either repeal this provision or, alternatively, expand its coverage to all small business contracts with either DOD or civilian agencies of the Government.

The Panel also recommends that 15 U.S.C. § 637(a)(1) (Procurement Contracts) be amended to permit Government contracting officers, particularly those in the DOD, to deal

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<sup>3</sup>*Id.* See in particular the Commission's findings on the Mentor-Protégé Program, pp. 74-83, and on access to capital, pp. 81-96.

directly with eligible 8(a) firms in the negotiations of Government contracts rather than going through the Small Business Administration. This amendment would streamline the contracting process by eliminating a third agency in the normal contracting process. Finally, the Panel recommends the amendment of 15 U.S.C. §644(j) and § 637(d) (Small business subcontracting plans). This amendment would alter the small purchase threshold in both of the referenced sections while preserving the small business reservation. The above changes are intended to parallel those being proposed in the Office of Federal Procurement Policy Act (41 U.S.C. § 403) relating to the existing small purchase threshold. That threshold would be raised to \$100,000 and defined as the level authorized for the operation of the new "simplified acquisition threshold" discussed earlier in this chapter. The new threshold is intended to permit greater flexibility in Government contracting for smaller purchases, typically those where small businesses have the greatest opportunities for participation.

The Panel recommends these statutory changes in the belief that they will promote wider participation of small business concerns in DOD contracting, particularly by disadvantaged and minority business concerns. The Panel's objective is to increase the opportunities for these entities to participate in DOD contracting, while at the same time reducing the administrative burden for both the Government and its suppliers.

## **4.3.1. 10 U.S.C. § 2322**

### **Limitation on small business set-asides**

#### **4.3.1.1. Summary of the Law**

This section addresses procurement under the Foreign Military Sales Program and limits authorization of small business set-aside provisions.

#### **4.3.1.2. Background of the Law**

This section was added by Pub. L. No. 98-525 on October 19, 1984.<sup>1</sup>

#### **4.3.1.3. Law in Practice**

This section prohibited the head of a Federal agency from authorizing a procurement to be set-aside for a small business concern in the case of a procurement under the Foreign Military Sales Program if the foreign purchaser specified the sources qualified to meet the requirement.

#### **4.3.1.4. Recommendation and Justification**

##### **Delete**

This section should be deleted from Title 10 because subsection (b) contains an expiration date of January 17, 1987.

#### **4.3.1.5. Relationship to Objectives**

Deletion of this section will eliminate an unnecessary law and thereby streamline the body of acquisition laws.

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<sup>1</sup>Department of Defense Authorization Act 1985, Pub. L. No. 98-525, 98 Stat. 2492 (1984).

## **4.3.2. 10 U.S.C. § 2392**

### **Prohibition on use of funds to relieve economic dislocation**

#### **4.3.2.1. Summary of the Law**

This section prohibits DOD funds from being used in any contract with a price differential for the purpose of relieving economic dislocation.

#### **4.3.2.2. Background of the Law**

Subsection (b) of section 2392 is derived from a long-standing provision of annual Department of Defense Appropriation Acts commonly referred to as the "Maybank Amendment." In 1954, Senator Burnett Maybank of South Carolina authored and achieved passage of a law prohibiting Congress from giving economic preference to areas of high unemployment. With some exceptions, the "Maybank Amendment" has been enforced in DOD ever since.<sup>1</sup> Those exceptions occurred in FY83-85 when DOD contracts were awarded with a price differential for the purpose of relieving economic dislocations.<sup>2</sup> This test program, run by the Defense Logistics Agency, was not renewed. The Office of Small and Disadvantaged Business Utilization (SADBU) for the Office of the Secretary of Defense asserts that this test program was extremely burdensome, difficult to implement fairly, and fiscally unwise.<sup>3</sup> At the urging of DOD, this test program was replaced in 1985 by the Procurement Technical Assistance Act,<sup>4</sup> which is still in effect and which has been recommended for retention by the Panel.

#### **4.3.2.3. Law in Practice**

This law preserves DOD policy of awarding contracts based on price, quality, performance, and related factors that reinforce the efficiency and integrity of the procurement process rather than awarding contracts based on location or local employment concerns.

#### **4.3.2.4. Recommendation and Justification**

##### **Retain**

SADBU strongly recommends the retention of 10 U.S.C. § 2392 because the language of this section continues to serve its original purpose of prohibiting contract awards based purely on criteria that are not related to efficient procurement practices. Based upon its review, the Panel concurs with this recommendation.

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<sup>1</sup> CONG. REC. S5030 (daily ed. May 14, 1981) (statement of Sen. Warner).

<sup>2</sup> 10 U.S.C. § 2392 note (a) (1984).

<sup>3</sup> Telephone interview with the Office of Small and Disadvantaged Business Utilization (May 7, 1992).

<sup>4</sup> 10 U.S.C. §§ 2411-2416.

#### **4.3.2.5. Relationship to Objectives**

Retention of this statute would promote the Panel's objectives of balancing an efficient procurement process with effective socioeconomic policies.

### 4.3.3. 10 U.S.C. §§ 2411-2418<sup>1</sup>

#### Procurement Technical Assistance Act (PTA)

##### 4.3.3.1. Summary of the Law

These eight sections, originally enacted in 1984, require DOD through the Defense Logistics Agency (DLA) to sponsor procurement technical assistance programs in order to encourage more participation in defense procurement. The Secretary of Defense, acting through the Director of the Defense Logistics Agency, enters into cooperative agreements with state and local governments or private nonprofit organizations to sponsor programs to furnish procurement technical assistance to business entities. The Secretary agrees to defray up to one-half to three-fourths of the costs depending on whether the services are provided in a "distressed area" (i.e., an area of high unemployment, low income, or a reservation).

##### 4.3.3.2. Background of the Law

In the early 1980s there was a perceived need to provide technical information and assistance to small businesses in order to enhance their ability to compete for Government defense contracts. The Northeast and Midwest Congressional (House) Coalition, an organization that represents business and environmental concerns of those regions, was involved in the organization and planning of this Act.<sup>2</sup>

##### 4.3.3.3. Law in Practice

The Procurement Technical Assistance Act program was launched in 1985 to assist state and local Governments and other nonprofit entities in establishing or maintaining PTA activities to help business firms market their goods and services to DOD. The purpose was to create economic stimulation in those areas without using direct procurement preferences for high unemployment areas. There are currently PTA centers in approximately 33 states. Cooperative agreement awards are made and administered by the Defense Contract Management District (DCMD) Small Business Offices. All cooperative agreement awards are made competitively and only for a 12 month period unless extended.<sup>3</sup>

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<sup>1</sup>10 U.S.C. § 2411 Definitions  
10 U.S.C. § 2412 Purposes  
10 U.S.C. § 2413 Cooperative Agreements  
10 U.S.C. § 2414 Limitation  
10 U.S.C. § 2415 Distribution  
10 U.S.C. § 2416 Subcontractor Information  
10 U.S.C. § 2417 Administrative Costs  
10 U.S.C. § 2418 Regulations

<sup>2</sup>Fact sheet supplied by program manager of Defense Logistics Agency (DLA) (March 2, 1992).

<sup>3</sup>*Id.*

#### 4.3.3.4. Recommendation and Justification

##### Retain

The Cooperative Agreement Program Manager for DLA stated that the program has been a good one and has done a lot in the communities where it has been used. The program is fully utilized and, in fact, the DLA is currently able to fund only 45% of the applicants.<sup>4</sup> Program quality is measured in part by performance reports from the cooperative agreements. A recent GAO report, *DEFENSE CONTRACTING: IMPROVEMENTS NEEDED IN PTA* was generally positive about the program, while making a number of recommendations to improve future program efficiency.<sup>5</sup> The Panel recommends that these sections be retained.

#### 4.3.3.5. Relationship to Objectives

The PTA helps establish full and open access to the DOD procurement system and broadens the defense industrial base.

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<sup>4</sup>Telephone interview with the Cooperative Agreement Program Manager for DLA (March 2, 1992).

<sup>5</sup>U.S. GAO, *Defense Contracting: Improvements Needed in PTA*, MSIAD-91-243.

#### 4.3.4. 15 U.S.C. § 631 *et seq.*

### Small Business Act and Related Public Laws

#### 4.3.4.1. Summary of the Law

The Small Business Act of 1958 ("1958 Act")<sup>1</sup> sets forth basic congressional policy to support small business as a vital and integral part of the U.S. economy. The Act provides that small businesses should receive a "fair proportion" of Federal agency contracts and that small businesses and small minority businesses should have the "maximum practical opportunity" to participate in contracting with Federal agencies. To further this congressional policy and to provide loans, contracting opportunities, and technical and other assistance to small business, the Act established the Small Business Administration (SBA).

The principal sections of Title 15 that were analyzed for their impact upon DOD are as follows:

- **Section 631:** Declares that it is congressional policy to assist small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals and women.
- **Section 632:** Provides definitions of some of the principal groups targeted for assistance under the Act, such as American Indian tribes, organizations for the handicapped, and agricultural cooperatives; also mandates various reports to Congress on the state of small business.
- **Section 636:**<sup>2</sup> Grants additional powers to the SBA, including authority for making various loans to small business concerns and enumerates other forms of financing and capital development.
- **Section 637:** Grants additional powers to the SBA, including a broad grant of authority in section 8(a) that has been the traditional means for awarding Government contracts to small and disadvantaged businesses through a system of set-asides and reservations; also establishes small and minority business subcontracting program.

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<sup>1</sup>Codified at 15 U.S.C. §§ 631 *et seq.*

<sup>2</sup>Sections 633-635 deal with the organization and general purpose of SBA and do not impact on DOD procurement.



- **Section 638:** Sets forth congressional policy relating to the assistance that must be given to small businesses in order for them to obtain Government contracts for research and development.
- **Section 644:** Delineates congressional policies regarding goals for Government contract participation by small businesses as well as those small businesses controlled by socially and economically disadvantaged persons; also established an "Office of Small and Disadvantaged Business Utilization" in each Federal agency having procurement powers.

#### **4.3.4.2. Background of the Law**

The Small Business Act is the backbone of a long-standing congressional commitment to foster the development of small business in the United States and to increase its role in the national economy. Congress originally created the Small Business Administration in 1953 as a successor to the Reconstruction Finance Corporation and the Small Defense Plant Administration. The 1958 Act expanded the SBA mission to include a flexible definition of "small business" itself. The agency was directed not only to revise its loan policies to assist small business development, but also to encourage those businesses to compete for Government research and development contracts. In the years that followed, the small business area became a convenient vehicle for the implementation of evolving social policies. To implement these policies, Congress enacted both business development and procurement provisions in the Small Business Act. Beginning in the 1980s, Congress began to direct a larger share of Federal procurement dollars to small business (minority and disadvantaged businesses in particular) using the annual Defense Appropriations and Authorization Acts to direct particular courses of action by DOD.

Small business programs have achieved some important national goals. In FY91, for example, small businesses accounted for more than 20% of DOD prime contract awards, an amount totaling almost \$26 billion. However, the steady accumulation of legislative enactments, entitlements, and reservations has created a system that is difficult to administer and equally confusing to contracting officers and small businesses alike. The specific steps in this statutory evolution that have had the greatest impact upon DOD can be highlighted as follows.

#### **Small Business Act Amendments (Pub. L. No. 95-89)**

In 1977, Congress passed Pub. L. No. 95-89<sup>3</sup> which amended the 1958 Act to expand the SBA's Certificate of Competency (COC) program. This amendment clarified congressional intent concerning the SBA's authority to determine that a small business was "responsible" and therefore eligible to be awarded Government contracts. Prior to 1977, the COC review by the SBA was generally limited to issues such as the capacity and creditworthiness of the small business. Once the SBA made its determination on those issues, the contracting officer was only "authorized" to award the contract. However, various procuring activities, to circumvent the SBA's

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<sup>3</sup>91 Stat. 553 (1977).

determination of competency, had determined on their own authority that certain small businesses lacked the tenacity and perseverance to perform a contract. On the basis of that finding, these small businesses were deemed to be "non-responsible contractors" who were consequently ineligible for Government contracts. Because tenacity and perseverance were regarded as being outside the scope of the SBA's certification authority, an SBA appeal was of negligible value. Further, there were at the time only a limited number of appellate fora that were within the limited resources available to the typical small business. The legislative history of this amendment makes it clear that Congress intended the SBA's determination to be conclusive on all criteria used by procurement officers to evaluate a contractor.<sup>4</sup>

### **Amendments to the 1958 Act and the Small Business Investment Act of 1958 (Pub. L. No. 95-507)**

In 1978, Congress passed Pub. L. No. 95-507<sup>5</sup> to amend the Small Business Act and the Small Business Investment Act. One set of amendments redesigned the SBA's minority business program by shifting the focus from contract assistance to business development. This law fundamentally changed the operation and organization of the Government's preference procurement programs, including the program for socially and economically disadvantaged business concerns. The Act amended section 8(a) to redefine eligibility for contracts so that only business concerns that are at least 51% owned and controlled by a socially and economically disadvantaged person and that have a reasonable chance of success in competing in the private sector are included.<sup>6</sup> In addition, the Act established a special category of set-asides, identified as small-business-small-purchase set-asides, for the acquisition of supplies and services that have an anticipated value of \$10,000 (later raised to \$25,000) or less. The law also required each Federal agency with contracting authority to have an Office of Small and Disadvantaged Business Utilization (OSADBU). The Act directs that the Director of OSADBU be appointed by the head of the agency and report only to the head or the deputy head of the agency. The amendment clarified definitions (15 U.S.C. § 637(c)) and required the release of specific information regarding bid sets and specifications requested by any small business.<sup>7</sup> Finally, section 211 of this law established the subcontracting program for small and disadvantaged businesses.<sup>8</sup>

### **Small Business Innovation Development Act of 1982 (Pub. L. No. 97-219)**

In 1982, Congress passed the Small Business Innovation Development Act.<sup>9</sup> Congress intended the Act to stimulate technological innovation, to foster participation by minority and disadvantaged persons in technological innovation, and to encourage the use of small business to meet Federal research and development needs.<sup>10</sup> The Act requires Federal agencies with research and development budgets in excess of \$100 million, including military departments, to establish a

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<sup>4</sup>H.R. REP. NO. 95-1, 95th Cong., 1st Sess. 23, *reprinted in* 1977 U.S. Code, Cong. & Admin. News 821; H.R. CONF. REP. NO. 95-535, 95th Cong., 1st Sess. 21-22, *reprinted in* 1977 U.S. Code, Cong. & Admin. News 843.

<sup>5</sup>92 Stat. 1757 (1978).

<sup>6</sup>S. REP. NO. 95-1070, 95th Cong., 2d Sess. 16-17, *reprinted in* 1978 U.S. Code, Cong. & Admin. News 3835.

<sup>7</sup>15 U.S.C. § 637(b).

<sup>8</sup>These provisions are now codified at 15 U.S.C. § 637(d).

<sup>9</sup>Pub. L. No. 97-219, 96 Stat. 217 (1982).

<sup>10</sup>S. REP. NO. 97-194, 97th Cong., 2d Sess. 1-4, *reprinted in* 1982 U.S. Code, Cong. & Admin. News 512.

Small Business Innovation Research Program (SBIR). Agencies with research and development budgets of more than \$20 million are required to establish goals for funding research and development by small business concerns. Under SBIR, agencies with research and development budgets over \$100 million must set aside a specified portion of their research or research and development budget for award to small business concerns. The Act authorized the Administrator of SBA, after consultation with the Attorney General and the Chairman of the Federal Trade Commission, to approve agreements between small business firms providing for joint research and development programs that might otherwise subject the firms to prosecution for violation of anti-trust statutes. Both the Small Business Administration and the Office of Science and Technology Policy review and monitor the performance of agency SBIR programs.<sup>11</sup> The SBIR program was extended by Pub. L. No. 99-443 in 1986, an amendment that made the program permanent with a required congressional review every 10 years. In 1992, Congress extended the SBIR Program through the year 2000.<sup>12</sup>

### **Small Business and Federal Procurement Competition Enhancement Act of 1984 (Pub. L. No. 98-577)**

In the 1984 Small Business and Federal Procurement Competition Enhancement Act,<sup>13</sup> Congress again reiterated the policy that the SBA's determination of a small business' responsibility under the COC procedure is final and binding on a procuring agency. Congress also provided legislation to deal with obstacles faced by small business in procuring Federal contracts for spare parts. The Act mandated that small businesses and small business concerns owned and controlled by socially and economically disadvantaged individuals "shall have the maximum practicable opportunity to participate in the performance of contracts and subcontracts" for "spare parts" and that prime contractors develop and submit to the Government a plan that demonstrates the prime contractor's "best efforts" to place subcontracts with small and small disadvantaged businesses.<sup>14</sup> The Act also prohibits the award of contracts unless the contractor has an approved plan that provides the "maximum opportunity for small business concerns and small business concerns owned and operated by socially and economically disadvantaged individuals" to participate in the program.<sup>15</sup> Finally, the Act created "spare parts break-out coordinators" in all major buying commands and eliminated thresholds for certificates of competency.<sup>16</sup>

### **Small Business Administration Reauthorization and Amendment Act of 1988 (Pub. L. No. 100-590)**

In the reauthorization of the SBA in 1988,<sup>17</sup> Congress required that designated agencies, including DOD, develop rural area business enterprise development plans to encourage prime contractors, subcontractors, and grant recipients to use small business concerns located in rural

<sup>11</sup>*Id.* at 27-28.

<sup>12</sup>See Pub. L. No. 102-484, § 4237(a), 106 Stat. 2315, 2692. For a highly favorable evaluation of the SBIR program, see Rep. Ike Skelton, *Small Business Innovation Research*, NATIONAL DEFENSE 15-17 (October 1992).

<sup>13</sup>Pub. L. No. 98-577, 98 Stat. 3066.

<sup>14</sup>*Id.* at § 402

<sup>15</sup>*Id.* at § 101.

<sup>16</sup>*Id.* at § 403.

<sup>17</sup>Pub. L. No. 100-590, 102 Stat. 2989 (1988).

areas as subcontractors and suppliers. The reauthorization act also permits the SBA to appeal to the department Secretary a decision not to break out a system component when the SBA's Breakout Procurement Center Representative so requests.<sup>18</sup>

### **Business Opportunity Development Reform of 1988 and Small Business Competitiveness Demonstration Program Act of 1988 (Pub. L. No. 100-656)**

The Business Opportunity Development Reform Act of 1988<sup>19</sup> was intended to combat scandals involving the Minority Small Business/Capital Ownership Development Program administered by the Small Business Administration under section 8(a) of the Small Business Act and to remedy serious shortcomings in the day-to-day administration of that program. Specifically, Congress found that the program "has generally failed to meet its objectives" and that

too few concerns that have exited the Program have been prepared to compete successfully in the open marketplace on competitive procurements, and many concerns have developed an unhealthy dependency on sole-source contracts by the time they are required to leave the program.<sup>20</sup>

Significantly, the Act prohibited SBA from operating any facet of the section 8(a) program for political purposes, and imposed new criminal penalties on persons who falsely represented any fact related to eligibility for the Program.<sup>21</sup> In addition, the Act revised the SBA's administrative procedures, set limits on the length of time a firm could be in the section 8(a) program, and provided for a transition out of the program.<sup>22</sup> Moreover, the Act provided for competition among firms within the program for contracts whose anticipated value would exceed \$5 million for manufacturing and \$3 million for all other industries.<sup>23</sup> Finally, the Act established a Government-wide goal for participation by small business concerns at not less than 20% of the total value of all prime contracts and a goal for participation by small businesses owned and controlled by socially and economically disadvantage individuals of not less than 5%.<sup>24</sup>

The Reform Act also created the Commission on Minority Business Development to review and assess all Federal programs designed to promote and foster the development of minority owned businesses. The Act charged the Commission with assessing the overall effectiveness of the Minority Small Business and Capital Ownership Development Program, including not only contract awards, but also development assistance, availability of capital, and

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<sup>18</sup>*Id.* at § 110.

<sup>19</sup>Pub. L. No. 100-656, 102 Stat. 3853 (1988)

<sup>20</sup>*Id.* at § 101(a), 102 Stat. 3853 (1988)

<sup>21</sup>*Id.* at §§ 403, 405.

<sup>22</sup>*See generally id.* at Titles II and III.

<sup>23</sup>*Id.* at § 303(b), *amending*, 15 U.S.C. § 637(a)(1).

<sup>24</sup>*Id.* at § 502, 102 Stat. 3881, *amending* 15 U.S.C. § 644(g).

the policies and procedures of major procurement agencies. The Commission issued its final report in September, 1992, which has been a major guide to this Panel.

Title VII of Pub. L. No. 100-656, the Small Business Competitiveness Demonstration Program Act of 1988, established a test program to determine whether:

- (1) the competitive capabilities of small business firms in certain industry categories will enable them to successfully compete on an unrestricted basis for Federal contracting opportunities,
- (2) the use of targeted goaling and management techniques by procuring agencies . . . can expand small business participation in Federal contracting opportunities which have been historically low, despite adequate numbers of qualified small business contractors in the economy, and
- (3) expanded use of full and open competition . . . adversely affects small business participation in certain industry categories . . . .<sup>25</sup>

The test program was initially to run through December 31, 1992. However, it was extended through September 30, 1996 by section 201 of Pub. L. No. 102-366.<sup>26</sup>

Four industry categories were chosen as "Designated Industry Groups" ("DIGs"): construction; refuse systems and related services; architectural and engineering services; and non-nuclear ship repair.<sup>27</sup> Within each DIG, 40% of contracts (by dollar value) were to be awarded to small businesses, with 15% going to "emerging small businesses," which the Act defined as a firm whose size was 50% or less of the small business size standard for firms doing the work required by a contract.<sup>28</sup> Section 15(j) of the Small Business Act, which creates the reservation for small business, was amended within the DIGs to permit a total reservation for emerging small businesses.<sup>29</sup>

As initially passed, section 713(b) of the Act required covered agencies to review their performance with respect to achieving the 40% goal for each of the four DIGs on a quarterly basis. So long as the goal was being met, contracts above the small purchase threshold were to be awarded on an unrestricted basis (subject to set-asides under section 8(a) of the Small Business Act and section 1207 of the FY 1987 Defense Authorization Act).<sup>30</sup> Otherwise, the agency was required to restrict all awards above the small purchase threshold for small business. The quarterly review, it turned out, could not be implemented effectively because data required to

<sup>25</sup>*Id.* at § 711(b), 102 Stat. 3889-90.

<sup>26</sup>106 Stat. 986, 993 (1992).

<sup>27</sup>*Id.* at § 717(a).

<sup>28</sup>*Id.* at §§ 712(a), 718(b).

<sup>29</sup>*Id.* at § 712(b), *amending* 15 U.S.C. § 644(j).

<sup>30</sup>Section 1207 has been codified as 10 U.S.C. § 2323 by section 801 of Pub. L. No. 102-484, the National Defense Authorization Act for Fiscal Year 1993.

make the determinations required by section 713 was not available in time to turn set-asides on and off. In addition, there was confusion as to the use of set-asides under section 1207, which were permitted so long as overall small business goals were being met and awards made without set-asides for small business, but which were not permitted when small business goals were not met and small business set asides were required to take priority over section 1207 awards. Pub. L. No. 102-366 sought to remedy certain of these practical problems by substituting an annual determination for the original quarterly goals.<sup>31</sup>

However, whereas section 713 had established the test at the agency level, section 202(b) of Pub. L. No. 102-366 establishes the test at the buying activity level. As a result, small businesses might have an exclusive preference for Army awards at Ft. Belvoir, Virginia, and section 1207 entities might have a preference for Marine Corps awards at Quantico, Virginia, even though these bases are in the same metropolitan area! The Panel believes that the buying-activity is not the correct place to make the determination of the type of set-aside to use in each DIG, and that Pub. L. No. 102-366 will add greater confusion for small businesses and small disadvantaged businesses. While not part of the formal recommendations detailed below, the Panel suggests that Congress review this feature of Pub. L. No. 102-366 over the next year to see whether an actual problem has arisen.

#### **Women's Business Ownership Act of 1988 (Pub. L. No. 100-533)**

In 1988, Congress also passed the Women's Business Ownership Act of 1988<sup>32</sup> to amend the Small Business Act. The purpose of the amendment is to stimulate the economy by aiding and encouraging the growth and development of small business concerns owned and controlled by women. The amendment did not change existing goals for small and small disadvantaged business but requires separate goals for small business concerns owned by women. It also requires separate reporting on the participation of women owned business in Government procurement activity. Congress established the National Women's Business Council to review the status of women-owned business nationwide and the impact of Federal, State, and local Governments' assistance for women-owned businesses.

#### **Department of Defense Authorization and Appropriations Acts**

In addition to the above laws that have Government-wide applicability, Congress has used various DOD Authorization and Appropriations Acts to mandate specific actions by DOD to assist small and small disadvantaged business.

#### **Department of Defense Authorization Act for FY 1987 (Pub. L. No. 99-661)**

Section 1207 of this Act<sup>33</sup> required that, for FY87 through 89, DOD "exercise (its) utmost authority, resourcefulness, and diligence"<sup>34</sup> in an effort to award 5% of designated

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<sup>31</sup>See Pub. L. No. 102-366, § 202, 106 Stat. 986, 994-95 (1992).

<sup>32</sup>Pub. L. No. 100-533, 102 Stat. 2689 (1988).

<sup>33</sup>Pub. L. No. 99-661, § 1207, 100 Stat. 3973-75 (1986).

<sup>34</sup>*Id.* at § 1207(e)(1), 100 Stat. 3974.

procurement funds, though contracts or subcontracts, to small business concerns owned and controlled by socially and economically disadvantaged individuals (as defined in 15 U.S.C. § 637(d)), to historically Black colleges and universities, or to minority institutes as defined by the Secretary of Education. These three groups are frequently referred to as "1207 entities." The purpose of this provision was to increase the number of section 1207 entities in the defense industrial base. To fulfill that purpose, the Act required DOD to make technical assistance available to such entities and permits the Secretary to award contracts on a sole-source basis so long as the price for such contracts does not exceed "fair market costs by more than ten percent."<sup>35</sup>

#### **Department of Defense Appropriations Act, 1990 (Pub. L. No. 101-165)<sup>36</sup>**

Congress directed DOD and each of its purchasing and contracting activities to assist small and minority-owned businesses to participate equitably in furnishing commodities and services financed with funds appropriated under the act by increasing the resources and personnel assigned to promote both small and disadvantaged businesses.<sup>37</sup> Another section of the same law appropriated \$8 million for incentive payments to prime contractors who use Native American corporations as subcontractors.<sup>38</sup>

#### **National Defense Authorization Act for FY90 and 91 (Pub. L. No. 101-189)<sup>39</sup>**

Section 831 of this Act<sup>40</sup> extended the 1207 program through the end of FY93. Section 832 of the Act<sup>41</sup> provides that credit for meeting subcontracting goals can be granted for work done by Indian tribes or tribal companies or by other companies working on Indian lands, provided that not less than 40% of the workers directly engaged in performance of the work are Indian. Section 834 of the Act<sup>42</sup> requires each military department and defense agency to establish a test program for the negotiation of comprehensive small business subcontracting plans. Under the test, prime contractors negotiate a single plan for all contracts in lieu of a single plan for each and every contract, as required by 15 U.S.C. § 637(d). The purpose of the test is to determine if such plans would result in an increase in opportunities for small business concerns under DOD contracts. As originally passed, the test program subjected contractors who failed to make a good faith effort to comply with its company-wide subcontracting plan to liquidated damages under the Small Business Act.<sup>43</sup> Congress suspended this provision in the Small Business Reauthorization and Amendment Act of 1990.<sup>44</sup> The test began in October, 1990, and, although it was scheduled to conclude in September, 1993, the program was extended for an additional year by the FY93 Defense Authorization Act (Pub. L. No. 102-484).

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<sup>35</sup>*Id.* at § 1207(c)(3), 100 Stat. 3974.

<sup>36</sup>Pub. L. No. 101-165, 103 Stat. 1112 (1989).

<sup>37</sup>*Id.* at § 9004, 103 Stat. 1129.

<sup>38</sup>*Id.* at § 9103, 103 Stat. 1129.

<sup>39</sup>103 Stat. 1352 (1989).

<sup>40</sup>*Id.* at § 831, 103 Stat. 1507.

<sup>41</sup>*Id.* at § 832, 103 Stat. 1352, 1508.

<sup>42</sup>*Id.* at § 834, 103 Stat. 1352, 1509-10.

<sup>43</sup>*See* 15 U.S.C. § 637(d)(4)(F).

<sup>44</sup>Pub. L. No. 101-574, § 402, 104 Stat. 2814, 2832 (1990).

**Defense Authorization Act for FY 1991 (Pub L. No 101-510)<sup>45</sup>**

Section 831 of this Act established the mentor-protégé pilot program:

to provide incentives for major Department of Defense contractors to furnish disadvantaged small business concerns with assistance designed to enhance the capabilities of disadvantaged small business concerns to perform as subcontractors and suppliers under Department of Defense contracts and other contracts and subcontracts in order to increase the participation of such business concerns as subcontractors and suppliers under Department of Defense contracts, other Federal Government contracts, and commercial contracts.<sup>46</sup>

The mentor-protégé pilot program is designed to "encourage large defense contractors to enter voluntarily into agreements to enhance the capabilities of small disadvantaged businesses (SDBs) to perform in the defense subcontract vendor base."<sup>47</sup> The mentor business would impart knowledge and skills necessary to help the small businesses to compete in the defense market. DOD reimburses the mentor firm for the total amount of any payments made to the protégé firm as contract payments and for the mentor's costs of giving assistance to the protégé. Congress intended that this program provide "a flexible framework for a mentor firm to develop SDBs capable of meeting available defense opportunities and should foster the establishment of stable, long-term business relationships."<sup>48</sup> Congress also expressed a hope that mentor firms would work with both established and emerging SDBs.<sup>49</sup>

By permitting the Secretary of Defense to promulgate regulations as to the types of firms permitted to participate in the programs, Congress expressed an intention that these regulations should encourage graduates of the Small Business Administration's section 8(a) program to participate as mentor firms.<sup>50</sup> Subsequent subsections provided for a developmental agreement between the parties. Congress intended that this agreement would include "agreed upon factors to assess the protégé firm's progress under the program and parameters concerning the number and type of subcontracts the protégé firm may anticipate being awarded."<sup>51</sup> The procedures the parties should follow in the event of termination should also be enumerated in the agreement.<sup>52</sup> Congress emphasized that the termination of the mentor-protégé agreement should not be construed as requiring the mentor and protégé to terminate or otherwise impair an existing subcontract awarded under the program.<sup>53</sup> In addition, the mentor firms are permitted to recover

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<sup>45</sup>104 Stat. 1485.

<sup>46</sup>*Id.* at § 831, 104 Stat. 1607-12. The Panel also considered the mentor-protégé pilot program as part of its treatment of the problems of contract administration. See Chapter 2.1.9., *supra*.

<sup>47</sup>H.R. REP. NO. 665, 101ST CONG., 2D SESS. 630, *reprinted in* 1990 U.S. CODE, CONG. & ADMIN. NEWS. 2931, 3187.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*



some unpaid costs involved in participation in the program through Government credits.<sup>54</sup> Congress also emphasized that an increase in the number of subcontracts awarded to small disadvantaged businesses would be the largest indicator of success of this program.<sup>55</sup>

Section 832 of this Act<sup>56</sup> amended section 1207 of the 1987 DOD Authorization Act by adding a requirement that DOD provide "infrastructure assistance" to historically Black colleges and universities. "Infrastructure assistance" included the establishment and enhancement of programs in scientific disciplines, use of DOD personnel to assist faculty members in the performance of defense related research, establishment of partnerships between historically Black colleges and universities, minority institutions and defense laboratories, the use of scholarships in disciplines critical to the national defense, and equipping or renovating laboratories for use in defense work.

Finally, section 806(a)(1) of this Act<sup>57</sup> established the small purchase threshold at \$25,000 by amending section four of the Office of Federal Procurement Policy Act,<sup>58</sup> and provided that this threshold would thereafter be adjusted for inflation every five years. The Small Business Act was conformed to this threshold.

#### **Defense Appropriations Act, 1991 (Pub. L. No. 101-511)<sup>59</sup>**

In section 8077, Congress made available \$8 million as incentive payments to contractors that had approved subcontracting plans utilizing Native American-owned firms as subcontractors. This action amended the Indian Financing Act of 1974<sup>60</sup> by authorizing the incentive payment of an additional 5% of the value of a subcontract given to Indians. The Act also mandated the "maximum opportunity" for nonprofit agencies for the blind and other severely handicapped individuals to participate as subcontractors and suppliers on DOD contracts.

#### **Defense Appropriations Act for FY92 (Pub. L. No. 102-172)<sup>61</sup>**

In section 8064A, Congress amended the Authorization Act of 1991 to redefine disadvantaged small business concerns specifically to include business entities owned and controlled by Indian tribes as defined in the Small Business Act, Native Hawaiian Organizations, and qualified organizations employing the severely disabled.

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<sup>54</sup>*Id.*

<sup>55</sup>*Id.* at 632.

<sup>56</sup>Pub. L. No. 101-510, § 832, 104 Stat. 1612.

<sup>57</sup>*Id.* at § 806(a)(1), 104 Stat. 1592.

<sup>58</sup>41 U.S.C. § 403.

<sup>59</sup>104 Stat. 1856 (1990).

<sup>60</sup>Pub. L. No. 100-442, 102 Stat. 1763.

<sup>61</sup>105 Stat. 1150 (1991).

### **Defense Authorization Act for FY92 (Pub. L. No. 102-190)<sup>62</sup>**

Sections 811-814 of this Act authorized \$15 million for infrastructure assistance to historically Black colleges and universities, and minority institutions, \$30 million for the Mentor-Protégé Program, and \$9 million for the Procurement Technical Assistance Cooperative Agreement Program.<sup>63</sup> The Technical Assistance Program provides technical assistance in distressed areas. It also authorized DOD to waive surety bonds for certain minority businesses and to award construction contracts to contractors under the 8(a) program without the approval of -- or consultation with -- the SBA. The Act set a goal of 30 contracts to be awarded to minority businesses under the Minority Small Business and Capital Ownership Development Program of the Small Business Administration.

### **Defense Authorization Act for FY93 (Pub. L. No. 102-484)<sup>64</sup>**

In the 1993 Defense Authorization Act, enacted on October 23, 1992, Congress codified all section 1207 related provisions in a single new section 2323 of Title 10.<sup>65</sup> (Section 1207 of Pub. L. No. 99-661 is the DOD preference program for small and disadvantaged business, historically Black colleges and universities, and minority institutions.) In codifying section 1207, Congress retained the 5% goal and extended the program through the year 2000. Congress mandated that the Secretary of Defense ensure that "substantial progress" is made in increasing awards to the 1207 entities and required that the Secretary issue regulations to provide guidance to contracting officers for making payments to the 1207 entities. The Act also requires the issuance of regulations to guide contracting officers in providing incentives for prime contractors to increase subcontract awards to 1207 entities and to emphasize the award of contracts to the 1207 entities in all industry categories. Further, the Act requires the issuance of guidance to DOD personnel on the relationship between the section 2323 program, the 8(a) program (15 U.S.C. § 637(a)), and the small business set-aside program (15 U.S.C. § 644(a)).<sup>66</sup> The Secretary is directed to establish policies to ensure that the current dollar level of contracts awarded under the 8(a) program and the set-aside program are maintained and that implementation of the 1207 program will not adversely affect these programs. Congress authorized \$15 million for "infrastructure assistance" to historically Black colleges and universities, and minority institutions.

Section 802 of the Act directs the Secretary of Defense to enforce the requirement that DOD contractors comply with the subcontracting requirements of section 8(d) of the Small Business Act (15 U.S.C. § 637(d)).

Section 804 of the Act modifies the SBA's Certificate of Competency Program. The modification requires that a contracting officer who determines that a small business concern is nonresponsible notify the small business concern in writing of the determination, and inform the

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<sup>62</sup>105 Stat. 1290 (1991).

<sup>63</sup>105 Stat. 1423-25.

<sup>64</sup>106 Stat. 2315 (1992).

<sup>65</sup>The other codified provisions are section 806 of Pub. L. No. 100-180 and section 832 of Pub. L. No. 101-189.

<sup>66</sup>Pub. L. No. 102-484, § 801, *adding* 10 U.S.C. § 2323(e)(5).

small business concern that it has the right to request a determination of its responsibility by the SBA. If the small business requests an SBA review, the small business must notify the contracting officer in writing within 14 days after receipt of the contracting officer's notice. The contracting officer may not award the contract during the 14 day period.

Section 805 of the Act extends the Comprehensive Small Business Subcontracting Test Plan, established in Pub. Law No. 101-189, above, through September 30, 1994. The program had been scheduled to expire on September 30, 1993. With respect to the Mentor-Protégé Program, the Act requires DOD to publish and maintain any DOD policy relating to the program in the DFARS. The Act also made changes to strengthen the program as it relates to the Small Business Act. Specifically, the Act directs that the SBA may not make a determination of affiliation or control based on the assistance a mentor firm provides to its protégé under the Program. Further, the Act prohibits the SBA from finding a disadvantaged small business ineligible for assistance under the 8(a) program based on its participation in the Mentor-Protégé Program. The Act also prohibits SBA from requiring a firm entering the Mentor-Protégé Program to submit the agreement or any other document required by DOD to the SBA for review or approval.

In section 807 of the Act, Congress authorized \$55 million for the Mentor-Protégé Program, including \$25 million solely for Mentor-Protégé programs involving major systems. However, the DOD Authorization Act provided only \$45 million for the program as a whole.

#### **4.3.4.3. Law in Practice**

As presently structured, the Small Business Act and DOD-specific legislation consists of myriad ad hoc programs designed to help small businesses and various subcategories of small businesses. The special groups covered by the law include small businesses owned and controlled by socially and economically disadvantaged individuals, emerging small businesses, various ethnic minorities, such as Blacks, American Indians, Aleuts, Hispanics, Hawaiians, historically Black colleges and universities, minority institutions, and women owned and operated small businesses. The Small Business Act, particularly the section 8(a) program, is the broadest program created by Congress to promote and foster small business and small businesses owned and controlled by socially and economically disadvantaged individuals. In 1992, the section 8(a) program accounted for 49% of all DOD contract awards to minority business firms, a figure that totaled approximately \$5.2 billion.<sup>67</sup>

#### **Small Disadvantaged Business Set-Aside Program**

Section 1207 of Pub. L. No. 99-661 gave DOD authority for other than "full and open" competition to meet the goal of awarding 5% of its contract dollars to small and disadvantaged business concerns. This authority has now been codified at 10 U.S.C. § 2323. Small and disadvantaged businesses are defined in the same manner as those firms qualifying for assistance under section 8(d) of the Small Business Act -- they must be owned by socially and economically

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<sup>67</sup>Office of the Secretary of Defense, Directorate of Information Operations and Reports.

disadvantaged individuals who have day-to-day management control. Awards under the program are limited to small and disadvantaged businesses, historically Black colleges and universities, and minority institutions. As administered today, the contracting officer must first determine that there is a reasonable expectation of competition from at least two qualified sources ("the rule of two"). Second, the contracting officer must reasonably conclude that the award price will not exceed the fair market price by more than 10%. Third, the contract value must be over \$25,000. Congress also mandated that the small and disadvantaged business program should not displace the small business program or the 8(a) program. The DOD order of precedence for set-asides is: (1) total set-aside for small and disadvantaged business concerns; (2) total set-aside for small business concerns; and (3) partial set-asides for small and disadvantaged businesses with preferential consideration for small and disadvantaged business concerns.<sup>68</sup> Once a product or service is procured successfully by a contracting office through the section 1207 set-aside program, future requirements for that product or service are thereafter reserved as a set-aside. In FY91, DOD awarded \$4.4 billion, 3.5% of its prime contract awards, under the set-aside program.

In practice there has been confusion over the meaning of the terms "economically and socially disadvantaged," which are key terms in the Small Business Act as well. Congress intended the terms to be more broadly construed in section 1207 than in section 8(a) of the Small Business Act.<sup>69</sup> Congress likened section 1207 to small business set-asides under the Small Business Act, considering both to be procurement policies, not business development programs, like section 8(a), that requires considerable involvement by the SBA. Many firms that have successfully completed or graduated from the 8(a) program are excluded from the 1207 program because they exceed the size standard. There has been some consideration given to targeting the section 1207 program to assist new and emerging small disadvantaged businesses.<sup>70</sup>

The DOD report on the 1207 Program for FY91 indicates great variation in the success rates of its commands. Some commands report awarding tenths of one percent of prime contract dollars to 1207 entities while others have reported awards at double digit levels.<sup>71</sup> Overall, subcontract awards to 1207 entities declined two-tenths of one percent in FY91 compared to the preceding year, the first decrease since the inception of the program.<sup>72</sup> The response rate to the program by historically Black colleges and universities and minority institutions continues to be slow.<sup>73</sup>

Some critics have charged that the 1207 program -- combined with the Competitiveness Demonstration Program -- has a negative effect on non-minority construction contractors. During hearings conducted by the House Armed Services Committee in 1990, for example, one witness testified that it has had an adverse impact on non-minority construction contractors,

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<sup>68</sup>DFARS 219.504.

<sup>69</sup>H.R. REP. NO. 101-665, 101st Cong., 2d Sess. 319-21, *reprinted in* 1990 U.S. Code, Cong. & Admin. News 2931.

<sup>70</sup>*Id.* at 322-23.

<sup>71</sup>S. REP. NO. 102-352, 102d Cong., 2d Sess. 229.

<sup>72</sup>*Id.*

<sup>73</sup>*Id.* at 230.

contrary to the congressional intent. In particular, the witness criticized the program because in some geographic areas it foreclosed small businesses from bidding on most or all contracts in FY89, since DOD relied on construction for a disproportionate share of minority participation. This was exacerbated by the Small Business Competitive Demonstration Program which allowed section 1207 set-asides for minority contractors while disallowing small business set-asides. The witness also claimed that the 1207 program has increased construction costs to DOD because of an effective lack of competition. Finally, the witness stated that it has been used by DOD to undermine the Small Business Competitiveness Demonstration Program because a threshold that had protected certain construction jobs from being set aside was lowered to a level that meant virtually all defense construction jobs would be eligible for set aside.<sup>74</sup> However, these views were sharply disputed by the Chairman of the Board of the National Association of Minority Business, who argued that small business programs were protected by statute and regulation from "intrusions by the SDB program." He also stated:

This falsehood that small businesses are losing contract opportunities, as a result of the SDB Program, has been purposely generated in some circles by opponents of any programs intended to benefit the minority population of this country. The allegation unfairly and unnecessarily seeks to alienate the small business community and, as a result, everyone loses!<sup>75</sup>

#### **Section 8(a) Program**

Section 8(a) of the Small Business Act authorizes the Small Business Administration to enter into all types of contracts with other agencies and to let subcontracts for performing those contracts to firms eligible to participate in the program. Under the program, the SBA certifies to an agency that the SBA is competent to perform a specific contract. Contracts under the program may be either sole source or awarded on a competitive basis. If mutually agreeable terms and conditions are established, the contracting officer is authorized to award the contract to the SBA. In an acquisition offered to the SBA in support of the section 8(a) program, the competition takes place among eligible 8(a) firms when: at least two eligible and responsible 8(a) firms will submit offers; the award can be made at a fair market price; and the anticipated award price of the contract, including options, will exceed \$5 million for acquisitions assigned manufacturing standard industrial classification codes and \$3 million for all other acquisitions. In a competitive situation, the contracting officer may negotiate directly with competing 8(a) firms. When an acquisition exceeds the competitive threshold, the SBA may accept the requirement for a sole source 8(a) award if:

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<sup>74</sup>Statement by Bill Craven, representing the Associated Builders and Contractors, before the House Armed Services Subcommittee on Investigations, March 15, 1990.

<sup>75</sup>Statement by Clemon Wesley, Jr., Chairman of the Board, National Association of Minority Business, before the Investigations Subcommittee, Committee on Armed Services, House of Representatives, April 30, 1992. (The Panel heard many of these same points and divergent views on these special programs during a public comments session held in the Rayburn House Office Building on July 31, 1992.)

- There is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair and reasonable price; or
- The SBA determines that an 8(a) concern owned and controlled by an economically disadvantaged Indian tribe is eligible and responsible and needs the acquisition for its business development.

The final report of the U.S. Commission on Minority Business Development concluded that "mismanagement is so pervasive and so repetitive" in the 8(a) program that it cannot "be presumed to have occurred merely as the result of chance." The Commission recommended the termination of the program as part of the Small Business Administration and its transfer to another Federal agency.<sup>76</sup> Speaking in support of that finding, Weldon Latham, the General Counsel of the National Association of Minority Business, said,<sup>77</sup>

While there is no question that the 8(a) program is the most effective such program ever devised to significantly increase minority business access to contracts in the federal marketplace, the implementation of that program by the SBA and the treatment of the constituent minority firms intended to be served by this program, has often resembled that of a plantation mentality.

Similarly, a report by the General Accounting Office (GAO), published in January 1992, noted that, in 76% of the cases it reviewed for the first 11 months of 1990, the SBA did not meet the statutorily mandated 90 day limit to process applications. SBA does not know the full extent of management and technical assistance provided to 8(a) firms because it does not track the various forms of assistance provided by contractors and others. As of October 1, 1991, only 57% of the firms in the program had the required new or revised business plans approved by the SBA. Without such plans, SBA cannot properly monitor the development of 8(a) firms, and the firms themselves are statutorily ineligible for Government contracts. Nonetheless, SBA had chosen to work with the firms rather than withhold contracts as required by law. Other criticisms of the SBA program noted by GAO include failure to assure equitable geographic distribution of 8(a) contracts, inadequate use of competitive bidding, and missing and inaccurate data.<sup>78</sup>

### **Small Business Competitiveness Demonstration Program**

Congress created the Small Business Competitiveness Demonstration Program in 1988 as part of the Business Opportunity Development Reform Act. The program is designed to deal with the fact that many agencies, in order to assure small business participation in a fair proportion of Federal procurements as mandated by Congress, tend to concentrate awards to

<sup>76</sup>UNITED STATES COMMISSION ON MINORITY BUSINESS DEVELOPMENT, FINAL REPORT 48 (Sept. 1992).

<sup>77</sup>Weldon Latham, General Counsel of the National Association on Minority Business, speaking before the House Committee on Government Operations (July 28, 1992).

<sup>78</sup>GAO, *Small Business--Problems in Restructuring SBA's Minority Business Development Program 2-3* (RCED-92-68, January, 1992) [hereafter GAO Small Business Report].

small businesses in a limited number of categories, naturally dominated by small businesses, through the use of set-asides. The agencies participating in the program, including DOD, are required to establish a 40% small business participation goal within designated industry groups. The participating agencies may count all contract awards of \$25,000 or more to any small business to determine if the goal is met. Further, participating agencies are required to offer contracting opportunities above the \$25,000 small purchase threshold to small businesses as long as small business participation does not fall below the specified goal. If a 30% goal<sup>79</sup> is not met, agencies reinstitute set-asides and use them until the goal is attained.

The Demonstration Program began on January 1, 1989, and has been extended through September 30, 1996. According to the Office of Federal Procurement Policy (OFPP), the objectives of the Demonstration Program "are largely being achieved" by the participating agencies, including DOD.<sup>80</sup> The Demonstration Program established 40% goals for small business participation in the four industry groups covered by the program. OFPP concluded that the 10 participating agencies collectively have exceeded both the 40% small business goal and the 15% emerging small business award goals for all but one of the industry categories, Architectural and Engineering Services.<sup>81</sup>

### **Mentor-Protégé Pilot Program**

As noted above, this program was passed in 1990,<sup>82</sup> implemented in 1991, and amended during the Persian Gulf crisis in 1991.<sup>83</sup> In its comments to the Panel, the Air Force Systems Command noted that the 1991 amendment strengthened the original program by allowing mentor firms to recover costs incurred in assisting protégé firms as direct items of cost on defense contracts, through indirect expense recovery or through separate contracts or agreements.<sup>84</sup> The Air Force also commented that the future cost impacts of the amended program may be substantial.<sup>85</sup> Section 307 of the National Defense Authorization Act for 1993 continued the pilot mentor-protégé program and authorized \$55 million for the performance of its functions.<sup>86</sup> This section directed the Secretary of Defense to publish DOD's policy on the program and any regulations or guidance it has issued in the Department of Defense Supplement to the Federal Acquisition Regulations.<sup>87</sup> Congress also directed the Secretary to make certain changes to strengthen the program's small business aspects.<sup>88</sup>

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<sup>79</sup>The 30% goal is established by regulation rather than statute. It applies only to subclassifications within the four designated industry groups.

<sup>80</sup>GAO Small Business Report at 2-3.

<sup>81</sup>*Id.* at i.

<sup>82</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 831, 104 Stat. 1485, 1607 (1990).

<sup>83</sup>Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. No. 102-25, § 704(c), 105 Stat. 75, 119-120 (1991).

<sup>84</sup>Memorandum from Anthony J. Perfilio, SES, Command Counsel, Headquarters Air Force Systems Command, Department of the Air Force (Mar. 6, 1992).

<sup>85</sup>*Id.*

<sup>86</sup>National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 807, 106 Stat. 2448 (1992).

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

The U.S. Commission on Minority Business recently examined the Mentor-Protégé Program and other congressionally mandated efforts to help small businesses and socially and economically disadvantaged businesses by selective reallocation of Government contracts. The Commission endorsed these efforts but concluded that they have been only partially successful. In its final report, the Commission stated that goals are of "marginal utility" and that the goal setting system is "mismanaged."<sup>89</sup> The Commission endorsed the idea of partnerships between large firms and small disadvantaged businesses such as those promoted by the Mentor-Protégé Program. However, since the program was authorized by Pub. L. No. 101-510, DOD has approved only 17 Mentor-Protégé Agreements. Some sources point out, however, this low figure may be partially attributable to the turbulence that has accompanied the downsizing of the defense industrial base. For many of these same reasons, company-wide contracting plans, authorized as a test by DOD by Pub. L. No. 101-189 in 1990, have not resulted in a significant number of such plans, even though private industry had indicated that the change would shift greater resources to finding and qualifying more small business subcontractors.<sup>90</sup>

A significant concern with the implementation of the program is that the close relationship between the mentor and the protégé could cause the protégé firm to lose its status as a small and disadvantaged business under the Small Business Administration. Additionally, under current SBA rules, an 8(a) firm must receive prior approval from the SBA before becoming a protégé and management assistance provided by the mentor firm is regarded as a management agreement requiring SBA prior approval even though DOD had already approved the developmental assistance provided by the mentor. Failure to obtain SBA approval could result in termination of 8(a) assistance to the protégé.<sup>91</sup>

### Summary

There are three general problem areas, all closely related, suggested by the Panel's examination of the Small Business Act and the statutes applicable to DOD:

- **Volatility and Complexity of the Law:** Over the years Congress has used the Small Business Act, its various amendments, and DOD appropriations and authorization acts as the primary means to promote a more equitable distribution of Federal procurement dollars among small and minority owned businesses. While these programs have had a generally positive impact, they are encumbered by "needless bureaucratic entanglements" that, in the words of the Chairman of the U.S. Commission on Minority Business Development, "strangle the lifeblood from businesses owned by minorities . . ."<sup>92</sup> Frequent changes to the small business statutes detract from the cohesiveness of the effort as a whole, even as they create a system that is complex, confusing, and uncertain. Myriad certification processes have also developed over the years that are cumbersome, duplicative, and time-

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<sup>89</sup>U.S. COMMISSION ON MINORITY BUSINESS, FINAL REPORT 21, 36 (Sept. 1992).

<sup>90</sup>*Id.* at 77.

<sup>91</sup>S. REP. NO. 102-352, 102d Cong., 2d Sess. 231-32.

<sup>92</sup>U.S. COMMISSION ON MINORITY BUSINESS DEVELOPMENT, FINAL REPORT xii (Sept. 1992).



consuming.<sup>93</sup> Burdensome as they are, certification and eligibility criteria are only parts of a complex administrative scheme that varies by program and agency, compounding the confusion that surrounds current efforts to promote small business concerns. The Panel believes that the small business area is characterized by a patchwork of legislative and administrative efforts, often based on expediency and good intentions rather than on a global view of how small businesses are to be helped by Federal procurement programs.

- **Need For Clear Goals And Objectives:** The problem of complex and constantly changing statutes is compounded by the absence of clear legislative goals and specific objectives. Many of the enacted programs contain no statutory language explaining the need for the program, its rationale, or its purpose. Often the purpose of a statute is expressed solely as "to promote small business," a vague statement at best. Pub. L. No. 99-661, for example, created the special program for historically Black colleges and universities, and minority institutions but does not explain the necessity for the program, how to judge its success, or how to integrate the program with other measures designed to assist minority business. Likewise, the legislative history of Pub. L. No. 101-574 does not fully explain the congressional decision to suspend the liquidated damages provision of the comprehensive small business subcontracting plan.<sup>94</sup> This lack of legislative clarity naturally leads to great difficulties for those who must administer these programs, particularly the Offices of Small and Disadvantaged Business Utilization in OSD, the uniformed services, and the defense agencies. Despite the great personal dedication of those who execute DOD small business policies, compliance with uncertain and frequently changing program goals represents a burden on the DOD procurement process that adds time, cost, and administrative overload.
- **Need For Streamlined Acquisition Procedures:** The legal complexity and unclear objectives surrounding the small business area also highlight the need for streamlined acquisition procedures. While many of the programs outlined above have been "reinforced" by a variety of compliance mechanisms, including the added "visibility" of individual reporting requirements and mandatory SBA involvement, the net effect of these measures is an overlay of procedural impediments that cannot always be justified by the value they add to the process. It is clearly in the best interests of the Government to reduce these burdens wherever possible as it seeks to reduce overhead costs in an era of reduced defense resources. Moreover, there was a surprising consensus from the small business community on the need to simplify the contracting process in order to make it easier for small businesses of all kinds to compete for procurement dollars. In particular, simplified purchase procedures, reductions in required paperwork during all phases of the contracting process, and wider access to procurement information were the factors consistently cited by the small business community as being important concerns.

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<sup>93</sup>*Id.* at 12.

<sup>94</sup>Pub. L. No. 101-574, 104 Stat. 2814 (1990).

#### **4.3.4.4. Recommendations and Justification**

##### **General Recommendations**

There are a number of reasons why this Panel refrains from making a more detailed and comprehensive set of recommendations concerning the Small Business Act, the most important of which is that this responsibility was not mandated by its charter. The body which was given that mission, the President's Commission on Minority Business Development, has spent several years compiling a report whose completion in September, 1992, marks the beginning of a period in which small business issues will be given intense scrutiny. Because DOD is an important stakeholder in this process, however, it is appropriate to state here some conclusions that may have a bearing on this larger debate.

##### **I**

##### **Congress Should Replace the Current Patchwork of Small Business Laws With a Comprehensive and Coherent Program With Clearly Stated Objectives.**

The frequent changes in the laws affecting small and minority business create confusion and uncertainty for administrators and contracting officers and, perhaps more importantly, among the intended beneficiaries of the legislation. The lack of clear objectives also makes it difficult for administrators in both the SBA and DOD to properly implement the law and issue necessary regulatory guidance.

##### **II**

##### **Congress Should Look Closely at Ways to Augment its Effort to Help Small Business, Especially in Promoting Minority Business.**

Present efforts to promote small business largely focus on goal-setting as a means to reallocate Federal procurement dollars to small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals. While the objective remains laudable, this approach has also led to persistent problems: the frequent need to "fine tune" programs; ever-increasing numbers of reports and certifications; and continued expressions of dissatisfaction by many of the intended beneficiaries of these programs. While access to procurement opportunities represents an important component in encouraging support for small business, two other equally significant needs are access to capital and access to training. These neglected legs of the "triad" of support to small business have been specifically addressed by the Commission on Minority Business Development. The Panel recommends those findings to the Congress as being consistent with our own.

### III

#### **In Accordance With the Provisions of the Federal Advisory Committee Act, the Secretary Of Defense Should Give Appropriate Consideration to the Appointment of a DOD Advisory Committee on Small Business.**

The Panel received testimony and recommendations on this point from several representatives of the small business community, particularly the National Association of Minority Business (NAMB). In suggesting a rationale for this committee, NAMB said,

... it would provide general defense policy advice to the Secretary of Defense concerning small business matters, any prospective change in policy affecting small business procurement programs, matters arising in connection with the administration of small business policy of the Department of Defense, and the effect of small business policy initiatives on the small business community. The Committee would advise, consult with, and make recommendations to the Secretary of Defense and other relevant agencies on defense related small business issues. It would serve as an objective source of knowledge and information on developments in the public and private sector which relate to small business concerns.<sup>95</sup>

In considering this recommendation, the Panel notes the far-reaching effort that DOD has made to implement both the spirit and the letter of the laws affecting small business, despite the problems caused by frequent changes in those laws. In particular, the Offices of Small and Disadvantaged Business Utilization throughout DOD have been the focal points for this effort, as well as an important forum for the exchange of information on small business issues. However, a high-level committee along the lines proposed by NAMB could provide useful and timely advice to the Secretary of Defense. Given the need for DOD to make further progress on small business issues, the present Panel recommends that the Secretary of Defense give appropriate consideration to creating this body.

#### **4.3.4.5. Relationship to Objectives**

The Panel recommends the statutory changes set out below in the belief that they will promote wider participation of small business concerns in DOD contracting, particularly by disadvantaged and minority business concerns. The Panel's objective is to increase the opportunities for these entities to participate in DOD contracting while at the same time reducing the administrative burden for both the Government and its suppliers.

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<sup>95</sup>Letter from Dwight Weaver, National Association of Minority Business to Acquisition Law Task Force, Subject: Small Business Advisory Committee, Nov. 13, 1992.

#### **4 3.4.6. Specific Recommendations and Proposed Statutes**

##### **4.3.4.5.1. Small Business Act**

###### **Miscellaneous**

The Panel recommends that the following sections of the Small Business Act be retained without modification: 15 U.S.C. § 631; 15 U.S.C. § 631a; 15 U.S.C. § 631b; 15 U.S.C. § 632; 15 U.S.C. § 636, and 15 U.S.C. § 638.<sup>96</sup>

###### **Direct Contracting With Small Business Under Section 8(a)**

###### **Amend**

Under present law and regulations, contracts are awarded to minority small businesses under the SBA section 8(a) program by the contracting agency awarding a contract to SBA and SBA awarding a contract to the small business. Usually both contracts contain or reference a "tripartite agreement" which, among other things, permits the contracting agency to bypass the SBA for most contract administration matters and gives the small business the benefit of the Changes and Disputes clauses. Both contractors and DOD agencies commented that this contractual structure is overly complex, redundant, and unnecessary. The Panel recommends an amendment to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), to permit the contracting agency to award a contract directly to the small business unless the contracting officer or the small business specifically requests that SBA be a signatory to the contract. This amendment would not affect any other assistance that SBA normally offers to small businesses. The language of the proposed amendment is as follows:

###### § 637. Additional powers

(a)(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate--

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion (i) to let such

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<sup>96</sup>The Panel did not review 15 U.S.C. §§ 633, 634, and 635 because they deal with the organization and general powers of the Small Business Administration and, as such, do not bear on DOD procurement.

procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer or (ii) to award such procurement contract directly to a socially and economically disadvantaged small business designated by the Administration provided that the small business does not request that the award be made through the Administration. Whenever the Administration and such procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator . . . .

## **Implementation of Simplified Acquisition Threshold**

### **Amend**

In order to implement the simplified acquisition threshold, the Panel recommends that section 8(d) of the Small Business Act, 15 U.S.C. § 637(d), be amended to change the phrase "small purchase threshold" wherever it appears to "simplified acquisition threshold;" that section 8(e) of the Act, 15 U.S.C. § 637(e), be repealed in its present form and replaced with the language shown below, and that sections 8(f), 8(g), and 8(i) of the Small Business Act, 15 U.S.C. § 637(f) and (g), be deleted:

(e) PROCUREMENT NOTICE.—Publication, notification, and availability requirements for solicitations leading to the award of contracts for property and services are those set forth in section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. § 416).

In addition, section 8(h) of the Act should be repealed since it duplicates 10 U.S.C. § 2304(f) and 41 U.S.C. § 253(f). Finally, section 8(j) of the Act should be renumbered as section 8(f), 15 U.S.C. § 637(f).

To implement the simplified acquisition threshold, the Panel also recommends the following amendment to section 15(j) of the Small Business Act, 15 U.S.C. § 644(j):

(j) Each contract for the procurement of goods and services which has an anticipated value not in excess of the ~~small purchase~~ simplified acquisition threshold and which is subject to ~~small~~ simplified purchase procedures prescribed by 10 U.S.C. § 2304(g) or 41 U.S.C. § 253(g) shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased; provided, however, that nothing in this subsection shall be construed as precluding the award of contracts with a value not in excess of the simplified

acquisition threshold under the authority of section 8(a) of this Act (15 U.S.C. § 837(a)), section 2323 of Title 10 or under section 712 of Public Law 100-656. In utilizing these procedures, contracting officers shall, wherever circumstances permit, choose a method of payment which minimizes paperwork and facilitates prompt payment to contractors.

#### **4.3.4.6.2. Public Laws**

Subject to its overall recommendation that Congress make a comprehensive revision of all small business and small disadvantaged business statutes affecting Federal procurement generally and DOD procurement specifically, the Panel recommends that the small business portions of the following public laws be retained: Pub. L. No. 99-272; Pub. L. No. 101-165; Pub. L. No. 101-189; Pub. L. No. 101-511; Pub. L. No. 102-172; Pub. L. No. 102-190; Pub. L. No. 102-366.

#### **Mentor Protégé Pilot Program (Pub L. No. 101-510)**

##### **Retain**

The Panel recommends that this statute be retained as written. Because this is a recent statute for which the implementation process was only begun one year ago, time should be given for the program to be set into motion and its provisions observed in practice before any changes are made. Congress has endorsed this recommendation by retaining the statute in the 1993 National Defense Authorization Act and by providing for its implementation in the regulations.

#### **Small Business Subcontracting Plans**

##### **No Action**

The Panel was urged by many commentators, in Government, industry and small business, to recommend the immediate implementation of company-wide small business subcontracting plans by amending 15 U.S.C. § 637(d). Industry, in particular, stated that the contract-by-contract reporting required by current law and regulation is burdensome and costly. In response, small business took the position that under the present structure, there would be no assurance that small businesses got "high technology" work (versus construction or janitorial work) without imposing contract-by-contract requirements.

A number of commentators also stated that the current structure of small business contracting could be made more effective if offerors were required to submit small business plans at the time of consideration for contract award and if award factors included the extent of minority participation in planned subcontracts. Alternatively, some suggested that achievement of subcontracting goals should be reflected in increased award or incentive fees or in authorized profit levels. No one spoke in favor of liquidated damages for failure to comply with a subcontracting plan, with many stating that liquidated damages were "overkill" that could not practically be implemented.

In light of these somewhat conflicting positions and the absence of data concerning the effectiveness of company-wide subcontracting plans, the Panel recommends that: the liquidated damage provisions in 15 U.S.C. § 637(d), which are today suspended,<sup>97</sup> remain suspended until the end of the test program; but that Congress immediately take up the issue of small business subcontracting upon the termination of the test program created by Pub. L. No. 101-189.

## **Certificates of Competency**

### **Repeal**

Section 804 of the 1993 Defense Authorization Act modifies the Certificate of Competency procedures solely for DOD contracts. Because it applies only to DOD contracts, it is likely to be burdensome to small business, since it will require small businesses to comply with two different statutory requirements, one for DOD and another for civilian agencies. The Panel can discern no value added by this section and recommends that it be repealed to revert to the former system so that small business is not confronted with two regulatory schemes. Alternatively, the 14 day notice period should be shortened to 5 days with an added option for the contracting officer to refer a dispute over a contractor's responsibility directly to the SBA for a COC. If this section is not repealed, it should be expanded to apply both to DOD and civilian agencies to spare small businesses the burden of a complex, dual system. Finally, the application of either alternative should be expanded to encompass all small business.<sup>98</sup>

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<sup>97</sup>See Pub. L. No. 101-574, § 402, 104 Stat. 2832 (1990).

<sup>98</sup>The Panel received a written comment on this point from the SBA: "While the SBA supports repeal of this legislation, we cannot conceive of any reason that the problem resulting from (it) should be imposed on other Federal agencies." Letter, Robert J. Moffitt, SBA Associate Administrator for Procurement Assistance to Donald H. Freedman, Executive Secretary, Acquisition Law Advisory Panel, Dec. 3, 1992.

#### **4.3.5. 25 U.S.C. § 1544**

### **Additional compensation to contractors of Federal agency**

#### **4.3.5.1. Summary of the Law**

This section allows a contractor working for a Federal agency to pay an additional amount of compensation equal to 5% of the amount paid, or to be paid, to a subcontractor or supplier if it is an Indian organization or Indian-owned enterprise.

#### **4.3.5.2. Background of the Law**

This law was passed as part of Pub. L. No. 100-442 in September, 1988.<sup>1</sup> The law was addressed in H.R. Comm. Rep. No. 100-838.<sup>2</sup>

#### **4.3.5.3. Law in Practice**

According to the Office of the Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition, they have no knowledge of DOD money paid under this section nor any related effect on DOD acquisition. However, they also stated that this issue was of great concern to the Indian and minority business community, presumably because of its impact upon non-DOD Government procurement.<sup>3</sup> This statute puts the Bureau of Indian Affairs (BIA) in much the same position with respect to Indian contracts that the Small Business Administration exercises in administering the 8(a) program. Those functions include issuing certificates of competency and resolving other contract disputes that may arise with Indian-owned concerns seeking to do business with the Federal Government.

The law is a relatively recent one, so BIA currently has no dollar figures available on the amount of DOD dollars affected by this statute. However, there is some reason to think that, like other set-asides, there may be an undetermined amount at the subcontracting level. Many tribal industries, for example, compete with a variety of second and third-tier subcontracts, especially in supplying clothing, electronics, and other piece-work goods to prime Federal contractors.

#### **4.3.5.4. Recommendation and Justification**

##### **Retain**

This is a new program with clear potential for fostering productive mentor-protégé type relationships. Although this law now has minimal impact on DOD, it is also possible that Indian

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<sup>1</sup>Act of Sept. 22, 1988, Pub. L. No. 100-442, § 504, 102 Stat. 1763, 1765.

<sup>2</sup>H.R. REP. NO. 838, 100th Cong., 2d Sess. 6 (1988).

<sup>3</sup>Letter from the Office of the Small and Disadvantaged Business Utilization, Office of the Under Secretary of Defense for Acquisition (May 28, 1992).



subcontractors and suppliers developed under this program could be viable competitors for DOD contracts in the future. Because of this potential, as well as minimal present impact on DOD contracting, the Panel recommends retention.

#### **4.3.5.5. Relationship to Objectives**

Retaining this statute will assist in establishing a balance between an efficient process and socioeconomic policies.

## **4.3.6. 41 U.S.C. § 417a**

### **Procurement data**

#### **4.3.6.1. Summary of the Law**

This law requires each Federal agency to report to the Office of Federal Procurement Policy "the number of small business concerns owned and controlled by women and the number of small business concerns owned and controlled by socially and economically disadvantaged business, by gender, that are first time recipients from such agency."

#### **4.3.6.2. Background of the Law**

This section, passed in 1988 by the 100th Congress, was enacted as part of the Women's Business Ownership Act of 1988 to enhance business opportunities for women owned businesses.<sup>1</sup>

#### **4.3.6.3. Law in Practice**

When a contract is signed, DFAR 204.6 requires DOD to process DD Form 350 which contains the information to fulfill the requirements of this statute. According to the Deputy Assistant Administrator for Federal Procurement Policy, this information is collected automatically by their office through the use of contract establishment numbers and comparison to previous years.<sup>2</sup> Therefore, this section imposes no additional reporting requirement on any Government agency.

#### **4.3.6.4. Recommendation and Justification**

##### **Retain**

Because this statute imposes no great administrative burden on any Government agency but provides a means of collecting useful information, the Panel recommends its retention.

#### **4.3.6.5. Relationship to Objectives**

Retention of this section promotes the Panel's objective of fulfilling reporting requirements by using data that already exists and is already collected without imposing additional administrative burdens.

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<sup>1</sup>Women's Business Ownership Act of 1988, Pub. L. No. 100-533, § 502, 102 Stat. 2689, 2697.

<sup>2</sup>Telephone interview with the Deputy Assistant Administrator for Federal Procurement Policy (May 4, 1992).

## 4.4. Protection of the Environment

### 4.4.0. Introduction

The Panel reviewed a number of statutes on environmental protection in order to determine if any of them represented an unusual burden upon DOD or its contractors. While some, such as the Marine Mammal Protection Act (10 U.S.C. § 7524), were primarily intended to correct specific defense policies, most were not. Eventually, only three statutes were selected for an in-depth review: the Clean Water Act (33 U.S.C. § 1368); the Clean Air Act (42 U.S.C. § 7606); and the Resource Recovery & Conservation Act (RCRA, 42 U.S.C. § 6962). All three laws clearly affect Government procurement, either by requiring contracts to contain implementing clauses or, in the case of RCRA, by directing agencies to establish "affirmative procurement programs." However, none of these laws contain provisions which appear to be unreasonable or to have an unusual impact upon defense-related firms. For that reason, all three of the laws reviewed here are recommended for retention without further amendment.

The Panel was aware of a September, 1989, report of a special environmental panel assembled under the auspices of the Defense Management Review, which uncovered 78 Federal statutes (as well as four Executive Orders and 8000 pages of regulations) that directly or indirectly affected the acquisition process.<sup>1</sup> However, when the Panel reviewed these 78 items, most were found to apply to businesses generally -- and hence did not warrant a special exception for DOD contractors -- or were related to environmental reporting or potential cleanup issues for DOD. Those concerns, while important, were only indirectly related to acquisition law.

While the Defense Management Review (DMR) Panel recommended a number of changes to individual statutes, one of its principal findings deserves special mention here:

A holistic approach to (environmental, safety, and occupational health) must begin with Congressional review of the patchwork quilt of Federal environmental laws. Recodification into a unified, consistent, and simplified scheme is essential. Currently, Federal agencies expend a large portion of their (environmental) resources compiling and filing reports -- not improving manufacturing processes, identifying environmentally safe substitutes for hazardous materials and developing environmentally sound advances in technology.<sup>2</sup>

Although three years have elapsed since the publication of this report, there is abundant evidence that the need identified by the DMR report has become progressively more acute. A study completed by the General Accounting Office (GAO) in October 1992, for example, documented a number of cases which had arisen concerning discrepancies in DOD reimbursement

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<sup>1</sup>U.S. Dept. of Defense, *Defense Management Review Background Analysis: Environmental Panel*, September, 1989, Washington, DC, pp. 1-2.

<sup>2</sup>*Id.*, p. 5.

of three large defense contractors for the costs they had incurred at four Superfund cleanup sites. Although these reimbursements already totaled \$50 million through mid-1992, the GAO report noted that the potential for "future payments could be many hundreds of millions of dollars."<sup>3</sup> The report also noted the inconsistencies in the reimbursements allowed by Government contracting officers, actions that differed widely in both form and substance despite the high-dollar stakes which were involved. And it was admirably concise in summing up the principal reason for these inconsistencies: "These variations can occur because federal acquisition laws, regulations, and policies do not provide specific guidance to decision makers on how to treat environmental cleanup costs."<sup>4</sup>

As is the case with that part of this report dealing with small business, the Panel finds that environmental law is a field in which defense and defense acquisition are simply two stakeholders among a number of others. Accordingly, the Panel did not attempt to make the comprehensive revision suggested by the DMR report, leaving that task for others with particular expertise in environmental issues.

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<sup>3</sup>U.S., General Accounting Office, *Environmental Cleanup: Observations on Consistency of Reimbursements to DOD Contractors*, GAO/NSIAD 93-'77, October 22, 1992, Washington, DC p. 1.

<sup>4</sup>*Id.*, p. 2.

## 4.4.1. 33 U.S.C. § 1368

### Clean Water Act

#### 4.4.1.1. Summary of the Law

Section 1368 (section 508 of the Clean Water Act) prohibits Federal agencies from entering into procurement contracts that are to be performed at any facility from which a conviction of the contractor under section 1319(c) of Title 33 arose.<sup>1</sup> When the Environmental Protection Agency (EPA) certifies that the condition giving rise to the conviction has been corrected, the prohibition is lifted.<sup>2</sup>

The EPA is instructed to establish notification procedures to facilitate Federal agencies' compliance with the Act.<sup>3</sup> The original statute called upon the President to issue an order requiring relevant Federal agencies to "effectuate the purpose and policy of this chapter."<sup>4</sup> Also, the President is authorized to provide exemptions from the prohibition when he determines an exemption to be in the paramount national interest.<sup>5</sup> Finally, the statute requires the President to report to Congress any exemptions granted<sup>6</sup> and the measures taken to implement the Act's provisions.<sup>7</sup>

#### 4.4.1.2. Background of the Law

Congress enacted the statute in 1972 as a parallel provision to a 1970 amendment to the Clean Air Act<sup>8</sup> so that the Federal Government would not patronize or subsidize polluters through its procurement practices.<sup>9</sup> No evidence of resistance to the enactment of this statute can be found in the legislative history, and the House, Senate, and Conference versions of the bill were substantially the same.<sup>10</sup> The Senate report did elaborate on the statute's facility specific scope. A second plant within a corporation seeking a contract unrelated to a violation at the first plant should be not be barred from bidding and receiving the contract. However, if the second plant were to bid and transfer other work to the violating plant, the intent of the statute would be circumvented, and in such a case the second plant would be barred from bidding until the first plant returns to compliance.<sup>11</sup> The report also emphasizes that in order for the statute to be

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<sup>1</sup>33 U.S.C. § 1368(a).

<sup>2</sup>*Id.*

<sup>3</sup>33 U.S.C. § 1368(b).

<sup>4</sup>33 U.S.C. § 1368(c).

<sup>5</sup>33 U.S.C. § 1368(d).

<sup>6</sup>*Id.*

<sup>7</sup>33 U.S.C. § 1368(e).

<sup>8</sup>42 U.S.C. § 7606.

<sup>9</sup>S. REP. NO. 414, 92d Cong., 2d Sess. (1972).

<sup>10</sup>S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. (1972).

<sup>11</sup>S. REP. NO. 414, 92d Cong., 2d Sess. (1972).

effective, the EPA must quickly and accurately apprise Federal agencies of a facility's current status.<sup>12</sup>

In 1987 and 1990, Congress amended section 1319 and expanded the number and types of violations that can serve as bases for debarment from procurement contracts.<sup>13</sup>

#### 4.4.1.3. Law in Practice

The Federal procurement provisions of both the Clean Air and Clean Water Acts (Acts) were implemented by Exec. Order No. 11738,<sup>14</sup> FAR subpart 23.1,<sup>15</sup> and EPA regulations part 15.<sup>16</sup> The Executive Order authorizes the EPA to compile and maintain a list of violating facilities and issue appropriate rules and regulations, forbids Federal procurement from facilities on the list, instructs that procurement regulations be amended to require insertion of compliance conditions into procurement contracts, establishes exemption procedures, and restricts application of the Acts to facilities within the United States.<sup>17</sup>

Regulations have been written in accordance with the Executive Order. Contracts and subcontracts under \$100,000 are exempt from the debarment and contracting requirements of the Acts and the regulations, if the facility to be used is not listed by the EPA for a conviction under the Acts.<sup>18</sup> Nonexempt contracts must certify, whether the facilities to be used are listed by the EPA, that the contractor will notify the contracting agency of any indication that the EPA is considering listing a facility to be used, and that every nonexempt subcontract will include the same certifications.<sup>19</sup> Furthermore, the contractor must agree: to comply with certain requirements of the Acts and regulations and guidelines issued thereunder; that no work will be performed at a listed facility; to use best efforts to comply with clean air and water standards at the facility to be used; and to insert these promises into any nonexempt subcontract.<sup>20</sup>

The EPA has established two mechanisms by which a facility can be listed. Mandatory listing occurs automatically upon conviction for a listed offense.<sup>21</sup> Discretionary listing follows a listing proceeding initiated by a recommendation from an EPA official, state governor, or member of the public which determines if there is a record of continuing or recurring noncompliance with clean air or water standards at the recommended facility.<sup>22</sup> Procedures for removing a facility from the list of violating facilities have also been established.<sup>23</sup>

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<sup>12</sup>*Id.* at 3749-50.

<sup>13</sup>Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 42-45; Oil Pollution Act of 1990, Pub. L. No. 101-380, § 4301(c), 104 Stat. 484, 537.

<sup>14</sup>Exec. Order No. 11,738, 38 Fed. Reg. 25161 (1973).

<sup>15</sup>48 C.F.R. § 23.101 *et seq.*

<sup>16</sup>40 C.F.R. § 15.1 *et seq.*

<sup>17</sup>Exec. Order No. 11,738, §§ 2, 3, 4, 5, 8, 10, 38 Fed. Reg. 25161 (1973).

<sup>18</sup>48 C.F.R. §§ 23.104(a)-(b), 23.105(b).

<sup>19</sup>48 C.F.R. § 52.223-1.

<sup>20</sup>48 C.F.R. § 52.223-2.

<sup>21</sup>40 C.F.R. § 15.10.

<sup>22</sup>40 C.F.R. §§ 15.11-15.

<sup>23</sup>40 C.F.R. §§ 15.20-27.

#### **4.4.1.4. Recommendation and Justification**

##### **Retain**

It is recommended that no change be made to this statute. Section 1368 does not require the establishment of affirmative compliance structures by Government contractors. In a relatively limited and costless fashion, the statute and the regulations issued to implement it ensure that the Federal Government does not knowingly or unwittingly enhance the profitability of violating the Clean Water Act. The environmental cost of tampering with this statute outweighs the incremental streamlining benefit its revision would provide.

#### **4.4.1.5. Relationship to Objectives**

Because this statute does not place unwarranted burden on the procurement process and serves the important socioeconomic goal of promoting environmentally safe practices, its retention is consistent with the Panel's objectives concerning the proper balance between sound acquisition and socioeconomic policies.

## 4.4.2. 42 U.S.C. § 7606

### Clean Air Act

#### 4.4.2.1. Summary of the Law

Section 7606 (section 306 of the Clean Air Act (the Act)) prohibits Federal agencies from entering into procurement contracts that are to be performed at any facility from which a conviction of the contractor under section 7413 of Title 42 arose.<sup>1</sup> When the EPA certifies the condition giving rise to the conviction has been corrected, the prohibition is lifted.<sup>2</sup>

The EPA is instructed to establish notification procedures to facilitate Federal agencies' compliance with the Act.<sup>3</sup> The statute calls upon the President to issue an order requiring relevant Federal agencies to "effectuate the purpose and policy of this chapter."<sup>4</sup> Also, the President is authorized to provide exemptions from the prohibition when he determines an exemption to be in the national interest.<sup>5</sup> Finally, the statute requires the President to report to Congress any exemptions granted and the measures taken to implement the Act's provisions.<sup>6</sup>

#### 4.4.2.2. Background of the Law

Congress enacted the statute in 1970 so the Federal Government would not patronize or subsidize polluters through its procurement practices.<sup>7</sup> The ultimately adopted House Conference version of the bill was more limited than the original Senate bill, which extended the procurement ban to any person not in compliance with a Federal court order issued pursuant to the Act.<sup>8</sup> The statute is far less expansive than a bill introduced by Senator Cook of Kentucky. He criticized the statute for basing procurement prohibitions only upon "knowing violations" of standards of the Act, as had been set out in 42 U.S.C. § 7413(c)(1) prior to the 1990 amendments, and for banning individual facilities rather than entire companies for noncompliance with the Act.<sup>9</sup>

The Nixon Administration expressed reservations about section 7606. Health, Education and Welfare Secretary Robert Finch was concerned that effective enforcement would require "very substantial and probably unwarranted" expense and stated enforcement would be accomplished more simply and directly through Federal or state enforcement of the Act's air

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<sup>1</sup>See 42 U.S.C. § 7606(a).

<sup>2</sup>*Id.*

<sup>3</sup>See 42 U.S.C. § 7606(b).

<sup>4</sup>42 U.S.C. § 7606(c).

<sup>5</sup>See 42 U.S.C. § 7606(d).

<sup>6</sup>See 42 U.S.C. § 7606(e).

<sup>7</sup>See S. REP. NO. 414, 92d Cong., 2d Sess. 83-84 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3749.

<sup>8</sup>See H.R. CONF. REP. NO. 1783, 91st Cong., 2d Sess. 56-57 (1970), reprinted in 1970 U.S.C.C.A.N. 5374, 5389.

<sup>9</sup>See Senate Debate, Sep. 22, 1970, in Legislative History of the Clean Air Act Amendments of 1970, at 343-47 (testimony of Senator Cook).



quality and emission standards.<sup>10</sup> The American Mining Congress also lobbied against section 7606, criticizing it as administratively unworkable and commenting that "[i]t could result in the inability of the government to procure essential commodities."<sup>11</sup> The National Steel Corporation condemned the disqualification of offenders from Government business as "unduly severe" in light of the "effective deterrent" effect of the other penalty provisions in the Act.<sup>12</sup>

In 1990 Congress amended sections 7606 and 7413 and expanded the number and types of violations which can serve as bases for debarment from procurement contracts.<sup>13</sup> Among the offenses added to the list is the negligent placing of another in imminent danger of death or serious bodily injury by the negligent release of a hazardous air pollutant.<sup>14</sup>

#### 4.4.2.3. Law in Practice

The Federal procurement provisions of both the Clean Air and Clean Water Acts (the Acts) were implemented by Exec. Order No. 11738,<sup>15</sup> FAR subpart 23.1,<sup>16</sup> and EPA regulations part 15.<sup>17</sup> The Executive Order authorizes EPA to compile and maintain a list of violating facilities and issue appropriate rules and regulations, forbids Federal procurement from facilities on the list, instructs that procurement regulations be amended to require insertion of compliance conditions into procurement contracts, establishes exemption procedures, and restricts application of the Acts to facilities within the United States.<sup>18</sup>

Regulations have been written in accordance with the Executive Order. Contracts and subcontracts under \$100,000 are exempt from the debarment and contracting requirements of the Acts and the regulations, if the facility to be used is not listed by the EPA for a conviction under the Acts.<sup>19</sup> Nonexempt contracts must certify: whether the facilities to be used are listed by the EPA, that the contractor will notify the contracting agency of any indication that the EPA is considering listing a facility to be used, and that every nonexempt subcontract will include the same certifications.<sup>20</sup> Furthermore, the contractor must agree: to comply with certain requirements of the Acts and regulations and guidelines issued thereunder, that no work will be performed at a listed facility, to use best efforts to comply with clean air and water standards at the facility to be used, and to insert these promises into any nonexempt subcontract.<sup>21</sup>

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<sup>10</sup>Hearings Before Senate Subcommittee on Air and Water Pollution, Mar. 17, 1970, in Legislative History of the Clean Air Act Amendments of 1970, at 977 (statement of Secretary Finch).

<sup>11</sup>Comment of James D. Kittelton, Director, Environmental Activities, American Mining Congress, in Legislative History of the Clean Air Act Amendments of 1970, at 717.

<sup>12</sup>Comment of Fred E. Tucker, Vice President, Environmental Control, National Steel Corp., in Legislative History of the Clean Air Act Amendments of 1970, at 777.

<sup>13</sup>Act of Nov. 15, 1990, Pub. L. No. 101-549, §§ 701, 705, 104 Stat. 2399, 2672, 2682.

<sup>14</sup>See 42 U.S.C. § 7413(c)(3).

<sup>15</sup>Exec. Order No. 11738, 38 F.R. 25161.

<sup>16</sup>48 C.F.R. § 23.101 *et seq.*

<sup>17</sup>40 C.F.R. § 15.1 *et seq.*

<sup>18</sup>See Exec. Order No. 11,738, §§ 2, 3, 4, 5, 8, 10.

<sup>19</sup>See 48 C.F.R. §§ 23.104(a)-(b), 23.105(b).

<sup>20</sup>See 48 C.F.R. § 52.223-1.

<sup>21</sup>See 48 C.F.R. § 52.223-2.

The EPA has established two mechanisms by which a facility can be listed. Mandatory listing occurs automatically upon conviction for a listed offense.<sup>22</sup> Discretionary listing follows a listing proceeding, initiated by a recommendation from an EPA official, state governor, or member of the public, which determines if there is a record of continuing or recurring noncompliance with clean air or water standards at the recommended facility.<sup>23</sup> Procedures for removing a facility from the list of violating facilities have also been established.<sup>24</sup>

#### **4.4.2.4. Recommendation and Justification**

##### **Retain**

It is recommended that no change be made to this statute. Section 7606 does not require the establishment of affirmative compliance structures by Government contractors. In a relatively limited and costless fashion, the statute and the regulations issued to implement it ensure that the Federal Government does not knowingly or unwittingly enhance the profitability of violating the Clean Air Act. The objections raised in 1970 do not seem to have materialized into substantial concerns. The environmental cost of tampering with this statute outweighs the incremental streamlining benefit its revision would provide.

#### **4.4.2.5. Relationship to Objectives**

Because retention of this law will not impose additional or undue administrative burdens on the acquisition process, its retention is consistent with the Panel's objectives concerning the balance between an efficient acquisition process and sound socioeconomic policies.

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<sup>22</sup>See 40 C.F.R. § 15.10.

<sup>23</sup>See 40 C.F.R. §§ 15.11-15.

<sup>24</sup>See 40 C.F.R. §§ 15.20-27.

#### 4.4.3. 42 U.S.C. § 6962

### Section 6002 of the Resource Conservation and Recovery Act (RCRA)

#### 4.4.3.1. Summary of the Law

Responding to the problem of increasing amounts of hazardous and solid waste in this country, Congress in 1976 passed the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991 (1988). One statutory objective of the Act was to encourage the reclamation of waste materials.<sup>1</sup> To this end, the Act imposed an obligation to buy recycled products on Federal procuring agencies.<sup>2</sup>

Section 6962 requires Federal agencies in contracts exceeding \$10,000 to procure items "composed of the highest percentage of recovered materials practicable consistent with maintaining a satisfactory level of competition."<sup>3</sup> This requirement is waived if an item made with recovered materials is "not reasonably available within a reasonable period of time, does not meet applicable specifications or reasonable performance standards, or is only available at an unreasonable price."<sup>4</sup> In addition, Federal fossil-fuel powered energy systems equipped to use fuels derived from solid waste are directed to use such fuels "to the maximum extent practicable."<sup>5</sup>

All Federal agencies are required to redraft their procurement specifications to eliminate any prohibition of recovered materials and any requirement of manufacture from virgin materials; specifications must instead require use of recovered materials to the maximum extent possible.<sup>6</sup> Further, agencies must require vendors to certify that the percentage of recovered materials in items offered to a Federal agency will meet the contractual specification for such items and, in addition, to estimate the percentage of total materials represented by recovered materials.<sup>7</sup>

The Environmental Protection Agency (EPA) is instructed to issue guidelines to assist agencies to comply with the statute.<sup>8</sup> The EPA must designate products that can be produced with recovered materials and recommend procurement and certification practices for those items after considering availability, solid waste impact, economic and technological feasibility, and

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<sup>1</sup>See H.R. Rep. No. 1491, 94th Cong., 2d Sess., 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238-39.

<sup>2</sup>42 U.S.C. §§ 6962(c)(1), 6903(17). RCRA imposes the same obligation on any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for a procurement. *Id.*

<sup>3</sup>42 U.S.C. § 6962(a),(c)(1). The Act also requires the use of recycled material in the procurement of any item the total purchases of which exceeded \$10,000 in the prior fiscal year.

<sup>4</sup>See 42 U.S.C. § 6962(c)(1)(A)-(C).

<sup>5</sup>42 U.S.C. § 6962(c)(2).

<sup>6</sup>See 42 U.S.C. § 6962(d).

<sup>7</sup>See 42 U.S.C. § 6962(c)(3).

<sup>8</sup>See 42 U.S.C. § 6962(e).

multiple uses of recovered materials.<sup>9</sup> In addition, the Office of Federal Procurement Policy (OFPP) is directed to implement the requirements of the statute, coordinate other procurement policies with the statutory goal of maximizing use of recovered resources, and report every two years on progress in implementation.<sup>10</sup>

Finally, the statute sets out an "affirmative procurement program" required of each procuring agency. Agencies must establish a "recovered materials preference program," a program to promote the preference program, a program for requiring estimates and certification of recovered material content, and a system to review and monitor the program's effectiveness. Further, an agency must adopt either a case-by-case policy favoring vendors offering the highest percentage of recovered materials in their products, or minimum content specifications, or a substantially equivalent alternative.<sup>11</sup>

#### 4.4.3.2. Background of the Law

Congress enacted RCRA in 1976 to stimulate use of recovered materials by Government and private industry. By requiring Federal agencies (and state agencies spending Federal funds) to purchase goods made with recycled materials, Congress hoped to create a direct market for recycled goods and also to influence the buying habits of the private market through the publication of Federal guidelines and specifications.<sup>12</sup> "Procurement policy is one way the Federal Government can help solve solid waste and resource use problems without launching major regulatory or financial assistance programs."<sup>13</sup>

The original statute contained no affirmative procurement program nor did it define any product category or types of materials to be recovered. Deferring to agency expertise in procurement matters, Congress left responsibility for implementation to the individual agencies. However, it did not expect a "business-as-usual" attitude and warned that more prescriptive legislation would be in order if the required annual reports show a lack of progress in Federal practices and performance.<sup>14</sup>

By 1980 Congress found Federal agencies had still not complied with the statutory requirement to procure items composed of the highest percentage of recovered materials practicable. This failure was largely due to the absence of guidelines published by the EPA. Thus, Congress amended the statute, providing deadlines for EPA issuance of guidelines for specified product categories and extending the extant deadlines for Federal agencies conforming their procurement specifications to the mandate of the statute.<sup>15</sup>

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<sup>9</sup>See *id.*

<sup>10</sup>See 42 U.S.C. § 6962(g).

<sup>11</sup>See 42 U.S.C. § 6962(i).

<sup>12</sup>See H. R. REP. NO. 94-1491, 94th Cong., 2d Sess. 51 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6289-90.

<sup>13</sup>See S. REP. NO. 94-988, 94th Cong., 2d Sess. 21 (1976)(discussing earlier version of the final bill).

<sup>14</sup>See *id.*

<sup>15</sup>See S. REP. NO. 96-172, 96th Cong., 2d Sess. 4 (1980), reprinted in 1980 U.S.C.C.A.N. 5019, 5022-23.

By 1984 Congress had become frustrated with the EPA and the OFPP. Despite the explicit timetables set out in 1980 requiring guidelines for at least five product categories by September, 1982, EPA had issued only one guideline, and that was four months late. Likewise, the OFPP failed to encourage or require procuring agencies to maximize use of recovered materials. The House Energy and Commerce Committee characterized their efforts as "almost totally unresponsive" to the goals of the Act.<sup>16</sup> As a result, Congress established new mandatory deadlines, provided definitions of "recycled paper" and "waste paper" within the statute "[i]n order to provide the Agency a firm starting point" for its paper guideline, and set forth an affirmative procurement program for which the agencies are directly responsible.<sup>17</sup>

#### 4.4.3.3. Law in Practice

To date, the EPA has issued guidelines for five product categories: building insulation products,<sup>18</sup> cement and fly ash concrete;<sup>19</sup> paper and paper products;<sup>20</sup> lubricating oils;<sup>21</sup> and tires.<sup>22</sup> The Federal Acquisition Regulation requires contracting officers to purchase recycled materials to the maximum extent practicable, sets out a requirement that contracting officers insert a Recovered Materials Certification<sup>23</sup> in solicitations incorporating recovered materials specifications, and establishes the conditions under which a contracting officer may waive requirements for using recovered materials.<sup>24</sup>

As a result of a court challenge to EPA's failure to provide detailed price and availability information in its paper product guideline,<sup>25</sup> as specifically required by the Act, the EPA amended four of the guidelines to include references to where and how price and availability information may be obtained.<sup>26</sup> The EPA also issued an interpretation that the price of an item containing recycled materials is "unreasonable" within the meaning of section 6962(c)(1)(C), and hence that a Federal agency need not purchase such an item if the price of the recycled item exceeds in any way the price of an item made from virgin materials.<sup>27</sup> The U.S. Court of Appeals for the District of Columbia Circuit upheld EPA's interpretation of "unreasonable price" in 1989.<sup>28</sup>

In response to EPA's interpretation that an "unreasonable price" is any higher price, legislation has been proposed in the current Congress which would define "reasonable price" to

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<sup>16</sup>H. R. REP. NO. 98-198, 98th Cong., 2d Sess. 70 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5529.

<sup>17</sup>*See id.* The conference report also commented explicitly about the statute's applicability to the activities of the Federal Highway Administration, indicated that the Federal Acquisition Regulations should include procedural guidelines to carry out the statute's purpose, and specifically addressed several other areas of ambiguity. *See* H. R. CONF. REP. NO. 1133, 98th Cong., 2d Sess. 121-22 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5649, 5692-93.

<sup>18</sup>40 C.F.R. § 248.1 *et seq.*

<sup>19</sup>40 C.F.R. § 249.01 *et seq.*

<sup>20</sup>40 C.F.R. § 250.1 *et seq.*

<sup>21</sup>40 C.F.R. § 252.1 *et seq.*

<sup>22</sup>40 C.F.R. § 253.1 *et seq.*

<sup>23</sup>*See* FAR 52.223-4.

<sup>24</sup>*See* FAR subpart 23.4.

<sup>25</sup>*See National Recycling Coalition, Inc. v. Reilly*, 884 F.2d 1431, 1437-38 (DC. Cir. 1989).

<sup>26</sup>*See* 56 Fed. Reg. 20548 (May 6, 1991); 56 Fed. Reg. 43702 (Sep. 4, 1991).

<sup>27</sup>*See* 53 Fed. Reg. 23,559 (June 23, 1988), promulgating the final rule creating 40 C.F.R. part 250 (1988).

<sup>28</sup>*See Reilly*, 884 F.2d at 1434-37.

include any price up to 10% greater than the price of a competing product composed of virgin materials.<sup>29</sup> The 10% price preference is one of several provisions proposed in the RCRA Amendments of 1992 which expand the current requirements for Federal procurement of recycled materials. The Amendments would also require the EPA to prepare final guidelines for seven additional product categories, require the DOD to review its procurement specifications and eliminate requirements which discriminate against items containing recovered materials, and make explicit that agencies are required to procure items made of the highest percentage of recovered materials practicable even if the EPA has not yet issued applicable guidelines.<sup>30</sup> The bill would also extend the procurement requirements of section 6962 to products procured by the legislative and judicial branches of the Government.<sup>31</sup> EPA has estimated that the bill's new procurement provisions would result in an additional cost of \$21 million to the Federal Government.<sup>32</sup>

#### **4.4.3.4. Recommendation and Justification**

##### **Retain**

The history of RCRA demonstrates an unequivocal congressional commitment to create a Federal buyer's market for recycled materials. Unlike other source preferences, however, RCRA does not require defense contractors to modify their plants, equipment, administrative procedures, or workforce. Nor does RCRA create unwieldy set-asides. Instead, RCRA directs contracting officers, in performing market research in preparation for an acquisition, to consider the use of recycled materials and give priority to such use if recycled materials can reasonably meet the Government's requirements. Under either the EPA's interpretation of "reasonable price" or that contained in proposed legislation, the contracting officer and contracting agencies will retain substantial discretion to ensure that recycled products meet the needs of the procuring agency. Accordingly, the Panel recommends that 42 U.S.C. § 6962 be retained.

#### **4.4.3.5. Relationship to Objectives**

Because this law promotes the environmentally beneficial practice of recycling but does not impose undue administrative or financial burdens, its retention is consistent with the Panel's objectives concerning the balance between an efficient procurement process and sound socioeconomic policies.

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<sup>29</sup>See S. 976, 102d Cong., 2d Sess. § 303, *summarized in* 23 Env't Rep. (BNA) 250-52 (1992).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at § 304, *summarized in* 23 Env't Rep. (BNA) 250 (1992).

<sup>32</sup>See Letter from Don Clay, Office of Solid Waste and Emergency Response, EPA, to Rep. Norman Lent (R-NY), (June 16, 1992) *summarized in* 23 Env't Rep. (BNA) 667 (1992).

## **4.5. Miscellaneous Statutes**

### **4.5.0. Introduction**

The Panel reviewed a number of statutes which had an apparent relationship to socioeconomic laws, but did not appear to pertain directly to any of the functional areas discussed above. For that reason, those laws are presented here with the Panel's recommendations as indicated.

## **4.5.1. 10 U.S.C. § 7341**

### **Airplanes and lighter-than-air craft: authorized number**

#### **4.5.1.1. Summary of the Law**

This section authorizes the President to construct and maintain "15,000 useful naval airplanes," including 200 lighter-than-air craft.

#### **4.5.1.2. Background of the Law**

This section was originally passed in 1926 and codified in 1956. The report language in the revised section of 1942 stressed the needs of the national defense in wartime, and specifically, the need for lighter-than-air craft for coastal defense.<sup>1</sup>

#### **4.5.1.3. Law in Practice**

According to the Naval Air Systems Command, this section has never been used.<sup>2</sup>

#### **4.5.1.4. Recommendation and Justification**

##### **Repeal**

This section addresses lighter-than-air craft that are no longer of significance. In addition, the issue of numbers of aircraft to be maintained is part of the annual authorization and appropriations of Congress.

The Naval Air Systems Command stated this section is a historical anachronism in present law and should be repealed on that basis alone. That Command also stated that to their knowledge this section has never been cited, used, or referred to, and is of no utility or relevance today.<sup>3</sup> The DOD General Counsel's Office concurred with the opinion of the Naval Air Systems Command.<sup>4</sup> The Panel recommends repeal of this section.

#### **4.5.1.5. Relationship to Objectives**

Repeal would streamline the body of defense related acquisition laws.

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<sup>1</sup>H.R. REP.NO. 2130, 77th Cong., 2d Sess. 2 (1942).

<sup>2</sup>Telephone interview with the Legal Counsel of the Naval Air Systems Command (Mar. 2, 1992).

<sup>3</sup>*Id.*

<sup>4</sup>Telephone interview with the DOD Deputy General Counsel (Logistics) (Mar. 3, 1992).



## **4.5.2. 10 U.S.C. § 7342**

### **Percentage required to be constructed or manufactured in United States plants**

#### **4.5.2.1. Summary of the Law**

This section mandates that at least 10% of the aircraft and aircraft engines for the Navy be manufactured in plants owned and operated by the U.S. Government unless those plants are producing at full capacity.

#### **4.5.2.2. Background of the Law**

This section originally was passed in 1940 and codified in 1956. The revised edition of 1940 was accompanied by report language that cited the need for this law due to the "European war and its effect on the United States" and "the reluctant realization that we could trust no one but ourselves in a world speaking only the language of force."<sup>1</sup>

#### **4.5.2.3. Law in Practice**

According to the Naval Air Systems Command, this section is outdated and has not been used for decades.<sup>2</sup>

#### **4.5.2.4. Recommendation and Justification**

##### **Repeal**

The subject of this section is already addressed in the Buy American Act. The Naval Air Systems Command stated that this section is a historical anachronism in present law and should be repealed on that basis alone. That Command also stated that to their knowledge this section has never been cited, used, or referred to, and is of no utility or relevance today.<sup>3</sup> The DOD General Counsel's Office has concurred with that opinion.<sup>4</sup> The Panel recommends repeal of this section.

#### **4.5.2.5. Relationship to Objectives**

Requirements of this section are covered elsewhere in the U.S. Code. Repeal would streamline the body of defense related laws.

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<sup>1</sup>H. R. REP. NO. 2187, 76th Cong., 1st Sess. (1940).

<sup>2</sup>Telephone interview with the Legal Counsel of the Naval Air Systems Command (Mar. 2, 1992).

<sup>3</sup>*Id.*

<sup>4</sup>Telephone interview with the DOD Deputy General Counsel (Logistics) (Mar. 3, 1992).

### **4.5.3. 10 U.S.C. § 7343**

#### **Manufacture in United States plants under certain circumstances**

##### **4.5.3.1. Summary of the Law**

This section allows the President to construct any naval aircraft, including parts and engines, at Government owned facilities if the President determines there is collusion or other actions taken by contractors to deprive the United States of a fair price.

##### **4.5.3.2. Background of the Law**

This section was originally passed in 1934 and codified in 1956. The Act of 1934 authorized the President to procure naval arms in accordance with the Washington and London Naval Treaties of 1922 and 1930.<sup>1</sup>

##### **4.5.3.3. Law in Practice**

The Naval Air Systems Command reports that this section has never been used.<sup>2</sup>

##### **4.5.3.4. Recommendation and Justification**

#### **Repeal**

The subject of this section is already addressed by the Defense Production Act of 1950 and violations are specified in the Trade Agreements Act of 1979.

The Naval Air Systems Command stated this section is an historical anachronism in present law and should be repealed on that basis alone. That Command also stated that to their knowledge it has never been cited, used, or referred to, and is of no utility or relevance today.<sup>3</sup> The DOD General Counsel's Office has concurred with that opinion.<sup>4</sup> The Panel recommends repeal of this section.

##### **4.5.3.5. Relationship to Objectives**

The subject of this section is covered elsewhere in the U.S. Code. Repeal would streamline the body of defense related acquisition laws.

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<sup>1</sup>S. REP. NO. 245, 73d Cong., 2d Sess. (1934).

<sup>2</sup>Telephone interview with the Legal Counsel of the Naval Air Systems Command (Mar. 2, 1992).

<sup>3</sup>*Id.*

<sup>4</sup>Telephone interview with the DOD Deputy General Counsel (Logistics) (Mar. 3, 1992).

#### **4.5.4. 10 U.S.C § 7345**

##### **Navy aircraft requirements: annual report**

###### **4.5.4.1. Summary of the Law**

This section requires the Secretary of the Navy to submit a report, no later than September 1st of each year, to the Committees on Armed Services and Committees on Appropriations of the House and Senate addressing "the current and projected aircraft requirements of the Navy and the plans of the Navy for aircraft acquisition and modernization."

###### **4.5.4.2. Background of the Law**

This legislation, passed in the 101st Congress, was the direct result of the back-to-back cancellation of two troubled naval aircraft programs -- the A-12 and the P-7. The great public attention generated by these cancellations impelled Congress to mandate this reporting requirement as an additional oversight measure.<sup>1</sup>

###### **4.5.4.3. Law in Practice**

Prior to the enactment of this section there was no statutory requirement for reporting. This law imposes such a requirement. However, the requirements of this law are already covered by other regulations and practices applicable to DOD as discussed immediately below.<sup>2</sup>

###### **4.5.4.4. Recommendation and Justification**

###### **Repeal**

This requirement is both burdensome and unnecessary and should be repealed.

First, DOD is routinely required to furnish accurate inventory information in the course of the annual appropriations process. According to the Office of the DOD Comptroller, for example, the data books submitted to Congress already contain this information on naval aircraft as justification for the President's budget request.<sup>3</sup>

Second, the Five Year Defense Plan (FYDP) routinely includes information on naval air squadrons that show both the types of aircraft being projected for procurement and their funding requirements. In fact, the Office of Investment in the DOD Comptroller's Office stated that the combination of these two reports covers the bulk of pertinent information requested by 10 U.S.C. § 7345.<sup>4</sup>

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<sup>1</sup>Telephone interview with the Office of the DOD Comptroller (Mar. 4, 1992).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>Telephone interview with the Office of Investment, DOD Comptroller's Office (Mar. 5, 1992).

Third, repeal of this section, while justifiable on its own merits, is part of the larger issue of establishing common standards of effectiveness that both DOD and Congress can use to reinforce oversight and accountability of defense procurement programs.

**4.5.4.5. Relationship to Objectives**

Repeal of this law would allow the use of existing data to produce the information required for proper congressional oversight. The reduction of such administrative burdens, particularly those involving reporting requirements, is a specific objective of the Panel.

#### **4.5.5. Public Law Number 101-511 § 8034**

### **U.S. Army Engineer Waterways Experiment Station**

#### **4.5.5.1. Summary of the Law**

This section, enacted as part of the Fiscal Year 1991 Defense Appropriations Act, requires that funds obligated or made available by the Act shall continue to fully use the facilities of the U.S. Army Engineer Waterways Experiment Station, including the supercomputer capability of that station. The section further provides that none of the funds expended under the Act may be used for the purchase of any supercomputer which is not manufactured in the United States unless the Secretary of Defense certifies to the Armed Services and Appropriations Committees of the House and the Senate that such an acquisition must be made for national security purposes and that this capability is not available from U.S. manufacturers.

#### **4.5.5.2. Background of the Law**

This section is directly attributable to the House Appropriations Committee's active interest in the research capability represented by the Army Corps of Engineers Waterways Experiment Station in Vicksburg, Mississippi. This facility, which performs the bulk of the Corps' civil works research into the problems of canals and waterways, has been built into a unique research facility, the centerpiece of which is an advanced model of the CRAY supercomputer.

#### **4.5.5.3. Law in Practice**

The Office of the Chief Counsel, Army Corps of Engineers, states this authority is useful in developing the unique research capabilities of the Waterways Experiment Station, especially in maintaining the state-of-the-art capabilities of its supercomputer. Because this provision has not been renewed by subsequent appropriations acts, that authority remains extremely useful<sup>1</sup>. The domestic source restriction is largely a moot point since the United States remains the global leader in super computer technology.

#### **4.5.5.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this statute. This authority is useful in maintaining a unique research capability which is in the best interests of DOD because it supports a wide variety of military and related commercial applications.

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<sup>1</sup>Information received by telephonic inquiry to the Office of the Chief Counsel, Army Corps of Engineers (17-18 Sept. 1992).

#### **4.5.5.5. Relationship to Objectives**

Further development of the above capabilities is consistent with the Panel's objectives of supporting the integration of civilian and military production and promoting a robust defense industrial base.

#### **4.5.6. Public Law Number 101-511 § 8057**

##### **Funding of Contractor in preparing material, reports lists, or analysis**

###### **4.5.6.1. Summary of the Law**

This section, enacted as part of the FY91 Defense Appropriations Act, states that no funds appropriated by the Act may be obligated or expended to assist any contractor of DOD in preparing any material, report, lists, or analysis with respect to the actual or projected economic or employment impact in a particular state or congressional district of an acquisition program for which all research, development, testing, and evaluation has not been completed.

###### **4.5.6.2. Background of the Law**

It is an article of faith that those defense programs with the widest degree of constituency support have the best chance of being fully funded during the Congressional budget process. In their efforts to build that support, defense contractors have sometimes prepared detailed analyses purporting to show the economic impact of prospective weapons programs. Depending on the size of the program, these analyses can be quite detailed, with some including figures to show the number of direct and indirect contract dollars expected to flow into each state and individual congressional district. While section 8017 of this Act follows the customary procedure of creating a general prohibition on the use of appropriated funds to influence, directly or indirectly, congressional action, section 8057 is a narrower restriction specifically intended to ensure these constituency analyses and the activities associated with them are not conducted with public funds.

###### **4.5.6.3. Law in Practice**

The Defense Acquisition Regulatory Council indicates this provision has not resulted in any cases or referrals, nor have they seen any necessity to incorporate it into the DFARS<sup>1</sup>. A number of industry sources have similarly indicated that this provision has a minimal impact, if any, upon the acquisition process, including their lobbying activities.

###### **4.5.6.4. Recommendation and Justification**

###### **Retain**

The Panel recommends retention of this statute even though it has minimal impact in dollar terms upon the defense acquisition process. Its recent enactment by the Congress, its promotion of sound ethical practices, and its potential for cost reductions, however slight, without

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<sup>1</sup>Information received by telephonic inquiry to the Special Assistant (Acquisition Policy & Management), Office of the Assistant Secretary of Defense for Legislative Affairs (Sep. 17, 1992).

creating heavy compliance burdens are all reasons that fully justify retention. To ensure its consistency with defense acquisition law, it is also recommended that this section be codified.

#### **4.5.6.5. Relationship to Objectives**

Retention and codification of this statute is consistent with the Panel's objective of promoting acquisition laws that encourage efficient procurement practices and financial integrity in ways that are simple, understandable, and not unduly burdensome.

#### **4.5.6.6. Proposed Statute**

No funds appropriated by the Congress may be obligated or expended to assist any contractor of the DOD in preparing any material, report, lists, or analysis with respect to the actual or projected economic or employment impact in a particular state or congressional district of an acquisition program for which all research, development, testing, and evaluation has not been completed.



## **4.5.7. Public Law Number 101-511 § 8067**

### **Residents of a particular state for employment**

#### **4.5.7.1. Summary of the Law**

This law states that notwithstanding any other provision of law, each contract awarded by DOD in FY 91 for construction or service performed, in whole or in part, in a state which is not contiguous with another state and has an unemployment rate in excess of the national average as determined by the Secretary of Labor shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in such state that is not contiguous with any other state, individuals who are residents of such state and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills. The Secretary of Defense may waive the requirements of this section in the interest of national security.

#### **4.5.7.2. Background of the Law**

This statute was part of the DOD Appropriations Act of 1991, originally H.R. 5803, passed during the 101st Congress and signed into law on November 5, 1990.

#### **4.5.7.3. Law in Practice**

In effect, this law mandates that DOD contracts awarded in the states of Alaska or Hawaii shall contain a provision requiring the contractor to employ residents of that state if that state's unemployment rate is above the national average.

#### **4.5.7.4. Recommendation and Justification**

##### **No Action**

This law is related to DOD acquisition but is not of primary importance to the Panel at this time. Therefore, the Panel suggests no further consideration.

#### **4.5.7.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

**Chapter 5  
Intellectual Property**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

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<b>5. INTELLECTUAL PROPERTY .....</b>	<b>1</b>
<b>5.0. Introduction.....</b>	<b>1</b>
<b>5.0.1. Background on Technical Data.....</b>	<b>3</b>
<b>5.0.2. Recommendations on Technical Data .....</b>	<b>5</b>
<b>5.0.3. Other Intellectual Property Issues.....</b>	<b>8</b>
<b>5.0.4. Recommendations on Technology Transfer .....</b>	<b>8</b>
<b>5.0.5. Recommendations on the Competitiveness of U.S. Companies .....</b>	<b>9</b>
<b>5.0.6. Recommendations on Government Use of Private Patents, Copyrights, and Trade             Secrets .....</b>	<b>9</b>
<b>5.1. Technical Data.....</b>	<b>11</b>
<b>5.1.0. Introduction.....</b>	<b>11</b>
<b>5.1.1. 10 U.S.C. §§ 2320 - 2321 .....</b>	<b>13</b>
<b>5.2. Technology Transfer.....</b>	<b>41</b>
<b>5.2.0. Introduction.....</b>	<b>41</b>
<b>5.2.1. 15 U.S.C. §§ 3701 - 3710d .....</b>	<b>43</b>
<b>5.2.2. 10 U.S.C. § 2363 .....</b>	<b>59</b>
<b>5.2.3. 35 U.S.C. §§ 200 - 212 .....</b>	<b>61</b>
<b>5.3. Competitiveness of United States Companies.....</b>	<b>67</b>
<b>5.3.0. Introduction.....</b>	<b>67</b>
<b>5.3.1. 35 U.S.C. §§ 181 - 188 .....</b>	<b>69</b>
<b>5.3.2. 22 U.S.C. § 2761(e).....</b>	<b>79</b>
<b>5.3.3. 5 U.S.C. § 552 .....</b>	<b>87</b>
<b>5.3.4. 10 U.S.C. § 130 .....</b>	<b>91</b>
<b>5.3.5. 10 U.S.C. § 2328 .....</b>	<b>93</b>
<b>5.4. Government Use of Private Patents, Copyrights and Trade Secrets .....</b>	<b>95</b>
<b>5.4.0. Introduction.....</b>	<b>95</b>
<b>5.4.1. 28 U.S.C. § 1498 .....</b>	<b>97</b>
<b>5.4.2. 10 U.S.C. § 2386 .....</b>	<b>103</b>
<b>5.4.3. 10 U.S.C. § 7210 .....</b>	<b>107</b>



## 5. INTELLECTUAL PROPERTY

### 5.0. Introduction

In the past decade there has been a major change in the relationship between the acquisition process and the research and development community in the United States. Prior to the 1980s, there was a general assumption that the technology necessary to support DOD could be obtained through direct funding of contracts for research and development and strong support of independent research and development conducted by defense contractors. The Department made use of some technology created in the commercial sector of the economy, but this was thought by many to be peripheral and, perhaps, aberrational. A corollary assumption was that very little technology produced by DOD research and development contracts had commercial application. Thus, the Department had no program to encourage commercial utilization of the technology it had sponsored. In this environment, the acquisition policies relating to intellectual property were properly focused on ensuring that the DOD obtained all of the rights in intellectual property that it needed to develop and use weapon systems. In some cases, the result of these policies was that DOD inadvertently took intellectual property rights in commercial products along with the rights in products developed at government expense.

In the 1980s it became more and more apparent that these earlier assumptions were becoming obsolete. As has been documented in the study of the Packard Commission and in the report by the Center for Strategic and International Studies, commercial technology has outpaced DOD technology in a number of areas of vital importance to the development of weapon systems. While the owners of this commercial technology may want to perform work for the Government, there appears to be increasing reluctance to use their best commercial technology if there is a possibility that DOD will take the intellectual property rights in that technology. It also appears that there will be a greater confluence of commercial and DOD technology in the future. This indicates that there may be greater opportunities to utilize DOD sponsored technology in the commercial sector of the economy. These premises require a different focus for the intellectual property policies of the Department in the acquisition process. The new focus must be on fulfilling the Department's needs in the least intrusive manner with regard to intellectual property and on maximizing the flow of technology from the commercial sector to DOD and from DOD to the commercial sector.

Both the Congress and the executive branch have recognized this new focus. Congress passed the Bayh-Dole bill in 1980 (35 U.S.C. § 200 et seq.) to ensure that small business and nonprofit organizations retained commercial rights to inventions made under Government contracts. In 1986, it passed the Federal Technology Transfer Act (15 U.S.C. § 3710a et seq.) to require Federal laboratories to enter into cooperative research and development agreements sharing technology with the private sector. These new policies were implemented and broadened by Executive Order 12591, April 10, 1987, which directed the head of each executive department, to the extent permitted by law, to:

- (1) delegate authority to its Government-owned, Government-operated Federal laboratories:

(A) enter into cooperative research and development agreements with other Federal laboratories, State and local governments, universities, and the private sector; and

(E) license, assign, or waive rights to intellectual property developed by the laboratory either under such cooperative research or development agreements or from within individual laboratories.

(2) identify and encourage persons to act as conduits between and among Federal laboratories, universities, and the private sector for the transfer of technology developed from federally funded research and development efforts;

(3) ensure that State and local governments, universities, and the private sector are provided with information on the technology, expertise, and facilities available in Federal laboratories;

(4) promote the commercialization, in accord with my Memorandum to the Heads of Executive Departments and Agencies of February 18, 1983, of patentable results of federally funded research by granting to all contractors, regardless of size, the title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government;

(5) implement, as expeditiously as practicable, royalty-sharing programs with inventors who were employees of the agency at the time their inventions were made, and cash award programs; and

(6) cooperate, under policy guidance provided by the Office of Federal Procurement Policy, with the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the Government.

The Panel reviewed each law relating to the creation and use of intellectual property in the acquisition process to determine whether it impeded or furthered the attainment of these goals. In making this review it proceeded from three fundamental premises:

- That a company will not generally make the investment necessary to bring a product or service based on sophisticated technology to the commercial marketplace unless it has intellectual property protection in the form of a patent, copyright or trade secret.

- That a company will not generally use technology with strong commercial potential to perform DOD contracts unless it is assured that it retains intellectual property protection in that technology.
- That as a result of the first two premises, companies are discouraged from integrating their commercial with their military work.

The Panel found that there are a number of laws which are not fully in accord with the new goals. Its recommendations for change are generally made in order to complete the task which Congress began in 1980.

For purposes of review, the Working Group divided the Intellectual Property Laws into four subchapters as follows: (1) Rights in technical data; (2) Technology transfer; (3) Competitiveness of U.S. companies; and (4) Government use of private patents, copyrights, and trade secrets.

### **5.0.1. Background on Technical Data**

During the 1940s, the War Department reserved the right to reproduce, use, and disclose technical information specified to be delivered by a contractor under a contract. While this information was to be provided for governmental purposes only, in fact, the Government construed this limitation broadly to encompass use for competitive procurement. This policy was refined and modified by DOD in the late 1950s to recognize for the first time the contractor's rights in "proprietary data." Such data would include, for example, selected information on a contractor's trade secrets or manufacturing processes. This proprietary data was protected by a contract clause stating that the contractor need not deliver such data if form, fit or function data was provided as a substitute. This clause also provided that data pertaining to "standard commercial items" need not be delivered.

In 1964, the Department modified this data rights policy, abandoning the concept of allowing the contractor to withhold "proprietary data." It substituted a new policy of allowing the Government to have "limited rights" in data pertaining to items, components, or processes developed at private expense. These limited rights permitted the Government to use the data for its own purposes except that the data could not be used to manufacture the product "in-house." Moreover, the data could not be disclosed to other contractors -- effectively barring its use for competitive procurement. To avoid disputes, an effort was also made at that time to have the Government and contractor agree in advance on their respective rights in such data before undertaking the contract.

This basic policy remained in effect until the early 1980s. At that time, concerns about abuses in spare parts procurement caused Secretary of Defense Weinberger to seek greater rights for the Department in technical data. The result was new military department contract clauses which, for example, required contractors to sell or relinquish their data rights as a condition of award and provided that the government would acquire unlimited rights after a stated period (five years in one widely used clause).

Congress followed suit by enacting new statutory requirements aimed at acquiring adequate data to permit competitive procurement of spare parts. The Defense Procurement Improvement Act of 1984 (Pub. L. No. 98-525) included extensive and detailed provisions (codified at 10 U.S.C. §§ 2320 and 2321). These were subsequently modified by Pub. L. No. 99-661 in 1986 to ensure that the implementing regulations provide a balance between the Government's needs for technical data to get competition and the contractor's needs for protection of its proprietary data. The June 1986 Packard Commission report also pointed out the impact of the data rights policy on the willingness of firms to participate in the defense marketplace. DOD published proposed regulations implementing Pub. L. No. 98-525 in September 1985. However, these regulations failed to satisfy the industry demand for protection of data that was perceived as being vital to maintaining their competitive position in both Government and commercial markets. Two revised proposals were published in 1988, but these still failed to achieve the agreed-upon balance between the Government's needs for competitive procurement and the contractors' proprietary rights. DOD continued its attempts to draft an acceptable regulation, but at the time the Panel discussed this issue, there was no indication how the matter would be resolved.

The inability of the Department to formulate a technical data policy acceptable to all parties is not a result of incompetence or lack of effort but rather of the fact that there are many competing demands that must be met. From the point of view of the Department, it must obtain technical data to meet its many needs with sufficient rights to ensure that the data can be used as necessary. One of the most compelling needs has been to ensure reasonable prices for spare parts through competition. If data is needed to meet that competition requirement, the Government must obtain sufficient rights to permit the data to be disclosed to companies that have the capability of manufacturing the product. There is a significant segment of industry that is dependent on obtaining this technical data in order to win contracts to manufacture parts. These companies generally perform little development work but have proved to be efficient manufacturers of parts for the Department. Another segment of industry including many small businesses consists of the major contractors and specialty subcontractors that have invested significant funds in developing new products for the Department as well as for the commercial market. These companies feel the need to protect their technical data in order to recover their investment and maintain their competitive position in the domestic and international market. Reconciling these competing needs has proven to be a formidable task and may never be possible in any perfect sense.

Congress intervened again and pushed DOD and industry toward a resolution of their differences by creating another group, the Section 807 Government/industry technical data committee, in the 1992 Defense Authorization Act. This committee was directed to develop a compromise technical data rule acceptable to both Government and industry. The committee is made up of representatives of DOD and the key industry groups (representing prime contractors, and subcontractors) which have a special interest in how the rule should be structured. Its report is also planned for early 1993.



## 5.0.2. Recommendations on Technical Data

After considering various options on how to proceed, the Panel decided to follow a two-pronged approach:

- First, make minimal modifications to the technical data statute, but sufficient to allow the Secretary of Defense the flexibility to explore other ways of treating the issue; and,
- Second, outline a new alternative approach for dealing with technical data that, instead of focusing on rights, focuses on the Government's need to ensure reasonable life-cycle costs, ordinarily through competition, for spare parts and other follow-on purchases.

The Panel recommends statutory changes to expand the definition of "technical data" to include computer data bases and manuals and other publications supporting computer programs while continuing to exclude computer programs themselves from the definition. In addition, the changes limit the law's applicability only to those data called for under a contract -- this is consistent with the current regulatory coverage. Finally, the Panel recommends that the law be modified to limit its applicability to commercial items being offered to the Government, reflecting the Panel's goal of encouraging firms to integrate their commercial and military work.

The alternative approach mentioned above focuses not on the distribution of rights between Government and industry, but rather on ways to ensure that the Government has the means to ensure that procurement prices are reasonable. As such, it is both new and controversial. However, given the impasse that has existed over the last decade in developing a workable rights policy, the Panel presents this as a new idea to be considered. More work is needed to flesh it out fully and explore all of its implications so that it can be tested in certain programs to be designated by the Secretary of Defense.

The new approach is based on the concept that the Government would establish its needs for data on the basis of whether or not this data was necessary to achieve competition. Parts and components would be categorized according to the likelihood of their being repurchased and the cost effectiveness of subjecting them to full and open competition or limited competition. The Government program manager would be responsible for making the final decisions on the categorization, working with the contractor as the system is developed.

Under this approach, the contractor would be contractually obligated to deliver, when needed, a technical data package that was sufficient to permit competition for those parts and components so categorized. Where the Government approved the designation of a part or component for a single source, the developing contractor or subcontractor would not be required to give up its proprietary rights in the data. In this situation, contractors or subcontractors would prepare a detailed life-cycle analysis demonstrating that the part or component was properly acquired without generally distributing detailed technical data, either by using sole source procedures, form, fit and function competition, multisource qualification, or long term pricing agreement. If the part or component were designated for limited competition, the developing contractor or subcontractor would be allowed to maintain its proprietary rights to the data as long

as the contractor could provide one or more additional qualified sources that could compete for the work. These sources could be established through licensing, dual development, or even reverse engineering.

The key to this approach is that it recognizes those cases where there is no need for the Government to take reprourement rights in a contractor's technical data as long as the Government's need to ensure reasonable life-cycle costs is satisfied.

The Panel circulated several drafts of this proposal and received numerous comments, some positive, but many of them negative. The concerns varied. Some Government officials disagreed with the proposal because they believed the Government should take unlimited rights to technical data that resulted from the expenditure of any amount of Government funds (this was the pre-1984 policy). The alternative approach is based on a different philosophy -- that the Government should only seek the data rights it needs to achieve its objective of cost-effective acquisition, including reasonable life-cycle costs for reprourement parts. The alternative approach seeks to provide the Government with the means to achieve that objective while protecting contractors' commercially valuable technical data from disclosure, thereby further contributing to cost-effectiveness by facilitating Government access to commercial technologies, technology transfer, and commercial-military integration.

In response to the early drafts of the proposal, both Government and industry expressed concern that the process would be under the complete control of the prime contractor.<sup>1</sup> Firms in the breakout community and second tier vendor base that rely on the availability of technical data packages for their livelihood were particularly concerned that most of the parts and components would be categorized as subject to limited or no competition.<sup>2</sup> Also, since prime contractors would serve as data repositories under the alternative approach, subcontractors and small businesses were concerned that, under the proposed system, any contractor who wanted to compete with the original equipment manufacturer (OEM) in the military marketplace would have to get the data from the OEM, who would not be forthcoming or timely with the information.<sup>3</sup> Finally, some subcontractors that invested corporate funds in developing items for defense systems were afraid that this proposal would give the prime contractors too much bargaining power and permit them to force the subcontractors to license competitors.<sup>4</sup>

These concerns were addressed in the revised proposal by making clear that the contractor would be obligated to develop and comply with a Spare Parts Acquisition Plan which was developed under the control of the Government and was approved by the contracting officer. In addition, the revised proposal makes clear that the program manager would have to approve any

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<sup>1</sup>See Memorandum from Capt. L. D. Harder, Space and Naval Warfare Systems Command, Dept. of Navy (Oct. 22, 1992); Memorandum from Edward J. Williamson, Jr., Head, Contracts Policy Branch, Naval Sea Systems Command, Dept. of Navy (Sept. 18, 1992); Memorandum from Alan Chvotkin, Sundstrand Corp. (Sept. 22, 1992); and Letter from Robert J. Moffitt, Associate Administrator for Procurement Assistance, U.S. Small Business Administration (Oct. 23, 1992).

<sup>2</sup>See Letter from Metal Forming and Fabrication, Inc. (Oct. 19, 1992) and Letter from James A. Fishback, Sr., Ontario Air Parts, Inc. (Oct. 19, 1992).

<sup>3</sup>See letter from Ann E. Burrows, Vice President, Galaxie Management, Inc. (Oct. 20, 1992).

<sup>4</sup>Letter from Bettie S. McCarthy, The Proprietary Industries Association (Sept. 25, 1992).

parts or components which a contractor or subcontractor proposed for inclusion in a category for which reprourement technical data would not be provided. As to the fear that OEMs would not furnish technical data, the revised proposal makes this a contractual requirement. Indeed, the Panel perceives this as one of the advantages of this proposal because it ensures that small businesses will have accurate data on these parts. As to any potential problem concerning a prime contractor's bargaining power, the Government would be able to challenge any recommendation that would limit competitive reprourement.

Although some Government officials also raised concerns about the program managers' abilities to manage such a system effectively, several program managers commented that they believed the proposal had promise because it would permit them to achieve their needs without continuing arguments about which party owned the rights to the data.

The Panel sees these comments as a further indication that the various groups have arrived at virtually irreconcilable positions on this issue. This would seem to indicate a need for a new approach to the problem. It is in this spirit that the Panel decided to suggest that the alternative approach be tested. The Panel is convinced that the concerns expressed primarily reflect a misunderstanding of the intent of the proposal and that the best way to alleviate this misunderstanding is to try it out on one or more programs where the Government agency and the contractor are supportive of the attempt to find a new way to resolve this dilemma. In doing so, the Secretary could continue to seek ways to refine the approach to address the concerns of the competing interests. Such experimentation would be particularly appropriate if the Section 807 committee is unable to report a workable approach that adequately protects the Government from excessive reprourement costs while providing adequate protection for commercially valuable technology.

The Panel would like it clearly understood that this proposal is in no way meant to relinquish Government control over the selection of which parts or components are appropriate for competition nor to revert to discredited sole source practices. Moreover, the Panel expects that the new approach would not alter significantly the proportion of competitive versus noncompetitive reprourements. Competitive reprourement would remain the primary means for protecting the Government from having to pay unreasonable prices for spare parts and other follow-on purchases. Indeed, the new approach is designed to ensure that complete technical data packages are made timely available so that interested firms can compete more effectively in spare parts procurements. Importantly, as explained below in the Technical Data discussion, the new approach could help to achieve the Government's goal of promoting the flow of technology from the commercial sector to the Government and from the Government to the commercial sector.

Taking into account both the controversial nature of technical data issues and the absence of any clear solution to the overall policy problems, the Panel presents this alternative approach as an option to be considered on a trial basis for further development and refinement and selective application during development of major systems or subsystems.

### **5.0.3. Other Intellectual Property Issues**

The other key intellectual property areas that the Panel addressed included those dealing with technology transfer, the competitiveness of U.S. companies and the Government's use of private patents, copyrights, and trade secrets. Again, the Panel approached these issues from the same policy framework described above, that is, of trying to meet Government or societal needs while continuing to protect the contractor's interest in the intellectual property it has developed.

### **5.0.4. Recommendations on Technology Transfer**

For technology transfer, three major statutes have been enacted to promote the transfer of technology from the Government to the private sector. These are the University, Small Business Patent Policy Act; the Federal Technology Transfer Act; and the Stevenson-Wydler Technology Innovation Act. The Panel found all were being well implemented by DOD and recommended only minor changes to the first two laws.

The University, Small Business Act promotes technology transfer by permitting small businesses and nonprofit organizations to retain title to inventions made in the performance of Government contracts if they elect to file for a patent. The Panel's recommended changes to this Act focus on obtaining earlier disclosure of both the contractor's invention and its intention to file for a patent abroad. They also would give more time for agency review of an invention to protect the Government's option to file if the contractor elects not to do so. A final change would have the contractor file the patent application within one year of election. These changes should help to protect valuable commercial technology while also accelerating the entry of new technologies into the marketplace.

The Federal Technology Innovation Act promotes technology transfer by letting Federal laboratories enter into cooperative research and development agreements with private contractors. The Panel recommends two changes in this area:

- Allowing Government laboratories to claim copyright protection in computer programs developed by their employees, similar to the protection employees receive on patents; and
- Allowing employees or former employees under certain conditions to assist in commercializing the technologies they have developed, even though they might be entitled to royalties for their invention.

In both cases, the changes should make it easier for technologies developed in the laboratories to find their way into the private sector.

### **5.0.5. Recommendations on the Competitiveness of U.S. Companies**

The Panel reviewed three statutes affecting the competitive status of the United States in the world market: the Invention Secrecy Act; the Arms Export Control Act; and, the Freedom of Information Act (FOIA). While the Panel recognizes the significant amounts of information (including at times information of value to contractors) released under FOIA requests, it believes the overall benefits of public disclosure of Government activities outweigh any potential negative effects. Therefore, it recommended no changes to FOIA.

For the Invention Secrecy Act, the Panel proposed that a new committee be established, chaired by DOD, and including representatives of the Patent Office, the Export Control Administration, and the Department of State, to review needs for secrecy orders on patent applications. Such orders are placed where the grant of a patent has been determined to be detrimental to the national security. The new committee should see that the policy is applied more consistently and effectively.

The key change recommended by the Panel for the Arms Export Control Act is the deletion of the requirement that the Government recoup nonrecurring costs when defense contractors sell major defense equipment through the Foreign Military Sales program. This recoupment requirement acts as a sales tax on U.S. goods, reducing the competitiveness of U.S. suppliers in world markets. The Panel's proposal is consistent with steps already taken by the Administration to eliminate all recoupment fees required by regulation. Existing Government export controls remain in place to determine what systems are appropriate for international sales and to which countries.

### **5.0.6. Recommendations on Government Use of Private Patents, Copyrights, and Trade Secrets**

28 U.S.C. § 1498 gives DOD necessary access to private technology by allowing contracting officer's to provide firms with the authorization or consent to use private patents on Government contracts. Often this is coupled with an indemnity clause protecting the Government from any liability should a patent owner decide to sue the Government for infringement. The liability would then rest with the infringing contractor. The changes proposed by the Panel would modify the law to provide further protections to a patent owner. Specifically, the change would allow the owner to sue an infringing contractor for damages directly, rather than having to sue the Government. This change should reduce any unfair competitive advantage for an infringing contractor. A similar approach would be followed for purchases of commercial items. This would be consistent with the Panel's goals to follow commercial practices when making such buys.

## **5.1. Technical Data**

### **5.1.0. Introduction**

The Panel reviewed two statutory provisions dealing with technical data generated or used by Government contractors in the performance of their contracts -- 10 U.S.C. §§ 2320 and 2321. In an attempt by Congress to establish overall policy for technical data, the above sections were enacted in 1984 by Pub. L. No. 98-525 and modified in 1986 by Pub. L. No. 99-661. In effect, section 2320 limits the conduct of both DOD and its contractors in negotiating for rights in technical data while section 2321 establishes procedures to be followed in validating the accuracy of the rights to data claimed by contractors. The Panel noted that section 2321 has been fully implemented by the Department without significant controversy but that section 2320 has been implemented by an interim regulation (issued in DFARS in October 1988) which has been vigorously challenged by industry. The Panel also noted that a separate committee, established by section 807 of the National Defense Authorization Act for 1992, is currently attempting to arrive at a data regulation which will resolve the Government-industry impasse on technical data policy.

In view of the fact that the controversy over rights in technical data has been unresolved between the Department and industry for almost a decade, the Panel expended considerable effort seeking a resolution of the controversy. It sought different approaches for resolving the conflict between the industry desire to protect its proprietary rights in commercially valuable data and the Government desire to have data for competitive procurement. The Panel has recommended a statutory modification to section 2320 which would make it possible for the Department to try different approaches for meeting the Government's need to ensure reasonable prices for spare parts and other follow-on acquisitions. In addition, the Panel describes in detail one such alternative method of dealing with the technical data issue which could be tested on a few programs.

A methodology for implementing the new alternative approach is outlined in the discussion of section 2320 and set forth in some detail in paragraph 5.1.1.7. In broad brush, it would allow the Government's contracting officials to utilize a policy based on the Government's need for competition rather than on an abstract rights in data policy. The approach recognizes that the Government needs to ensure reasonable prices for spare parts and other follow-on acquisitions. Competitive procurement would remain the primary means for ensuring reasonable prices. Therefore, the norm would be to require contractors to provide complete procurement technical data packages, if needed. That requirement would be clearly stated in the solicitation and would be included in the resultant contract so that firms interested in participating in a competitive procurement had an effective opportunity to do so.

Importantly, the alternative approach also recognizes that if the Government's procurement practices do not accommodate effective protection for commercially valuable technologies, contractors may not offer to apply those technologies when developing items for Government use. In addition, they will be discouraged from investing in commercial applications of new technologies that are developed for Government use. As a result, contractors will be encouraged to keep their commercial work separate from their Government work, thereby

thwarting technology transfer between the Government and commercial sectors. When this happens, the Government gets less for its money, the defense industrial base shrinks, and the competitiveness of U.S. firms suffers. Accordingly, the alternative approach would provide flexibility so that contracting officials could 1) agree to accept data for limited purposes for specifically identified parts and components, or 2) negotiate to acquire unlimited rights of the Government long term needs would thereby be better served. In any case, the Government would continue to receive the technical data necessary for internal purposes such as design verification, training, installation, operation, maintenance, and testing.

The Panel has also suggested other modifications to 41 U.S.C. § 403 that 1) make it clear that the section relates only to the situation where the Government orders technical data on a contract, 2) ensure that the Government does not demand excessive data rights when buying commercial items, and 3) clarify the provision dealing with time limits placed on limited rights in data. The Panel believes that these recommendations clarify the section without making significant substantive changes to the fundamental policies embodied in the section.

The Panel has also suggested a new definition of "technical data" in 41 U.S.C. § 403. This recommended change clarifies the distinction between technical data and computer programs so that policy in this area can address each of these issues separately. The definition recommended is essentially the same as has been agreed to in the latest proposed FAR provision on technical data and computer software.

Finally, the Panel recommends a minor modification to section 2321 that limits validation of technical data rights to those situations where the Government has identified a need to use the data for competitive procurement purposes. This modification is needed to ensure that the Government and its contractors do not expend resources determining the rights in technical data which will never be used by the Government for competitive procurement.

**5.1.1. 10 U.S.C. §§ 2320 - 2321<sup>1</sup>**

**Rights in technical data and validation of proprietary data restrictions**

**5.1.1.1. Summary of the Law**

Section 2320 states that the "Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process."<sup>2</sup> The section sets forth three categories of rights in technical data.

- **Government funded.** This is defined as an item or process that is developed by a contractor or subcontractor exclusively with Federal funds.<sup>3</sup> Under this category, the U.S. has unlimited rights to: (1) use technical data pertaining to the item or process; or (2) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons.<sup>4</sup>
- **Privately funded** This is defined as an item or process that is developed by a contractor or subcontractor exclusively at private expense.<sup>5</sup> In this case, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to that item or process to persons outside the Government, or permit the use of the technical data by such persons.<sup>6</sup> This does not apply to technical data that: (1) constitutes a correction or change to data furnished by the U.S.; (2) relates to form, fit, or function; (3) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or (4) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.<sup>7</sup> The U.S. may also release or disclose technical data under this category if such release, disclosure, or use: (1) is necessary for emergency repair and overhaul; or (2) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the U.S. and is required for evaluational or informational purposes.<sup>8</sup> Such release under this exception is made subject to a prohibition that the person to whom the data is released

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<sup>1</sup>Also included in this paper is a discussion of 41 U.S.C. § 403, which defines the term "technical data."

<sup>2</sup>10 U.S.C. § 2320(a)(1).

<sup>3</sup>10 U.S.C. § 2320(a)(2)(A).

<sup>4</sup>*Id.*

<sup>5</sup>10 U.S.C. § 2320(a)(2)(B).

<sup>6</sup>*Id.*

<sup>7</sup>10 U.S.C. § 2320(a)(2)(C).

<sup>8</sup>10 U.S.C. § 2320(a)(2)(D).



or disclosed may not further release, disclose, or use such data and the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.<sup>9</sup>

- **Mixed funding.** In this case, an item or process is developed in part with Federal funds and in part at private expense.<sup>10</sup> The statute provides that the respective rights of the U.S. and of the contractor or subcontractor in technical data pertaining to such item or process shall be established as early in the acquisition process as practicable (preferably during contract negotiations).<sup>11</sup> Such rights shall be based on the following considerations: (1) the congressional policy and objectives in section 200 of Title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982, and the declaration of policy in section 2 of the Small Business Act;<sup>12</sup> (2) the interest of the U.S. in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture;<sup>13</sup> (3) the interest of the U.S. in encouraging contractors to develop at private expense items for use by the Government;<sup>14</sup> and (4) such other factors as the Secretary of Defense may prescribe.<sup>15</sup>

Section 2321 is applicable to any contract for supplies or services entered into by DOD that includes provisions for the delivery of technical data.<sup>16</sup> Under this section, a contractor and any subcontractor must be prepared to furnish a written justification to the contracting officer for any use or release restriction.<sup>17</sup> The Secretary of Defense must ensure that there is a thorough review of the appropriateness of any use or release restriction asserted.<sup>18</sup> This review must be conducted before the end of a three-year period beginning on the later of: (1) the date on which final payment is made on the contract under which the technical data is required to be delivered; or (2) the date on which the technical data is delivered under the contract.<sup>19</sup>

The Secretary of Defense may challenge a contractor or subcontractor's use or release restriction if the Secretary finds that: (1) reasonable grounds exist to question the current validity of the asserted restriction, and (2) the continued adherence to the asserted restriction would make it impracticable to procure the item competitively at a later time.<sup>20</sup> A challenge to an asserted use or release restriction may not be made, however, after the end of the three-year period unless the technical data: (1) are publicly available; (2) have been furnished to the U.S. without restriction; or (3) have been otherwise made available without restriction.<sup>21</sup> The Secretary must provide

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<sup>9</sup>10 U.S.C. § 2320(a)(2)(D)(ii) and (iii).

<sup>10</sup>10 U.S.C. § 2321(a)(2)(E).

<sup>11</sup>*Id.*

<sup>12</sup>10 U.S.C. § 2320(a)(2)(E)(i).

<sup>13</sup>10 U.S.C. § 2320(a)(2)(E)(ii).

<sup>14</sup>10 U.S.C. § 2320(a)(2)(E)(ii).

<sup>15</sup>10 U.S.C. § 2320(a)(2)(E)(iv).

<sup>16</sup>10 U.S.C. § 2321(a).

<sup>17</sup>10 U.S.C. § 2321(b).

<sup>18</sup>10 U.S.C. § 2321(c).

<sup>19</sup>*Id.*

<sup>20</sup>10 U.S.C. § 2321(d).

<sup>21</sup>*Id.*

written notice of the challenge to the contractor or subcontractor asserting the restriction.<sup>22</sup> If the contractor or subcontractor fails to respond to the notice, the contracting officer shall issue a final decision pertaining to the validity of the asserted restriction.<sup>23</sup> If a contractor or subcontractor submits a justification in response to the notice, the contracting officer must, within 60 days of receipt, issue a final decision or notify the party asserting the restriction of the time within which a final decision will be issued.<sup>24</sup>

The section also provides that it is a justification of an asserted use or release challenge that, within the three-year period preceding the challenge to the restriction, DOD validated a restriction identical to the asserted restriction if: (1) such validation occurred after a challenge to the validated restriction under this subsection, and (2) the validated restriction was asserted by the same contractor or subcontractor.<sup>25</sup>

Any claim submitted pertaining to the validity of an asserted restriction will be considered a claim within the meaning of the Contract Disputes Act.<sup>26</sup> If the contracting officer's challenge is sustained, then the restriction will be canceled and the contractor or subcontractor may be liable for fees and other expenses if the restriction is found not to be substantially justified.<sup>27</sup> If the contracting officer's challenge is not sustained, then the U.S. shall continue to be bound by the restriction and may be liable for payment to the party asserting the restriction for fees and other expenses.<sup>28</sup>

#### **5.1.1.2. Background of the Law**

During the early and middle 1940s, data rights were governed by a single paragraph in the patent provisions.<sup>29</sup> This paragraph was embodied in Procurement Regulation (PR) 3 of the War Department Regulations. In 1947, the Army Procurement Regulations (APR),<sup>30</sup> which superseded the War Department Procurement Regulations, issued a data rights provision that was basically identical to PR 3. This clause stated:

(d) Contractor agrees to and does hereby grant to the Government, to the full extent of Contractor's right to do so without payment of compensation to others, the right to reproduce, use and disclose for governmental purposes (including the right to give to foreign governments as national interest may demand) all or any part of the reports, drawings, blueprints, data and technical information specified to be delivered by Contractor to the Government under

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<sup>22</sup>10 U.S.C. § 2321(d)(3).

<sup>23</sup>10 U.S.C. § 2321(f).

<sup>24</sup>*Id.*

<sup>25</sup>10 U.S.C. § 2321(d)(4).

<sup>26</sup>10 U.S.C. § 2321(g).

<sup>27</sup>10 U.S.C. § 2321(h).

<sup>28</sup>*Id.*

<sup>29</sup>See Judge Lane's opinion in *Bell Helicopter Textron*, ASBCA No. 21192, 85-3 BCA 18,415, for an excellent regulatory history of data rights.

<sup>30</sup>Army Procurement Regulations issued Nov. 1, 1947 (later renamed the Joint Procurement Regulations).

this contract; provided, however, that nothing contained in this sentence shall be deemed to grant a license under any patent now or hereafter issued or imply any right to reproduce anything else for this contract.<sup>31</sup>

The Armed Services Procurement Regulation (ASPR) superseded the APR (renamed Joint Procurement Regulations) in 1948.<sup>32</sup> The standard patent rights clause prescribed by ASPR 9-107.1 again contained essentially the same data rights provision as its predecessor clauses. This clause contained no provision for protecting proprietary information delivered to the Government by a contractor. The Government's reproduction, use, or disclosure of contractor's submitted data, however, was limited to Governmental purposes. The Government often ignored this limitation and viewed its rights as unlimited.

ASPR Revision No. 1 dated 4 January 1955 finally removed the data rights paragraph from the patent rights clause and made it a separate clause entitled "Reproduction and Use of Technical Data."<sup>33</sup> Judge Lane, in his opinion in *Bell Helicopter Textron*, stated that severing the data rights provision from the patent clause was done in anticipation of revising section IX, Part 2 to cover both technical data and copyright.<sup>34</sup>

The first comprehensive data policy was set forth in ASPR Revision 20 dated 26 March 1957. This was the first regulation to recognize a contractor's proprietary data. The revision deleted ASPR 9-112 and established three categories of data, which were: (1) operational data; (2) design data; and (3) proprietary data. This was the first time that contractors were given certain protections for their data. The policy also established the term "standard commercial items."

The three categories of data were defined as follows:

- (a) "Operational data" means data providing information suitable, among other things, for instruction, operation, maintenance, evaluation or testing.
- (b) "Design data" means data providing descriptive or design drawings which could be used by any competent manufacturer, in conjunction with its own internal manufacturing techniques and processes, to reproduce the supplies and services.
- (c) "Proprietary data" means data providing information concerning the details of the contractor's trade secrets or manufacturing

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<sup>31</sup>APR 8-103.2(3) and APR 8-103.3(3).

<sup>32</sup>Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 62 Stat. 21-26 (1948), 41 U.S.C. §§ 151-162 (1952).

<sup>33</sup>ASPR 9-112 (ASPR 1955 ed., rev. 1, Jan. 4, 1955).

<sup>34</sup>*Bell Helicopter*, 85-3 B.C.A. at 92,388.

processes which are not disclosed by the design itself and which the contractor has the right to protect from use by others.<sup>35</sup>

Under this policy, "only proprietary data was recognized as legitimately entitled to protection against unlimited use by the Government."<sup>36</sup> The policy set forth two ways by which a contractor's proprietary data could be protected. First, a "Rights in Data -- Limited" clause could be inserted in supply contracts. This clause would be used when the Government had a specific need for the proprietary data for a limited purpose. The second way that a contractor's data could be protected was by a proscription against obtaining the data in the first place. The proscription could be used, for example, when the contract was for a "standard commercial item." The policy also introduced the procedure of placing restrictive legends or markings on technical data.<sup>37</sup>

In 1958, the ASPR provided increased protection for a contractor's proprietary data. Revision 38 dated 15 October 1958 added a general statement at ASPR 9-202.1(a) which provided:

(a) General. It is the policy of DOD to encourage inventiveness and to provide incentive therefor by honoring the "proprietary data" resulting from private developments and hence to limit demands for data to that which is essential for Government purposes.<sup>38</sup>

In carrying out this policy, ASPR 9-203.2, Revision 38, added a provision to the data clause that proprietary data need not be delivered for supply contracts unless "specifically identified in the schedule." Under research and development contracts, ASPR 9-202.1(c), Revision 38, adopted a broad proprietary data provision as follows:

Data need not be furnished for standard commercial items or services which are normally or have been sold or offered to the public commercially by any supplier and which are incorporated as component parts in or to be used with the product or process being developed if in lieu thereof identification of source and characteristics (including performance specifications, when necessary) sufficient to enable the Government to procure the part or an adequate substitute, are furnished; and further, proprietary data need not be furnished for other items which were developed at private expense and previously sold or offered for sale, including minor modifications thereof, which are incorporated as component parts in or to be used with the product or process being developed, if in lieu thereof the Contractor shall identify such other items and that "proprietary data" pertaining thereto which is necessary to enable reproduction or manufacture of the item or performance of

<sup>35</sup>ASPR 9-201 (ASPR 1955 ed., rev. 20, Mar. 26, 1957).

<sup>36</sup>Bell Helicopter, 85-3 BCA at 92, 388 (quoting ASPR 9-202.2(a), ASPR 1955 ed., rev.21, Apr. 9, 1957).

<sup>37</sup>ASPR 9-203.2 (ASPR 1955 ed., rev. 21, Apr. 9, 1957).

<sup>38</sup>ASPR 9-202.1(a) (ASPR 1955 ed., rev. 38, Oct. 15, 1958).

the process. For the purpose of this clause "proprietary data" means data providing information concerning the details of a Contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the Contractor has protected such information from unrestricted use by others.<sup>39</sup>

In 1964, DOD promulgated a new data rights policy in Defense Procurement Circular (DPC) No. 6.<sup>40</sup> The DPC was optional the first year and became mandatory the following year.<sup>41</sup> The policy, with some additional changes provided by DPC No. 24, was subsequently incorporated into the ASPR by Revision No. 10 dated 1 April 1965. This policy remained largely intact until the early 1980s. One of the factors possibly contributing to the longevity of this policy may have been that "developed at private expense" was never defined.

The 1964 policy abandoned the concept of withholding proprietary data and replaced it with a policy of requiring the delivery of certain contractor proprietary information with limited rights. Under this policy, the Government's rights in contractor data would be either "limited" or "unlimited." Limited rights in data would largely preclude the Government from releasing the data for use in competitive reprocurement or in-house manufacture. Unlimited rights would allow the Government unrestricted use and disclosure of the data (e.g., use in competitive reprocurement). The Government would have limited rights in "technical data pertaining to items, components or processes which were developed at private expense and incorporated into, or used in making the end-items, components, modifications, or processes developed."<sup>42</sup> There was a proviso that "form, fit, or function" data was furnished with unlimited rights.<sup>43</sup> Included in this policy was a provision for "predetermination of rights in data." This procedure was intended to be used to forestall disputes by having the Government and contractor agree on their rights before contract performance.

In 1965, DOD issued DPC No. 22,<sup>44</sup> promulgated in the 1963 edition of the ASPR. This DPC set forth a policy statement "that independent research and development costs (IR&D) were treated as 'private expense' for data rights purposes, even if reimbursed by the Government through indirect cost allocations."<sup>45</sup>

During the 1970s, the ASPR Committee proposed various definitions of the term "developed at private expense," hoping to find a definition suitable to both the Government and

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<sup>39</sup>Ralph C. Nash, Jr. and Leonard Rawicz, PATENTS AND TECHNICAL DATA, 428 (quoting ASPR 9-203.2, ASPR 1955 ed., rev. 38, Oct. 15, 1958).

<sup>40</sup>DPC No. 6 (May 14, 1964).

<sup>41</sup>DPC No. 20 (Dec. 18, 1964).

<sup>42</sup>*Bell Helicopter*, 85-3 BCA at 92,391 (quoting ASPR 9-202.2(b)(2), ASPR 1963 ed., rev. 10, Apr. 1, 1965).

<sup>43</sup>ASPR 9-203 (b)(1)(ii) (DPC No. 6, May 14, 1964).

<sup>44</sup>DPC No. 22 (Jan. 29, 1965).

<sup>45</sup>*Bell Helicopter*, 85-3 BCA at 92,392.

industry. The ASPR Committee eventually submitted a report with a proposed definition; however, it was never issued.<sup>46</sup>

In the early 1980s, the data rights policy collapsed primarily because of the adverse publicity from the procurement of spare parts at arguably excessive prices.<sup>47</sup> Secretary of Defense Weinberger issued a blanket deviation to the technical data regulations which allowed the military services to adopt a variety of policies to obtain greater rights in technical data. Congress then enacted new statutory requirements as part of the Defense Procurement Improvement Act of 1984 (Pub. L. No. 98-525), stressing the need to acquire data for competitive reprocurement of spare parts. These statutory provisions were modified in 1986 by Pub. L. No. 99-661 and are codified at 10 U.S.C. §§2320 and 2321. Other factors contributing to the enactment of these statutes included 1) the adoption of the Competition in Contracting Act (CICA) which became effective in April 1984 and which required increased competition in defense procurement, and 2) the increased unwillingness of contractors selling commercial products and computer software to agree to the policy of giving the Government unlimited rights to technical data and computer software developed in the performance of a Government contract.<sup>48</sup>

The development of workable implementing regulations was still elusive, notwithstanding Congress' direction to DOD to provide regulations which would balance the needs of the Government (to obtain competition) with the protection of contractors' proprietary rights. Coverage of data rights was noticeably missing from the FAR when it was published in 1984. This was because DOD and the civilian agencies could not agree on a single regulation. Instead, they decided to issue two data regulations. A proposed FAR was published for comment in the Federal Register in August 1985,<sup>49</sup> followed by a proposed DOD FAR supplement (DFARS) in September 1985.<sup>50</sup> The proposed DFARS was subsequently withdrawn primarily because of congressional and industry objections to the definition of the term "developed", and because it did not provide the balancing of interest required by the statute. An interim DFARS rule was subsequently published, which modified the pre-CICA coverage on data rights to comply with the Department's obligations under the new statute.

Also during 1984 and 1985, the Air Force and Navy devised their own clauses on data rights. In both cases, the clauses required contractors and subcontractors to sell or relinquish their data rights as a condition of award or to give up rights a short time after contract performance.

In June 1986, the Packard Commission issued its report which included extensive treatment on data rights. The Commission's report noted that the current practice discouraged

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<sup>46</sup>The Navy members of the ASPR Subcommittee on Technical Data submitted a minority report disagreeing with this definition.

<sup>47</sup>See Ralph C. Nash, Jr., *Proprietary Rights in the Competitive Era*, Gov't. Excc. 51 (Apr. 1987).

<sup>48</sup>*Id.*

<sup>49</sup>50 *Fed. Reg.* 32870 (1985).

<sup>50</sup>50 *Fed. Reg.* 36887 (1985).

firms from participating in defense markets.<sup>51</sup> Later that year, Secretary of Defense Weinberger rescinded the 1983 deviation waiver.

The proposed data rights regulation in the DFARS subpart 227 was published for comment on 16 January 1987.<sup>52</sup> The regulation, however, failed to address the contractors' needs for protection of their commercial technology which they had incorporated into military products.<sup>53</sup> Some of the features of the proposed DFARS regulation included a new type of right in the standard clause -- a "Government purpose license right" in technical data for items, components, or processes developed with mixed funding. This right would permit the Government to use the data for competitive procurement purposes, but would require recipients of such data to sign an agreement precluding disclosure and commercial use of the data.

Another significant feature of the proposed DFARS regulation was the definition of "developed at private expense." The proposed DFARS 227.471 followed the guidance of the Congressional Conference Committee on the definition of the term "developed." This guidance provided that "the item or component must have been constructed or the process practiced" and "workability" must be established. The proposed DFARS 227.471 definition of the term "at private expense," however, was less consistent with the congressional guidance. The proposed definition of "at private expense" was as follows:

The cost of the development has not been paid in whole or in part by the Government and that such development was not sponsored by or required as an element of performance under a Government contract or subcontract; provided, however, independent research and development and bid and proposal costs are deemed to be at private expense.

Pub. L. No. 99-661 amended 10 U.S.C. § 2320(a)(2)(F) to prohibit the Government from requiring a contractor "to sell or otherwise relinquish" rights in private expense data "as a condition of being responsive to a solicitation or as a condition for the award of a contract." This provision was directed at the practice of requiring offerors to submit alternative proposals giving up all rights and making their willingness to cooperate an evaluation factor in the source selection.

10 U.S.C. § 2320 was again amended by section 808 of the DOD Authorization Act of 1988, Pub. L. No. 100-180. The amendments to the statute were minor. On 10 April 1987, Executive Order No. 12591 was issued. This order provided that contractors be permitted to retain commercial rights in technical data and computer software developed on Government contracts. The order mandated that each agency shall:

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<sup>51</sup>COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE -- FINAL REPORT TO THE PRESIDENT, 15 (June 1986).

<sup>52</sup>52 Fed. Reg. 2082 (1987).

<sup>53</sup>Ralph C. Nash & John Cibinic, *Proposed New Department of Defense Technical Data Policies*, 1 N&CR ¶ 16 (Feb. 1987).

(6) cooperate, under policy guidance provided by the Office of Federal Procurement Policy, with the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the Government.

On 16 April 1987, proposed DFARS 227.471 set forth the following definition of "developed":

"Developed," as used in this subpart, means that the item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed," the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the U.S. Code.<sup>54</sup>

This resolved the major disagreement that had existed over the amount of "testing" required to prove that the item, component, or process was developed. Many individuals in Government had believed that the definition should require sufficient testing to show "a reduction to practice" as required with patentable inventions. Industry had objected to such a stringent requirement. Judge Lane, in his opinion in *Bell Helicopter Textron*, arrived at a middle ground stating that:

Practicability, workability, and functionality (which seem to be essentially synonymous concepts for this purpose) must be demonstrated, that is, the item or component must be analyzed and/or tested sufficiently to demonstrate to reasonable persons skilled in the applicable art that there is a high probability the item or component will work as intended. Whether testing is required in addition to analysis, and the degree of testing and whether dynamic as well as static, depends on the nature of the item or component and the state of the art.<sup>55</sup>

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<sup>54</sup>This definition is based on the guidance contained in the Conference Report to The National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3876 and on the detailed analysis and holding in *Bell Helicopter Textron*, ASBCA 21192, 85-3 BCA ¶ 18, 414.

<sup>55</sup>*Bell Helicopter*, 85-3 BCA at 94,421 & 94, 422.



These words are used almost verbatim in the DFARS definition.

Proposed DFARS 227.471 also adopted the following definition of "private expense":

"Private expense," as used in this subpart, means that the cost of development has not been paid in whole or in part by the Government and that such development was not required as an element of performance under a Government contract or subcontract; provided, however, independent research and development and bid and proposal costs are deemed to be at private expense.

This definition largely reflected the views of the drafters of the 1964 DOD policy.

In May 1987, the FAR data provisions were finally issued.<sup>56</sup> FAR Subpart 27.4 provided a single policy for all agencies except DOD. Notably, the FAR provision also established a goal of 30 September 1988 for the issuance of a single regulation. The FAR clause provided the Government with unlimited rights in the following categories of data:

- (1) Data first produced in the performance of the contract;
- (2) Form, fit, and function data delivered under the contract;
- (3) Manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under the contract; and
- (4) All other data delivered under the contract other than limited rights data.<sup>57</sup>

These categories are similar to the unlimited rights provisions in the DFARS. Notice, however, that the FAR clause only gives data rights in data relating to the specific contract. The DFARS clause, on the other hand, is broader in that it gives rights in data relating to "this or any other Government contract or subcontract."

In April 1988, DOD issued an interim rule on a new technical data policy. This policy required "cradle to grave" negotiation of all technical data rights. There was, however, little guidance provided on the techniques to be used in the negotiation. The interim rule called for the negotiation of data rights pertaining to every item, component, and process for which the contractor was claiming a proprietary right. Under DFARS 227.473-1(c)(1)(iii), the parties had to agree to a list. This list was required to:

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<sup>56</sup>52 *Fed. Reg.* 18140 (1987).

<sup>57</sup>See Ralph C. Nash & John Cibinic, *FAR Data Provisions Issued At Last*, 1 N&CR ¶ 51 (June 1987).

(A) identify the items, components, processes, or computer software to which the technical data pertains;

(B) identify or describe the technical data or computer software subject to other than unlimited rights; and

(C) identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use or disclosure of the technical data or computer software.

DFARS 252.227-7013(b)(1)(ix) and (k) provided that the Government would obtain unlimited rights in any technical data not on the list. This provided contractors with an incentive to ensure that the list was complete.

DOD again revised its technical data policy by issuing another interim rule which took effect in November 1988.<sup>58</sup> The November interim rule backed away from the total negotiation policy set forth in the previous interim rule. This was the third data policy in less than three years. From the progression of these policies, it appears that DOD seems to be moving toward a balance between: (a) protecting contractor rights in technical data and (b) obtaining information necessary to conduct competitive procurements.

On 15 October 1990, an Advance Notice of Proposed Rule making was published.<sup>59</sup> The advance notice addressed four types of rights: (1) unlimited; (2) limited; (3) restricted; and (4) Government purpose. The proposal seemed to suggest that the Government should have unlimited rights in any data produced during a contract, regardless of whether the Government has a need for the data or whether Government acquisition of the data would destroy its commercial value. The Advance Notice of Proposed Rule making was not implemented.

### 5.1.1.3. Law in Practice

While representing extensive effort by both the Government and the private sector to ensure fair and workable rules, the current implementation of the law on technical data rights, 10 U.S.C. § 2320, is still a source of conflict and confusion for both sides. The recent changes in the law have solved some problems. For example, it now establishes a statutory basis for recognizing and protecting contractor rights in privately developed items, components, and processes and clarifies boundaries for the Government in pursuing data rights for full and open competition. The law also clarifies validation procedures, 10 U.S.C. § 2321.

The current procurement process, however, is driven by an allocation or determination of rights in technical data which begins during development but often occurs after the system has been produced, and when the Government's needs are more likely to conflict with the interests of the contractor and its vendors. The result is that the Government spends millions of dollars trying

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<sup>58</sup>This interim rule was subject to further revision after receipt of public comments, 53 *Fed. Reg.* 43698 (1988).

<sup>59</sup>55 *Fed. Reg.* 41788 (1990).

to obtain and maintain full data packages for parts or components which may not be suitable for competition for technical reasons, while other parts or components for which competition may be appropriate are overlooked.

#### **5.1.1.4. Recommendations and Justification**

### **I**

#### **Amend 41 U.S.C. § 403 to provide a more accurate definition of "technical data."**

The current statutory definition of the term "technical data" was derived from the procurement regulations in 1984 when the statute was enacted. It excluded computer software but included computer software documentation based on the current thinking in the Department. Since that time, almost all persons that have addressed the technical data and computer software policies have agreed that this is not a useful breakdown of intellectual property as it regards computer software. The current thinking, as reflected in the Advance Notice of Proposed Rule making in October 1990, is that technical data should include computer data bases and manuals and other publications supporting computer programs but that all elements of the computer programs themselves should be excluded from the definition of technical data. The Panel agrees with this view and has recommended that the definition of "technical data" be revised to permit the new policy to be written on this basis.

### **II**

#### **Amend 10 U.S.C. § 2320 to more clearly define when it is applicable.**

#### **Amend 10 U.S.C. § 2321 to place reasonable limits on the scope of review.**

#### **Amend 10 U.S.C. §§ 2320 and 2321 to better clarify the laws.**

The proposed amendments to 10 U.S.C. § 2320 contain a clearer statement of when the law is applicable. Thus, the first sentence of section 2320(a)(1) is amended to state that "[t]he Secretary of Defense shall prescribe regulations to define, in all contracts where technical data is specified to be delivered, the respective rights of the U.S. and of a contractor or subcontractor." This change reflects the DFARS requirement that the policy applies when the Government is calling for data under a contract and not otherwise.

Section 2320(b)(7) is deleted in its entirety because the Panel concluded that the certification requirement is burdensome on contractors and acts counter to the goal of streamlining the acquisition process by reducing paperwork.

The Panel also concluded that section 2320(c) should be deleted in its entirety. This section is unnecessary because the Secretary already has authority under the basic statute to prescribe regulations and negotiate rights. Specifically, section 2320(a) provides the Secretary with the authority to prescribe regulations and section 2320(a)(2)(G) allows the Secretary to negotiate the acquisition of rights. Thus, section 2320(c) is redundant and should be repealed.

Section 2321(c) provides that the Secretary of Defense must review the appropriateness of any use or release restriction with respect to technical data delivered by a contractor or subcontractor. Technically, this requires the Secretary to review all technical data for which the contractor asserts a use or release restriction regardless of whether the Government has a need for the data. The proposed amendment provides that a review need not be conducted unless the Government has a need for the data and the contractor requests to provide less than full procurement data rights. This proposal attempts to place reasonable limits on the scope of review.

The remaining proposed statutory changes to sections 2320 and 2321 are primarily ones of clarification. For instance, the term "for any purpose" was added to sections 2320(a)(2)(A)(i) and (ii) to clarify that the Government has full data rights under these provisions. The proposed amendment to section 2320(a)(2)(B) attempts to clarify the use limitation by providing that the contractor or subcontractor may restrict the right of the U.S. to "use technical data pertaining to the item or process for manufacturing by the Government." Other minor clarification amendments include adding the word "final" before "decision" in section 2321(f) in order to be consistent with the Contract Disputes Act. Also, the proposed amendment to section 2321(g) clarifies that there is no requirement to state a sum certain to be considered a claim within the meaning of the Contract Disputes Act.

### III

#### **Amend 10 U.S.C. § 2320(a)(3) to provide a separate policy for commercial items or components.**

Section 2320(a)(3) is amended to limit its applicability to commercial items. DOD policy, as set forth in the DFARS, encourages the use of commercial items to the maximum extent possible. The DFARS state that DOD will normally only obtain technical data and data rights with regard to commercial items as provided in 10 U.S.C. § 2320(a)(2)(C) & (D). The proposed statutory amendment to section 2320 adopts this policy.

### IV

#### **Amend 10 U.S.C. § 2320 to permit the Secretary of Defense to utilize any technical data policy that would meet the Government's procurement needs while providing protection for commercially valuable technology.**

The proposed amendment to section 2320(a)(2)(G)(ii) would permit the Secretary of Defense to utilize any technical data policy that would meet the Government's reprourement needs while providing the maximum possible protection for commercially valuable technology. Thus, it would permit the Secretary to adopt policies that did not take reprourement rights in technical data for commercially valuable technology. This broad authority would enable the Secretary to consider a new approach for the procurement of replenishment parts and components of weapon systems that was based on ascertaining competition needs and meeting those needs without the necessity of negotiating rights to technical data. Under the amended provision, the Secretary would have the flexibility to test this new approach as an alternative method of dealing with technical data.

The new alternative approach is intended to be applied during the engineering and manufacturing development (EMD) and production of a system or product to be used by the Government. This proposal is not based on a distribution of technical data rights theory (as set forth in section 2320), but rather on a procurement strategy which relies on identifying the need for competitive acquisition based on a life cycle cost analysis and providing competitive sources to meet that need.

The approach would not significantly alter the current policies of the Department with regard to technical data needed for internal purposes such as design verification, training, installation, operation, maintenance, and testing. The contractor would be required to deliver all technical data needed to meet these needs, and, to the extent that data constituted form, fit, or function data and manuals, it would be required to be delivered with unlimited rights. To the extent the data required to meet these needs included detailed manufacturing drawings or detailed manufacturing process data, that data would be delivered with proprietary legends restricting the Government's use of the data to meet these internal needs.

With regard to the impact of the alternative approach on reprourement of parts, the prime contractor would be required to develop a Spare Parts Acquisition Plan and implement it during the design and early manufacture phases of the acquisition. This system would be modeled on the spare parts provisioning conferences that are presently being used by the services but it would move these conferences into the development process and place them under the responsibility of the Government program manager. By merging the present system of early identification of proprietary data with the provisioning conference system, the new methodology would focus the attention of the development contractor and the Government program manager on steps that could be taken in the development process to enhance competition.

The prime contractor, with the approval of the Government's program manager, would be required to categorize all parts and components of a system or product into three categories: (1) those for which no future competitive procurement was anticipated; (2) those for which limited competition was required because of the need for qualified vendors; and (3) those for which full and open competition was practicable. Category 3 would be the default option, and a contractor or subcontractor proposing to include an item in categories 1 or 2 would have the burden to demonstrate to the program manager's satisfaction that the Government would be protected from having to pay unreasonable reprourement prices. The Government program manager would

make the final decision on this categorization as the development of the system progressed and the contractor would implement the decisions that were made.

With regard to parts and components in category 1, the contractor would not deliver a detailed technical data package because they would be procured in the future on a sole source basis. With regard to parts and components in category 2, the contractor would qualify and develop competitive sources using techniques such as licensing, dual development, or reverse engineering. No detailed technical data package would be delivered on these parts and components because the Government would have the qualified sources available for future procurement using limited competition.

With regard to parts and components in category 3, the contractor would be required to deliver a detailed technical data package without proprietary rights that was sufficient to permit procurement from any competent manufacturer through full and open competition. The contractor would serve as the data repository for all data on the system or product and would be required to place that data in escrow in the event it did not perform its contract obligations or went out of business.

The goal of the approach is to shift the focus of attention from the question of who owns rights to technical data to the question of where will competition be cost effective in the future life of the system being developed. The premise is that there is no need for Government and industry to fight about proprietary rights if the Government's long term needs for competition is met through proper front end planning. The methodology for implementing the new approach outlined above has the added advantage that it minimizes the amount of proprietary data that must be delivered to the Government. This ensures contractors and subcontractors of protection of their proprietary information and reduces the Government's need for systems to store, retrieve, and protect large volumes of proprietary information.

Thus, the alternative approach, as implemented through the methodology outlined above, has a number of potential advantages over the current system:

- It obtains the agreement of the prime contractor to provide nonproprietary data packages for those parts and components where full and open competition will provide quality products. This allows the Government to obtain these parts and components through full and open competition with a guarantee of a current and accurate data package to be furnished from the data repository. This ensures that the competition is effective by responding to the constant complaint of vendors that they cannot obtain accurate data packages for such parts and components on a timely basis.
- It allows contractors and subcontractors to protect commercially valuable data, thereby facilitating technology transfer, integration, and Government access to commercial technologies. This enhances the quality and value of the products and components developed for Government use and strengthens the competitiveness of the firms and the industrial base generally.

- It ensures that manufacturers of parts and components that require qualification are adequately qualified prior to the competition. This responds to the complaint that vendors that win contracts to provide such parts and components deliver defective items or are very late in performing their contracts.
- It permits an orderly transition to a totally electronic data storage and retrieval system. As design is performed more and more by computer, the logical entity to act as the repository is the designing contractor or subcontractor. Necessary Government access to this repository, with appropriate protections, will become easier as electronic systems are put in place.

A more detailed description of the methodology outlined here for implementing the alternative approach is set forth in paragraph 5.1.1.7.

#### 5.1.1.5. Relationship to Objectives

The first recommendation expands the definition of "technical data" to include computer data bases and manuals and other publications supporting computer programs while continuing to exclude computer programs themselves from the definition. The second recommendation clarifies both sections 2320 and 2321. The third recommendation encourages the maximum use of commercial items by providing in section 2320 that DOD will normally only obtain technical data and data rights for commercial items that relate to form, fit, or function or which are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data). This recommendation reflects the Panel's goal of encouraging firms to integrate their commercial and military work. The fourth recommendation offers one alternative approach to data which focuses not on the distribution of rights between Government and industry but rather on ways to ensure that the Government has the means to ensure procurement prices are reasonable, and that full and open competition is obtained, when appropriate.

#### 5.1.1.6. Proposed Statute

##### 41 U.S.C. §403. Definitions

(8) The term "technical data" means recorded information of a scientific or technical nature. It does not include computer programs but does include manuals, instructional materials and technical data formatted as a computer data base. ~~recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency.~~ Such term does not include ~~computer software or~~ financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

##### 10 U.S.C. § 2320. Rights in technical data

(a)(1) The Secretary of Defense shall prescribe regulations to define, in all contracts where technical data is specified to be delivered, the respective rights legitimate interest of the United

States and of a contractor or subcontractor ~~in technical data pertaining to an item or process~~. Such regulations shall be included in regulations of the DOD prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations also may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

(2) Such regulations shall include the following provisions:

(A) In the case of an item component, or process that is developed by a contractor or subcontractor exclusively with Federal funds (other than an item component, or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (15 U.S.C. 638(j)(2)) apply), the United States shall have the unlimited right to-

(i) use technical data pertaining to the item component, or process for any purpose; or

(ii) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons for any purpose.

(B) Except as provided in subparagraphs (C) and (D), in the case of an item component, or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to ~~--(i) use technical data pertaining to the item component, or process for manufacturing by the Government; or (ii) release or disclose technical data pertaining to the item component, or process to persons outside the Government, or permit the use of the technical data by such persons. For purposes of this section, amounts spent for independent research and development and bid and proposal costs shall be considered to be private expense. The Secretary shall specify the manner in which other indirect costs shall be treated.~~

(C) Subparagraph (B) does not apply to technical data that-

(i) constitutes a correction or change to data furnished by the United States;

(ii) relates to form, fit, or function;

(iii) is necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.



(D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if

(i) such release, disclosure, or use-

(I) is necessary for emergency repair and overhaul; or

(II) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

(E) In the case of an item, component, or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item, component, or process shall be established as early in the acquisition process as practicable (preferably during contract negotiations) and shall be based upon negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable. The establishment of such rights shall be based upon consideration of all of the following factors:

(i) The statement of congressional policy and objectives in section 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the declaration of policy in section 2 of the Small Business Act (15 U.S.C. 631).

(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

(iv) Such other factors as the Secretary of Defense may prescribe.

(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract--

(i) to sell or otherwise relinquish to the United States any rights in technical data except-

(I) rights in technical data described in subparagraph (C); or

(II) under the conditions described in subparagraph (D); or

(ii) to refrain from offering to use, or from using, an item, component, or process to which the contractor is entitled to restrict rights in data under subparagraph (B).

(G) The Secretary of Defense may-

(i) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data not otherwise provided under subparagraph (C) or (D), if necessary to develop alternative sources of supply and manufacture;

(ii) agree to restrict rights in technical data otherwise accorded to the United States under this section if the United States receives a royalty-free license to use, release, or disclose the data for internal Government purposes of the United States (~~including purposes of competitive procurement~~); or

(iii) ~~encourage permit~~ a contractor or subcontractor to license directly to a third party the use of technical data which the contractor is otherwise allowed to restrict, if necessary to develop alternative sources of supply and manufacture.

~~(3) Notwithstanding paragraph (2) above, the Secretary of Defense shall prescribe regulations for contracts for commercial items or components, where technical data is specified to be delivered by a contractor or subcontractor, which prohibit the Government from obtaining unlimited rights to technical data; provided, however, that unlimited rights may be obtained when necessary to the extent specified in paragraphs (a)(2)(C) & (D). The Secretary of Defense shall define the terms "developed", "exclusively with Federal funds", and "exclusively at private expense" in regulations prescribed under paragraph (1). In defining such terms, the Secretary shall specify the manner in which indirect costs shall be treated and specify that amounts spent for independent research and development and bid and proposal costs shall not be considered to be Federal funds for the purpose of definitions under this paragraph.~~

(4) [Deleted]

(b) Regulations prescribed under subsection (a) shall require that, whenever practicable, a contract for supplies or services entered into by an agency named in section 2303 of this title [10 U.S.C. § 2303] contain appropriate provisions relating to technical data, including --

(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;

(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with a use or release restriction, as defined in section 2321(i)~~restrictions on the right of the United States to use such data;~~

(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

~~(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;~~

~~(7)(8) establishing remedies to be available to the United States when deliverable technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not to satisfy the requirements of the contract concerning technical data; and~~

~~(8)(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.~~

~~(c) Nothing in this section or in section 2305(d) of this title prohibits the Secretary of Defense from--~~

~~(1) prescribing standards for determining whether a contract entered into by the DOD shall provide for a time to be specified in the contract after which the United States shall have the right to use (or have used) for any purpose of the United States all technical data required to be delivered to the United States under the contract or providing for such a period of time (not to exceed 7 years) as a negotiation objective; or~~

~~(2) prescribing reasonable and flexible guidelines, including negotiation objectives, for the conduct of negotiations regarding the respective rights in technical data of the United States and the contractor.~~

(c) The Secretary of Defense shall by regulation establish programs which provide domestic business concerns an opportunity to purchase or borrow replenishment parts from the United States for the purpose of design replication or modification, to be used by such concerns in the submission of subsequent offers to sell the same or like parts to the United States. Nothing in this subsection limits the authority of the head of an agency to impose restrictions on such a program related to national security consideration, inventory needs of the United States, the improbability of future purchases of the same or like parts, or any additional restriction otherwise required by law.

#### **10 U.S.C. § 2321. Validation of proprietary data restrictions**

(a) Contracts covered by section. This section applies to any contract for supplies or services entered into by the DOD that includes provisions for the delivery of technical data.

(b) Contractor justification for restrictions. A contract subject to this section shall provide that a contractor under the contract and any subcontractor under the contract at any tier shall be prepared to furnish to the contracting officer a written justification for any use or release restriction (as defined in subsection (i)) asserted by the contractor or subcontractor.

(c) Review of restrictions.

(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any use or release restriction asserted with respect to technical data to be delivered by a contractor or subcontractor at any tier under a contract subject to this section. This review need not be conducted when the Secretary of Defense determines that the Government will have no requirement for rights greater than permitted by any asserted restriction.

(2) The review of an asserted use or release restriction under paragraph (1) shall be conducted before the end of the three year period beginning on the later of

(A) the date on which final payment is made on the contract under which the technical data is required to be delivered; or

(B) the date on which the technical data is delivered under the contract.

(d) Challenges to restrictions.

(1) The Secretary of Defense may challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section if the Secretary finds that-

(A) reasonable grounds exist to question the current validity of the asserted restriction; and

(B) the continued adherence [adherence] by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

(2)(A) A challenge to an asserted use or release restriction may not be made under paragraph (1) after the end of the three-year period described in subparagraph (B) unless the technical data involved --

- (i) are publicly available;
- (ii) have been furnished to the United States without restriction; or
- (iii) have been otherwise made available without restriction.

(B) The three-year period referred to in subparagraph (A) is the three-year period beginning on the later of --

- (i) the date on which final payment is made on the contract under which the technical data are required to be delivered; or
- (ii) the date on which the technical data are delivered under the contract.

(3) If the Secretary challenges an asserted use or release restriction under paragraph (1), the Secretary shall provide written notice of the challenge to the contractor or subcontractor asserting the restriction. Any such notice shall --

(A) state the specific grounds for challenging the asserted restriction;

(B) require a response within 60 days justifying the current validity of the asserted restriction; and

(C) state that evidence of a justification described in paragraph (4) may be submitted.

(4) It is a justification of an asserted use or release restriction challenged under paragraph (1) that, (A) the DOD and the contractor or subcontractor agreed to a predetermination of rights; or (B) within the three-year period preceding the challenge to the restriction, the DOD validated a restriction identical to the asserted restriction if --

(i) ~~(A)~~ such validation occurred after a challenge to the validated restriction under this subsection; and

(ii) ~~(B)~~ the validated restriction was asserted by the same contractor or subcontractor (or a licensee of such contractor or subcontractor).

(e) Time for contractors to submit justifications. If a contractor or subcontractor asserting a use or release restriction submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(f) Decision by contracting officer.

(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (d)(3), the contracting officer shall issue a final decision pertaining to the validity of the asserted restriction.

(2) After review of any justification submitted in response to the notice provided pursuant to subsection (d)(3), the contracting officer shall, within 60 days of receipt of any justification submitted, issue a final decision or notify the party asserting the restriction of the time within which a final decision will be issued.

(g) Claims. If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.) without regard to the requirement to state a sum certain.

(h) Rights and liability upon final disposition.

(1) If, upon final disposition, the contracting officer's challenge to the use or release restriction is sustained --

(A) the restriction shall be canceled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor asserting the restriction shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28 [28 U.S.C. § 2412(d)(2)(A)]) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the use or release restriction is not sustained --

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in section 2412(d)(2)(A) of title 28 [28 U.S.C. § 2412(d)(2)(A)]) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(i) Use or release restriction defined. In this section, the term "use or release restriction", with respect to technical data delivered to the United States under a contract subject to this section, means a restriction by the contractor or subcontractor on the right of the United States--

(1) to use such technical data; or

(2) to release or disclose such technical data to persons outside the Government or permit the use of such technical data by persons outside the Government.

#### **5.1.1.7. A Methodology for Implementing the Alternative Technical Data Approach**

During the competition for the development contract for a new system, the Request for Proposals would require competing prime contractors to present a Spare Parts Acquisition Plan. The plan would have to show what organization they would put in place: (1) to work with the Government program office to classify each component and part of the system during the development and early production phases, and (2) to obtain competition when it was required. They would also be expected to provide an overall appraisal of the amount of competition that they could develop during development of the system. The quality of this Spare Parts Acquisition Plan would normally be an evaluation factor in the source selection decision.

After the contract was awarded, the contractor would begin to classify all parts and components as the design progressed. If any of the subcontracted components contained repairable parts, the subcontractor could be tasked with the same classification obligation. Government employees would work closely with the contractor in this process and, as in the case of current spare parts provisioning conferences, would make the final decision on the proper classification of each part or component. They would have full access to all data, proprietary or nonproprietary, necessary fulfill their responsibilities in the process. The goal of the system would be to identify three categories of parts and components: (1) those for which no future competitive procurement was anticipated, (2) those for which limited competition was required because of the need for qualified sources, and (3) those for which full and open competition was practicable.

The initial determination would identify those parts and components which fell into category 1, where a life cycle cost analysis indicated that future competition would be impracticable or unproductive. This would include parts and components where there would be little need for replacement during use of the system, where a very large capital investment would be needed for manufacturing, or where there was very high sensitivity of the part or technology being incorporated in the item indicating that there would be only one suitable and cost effective source, or where considerations of criticality or proprietary rights precluded reprourement from

other sources. In each case, the contractor (or subcontractor) would prepare a detailed analysis, including life cycle cost where applicable, demonstrating that the part or component was properly placed in category 1 and the Government program manager would make the final decision to place the part or component in this category. When the part or component was placed in category 1, the contractor would not be required to deliver a detailed Technical Data Package to the Government as part of performance of the contract. However, the classification of the parts and components in this category would be subject to reconsideration whenever either the contractor or the Government determined that the circumstances had changed. As long as a part or component remained in category 1, additional parts or components would be procured by the Government using sole source procurement procedures.

With regard to those parts and components determined not to fall in category 1, there would be a presumption that they fell in category 3. This category would include the majority of parts and components which could clearly be manufactured by any competent company without special qualification. The new methodology would require the contractor to prepare a list of such parts and components and to develop and deliver (when needed for reprocurement) a nonproprietary Technical Data Package for them that was sufficiently detailed to support full and open competition. This Technical Data Package would be kept current in the contractor's data repository and would be available to the Government at any time on short notice. These Technical Data Packages would be used by the Government to procure these parts and components through normal procurement procedures as is done under current spare parts procurements.

With regard to any part or component that the contractor believed should be placed in category 2 because of the need for qualification of sources, it would have to present justification for this determination to the Government program manager who would make the final decision placing a part or component in this category and the number of sources to be qualified. Once it had been determined that a part or component was in category 2, the contractor would have the primary responsibility for developing and qualifying those competitive sources. As long as the sources were provided and performed, the contractor would not be required to deliver a detailed Technical Data Package to the Government but, as discussed earlier, the Government would have full access to all detailed data for internal purposes such as design review, inspection, or other necessary governmental purposes.

The contractor would be expected to develop at least two competitive sources for parts and components in category 2 through normal prime contractor qualification and procurement techniques. If the part or component was to be designed and manufactured by the contractor, the contractor would be contractually required to develop one or more of the competitive sources using the least expensive technique -- normally licensing another manufacturer. If the part or component was to be designed and manufactured by a subcontractor to a prime contractor's form, fit, or function specification, the contractor would normally request that subcontractor to agree to license another manufacturer. If the subcontractor was unwilling to license competitors, the contractor could seek to include the item in category 1, provided the Government was adequately protected under sole source procedures or some other form of protection, such as a long-term pricing agreement with that subcontractor or using a form, fit, or function specification to develop



two or more subcontractors. In the rare case where it was believed that the part or component could be bought in the future from another vendor using reverse engineering techniques, a single subcontract could be awarded in the early program phases with the intent to subsequently obtain competition through the use of this technique. In any case where competition was developed through licensing, the contractor or subcontractor would be paid a technology transfer fee, to be negotiated on a case-by-case basis by the contracting officer and the contractor or subcontractor. Once the competitive sources had been qualified and developed, parts and components would be procured from them by the Government using normal procurement procedures as is done in current spare parts procurements.

This system would require the constant attention of the prime contractor and the Government program manager to ensure that the parts and components were placed in the proper category and that each decision was fully substantiated by analytical data supporting the life cycle cost analysis and the technical decision that certain parts and components were of sufficient criticality or complexity to require procurement from qualified vendors. In all cases, the final decision of the categorization of parts and components would be made by the Government program manager but the contractor would be permitted to seek review of a decision to place a part or component in category 2 by the Assistant Secretary for Acquisition of the military service.

The system would be dynamic rather than static. Thus, any initial categorization of parts or components could be changed by the Government program manager as additional information became available. For example, a component initially placed in category 1 might be reclassified into category 2 or 3 if later usage information indicated that there would be need to acquire a considerably greater number of components that had been originally projected. Similarly, a component initially placed in category 2 might be reclassified into category 1 if the cost of developing and qualifying a competitive source was so great that it was determined by life cycle cost analysis that competition was not economical.

With regard to data necessary for modification of systems or significant subsystems, this methodology would require the development contractor to assist the Government in obtaining competition when the agency had determined that modification of the system or subsystem should be acquired competitively. At the direction of the Government, the contractor would qualify competitive modification sources, license modification sources providing necessary technical assistance, or make a data package available to the Government to permit procurement of the modification. If proprietary data were included in this package or sources were licensed, an appropriate fee would be negotiated to compensate the contractor or its subcontractors for transferring the technology. The same provisions would flow down to subcontractors furnishing significant subsystems.

Finally, the contractor would normally be the data repository for all technical data applicable to the system. As such, for category 3 type parts the contractor would be required to furnish such data to the Government for internal use or for competitive reprourement of parts and components whenever a procurement was imminent. The contractor and subcontractor would also be required to hold a full technical data package for all category 1, 2, and 3 parts or components in escrow for the Government in the event that the contractor failed to perform. The

contractor would be permitted to use subcontractors as data repositories when that was a more practicable means of maintaining the data in a current status. This escrow account would permit the Government to use the data to meet its needs if the contractor or subcontractor failed to perform its obligations under the contract, or terminated its business as a Government contractor or subcontractor. Decisions of the Government to use the escrow would be subject to appeal by the contractor or subcontractor under accelerated procedures. When the data was to be used for competitive reprourement, the contractor would be required to furnish a fully adequate technical data package in a short period of time -- to ensure that accurate data is available to support the competitive reprourement process.

## **5.2. Technology Transfer**

### **5.2.0. Introduction**

The Panel reviewed the three major statutes that have been enacted to promote the transfer of technology from the Government to the private sector. These statutes are the University, Small Business Patent Policy Act, Pub. L. No. 96-517, the Federal Technology Transfer Act, Pub. L. No. 99-502, and the Stevenson-Wydler Technology Innovation Act, Pub. L. No. 96-480. The Panel found that DOD has taken steps to implement all of these statutes -- indicating that a successful start has been made. The Panel also identified several small improvements that could be made to two of these statutes to enhance their effectiveness.

The University, Small Business Patent Policy Act promotes technology transfer by permitting small businesses and nonprofit organizations to retain title in inventions made in the performance of Government contracts if they elect to file for a patent. This policy leaves the commercial rights in such inventions in the hands of the organization where the invention was made -- under the theory that the organization has the strongest motivation to utilize the invention in the commercial marketplace. The Panel found that this policy has been fully implemented and that it works well. (The Panel found one major university that had licensed over 50% of its inventions to commercial companies.) However, the Panel found that provisions of the statute governing the time for reporting inventions as well as the period for electing to file were lax -- with the result that too little time was given to DOD agencies to file for patent protection in cases where the small business or nonprofit organization elected not to file. While there are probably not a large number of situations where agency personnel would find that a patent application should be filed to preserve valuable commercial or Government rights, the Panel recommends some minor changes to the statute which would make improvements in this area.

First, the Panel recommends that the statute be amended to require contractors to disclose each subject invention within a reasonable time, but in any event, prior to publication. This will enhance the ability of the contractor and the Federal agency, if the contractor elects not to retain title, to file for a patent before the time period for filing expires. Second, the Panel recommends that the law be amended to provide that contractors specifically state their election to retain title to a subject invention in the U.S. and in any foreign country. The purpose of this recommendation is to require contractors to disclose their intentions on filing abroad. If a contractor only planned on filing in the U.S., then the Federal agency would have an opportunity to file the patent abroad, thereby protecting domestic technologies from foreign competitors. Third, in order to provide the Federal agency sufficient time to review an invention and have a patent application prepared and filed, the Panel recommends that the period of election may be shortened by the Federal agency to a date that is not more than four months prior to the end of the statutory period. Lastly, to encourage more timely filing, the Panel recommends that the statute provide that whenever contractors elect to retain title, they will file a patent application within one year of election. The contractor may, however, have additional time to file upon approval by the Federal agency. Timely filing of patent applications will hasten the entry of new technologies into the marketplace.

The Federal Technology Transfer Act directly promotes technology transfer by permitting Federal laboratories to enter into cooperative research and development agreements (CRADAs) in the private sector. The Panel found that DOD laboratories are beginning to utilize this statute but that there are two impediments to its full utilization. First, under current law, although Federal laboratories may patent inventions of their employees, they may not claim copyright protection in works of their employees. This reduces the protection that the laboratories have over computer programs written by their employees. The result is a reduction of the laboratories' ability to enter into cooperative research and development agreements because many organizations in the private sector will not attempt to move technology into the private sector without protection of the intellectual property underlying that technology. The Panel has concluded that the dichotomy between patent protection and copyright protection is illogical and does not serve the goal of maximizing technology transfer. The Panel, therefore, recommends that Federal laboratories be permitted to claim copyright in computer programs when those programs can promote a cooperative research and development agreement. The Panel has crafted its proposed statutory change to ensure that the Government continues to have no right to claim copyright in other types of Government information which should be freely available to the public.

Second, the Panel recommends that section 3710a of the Federal Technology Transfer Act be amended to provide that employees or former employees may assist contractors in commercializing inventions, notwithstanding that such employees may have received, or subsequently be entitled to receive, royalties pursuant to section 3710c. This will clarify that such royalties, in and of themselves, do not constitute a conflict of interest. Recognizing that there are some situations where royalties should be considered a conflict of interest, the proposed amendment includes a limiting proviso that royalties may be considered a financial interest if the inventor or author participated in the selection of the collaborating party to the cooperative research and development agreement or in the negotiation of the licensing agreement. This recommendation should encourage Federal employees to work with contractors in the commercialization of inventions or copyrighted works.

The Stevenson-Wydler Technology Innovation Act establishes the program of enabling Federal laboratories to transfer technology to the private sector. The Panel makes no recommendations for changes to this Act.

Lastly the Panel recommends the repeal of 10 U.S.C. section 2363, which was enacted by the Department of Defense Authorization Act of 1986. The Panel found that this law was redundant with the Stevenson-Wydler Technology Innovation Act and, therefore, is unnecessary.

## 5.2.1. 15 U.S.C. §§ 3701 - 3710d

### Technology Innovation

#### 5.2.1.1. Summary of the Law

Chapter 63 of Title 15, U.S. Code entitled "technology innovation" encompasses two large acts. These Acts are the Stevenson-Wydler Technology Innovation Act of 1980 (15 U.S.C. §§ 3701-3710) and the Federal Technology Transfer Act of 1986 (15 U.S.C. §§ 3710a-3710d). The following discussion focuses on the later Act with recommendations to enhance its effectiveness.

Section 3710a authorizes each Federal agency to permit the director of any of its Government-operated Federal laboratories, and to the extent provided in an agency-approved joint work statement, the director of any of its Government-owned, contractor-operated (GOCO) laboratories to enter into cooperative research and development agreements (CRADAs) on behalf of such agency with other Federal agencies; units of state or local governments; industrial organizations; public and private foundations; nonprofit organizations; or other persons.<sup>1</sup> The law also permits the director to negotiate licensing agreements for inventions made or other intellectual property developed at the laboratory and other inventions or other intellectual property that may be voluntarily assigned to the Government.<sup>2</sup>

Under the CRADA, the laboratories may:

(1) accept, retain, and use funds, personnel, services, and property from collaborating parties and provide personnel, services, and property to collaborating parties;

(2) grant or agree to grant in advance, to a collaborating party, patent licenses or assignments, or options thereto, on any invention made in whole or in part by a laboratory employee under the agreement, retaining a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the

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<sup>1</sup>15 U.S.C. § 3710a(a)(1).

<sup>2</sup>15 U.S.C. § 3710a(a)(2). The Army Intellectual Property Law Division pointed out that the Technology Transfer Act of 1986, as amended, allows the Government to license "other intellectual property." They surmise that the only reasonable inference to "other intellectual property" is that it includes copyrights, as it is a type of intellectual property. The division, therefore, concluded that the Government already has the ability statutorily to license copyrighted material. They recommended that the FAR and DFARS policy be changed to allow the contracting agency the ability to require the contractor to assign all copyright interest to the Government, unless the contractor can demonstrate a plan for commercialization. The Government then can license the copyright under the provisions of the Technology Transfer Act, thereby increasing the scope of commercialization.

Government and such other rights as the Federal laboratory deems appropriate;

(3) waive, subject to reservation by the Government of a nonexclusive, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government, in advance, in whole or in part, any right of ownership which the Federal Government may have to any subject invention made under the agreement by a collaborating party or employee of a collaborating party;

(4) determine rights in other intellectual property developed under an agreement entered into under a CRADA; and

(5) to the extent consistent with any applicable agency requirements and standards of conduct, permit employees or former employees of the laboratory to participate in efforts to commercialize inventions they made while in the service of the United States.<sup>3</sup>

To encourage technology development, section 3710b provides rewards for inventions, innovations, computer software, or other outstanding scientific or technological contributions of value to the U.S. made by its scientific, engineering, and technical personnel.<sup>4</sup> This section also rewards such personnel for exemplary activities that promote the domestic transfer of science and technology development within the Federal Government.<sup>5</sup>

Section 3710c directs that any royalties or other income received by a Federal agency from a licensing or assignment of inventions under agreements entered into by Government-operated Federal laboratories and inventions of Government-operated Federal laboratories shall be retained by the agency whose laboratory produced the invention.<sup>6</sup> Under this provision, at least 15% of the royalties or other income that the agency received on account of the invention must be paid to the inventor.<sup>7</sup> The balance of the royalties or other income must be transferred by the agency to its Government-operated laboratories, with the majority share of the royalties or other income from the invention going to the laboratory where the invention occurred.<sup>8</sup>

Section 3710d allows a Government employee, or former employee who made an invention during the course of employment with the Government, to retain title to the invention if

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<sup>3</sup> 15 U.S.C. § 3710a(b).

<sup>4</sup> 15 U.S.C. § 3710b.

<sup>5</sup> *Id.*

<sup>6</sup> 15 U.S.C. § 3710c.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

the Federal agency does not intend to file for a patent application or otherwise promote commercialization of the invention.<sup>9</sup>

### 5.2.1.2. Background of the Law

As stated above, this chapter consists of two large Acts. The Stevenson-Wydler Technology Innovation Act of 1980<sup>10</sup> was intended to address a perceived decline in industrial technological innovation by attempting to build links between the sources of technological innovation (universities and Federal laboratories) and the consumers of that information (industry and state and local governments).<sup>11</sup> The Federal Technology Innovation Act of 1986 permitted Government-operated Federal laboratories to enter into CRADAs.<sup>12</sup> A CRADA is defined as "an instrument that can be executed without triggering the many legal conditions that are placed on the other statutory methods [contracts, cooperative agreements, grants] under which the Federal Government may enter into legal agreements."<sup>13</sup> The National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, extended the authority contained in the Federal Technology Innovation Act to GOCO laboratories.<sup>14</sup>

The purpose of these Acts was to establish organizations in the executive branch to study and stimulate technology; promote technology development through the establishment of centers for industrial technology; stimulate improved use of federally funded technology developments by state and local governments and the private sector; provide encouragement for the development of technology transfer through rewards; and encourage the exchange of scientific and technical personnel among academia, industry, and Federal laboratories.<sup>15</sup>

Congress expressed concern that trends such as the declining real Federal research and development (R&D) expenditure, the decreasing domestic-origin patents, and the declining ratio of R&D expenditure to the gross national product indicated a significant decline in U.S. innovative performance.<sup>16</sup> The House Report to the Stevenson-Wydler Technology Innovation Act stated that technological innovation impacts both on domestic considerations as well as on the U.S. position in the international marketplace.<sup>17</sup> In particular, technological innovation plays a vital role in economic growth and contributes to increased productivity and efficiency.<sup>18</sup> The report also stated that testimony at congressional hearings had repeatedly highlighted the lack of a national policy as hindering technology transfer within the Federal Government.<sup>19</sup>

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<sup>9</sup>15 U.S.C. § 3710d.

<sup>10</sup>Stevenson-Wydler Technology Innovation Act of 1980, Pub. L. No. 96-480, 94 Stat. 2311 (codified as amended at 15 U.S.C. § 3701 -3715).

<sup>11</sup>H.R. Rep. No. 1199, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4893.

<sup>12</sup>H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 757 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1146.

<sup>13</sup>*Id.*

<sup>14</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352.

<sup>15</sup>H.R. Rep. No. 1199, 96th Cong., 2d Sess. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4892.

<sup>16</sup>H.R. Rep. No. 1199, 96th Cong., 2d Sess. 6-8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4896-4898. *See also*, S. Rep. No. 781, 96th Cong., 2d Sess. (1980).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

### 5.2.1.3. Law in Practice

In review of this chapter, the Panel found that DOD has taken steps to implement both the Stevenson-Wydler Technology Innovation Act and the Federal Technology Transfer Act. Because Stevenson-Wydler focuses on establishing centers to stimulate technology and is only remotely related to acquisition, the Panel made no recommendations to amend this Act. In regards to the Federal Technology Transfer Act, the Panel found that the DOD laboratories are beginning to utilize the provisions of the Act. There are, however, two impediments to its full utilization. First, under current law, although Federal laboratories may patent inventions of their employees, they may not claim copyright protection in works of their employees. This reduces the protection that the laboratories have over computer programs written by their employees. Second, the Act also contains a provision for a dual employee award system of royalty sharing and cash awards. There is a concern that the royalty received by the inventor under this provision is a financial interest, thereby subjecting the inventor to conflict of interest rules.

Concerned with the lack of copyright protection for computer software, Congresswoman Morella (R., MD) introduced H.R. 191.<sup>20</sup> This bill would allow copyright protection for Government computer software if the software is developed "in the course of work under a cooperative research and development agreement." Specifically, the bill amends the U.S. copyright law in order to authorize the Federal Government to obtain copyrights in computer software developed by Federal employees and to authorize the Federal Government to grant intellectual property rights for computer software to a collaborating party in a CRADA or under the provisions of the National Aeronautics Space Administration Act.<sup>21</sup> The intent of this legislation is to increase the transfer of technology from the Federal Government to the private sector, thereby increasing U.S. competitiveness in the international market.<sup>22</sup> The bill was referred jointly to the Committee on Science, Space, and Technology and the Committee on the Judiciary.

The Senate version of the bill deletes the language pertaining to copyright protection of pre-existing software.<sup>23</sup> This variance from the House bill may have been the result of testimony made by the Institute of Electrical and Electronics Engineers, Inc. (IEEE) before the House Subcommittee on Intellectual Property and Judicial Administration. IEEE argued before the subcommittee that protecting pre-existing software would be comparatively disadvantageous to newcomers because they would have to pay for this software while those who were already in the market would not.<sup>24</sup>

The policy behind the original copyright legislation<sup>25</sup> was to ensure easy and inexpensive public access to Federal documents. At the time of the legislation, most of what the Federal

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<sup>20</sup>H.R. Rep. 191, 102d Cong., 1st Sess. (1991).

<sup>21</sup>*Id.*

<sup>22</sup>See H.R. Rep. 415, 102d Cong., 1st Sess., pt. 1 at 3 (1991).

<sup>23</sup>S. Rep. 1581, 102d Cong., 1st Sess. (1991).

<sup>24</sup>*Id.*

<sup>25</sup>The Copyright Act of 1909, Pub. L. No. 66-319, Ch. 320, prohibited the Federal Government from copyrighting any of its materials. (As a historical note, Congress enacted a statute forbidding the Federal Government to claim copyright in its own works as early as 1895.) Since 1909, this prohibition has been codified in the copyright laws.



Government published were laws, regulations, and policy letters. Modern technology, however, brought about a "new" kind of writing known as a computer program. Although not a writing in the traditional sense, computer programs fell under the copyright umbrella along with other writings. Consequently, because copyright laws do not protect writings of the U.S., they also do not protect computer programs. As a result, this law may be hindering commercialization of certain federally developed computer software.

#### **5.2.1.4. Recommendations and Justification**

##### **I**

**Amend 15 U.S.C. § 3710a to provide that each Federal agency may secure copyright registration on behalf of the U.S. as author or proprietor in any computer program and instructions necessary for its use (except data, data bases, and data base retrieval programs) prepared by civilian and/or military employees of the U.S. Government as part of their official duties in the course of work under, or related to, a CRADA.**

##### **II**

**Amend 15 U.S.C. § 3710a to establish the procedures for securing copyright, licensing, and sharing royalties with employees for copyrightable works.**

This proposal largely parallels the Morella bill that would allow copyright protection of computer programs developed "in the course of work under a cooperative research and development agreement." The proposal is broader than the Morella bill in that it includes copyrightable works that are related to a CRADA. The intent of permitting copyright protection in the course of work performed under, or related to, a CRADA is to increase the transfer of technology from the Federal Government to the private sector, thereby increasing U.S. competitiveness in the international market. In many cases, the most effective way to transfer computer software technology is by copyrighting and exclusively licensing it.

Several studies cited the Federal copyright prohibition as one of the major impediments to technology transfer. For instance, a March 1988 survey by the General Accounting Office (GAO) stated that businesses do not have an incentive to fully develop and market Federal computer software programs because such programs are publicly disseminated.<sup>26</sup> This dissemination often

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The law was reenacted in the 1976 Copyright Act, Pub. L. No. 94-533, 90 Stat. 2541, when present section 105 was adopted. The House Report to the Act specifically stated that the intent of the law was to place all works of the United States, published or unpublished, in the public domain. See H. Rep. 1476, 94th Cong., 2d Sess., at 59 (1976), reprinted in 1976 U.S.C.C.A.N. 5673.

<sup>26</sup>U.S. GAO, *Technology Transfer: Constraints Perceived by Federal Laboratory and Agency Officials*, RCED-88-116BF at 3 (Mar. 1988).

provides foreign business competitors equal access to the software. Moreover, Federal employees who develop computer software do not have the same incentives to commercialize it as those who make inventions because they cannot share in royalty income.<sup>27</sup> Another report by GAO in 1989 cited the lack of copyright protection as a significant barrier to the effective implementation of the Federal Technology Transfer Act of 1986.<sup>28</sup>

The Federal Technology Transfer Act of 1986 directed the Secretary of Commerce to examine the issue of computer software and report to Congress. That report, dated June 1988, found that:

[M]any agencies are already reporting that the inability of their employees to have copyright protection for valuable computer software is limiting the success of their efforts. Companies are rightly afraid that if Federal employees create software with their support it will fall into the public domain. Thus, foreign competitors could obtain for nothing important discoveries largely funded by our private sector.

In testimony before the House Subcommittee on Intellectual Property and Judicial Administration on H.R. 191, the Assistant Secretary of Commerce for Technology Policy stated that "firms simply will not undertake the risk of developing commercial applications for federally developed software without copyright protection."<sup>29</sup> In support of this statement, the Assistant Secretary gave examples of lost opportunities cited by agency officials which included NIST-developed software that made use of innovative graphical procedures for designing and analyzing experiments; USDA-developed software that predicts the growth of food-borne pathogens and software that can be used in making decisions about irrigating, spraying, and fertilizing crops; and USAF-developed software for training people to use and maintain sophisticated equipment as well as software that can be used in hospital administration.<sup>30</sup>

The strongest opposition against allowing copyright protection for computer programs appears to come from the Information Industry Association (IIA). IIA claims that copyright protection for computer programs will lead to the demise of the public's access to Government information.<sup>31</sup> This assertion attempts to blur the distinction between public access to Government information and copyright protection of computer programs. Valuable computer program technology can be protected without impairment to the Freedom of Information Act (FOIA).

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<sup>27</sup>*Id.*

<sup>28</sup>U.S. GAO, *Technology Transfer: Implementation Status of the Federal Technology Transfer Act of 1986*, RCED-89-154 at 37 (May 1989).

<sup>29</sup>Statement of Deborah L. Wince-Smith, Assistant Secretary of Commerce for Technology Policy on H.R. 191, The Technology Transfer Improvements Act, before the Subcommittee on Intellectual Property and Judicial Administration Committee on the Judiciary, U.S. House of Representatives at 7 (May 6, 1992).

<sup>30</sup>*Id.* at 7 & 8.

<sup>31</sup>See Statement of Steven J. Metalitz, vice-president and general counsel to Information Industries Association, before the Subcommittee on Intellectual Property and Judicial Administration Committee on the Judiciary, U.S. House of Representatives (May 6, 1992).

In support of their position, IIA states that it is often hard to distinguish between programs and data.<sup>32</sup> Copyright over software, therefore, readily translates to the ability to control access to the underlying data.<sup>33</sup> Although a valid concern, the proposed statutory language alleviates this fear. The proposed language, "data, data bases, or data base retrieval programs," refers to programs which are not created or used as a primary source of information about organizations, policies, functions, decisions, or procedures of a Government component. Thus, with this protective language in place, Government computer data bases, and the computer programs necessary to access those data bases, would continue to be available under the FOIA.

Opponents to H.R. 191 also state that the bill is merely an effort to increase the compensation paid to Federal employees above the limits set by law. This argument overlooks fairness to the Federal employee and the notion of encouraging technology transfer in the Federal laboratories. The bulk of any royalties received by the laboratories would be used to support Federal employees' research work, thereby leveraging Federal expenditures which will benefit U.S. taxpayers.

The procedural amendments to section 3710a are necessary in order to implement the proposal to allow copyright protection of works under, or related to, a CRADA. The recommended changes to section 3710a establish procedures for securing copyright, licensing, and sharing royalties with employees for copyrightable works. These procedural recommendations parallel the procedures already in existence for inventions.

### III

**Amend 15 U.S.C. § 3710a(b)(5) to permit employees or former employees of the laboratory to commercialize inventions they made or works they copyrighted while in the service of the U.S., notwithstanding that such employees may have received royalties pursuant to 15 U.S.C. § 3710(c); provided, however, that such inventor or author did not participate in the selection of the collaborating party to the cooperative research and development agreement or in the negotiation of the licensing agreement.**

The Federal Technology Transfer Act of 1986 recognized that "technology transfer will be enhanced if Government engineers and scientists have some financial motivation to work actively to move their inventions and discoveries into the commercial market."<sup>34</sup> The 1986 Act amended Stevenson-Wydler by establishing two types of financial motivation. First, section 3710b mandates a cash awards program. Second, section 3710c requires agencies to pay their Government engineers and scientists "at least 15%" of any license income received on inventions. It was thought that these two financial incentives would motivate employees to advocate

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<sup>32</sup>*Id.* at 9.

<sup>33</sup>*Id.*

<sup>34</sup>Ralph C. Nash, Jr. & John Cibinic, *Transfer of Technology from the Government to the Private Sector*, 6 N&CR ¶ 40 (July 1992).

exploitation of their technologies. The legislative history to the 1986 Act notes that "providing a predictable, guaranteed reward from royalties to federally employed inventors provides a strong incentive to report, develop, and help license inventions with commercial potential."<sup>35</sup>

The legislative history, however, is ambiguous as to the application of the conflict of interest statutes to Federal employees who receive additional compensation pursuant to the royalty-sharing component of the Act.

The Department of Commerce has stated that royalties are no more than a reward for developing the invention. Thus, royalties should not be considered a financial interest within the provisions of 18 U.S.C. § 208. The Office of Government Ethics is presently reviewing two cases on this issue.

A conflict of interest can only arise when: (1) there is a flow of royalties; and (2) the employee has the ability to work for the contractor. The only authority which allows an employee to work for a contractor is 15 U.S.C. § 3710(a)(b)(5). This provision provides:

to the extent consistent with any applicable agency requirements and standards of conduct, permit employees or former employees of the laboratory to commercialize inventions they made while in the service of the U.S.

As a practical matter, a potential conflict of interest can only arise under a CRADA. Contractors desire to have the inventor assist in developing the technology for the commercial market because of the inventor's expertise. Because the goal is to move as much technology into the commercial market as possible, inventors should be encouraged to participate in assisting contractors. The authority permitting employees to work for contractors is broad. It appears that the drafters of the legislation intended to permit inventors to assist contractors in commercializing technologies. Royalties received for such assistance should not, in and of themselves, be considered a conflict of interest. That assertion would thwart the intentions of the Act by discouraging inventors from participating in the commercialization of their invention. Recognizing that there are some situations where royalties should be considered a conflict of interest, the proposed amendment includes a limiting proviso that royalties may be considered a financial interest if the inventor or author participated in the selection of the collaborating party to the cooperative research and development agreement or in the negotiation of the licensing agreement.

#### **5.2.1.5. Relationship to Objectives**

The proposed recommendations will facilitate commercial market access to Government developed technologies.

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<sup>35</sup>H.R. Conf. Rep. No. 953, 99th Cong., 2d Sess. 20 (1986).

### 5.2.1.6. Proposed Statute

#### 15 U.S.C. § 3710a. Cooperative research and development agreements

(a) General Authority. Each Federal agency may permit the director of any of its Government-operated Federal laboratories, and, to the extent provided in an agency-approved joint work statement, the director of any of its Government-owned, contractor-operated laboratories:

(1) to enter into cooperative research and development agreements on behalf of such agency (subject to subsection (c) of this section) with other Federal agencies; units of State or local government; industrial organizations (including corporations, partnerships, and limited partnerships, and industrial development organizations); public and private foundations; nonprofit organizations (including universities); or other persons (including licensees of inventions or copyrighted works owned by the Federal agency); and

(2) to negotiate licensing agreements under section 207 of Title 35 or under other authorities (in the case of a Government-owned, contractor-operated laboratory, subject to subsection (c) of this section) for inventions made or other intellectual property developed at the laboratory and other inventions or other intellectual property that may be voluntarily assigned to the Government.

(3) to negotiate licensing agreements following the criteria set forth in section 207 of Title 35 or under other authorities (in the case of a Government-owned, contractor-operated laboratory, subject to subsection (c) of this section) for copyrighted works owned by the Government pursuant to section (h) or copyrighted works that may be voluntarily assigned to the Government.

(b) Enumerated authority. Under agreements entered into pursuant to subsection (a)(1), a Government-operated Federal laboratory, and, to the extent provided in an agency-approved joint work statement, a Government-owned, contractor-operated laboratory, may (subject to subsection (c) of this section):

(1) accept, retain, and use funds, personnel, services, and property from collaborating parties and provide personnel, services, and property to collaborating parties;

(2) grant or agree to grant in advance, to a collaborating party, patent and copyright licenses or assignments, or options thereto, in any invention made or copyrighted work prepared in whole or in part by a laboratory employee under the agreement, retaining a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention and exercise all rights under the copyright or have the invention practiced and have all rights under the copyright exercised throughout the world by or on behalf of the Government and such other rights as the Federal laboratory deems appropriate;

(3) waive, subject to reservation by the Government of a nonexclusive, irrevocable, paid-up license to practice the invention and reproduce the copyrighted work or have the invention

practiced and the copyrighted work reproduced throughout the world by or on behalf of the Government, in advance, in whole or in part, any right of ownership which the Federal Government may have to any subject invention made or copyrighted work prepared under the agreement by a collaborating party or employee of a collaborating party;

(4) determine rights in other intellectual property developed under an agreement entered into under subsection (a)(1) of this section; and

(5) to the extent consistent with any applicable agency requirements and standards of conduct, permit employees or former employees of the laboratory to participate in efforts to commercialize inventions they made or copyrighted works they prepared while in the service of the United States, notwithstanding that such employees may have received royalties pursuant to 15 U.S.C. § 3710(c); provided, however, that such inventor or author did not participate in the selection of the collaborating party to the cooperative research and development agreement or in the negotiation of the licensing agreement. A Government-owned, contractor-operated laboratory that enters into a cooperative research and development agreement under subsection (a)(1) of this section may use or obligate royalties or other income accruing to such laboratory under such agreement with respect to any invention or copyrighted work only (i) for payments to inventors; (ii) for the purposes described in section 3710c(a)(1)(B)(i),(ii), and (iv) of this title; and (iii) for scientific research and development consistent with the research and development mission and objectives of the laboratory.

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(d) Definition. As used in this section --

(1) the term "cooperative research and development agreement" means any agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government, through its laboratories, provides personnel, services, facilities, equipment, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory; except that such term does not include a procurement contract or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of title 31, United States Code;

(2) the term "laboratory" means --

(A) a facility or group of facilities owned, leased, or otherwise used by a Federal agency, a substantial purpose of which is the performance of research, development, or engineering by employees of the Federal Government;

(B) a group of Government-owned, contractor-operated facilities under a common contract, when a substantial purpose of the contract is the performance of research and development for the Federal Government; and

(C) a Government-owned, contractor-operated facility that is not under a common contract described in subparagraph (B), and the primary purpose of which is the performance of research and development for the Federal Government, but such term does not include any facility covered by Executive Order No. 12344 [42 U.S.C. § 7158 note], dated February 1, 1982, pertaining to the naval nuclear propulsion program; and

(3) the term "joint work statement" means a proposal prepared for a Federal agency by the director of a Government-owned, contractor-operated laboratory describing the purpose and scope of a proposed cooperative research and development agreement, and assigning rights and responsibilities among the agency, the laboratory, and any other party or parties to the proposed agreement;

(4) the term "Computer Program" means a computer program as defined in section 101 of title 17, United States Code; and

(5) the term "Author" means a Federal officer or employee who has prepared a copyrighted work as part of that person's official duties.

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(h) Copyright of Computer Programs - Each Federal agency may secure copyright on behalf of the United States as author or proprietor in any computer program prepared by employees of the United States Government in the course of work under, or related to, a cooperative research and development agreement entered into under the authority of subsection (a)(1) of this section, or under any other equivalent authority, notwithstanding the limitations contained in section 105 of title 17, United States Code; and may grant or agree to grant in advance to a collaborating party, licenses or assignments for such copyrights, or options thereto, retaining a nonexclusive, nontransferable, irrevocable, paid-up license to reproduce, adapt, translate, distribute, and publicly perform or display the computer program throughout the world by or on behalf of the Government and such other rights as the Federal agency deems appropriate.

#### **15 U.S.C. § 3710c. Distribution of royalties received by Federal agencies**

##### **(a) In general**

(1) except as provided in paragraphs (2) and (4), royalties or other income received by a Federal agency from the licensing or assignment of inventions or copyrightable works under agreements entered into by Government-operated Federal laboratories under section 3710a of this title, and inventions or copyrightable works of Government-operated Federal laboratories licensed under section 207 of Title 35, or under any other provision of law, shall be retained by the agency whose laboratory produced the invention or copyrighted work and shall be disposed of as follows:

(A)(i) The Head of the agency or his designee shall pay at least 15 percent of the royalties or other income the agency receives on account of any invention to the inventor or copyrighted work of an author (or co-inventors or co-authors) if the inventor or author (or each

such co-inventor or co-author) has assigned his or her rights in the invention or copyrighted work to the United States. ~~This clause shall take effect on October 20, 1986, unless the agency publishes a notice in the Federal Register within 90 days of such date indicating its election to file a Notice of Proposed Rulemaking pursuant to clause (ii).~~

(ii) An agency may promulgate, in accordance with section 553 of Title 5, regulations providing for an alternative program for sharing royalties with inventors or authors under clause (i). Such regulations must --

(I) guarantee a fixed minimum payment to each such inventor or author, each year that the agency receives royalties from that inventor's invention or author's copyrighted work;

(II) provide a percentage royalty share to each such inventor or author, each year that the agency receives royalties from that inventor's invention or author's copyrighted work in excess of a threshold amount;

(III) provide appropriate incentives from royalties for those laboratory employees who contribute substantially to the technical development of a licensed invention or copyrighted work between the time of the filing of the patent application and the licensing of the invention or copyrighted work;

(IV) provide appropriate incentives from royalties for those laboratory employees who contribute substantially to the technical development of a licensed invention or copyrighted work between the time of the filing of the patent application and the licensing of the invention or copyrighted work.

(iii) An agency that has published its intention to promulgate regulations under clause (ii) may elect not to pay inventors or authors under clause (i) until the expiration of two years after October 20, 1986, or until the date of the promulgation of such regulations, whichever is earlier. If an agency makes such an election and after two years the regulations have not been promulgated, the agency shall make payments (in accordance with clause (i)) of at least 15 percent of the royalties involved, retroactive to October 20, 1986. If promulgation of the regulations occurs within two years after October 20, 1986, payments shall be made in accordance with such regulations, retroactive to October 20, 1986. The agency shall retain its royalties until the inventor's or author's portion is paid under either clause (i) or (ii). Such royalties shall not be transferred to the agency's Government-operated laboratories under subparagraph (B) and shall not revert to the Treasury pursuant to paragraph (2) as a result of any delay caused by rule making under this subparagraph.

(B) The balance of the royalties or other income shall be transferred by the agency to its Government-operated laboratories, with the majority share of the royalties or other income from any invention or copyrighted work going to the laboratory where the invention occurred or copyrighted work was prepared, and the funds so transferred to any such laboratory may be used



or obligated by that laboratory during the fiscal year in which they are received or during the succeeding fiscal year --

(i) for payment of expenses incidental to the administration and licensing of inventions or copyrighted work by that laboratory or by the agency with respect to inventions which occurred or copyrighted work prepared at that laboratory, including the fees or other costs for the services of other agencies, persons, or organizations for inventions or copyrighted work management and licensing services;

(ii) to reward scientific, engineering, and technical employees of that laboratory, including payments to inventors and developers of sensitive or classified technology, regardless of whether the technology has commercial applications;

(iii) to further scientific exchange among the Government-operated laboratories of the agency; or

(iv) for education and training of employees consistent with the research and development mission and objectives of the agency, and for other activities that increase the licensing potential for transfer of the technology of the laboratories of the agency.

Any of such funds not so used or obligated by the end of the fiscal year succeeding the fiscal year in which they are received shall be paid into the Treasury of the United States.

(2) If, after payments to inventors or authors under paragraph (1), the royalties received by an agency in any fiscal year exceed 5 percent of the budget of the Government-operated laboratories of the agency for that year, 75 percent of such excess shall be paid to the Treasury of the United States and the remaining 25 percent may be used or obligated for the purposes described in clauses (i) through (iv) of paragraph (1)(B) during that fiscal year or the succeeding fiscal year. Any funds not so obligated shall be paid into the Treasury of the United States.

(3) Any payment made to an employee under this section shall be in addition to the regular pay of the employee and to any other awards made to the employee, and shall not affect the entitlement of the employee to any regular pay, annuity, or award to which he is otherwise entitled or for which he is otherwise eligible or limit the amount thereof. Any payment made to an inventor or author as such shall continue after the inventor or author leaves the laboratory or agency. Payments made under this section shall not exceed \$100,000 per year to any one person, unless the President approves a larger award (with the excess over \$100,000 being treated as a Presidential award under section 4504 of Title 5).

(4) A Federal agency receiving royalties or other income as a result of invention, or copyrighted work, management services performed for another Federal agency, or laboratory under section 207 of Title 35 may retain such royalties or income to the extent required to offset the payment of royalties to inventors or authors under clause (i) of paragraph (1)(A), costs and expenses incurred under clause (i) of paragraph (1)(B), and the cost of foreign patenting or copyrighting and maintenance for any invention or copyright of the other agency. All royalties

and other income remaining after payment of the royalties, costs, and expenses described in the preceding sentence shall be transferred to the agency for which the services were performed, for distribution in accordance with clauses (i) through (iv) of paragraph (1)(B).

(b) Certain assignments. If the invention or copyrightable work involved was one assigned to the Federal agency --

(1) by a contractor, grantee, or participant in a cooperative agreement with the agency,  
or

(2) by an employee of the agency who was not working in the laboratory at the time the invention was made or copyrightable work prepared, the agency unit that was involved in such assignment shall be considered to be a laboratory for purposes of this section.

(c) Reports.

(1) In making their annual budget submissions Federal agencies shall submit, to the appropriate authorization and appropriation committees of both Houses of Congress, summaries of the amount of royalties or other income received and expenditures made (including inventor or author) under this section.

~~(2) The Comptroller General, five years after October 20, 1986, shall review the effectiveness of the various royalty sharing programs established under this section and report to the appropriate committees of the House of Representatives and the Senate, in a timely manner, his findings, conclusions, and recommendations for improvements in such programs.~~

#### 15 U.S.C. § 3710d. Employee Activities

(a) Rights to inventions prepared by Government employees [In general]

If a Federal agency which has the right of ownership to an invention under this chapter does not intend to file for a patent application or otherwise to promote commercialization of such invention, the agency shall allow the inventor, if the inventor is a Government employee or former employee who made the invention during the course of employment with the Government, to retain title to the invention (subject to reservation by the Government of a nonexclusive, nontransferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world by or on behalf of the Government). In addition, the agency may condition the inventor's right to title on the timely filing of a patent application in cases when the Government determines that it has or may have a need to practice the invention.

(b) Rights to computer programs prepared by Government employees

(1) A computer program prepared by an officer or employee of the United States Government as part of that person's official duties shall be a "work made for hire" as defined in subparagraph (1) of section 101 of title 17, United States Code, and the United States

Government shall obtain all rights, title, and interest therein as "author" in accordance with section 201(b) of title 17, United States Code unless otherwise provided in (b)(2).

(2) If a Federal agency has the right of ownership to a computer program for which the agency does not intend to copyright or otherwise promote the commercialization of such computer program, the agency may agree to allow the author to acquire title to copyright, subject to the reservation of a nonexclusive, nontransferable, irrevocable, paid-up license to exercise all rights under the copyright by or on behalf of the Government throughout the world, and such other reservations deemed necessary to assure distribution and utilization of the computer program.

**17 U.S.C. § 105. Subject matter of copyright: United States Government**

Copyright protection under this title is not available for any work of the United States Government, except as provided in section 3710a of Title 15, United States Code, but the United States is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

## **5.2.2. 10 U.S.C. § 2363**

### **Encouragement of technology transfer**

#### **5.2.2.1. Summary of the Law**

This section encourages the transfer of technology between laboratories and research centers of DOD and other Federal agencies, state and local governments, colleges and universities, and private persons in cases that are likely to result in the maximum domestic use of such technology.<sup>1</sup>

#### **5.2.2.2. Background of the Law**

This section was enacted by the Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 1457 of Title XIV.<sup>2</sup> There is no comment on this section in the legislative history of Pub. L. No. 99-145. There was, however, extensive activity on Capitol Hill in 1985 dealing with Federal technology transfer as a way to improve the competitiveness of the American economy.

#### **5.2.2.3. Law in Practice**

The managers of the technology transfer programs in each of the uniform services were not familiar with section 2363. After review of the statute, the Air Force and Navy concluded that it did not provide them with either authority or support in the execution of their programs.

The Army Domestic Technology Transfer Program Manager, however, stated that section 2363 requires the Secretary of Defense to take positive action to encourage technology transfer from the defense laboratories. He stated that, although the amended Stevenson-Wydler provides for flexibility in implementation, it does not focus responsibility on the top management of the cabinet department as does section 2363. Moreover, he asserted that section 2363 was the only statutory expression of congressional intent to place responsibility upon top cabinet members for technology transfer. Based on this reason, the Army technology manager recommended retention of section 2363.

#### **5.2.2.4. Recommendation and Justification**

##### **Repeal**

Section 2363 only encourages the transfer of technology and does not explicitly place responsibility on top cabinet members for technology transfer. 15 U.S.C. § 3710 of the Stevenson-Wydler Act provides authority and permits specific technology transfer activities for all

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<sup>1</sup>10 U.S.C. § 2363.

<sup>2</sup>Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, § 1457, 99 Stat. 762 (1985).

Federal laboratories, including those in DOD. The Stevenson-Wydler Act encompasses the provisions of section 2363, and provides managers of the technology program with the authority and support to execute their programs.

#### **5.2.2.5. Relationship to Objectives**

This recommendation enhances the goal of streamlining the acquisition process by eliminating a redundant law.

#### **5.2.2.6. Proposed Statute**

##### **10 U.S.C. § 2363. Encouragement of technology transfer**

~~(a) The Secretary of Defense shall encourage, to the extent consistent with national security objectives, the transfer of technology between laboratories and research centers of the Department of Defense and other Federal agencies, State and local governments and universities, and private persons in cases that are likely to result in the maximum domestic use of such technology.~~

~~(b) The Secretary shall examine and implement methods, in addition to the encouragement referred to in subsection (a), that are consistent with national security objectives and will enable Department of Defense personnel to promote technology transfer in cases referred to in subsection (a).~~

### 5.2.3. 35 U.S.C. §§ 200 - 212<sup>1</sup>

## Patent Rights In Inventions Made With Federal Assistance

### 5.2.3.1. Summary of the Law

This statute uses the patent system to promote the utilization of inventions arising from federally supported research and development.<sup>2</sup> The objective of the statute is to encourage maximum participation of small business firms and nonprofit organizations in federally supported research and development efforts, promote collaboration between commercial concerns and nonprofit organizations, ensure that the Government obtains sufficient rights in federally supported inventions to meet its needs, and protect the public against nonuse or unreasonable use of inventions.<sup>3</sup>

Section 202 sets forth the disposition of rights between the nonprofit organization or small business and the Government.<sup>4</sup> Specifically, this section provides that each nonprofit organization or small business may elect to retain title to any subject invention within a reasonable time after disclosure to the Government.<sup>5</sup> The Government may receive title to any subject invention if not disclosed within a reasonable time.<sup>6</sup> The contractor must make a written election within two years after disclosure to the Federal agency whether to retain title to a subject invention.<sup>7</sup> However, where publication, sale, or public use has initiated the one year statutory period in which valid protection can still be retained in the United States,<sup>8</sup> the election may be shortened to a date that is not more than 60 days prior to the end of the statutory period.<sup>9</sup> The one year statutory period is set forth in 35 U.S.C. § 102(b). This statute provides that a person shall be entitled to a patent unless "the invention was patented or described in a printed publication in this

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<sup>1</sup> Section 200. Policy and objective.

Section 201. Definitions.

Section 202. Disposition of rights.

Section 203. March-in-rights.

Section 204. Preference for United States industry.

Section 205. Confidentiality.

Section 206. Uniform clauses and regulations.

Section 207. Domestic and foreign protection of federally owned inventions.

Section 208. Regulations governing Federal licensing.

Section 209. Restrictions on licensing of federally owned inventions.

Section 210. Precedence of chapter.

Section 211. Relationship to antitrust laws.

Section 212. Disposition of rights in educational awards.

<sup>2</sup> 35 U.S.C. § 200.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 35 U.S.C. § 202(c)(1).

<sup>6</sup> *Id.*

<sup>7</sup> 35 U.S.C. § 202(c)(2).

<sup>8</sup> 35 U.S.C. § 102(b).

<sup>9</sup> 35 U.S.C. § 202(c)(2).

or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States."<sup>10</sup>

### 5.2.3.2. Background of the Law

In 1980, Congress enacted the first uniform patent policy statute applicable to all Federal agencies. This statute (Pub. L. No. 96-517) added 35 U.S.C. §§ 200-211 to the body of patent law.<sup>11</sup> The statute also repealed all other laws concerning Government patent policy that related to small business firms and nonprofit organizations. Thus, by enacting this statute, Congress established a distinct patent policy for small business firms and nonprofit organizations.

Pub. L. No. 96-517 permits small businesses and nonprofit organizations to retain title to inventions, called "subject inventions," made in the performance of funding agreements with Federal agencies. The House Report to Pub. L. No. 96-517 stated that nonprofit institutions and small businesses were to be given preferential treatment for obtaining patent rights in inventions. The report further stated a presumption that ownership of all patent rights in Government funded research would vest in any contractor that is a nonprofit institution or small business.<sup>12</sup> This policy substantially incorporated legislation separately introduced by the University, Small Business Patent Policy Act.<sup>13</sup> The purpose of the Act was to foster cooperative research arrangements among the Government, universities, and industry in order to "more effectively utilize the productive resources of the nation in the creation and commercialization of new technologies."<sup>14</sup>

### 5.2.3.3. Law in Practice

This statute encourages commercialization of subject inventions by giving the contractor the first opportunity to file for a patent. It has served its purpose well in the fact that a number of universities and small businesses have undertaken significant efforts to commercialize inventions made in Government contracts. However, the Panel found that provisions of the statute governing the time for reporting inventions as well as the period for electing to file are lax -- with the result that too little time is given to DOD agencies to file for patent protection in cases where the small business or nonprofit organization elected not to file.<sup>15</sup>

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<sup>10</sup>35 U.S.C § 102(b).

<sup>11</sup>Pub. L. No. 96-517 was first implemented by the Office of Federal Procurement Policy (OFPP) in OMB Bulletin 81-22, 46 *Fed. Reg.* 34775 (1981). Unlike the usual guidance provided by OMB or OFPP, the Bulletin was a detailed regulation. Subsequently, DOD issued Defense Acquisition Circular 76-29 (Aug. 31, 1981) to implement Pub. L. No. 96-517 and the OMB Bulletin. NASA also implemented the policy by modifying its Patent Waiver Regulations, 46 *Fed. Reg.* 37023 (1981) and its procurement regulations, NASA PRD 81-5 (July 1, 1981). 35 U.S.C. § 212 was added Nov. 8, 1984 by Pub. L. No. 98-620.

<sup>12</sup>See H.R. Rep. No. 1307, 96th Cong., 2d Sess., pt. 1, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6464.

<sup>13</sup>H.R. 2414 (S.414). S.414 was introduced by Senators Birch Bayh (D.-Ind.) and Robert Dole (R.-Kan.). The Senate passed S.414 by an overwhelming vote of 91-4.

<sup>14</sup>Ralph C. Nash, Jr. & Leonard Rawicz, *Patents and Technical Data* at 156 (1983).

<sup>15</sup>The Intellectual Property Counsel at Massachusetts Institute of Technology was neutral in its position on this proposal.

#### **5.2.3.4. Recommendations and Justification**

##### **I**

**Amend 35 U.S.C. § 202(c)(1) to require contractors to disclose each subject invention within a reasonable time, but in any event prior to publication.**

Under the current law, a contractor is required to disclose each subject invention to the Federal agency within a reasonable time after it becomes known to contractor personnel responsible for the administration of patent matters. Inventors may, however, publish their inventions and not bring them to the attention of contractor personnel responsible for patent matters. Once an invention is published, a one year time limit for filing for a patent begins to run. Requiring that each subject invention be reported "prior to publication" would enhance the ability of the contractor and the Federal agency, if the contractor elects not to retain title, to file for a patent before the time limit for filing expires.

##### **II**

**Amend 35 U.S.C. § 202(c)(2) to provide that contractors specifically state their election to retain title to a subject invention in the U.S. and in any foreign country.**

**Amend 35 U.S.C. § 202(c)(2) to provide that where publication, or sale, or public use, has initiated the one year statutory period in which valid patent protection can still be obtained in the U.S., the period for election may be shortened by the Federal agency to a date that is not more than four months prior to the end of the statutory period.**

The intent of the first recommendation is to require that contractors disclose their intentions on filing abroad. The current language only requires that contractors make a written election within two years, but is silent on the place of filing. Thus, contractors can satisfy the statute merely by telling the federal agency that they elect to retain title, while not disclosing their intentions on filing abroad. Often, contractors do not wish to file abroad. This leaves many domestic technologies without international protection. If a contractor planned to file only in the United States, then a Federal agency, having been made aware of this fact, could file the patent abroad.

The second recommendation would allow the Federal agency four months in which to evaluate an invention and file for a patent when the contractor elects not to retain title and the one year statutory bar had been initiated. Presently, the statute provides that the period of election may be shortened by the Federal agency to a date that is not more than 60 days prior to the end of the statutory period. The 60 day period is insufficient time for the invention evaluation board of the Federal agency to review the invention and have a patent application prepared and filed.



### III

**Amend 35 U.S.C. § 202(c)(3) to provide that whenever contractors elect to retain title, they will file a patent application within one year of election (or additional time as approved by the Federal agency).**

The intent of this recommendation is to encourage contractors to file in a timely manner after they elect to retain title. Sometimes, contractors elect to retain title but either delay filing or do not file for a patent. This proposal encourages contractors to file within one year of the election to retain title. The contractor may have additional time to file upon approval of the Federal agency. Timely filing will hasten the entry of new technologies into the market.

#### **5.2.3.5. Relationship to Objectives**

By encouraging the filing of patents by universities, industry, and the Government, the proposed recommendations will facilitate commercial market access to Government developed technologies.

#### **5.2.3.6. Proposed Statute**

##### **35 U.S.C. § 202. Disposition of rights**

(c) Each funding agreement with a small business firm or nonprofit organization shall contain appropriate provisions to effectuate the following:

(1) That the contractor disclose each subject invention to the Federal agency prior to publication of the invention and within a reasonable time after it becomes known to contractor personnel responsible for the administration of patent matters, and that the Federal Government may receive title to any subject invention not disclosed to it within such reasonable time.

(2) That the contractor make a written election within two years after disclosure to the Federal agency (or such additional time as may be approved by the Federal agency) whether to the contractor will retain title to a subject invention in the United States and in any foreign countries: Provided, That if a Contractor elects to retain title in the United States the election to retain title in any foreign country may be delayed until six months after filing the United States patent application. And provided further, That in any case where publication, or sale, or public use, has initiated the one year statutory period within in which a valid patent application must protection can still be filed obtained in the United States, the period for election may be shortened by the Federal agency to a date that is not more than four months sixty days prior to the end of the statutory period: And provided further, that the Federal Government may, after notice to the contractor, receive title to any subject invention in which the contractor does not elect to retain title rights or fails to elect rights within such time.

(3) That a contractor ~~electing rights in a subject invention~~ agrees to file a patent application on a subject invention in each elected country within one year of the written election to retain title (or such additional time as may be approved by the Federal agency) and, in any event, prior to any statutory bar date that may occur under this title due to publication, or sale, or public use, and shall thereafter file corresponding patent applications in other countries in which it wishes to retain within reasonable times, and that the Federal Government, may after notice to the contractor, receive title to any subject inventions in the ~~United States or other~~ countries in which the contractor has not filed patent applications ~~on the subject invention~~ within one year of election such times.

## **5.3. Competitiveness of United States Companies**

### **5.3.0. Introduction**

The Panel reviewed those statutes that affect the competitiveness of U.S. companies in competition for worldwide business, the Invention Secrecy Act; the Export Control Act; and the Freedom of Information Act. The Panel recognizes that U.S. companies are no longer dominant in their technological advantage over foreign companies and that Federal policy must, therefore, be carefully scrutinized to ensure that it does not inadvertently deprive U.S. companies of access to worldwide markets. The Panel has identified a few instances where these statutes have that effect and recommends changes to reduce it to a minimum.

The Invention Secrecy Act, 35 U.S.C. §§ 181-188, creates a process where the Patent Office may impose a secrecy order on a patent application when publication would be detrimental to the national defense. The Panel found that the process being used at the present time places many patents under secrecy order, thereby impeding the owner of the invention from using it in worldwide commerce. The Panel concluded that the number of secrecy orders was excessive because the process relies on decisions of lower level technical personnel in DOD who have been given little or no guidance on the current standards (generally export control criteria) for the imposition of these orders. The fact that export control criteria have been very dynamic in recent years exacerbates this problem. The Panel has concluded that the process will function much more effectively if the decision is made by a high level committee chaired by DOD and composed of personnel from the Export Control Administration, the Patent Office, and the Department of State. The Panel has also made some recommendations for technical amendments to this statute.

The Arms Export Control Act, 22 U.S.C. § 2751 et seq. is, in general, not sufficiently related to Government procurement to fall within the parameters of this study. However, one section of this statute, 22 U.S.C. § 2261(e), does impact worldwide competitiveness of defense contractors in that it requires recoupment of nonrecurring costs in foreign military sales. The Panel noted that the question of recoupment was thoroughly studied by the Administration in 1992 and the conclusion was reached that it impeded the ability of U.S. companies to compete in the foreign marketplace. It was, therefore, rescinded as a policy of the executive branch but remains statutory policy in this one section. The Panel agrees with the conclusion that recoupment impedes the ability of U.S. companies to compete in worldwide markets and recommends that this section of the Arms Export Control Act be repealed.

The Freedom of Information Act, 5 U.S.C. § 552, establishes the general principle that information possessed by the Government should be freely available to members of the public. While proprietary information received from contractors is generally exempt from this requirement, the statute releases large amounts of Government information to the public (including foreign companies and governments) and some of this information is inevitably technical information of value to contractors. The statute is also very costly for DOD to administer. However, the Panel recommends that no changes be made to this statute because of the validity of its overall purpose that Government should be conducted in the open.

In the course of reviewing the Freedom of Information Act, the Panel also reviewed two peripheral statutes, 10 U.S.C. § 130 and 10 U.S.C. § 2328, and recommends that both be retained. The first of these statutes provides that technical data subject to the export control laws may be withheld from release under the Freedom of Information Act. This statute serves the purpose of protecting U.S. companies in worldwide competition as well as the purpose of protecting information whose release would adversely impact on the national security. The second of these statutes provides that the Department may charge reasonable fees for searching and preparing information for release under the Freedom of Information Act -- fees in excess of those called for by that Act. The statute also permits waiver of this larger fee if the request is made by a U.S. company. This statute thus carries out the policy of ensuring that U.S. companies are not placed at a disadvantage in competing with foreign companies.

### 5.3.1. 35 U.S.C. §§ 181 - 188

## Secrecy of Certain Inventions and Filing Applications in Foreign Countries<sup>1</sup>

### 5.3.1.1. Summary of the Law

This statute authorizes the U.S. Patent and Trademark Office (PTO) to impose secrecy orders on patent applications when disclosure of an invention by publication of a patent would be detrimental to the national security.<sup>2</sup> A secrecy order withholds the grant of a patent, thereby restricting the dissemination of technical data contained in the application. Secrecy orders are imposed by the PTO upon specific recommendation by defense agencies, including the Army, Navy, Air Force, National Security Agency, Department of Energy, and National Aeronautics and Space Administration.<sup>3</sup>

Specifically, the law requires: (1) the Commissioner of Patents to impose a secrecy order on an application in which the Government has a property interest if, in the opinion of the interested Government agency, the grant of a patent would be detrimental to the national security; and (2) where there is no Government property interest, an application is made available by the PTO to defense agencies who have expressed an interest in the referenced technology. If, upon inspection, a defense agency determines that disclosure would be detrimental to the national security, it may recommend that the Commissioner of Patents place a secrecy order on the application. Upon receipt of such recommendation, the Commissioner must issue a secrecy order.<sup>4</sup>

Three specialized secrecy orders have been established to handle the different sensitivity levels of technical information contained in patent applications as well as other variables, such as the degree of Government ownership of the invention and the known ability of the owner to protect sensitive/classified information. These secrecy orders are intended to permit the broadest disclosure of the subject matter in a patent application that is consistent with existing statutory and regulatory controls.

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<sup>1</sup>Section 181. Secrecy of certain inventions and withholding of patent.

Section 182. Abandonment of invention for unauthorized disclosure.

Section 183. Right to compensation.

Section 184. Filing of application in foreign country.

Section 185. Patent barred for filing without license.

Section 186. Penalty.

Section 187. Nonapplicability to certain persons.

Section 188. Rules and regulations, delegation of power.

This paper also includes discussion of 35 U.S.C. § 155 as it relates to recommendation II.

<sup>2</sup>35 U.S.C. § 181.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

These orders are commonly identified as type 1, 2, and 3 secrecy orders, each having a different purpose and effect. A type 1 secrecy order is used for applications containing technical data that may be export controlled. Types 2 and 3 secrecy orders are used for those patent applications containing technical data that is classified or "classifiable" under an existing security guideline. Type 2 orders are generally used when the owner has a current industrial security agreement with DOD. A type 3 secrecy order is used in all instances where a type 1 or 2 order is not appropriate, *e.g.*, for applications containing classifiable subject matter of extreme sensitivity, where the owner has an industrial security agreement that is deemed insufficient to meet security requirements, or where the owner does not have an industrial security agreement in place.

Secrecy orders remain in effect until withdrawn by the PTO upon request by the sponsoring agency.<sup>5</sup> An applicant may, however, file a petition to the PTO requesting rescission of the secrecy order. The petition takes the form of a request for reconsideration of the sponsoring agency's recommendation to impose a secrecy order. When the PTO receives a petition for rescission, it forwards the petition to the sponsoring agency for recommendation. Experience has shown that to be successful, an applicant often has to have direct contact with the sponsoring agency or have the applicant's Congressman intercede.

#### **5.3.1.2. Background of the Law**

The authority of the Commissioner of Patents to withhold a patent when in the interest of national security may be traced back to World War I. The Act of October 6, 1917,<sup>6</sup> authorized the Commissioner of Patents to withhold, during time of war, the issuance of patents or inventions important to the national defense. It also provided such applicants the right to sue in the Court of Claims for damages resulting from the loss of use. On July 1, 1940, Pub. L. No. 76-700 was enacted to make the law applicable at any time by removing the wartime restriction. The House Report to that law stated that "[i]nventions useful in war are made and developed during times of peace and it is equally if not more important that this country be in a position to prevent knowledge of war inventions from being published and disclosed during times of peace as well as times of war."<sup>7</sup> In 1951, in light of the impending peace treaties with Germany and Japan, Congress began consideration of several bills designed to make these various laws permanent. As ultimately approved on February 1, 1952, the Invention Secrecy Act of 1951 made secrecy orders a permanent part of the patent system.<sup>8</sup>

#### **5.3.1.3. Law in Practice**

There is a lack of clear and consistent policy governing the imposition of secrecy orders. For instance, neither the PTO nor individual service branches and intelligence services have issued consistent guidance concerning procedures for determining which technologies deserve scrutiny.

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<sup>5</sup>*Id.*

<sup>6</sup>Act of Oct. 6, 1917, Pub. L. No. 65-80, 40 Stat. 394.

<sup>7</sup>See H.R. Rep. No. 2515, 76th Cong.

<sup>8</sup>Invention Secrecy Act of 1951, Pub. L. No. 82-256, 66 Stat. 3 (codified by Pub. L. No. 82-593 at sections 181-188 of title 35, U.S. Code). See S. Rep. No. 1001, 82d Cong., 1st Sess. (1951), reprinted in 1952 U.S.C.C.A.N. 1321.

Agencies often rely on the Military Critical Technologies List (MCTL) to determine whether to recommend the imposition of a secrecy order to the PTO. According to the Institute for Defense Analysis, which administers the MCTL, the list was never intended for such use. The list contains references to freely traded and patented inventions. Using the list as a justification for the imposition of a secrecy order could cause severe constraints on the availability of critical technologies to U.S. defense industries by denying patent protection to U.S. technology innovators. Moreover, agencies often do not apply the other criteria used by the State and Commerce Departments when making export control determinations, specifically foreign availability and the extent of prior publication. Thus, section 181 has become a tool to implement unilateral export controls but in a manner inconsistent with contemporary policies and procedures of other agencies, specifically the State and Commerce Departments.

#### **5.3.1.4. Recommendations and Justification**

### **I**

#### **Amend 35 U.S.C. § 181 to establish a Patent and Trademark Technical Advisory Committee within DOD to review and administer the imposition of secrecy orders.**

Congress was primarily concerned with national security when enacting the Invention Secrecy Act of 1951. While national security should remain the primary focus, economic vitality and technological advancement should also be carefully considered when recommending the imposition of secrecy orders because these factors also promote the goal of maintaining U.S. national security. At the same time it is paramount that critical technologies not fall into the wrong hands. Thus, the statute should operate in a manner that will promote the U.S. technological base while at the same time impede the flow of technologies to potential adversaries.

This recommendation proposes the establishment of a Patent and Trademark Technical Advisory Committee within DOD to review and administer the imposition of secrecy orders. Presently, the defense agencies have the responsibility of recommending the imposition of secrecy orders to the PTO. This proposal would shift responsibility from agencies whose principal and often only concern is technology control to a body with expertise in both the control of technology and its development.

The problem with the current structure is that a considerable number of patent applications are being subjected to secrecy orders. This is largely due to the rampant use of the MCTL as well as the lack of clear guidance at the agency level as to what is "detrimental to the national security" as set forth in section 181. The Panel on the Impact of National Security Controls on International Technology Transfer foresaw this occurrence back in 1984.<sup>9</sup> The Panel stated that use of the MCTL or other broad criteria as guidance could result in a number of

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<sup>9</sup>This Panel was organized by the National Academy complex in 1984. The purpose of the Panel was to examine the effect of export controls on commercial trade in high-technology goods.

applications being subjected to secrecy orders.<sup>10</sup> Moreover, the Panel stated that extensive use of secrecy orders would "undermine the benefits of the patent system, increase the duplication of R&D activities, and result in important innovations being withheld from commercial markets."<sup>11</sup> The extensive use of secrecy orders has, in fact, undermined the benefits of the patent system by stifling the development and transfer of technologies into the community.

Agencies often use the MCTL as a guide for determining whether to recommend the imposition of a secrecy order to the PTO.<sup>12</sup> The agencies generally do not, however, apply the other criteria used by the Departments of Commerce and State when making export control determinations, specifically foreign availability and the extent of prior publication. Thus, in practice, section 181 has become a tool to implement the unilateral export controls. Extending controls to unclassified technical data that relate to the wide range of technologies on the MCTL impedes the exchange of information in the technical community without necessarily enhancing national security.

Moreover, broad imposition of secrecy orders will result in reduced revenues from lost sales and market shares. This will lead to less investment, a lower growth rate, and reduced innovation, with resulting adverse effects on both the commercial and military sectors.

The time is ripe to shift from a purely DOD standard of national security to a standard as defined by both military and economic parameters. Only by this shift can the United States maintain national security, revitalize the economy, and continue to be the leader in technological advancement.

## II

**Amend 35 U.S.C § 155 to extend the term of any patent, which has been delayed from a grant by a secrecy order, for a period equal to the period of the delay, but not to exceed five years.**

## III

**Amend 35 U.S.C. § 183 to provide compensation only for periods of delay exceeding five years.**

These recommendations are interrelated and will be discussed together. The present statutory scheme, set forth in section 183, provides a right to just compensation for damages caused by a secrecy order. A claimant may apply to the head of any department or agency that

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<sup>10</sup>*Balancing the National Interest* at 127 (National Academy Press, Washington, D.C. 1987).

<sup>11</sup>*Id.* at 128.

<sup>12</sup>Both the Contract Law Division and the Intellectual Property Counsel of the Army disagreed with the proposal stating that there is a proposed administrative recommendation within the Army and Navy not to apply the MCTL guidelines to secrecy applications and, therefore, the recommendation is not necessary. (memorandums from the Army Contract Law Division, Aug. 11, 1992 and the Intellectual Property Counsel of the Army, Aug. 10, 1992) Although this is a step in the right direction, the Army failed to state what guidance would be issued in its place.



caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from its disclosure.<sup>13</sup> A claimant may bring suit against the U.S. in the U.S. Claims Court or in the District Court of the U.S. for the district in which such claimant is a resident.<sup>14</sup>

While the primary value of a patent grant is the right to exclude others, just compensation for this loss is difficult to obtain. The administrative costs of complying with a secrecy order often are not recovered. For example, it may be necessary to notify people to whom the invention has already been disclosed. Additionally, there may be restrictions on seeking advice from others both as to prosecuting the application as well as to investigating marketing opportunities. It is also administratively burdensome to go through the court process of compensating a claimant for damages under section 183.

A scheme that would provide compensation "in-kind" would be more equitable than the current scheme, which puts the patent owner to the task of proving damages. Thus, section 155 should be amended to extend the term of any patent which has been delayed from a grant by a secrecy order for a period equal to the period of delay, up to five years.

Additionally, term extension would be much simpler to administer. The term can simply be extended for a period equal to that of the delay occasioned by the secrecy order. The extension would be capped at five years, while, simultaneously, compensation would be eliminated for damages caused by secrecy orders up to five years under section 183.

#### **5.3.1.5. Relationship to Objectives**

This proposal will further the development and preservation of the U.S. industrial base. Moreover, the proposal will ensure the implementation of a consistent policy governing the imposition of secrecy orders. This will facilitate both Government access to commercial technologies as well as commercial market access to Government technologies.

#### **5.3.1.6. Proposed Statute**

##### **35 U.S.C. § 181. Secrecy of certain inventions and withholding of patent**

(a) Whenever publication or disclosure by the grant of a patent on an invention in which, in the opinion of the Patent and Trademark Technical Advisory Committee or the Department of Energy, the Government has a property interest might, in the opinion of the head of the interested Government agency, be detrimental to the national security, the Commissioner upon being so notified shall order that the invention be kept secret and shall withhold the grant of a patent therefor under the conditions set forth hereinafter.

(b) The Patent and Trademark Technical Advisory Committee shall be chaired by the chairman of the Armed Services Patent Advisory Board or his/her designee within the Department of Defense.

<sup>13</sup>35 U.S.C. § 183.

<sup>14</sup>*Id.*

and shall consist of at least the Commissioner of the Patent and Trademark Office or his/her designee, the Deputy Assistant Secretary for Export Administration or his/her designee within the Department of Commerce, and the Director of the Bureau of Economic and Business Affairs or his/her designee within the Department of State. Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner, be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection to the Atomic Energy Commission, the Secretary of Defense, and the chief officer of any other department or agency of the Government designated by the President as a defense agency of the United States.

(c) Each individual to whom the application is disclosed shall sign a dated acknowledgment thereof, which acknowledgment shall be entered in the file of the application. If, in the opinion of the Patent and Trademark Technical Advisory Committee or the Department of Energy Atomic Energy Commission, the Secretary of a Defense Department, or the chief officer of another department or agency so designated, the publication or disclosure of the invention by the granting of the patent therefor would be detrimental to the national security, the Patent and Trademark Technical Advisory Committee and the Department of Energy Atomic Energy Commission, the Secretary of a Defense Department, or such other chief officer shall notify the Commissioner and the Commissioner shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof. Upon proper showing by the chairman of the Patent and Trademark Technical Advisory Committee or the Department of Energy, head of the department or agency who caused the secrecy order to be issued that the examination of the application might jeopardize the national interest, the Commissioner shall thereupon maintain the application in a sealed condition and notify the applicant thereof. The owner of an application which has been placed under a secrecy order shall have a right to appeal from the order to the Secretary of Commerce under rules prescribed by him.

(d) An invention shall not be ordered kept secret and the grant of a patent withheld for a period of more than one year. The Commissioner shall renew the order at the end thereof, or at the end of any renewal period, for additional periods of one year upon notification by the Patent and Trademark Technical Advisory Committee or the Department of Energy head of the department or the chief officer of the agency who caused the order to be issued that an affirmative determination has been made that the national interest continues to so require. An order in effect, or issued, during a time when the United States is at war, shall remain in effect for the duration of hostilities and one year following cessation of hostilities. An order in effect, or issued, during a national emergency declared by the President shall remain in effect for the duration of the national emergency and six months thereafter. The Commissioner may rescind any order upon notification by the Patent and Trademark Technical Advisory Committee or the Department of Energy heads of the departments and the chief officers of the agencies who caused the order to be issued that the publication or disclosure of the invention is no longer deemed detrimental to the national security.

### 35 U.S.C. § 182. Abandonment of invention for unauthorized disclosure

The invention disclosed in an application for patent subject to an order made pursuant to section 181 of this title may be held abandoned upon its being established by the Commissioner that in violation of said order the invention has been published or disclosed or that an application for a patent therefor has been filed in a foreign country by the inventor, his successors, assigns, or legal representatives, or anyone in privity with him or them, without the consent of the Commissioner. The abandonment shall be held to have occurred as of the time of violation. The consent of the Commissioner shall not be given without the concurrence of the Patent and Trademark Technical Advisory Committee and the Department of Energy ~~heads of the departments and the chief officers of the agencies~~ who caused the order to be issued. A holding of abandonment shall constitute forfeiture by the applicant, his successors, assigns, or legal representatives, or anyone in privity with him or them, of all claims against the United States based upon such invention.

### 35 U.S.C. § 183. Right to compensation

An applicant, his successors, assigns, or legal representatives, whose patent is withheld as herein provided, shall have the right, beginning at the date the applicant is notified that, except for such order, his application is otherwise in condition for allowance, or February 1, 1952, whichever is later, and ending six years after a patent is issued thereon, to apply to the Secretary of Defense or the Department of Energy ~~head of any department or agency~~ who caused the order to be issued for compensation for the damage caused by the order of secrecy and/or for the use of the invention by the Government, resulting from his disclosure. The right to compensation for use shall begin five years from ~~on the date of~~ the first use of the invention by the Government. The head of the department or agency is authorized, upon the presentation of a claim, to enter into an agreement with the applicant, his successors, assigns, or legal representatives, in full settlement for the damage and/or use. This settlement agreement shall be conclusive for all purposes notwithstanding any other provision of law to the contrary. If full settlement of the claim cannot be effected, the Secretary of Defense or Department of Energy ~~head of the department or agency~~ may award and pay to such applicant, his successors, assigns, or legal representatives, a sum not exceeding 75 per centum of the sum which the Secretary of Defense or the Department of Energy ~~head of the department or agency~~ considers just compensation for the damage and/or use. A claimant may bring suit against the United States in the United States Claims Court or in the District Court of the United States for the district in which such claimant is a resident for an amount which when added to the award shall constitute just compensation for the damage and/or use of the invention by the Government. The owner of any patent issued upon an application that was subject to a secrecy order issued pursuant to section 181 of this title, who did not apply for compensation as above provided, shall have the right, after the date of issuance of such patent, to bring suit in the United States Claims Court for just compensation for the damage caused by reason of the order of secrecy and/or use by the Government of the invention resulting from his disclosure. The right to compensation for use shall begin five years from ~~on the date of~~ the first use of the invention by the Government. In a suit under the provisions of this section the United States may avail itself of all defenses it may plead in an action under section 1498 of title 28. This section shall not confer a right of action on anyone or his successors, assigns, or legal

representatives who, while in the full-time employment or service of the United States, discovered, invented, or developed the invention on which the claim is based.

### **35 U.S.C. § 184. Filing of application in foreign country**

Except when authorized by a license obtained from the Commissioner a person shall not file or cause or authorize to be filed in any foreign country prior to six months after filing in the United States an application for patent or for the registration of a utility model, industrial design, or model in respect of an invention made in this country. A license shall not be granted with respect to an invention subject to an order issued by the Commissioner pursuant to section 181 of this title [35 U.S.C. § 181] without the concurrence of the Patent and Trademark Technical Advisory Committee or the Department of Energy ~~head of the departments and the chief officers of the agencies~~ who caused the order to be issued. The license may be granted retroactively where an application has been filed abroad through error and without deceptive intent and the application does not disclose an invention within the scope of section 181 of this title [35 U.S.C. § 181].

The term "application" when used in this chapter [35 U.S.C. § 181 *et seq.*] includes applications and any modifications, amendments, or supplements thereto, or divisions thereof. The scope of a license shall permit subsequent modifications, amendments, and supplements containing additional subject matter if the application upon which the request for the license is based is not, or was not, required to be made available for inspection under section 181 of this title and if such modifications, amendments, and supplements do not change the general nature of the invention in a manner which would require such application to be made available for inspection under such section 181. In any case in which a license is not, or was not, required in order to file an application in any foreign country, such subsequent modifications, amendments, and supplements may be made, without a license, to the application filed in the foreign country if the United States application was not required to be made available for inspection under section 181 and if such modifications, amendments, and supplements do not, or did not, change the general nature of the invention in a manner which would require the United States application to have been made available for inspection under section 181.

### **35 U.S.C. § 185. Patent barred for filing without license**

Notwithstanding any other provisions of law, any person, and his successors, assigns, or legal representatives, shall not receive a United States patent for an invention if that person, or his successors, assigns, or legal representatives shall, without procuring the license prescribed in section 184 of this title, have made, or consented to or assisted another's making, application in a foreign country for a patent or for the registration of a utility model, industrial design, or model in respect of the invention. A United States patent issued to such person, his successors, assigns, or legal representatives shall be invalid, unless the failure to procure such license was through error and without deceptive intent, and the patent does not disclose subject matter within the scope of section 181 of this title.

### 35 U.S.C. § 186. Penalty

Whoever, during the period or periods of time an invention has been ordered to be kept secret and the grant of a patent thereon withheld pursuant to section 181 of this title, shall, with knowledge of such order and without due authorization, willfully publish or disclose or authorize or cause to be published or disclosed the invention, or material information with respect thereto, or whoever willfully, in violation of the provisions of section 184 of this title, shall file or cause or authorize to be filed in any foreign country an application for patent or for the registration of a utility model, industrial design, or model in respect of any invention made in the United States, shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than two years, or both.

### 35 U.S.C. § 187. Non applicability to certain persons

The prohibitions and penalties of this chapter shall not apply to any officer or agent of the United States acting within the scope of his authority, nor to any person acting upon his written instructions or permission.

### 35 U.S.C. § 188. Rules and regulations, delegation of power

~~The Department of Energy Atomic Energy Commission, the Secretary of a defense department, the chief officer of any other department or agency of the Government designated by the president as a defense agency of the United States, and the Secretary of Defense may separately issue rules and regulations to enable the respective department or agency to carry out the provisions of this chapter, assuring consistency with the regulations to implement the Export Administration Act of 1979, and may delegate any power conferred by this chapter. Upon the request of the Secretary of Defense, Secretary of Commerce and any other department of the Government designated by the President as a defense agency of the United States desiring participation on the Patent and Trademark Technical Advisory Committee, shall detail to the Committee, on a nonreimbursable basis, personnel with appropriate expertise to assist in the review of patent applications reasonably expected to contain matter the subject of which is deemed applicable to section 181 of this title.~~

### 35 U.S.C. § 155. Patent term extension

Notwithstanding the provisions of section 154 [35 U.S.C. § 154], the term of a patent shall be extended for any patent which:

(a) encompasses within its scope a composition of matter or a process for using such composition shall be extended if such composition or process has been subjected to a regulatory review by the Federal Food and Drug Administration pursuant to the Federal Food, Drug, and Cosmetic Act [21 U.S.C. § 301 *et seq.*] leading to the publication of regulation permitting the interstate distribution and sale of regulation of approval imposed pursuant to section 409 of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. § 348] which stay was in effect or January 1, 1981, by a length of time to be measured from the date such stay of regulation of approval was imposed until such proceedings are finally resolved and commercial marketing permitted. The patentee, his heirs, successors or assigns shall notify the Commissioner of Patents and Trademarks within

ninety days of the date of enactment of this section [enacted Jan. 3, 1983] or the date the stay of regulation of approval has been removed, whichever is later, of the number of the patent to be extended and the date the stay was imposed and the date commercial marketing was permitted. On receipt of such notice, the Commissioner shall promptly issue to the owner of record of the patent a certificate of extension, under seal, stating the fact and length of the extension and identifying the composition of matter or process for using such composition to which such extension is applicable. Such certificate shall be recorded in the official file of each patent extended and such certificate shall be considered as part of the original patent, and an appropriate notice shall be published in the Official Gazette of the Patent and Trademark Office, or

(b) was delayed, pursuant to 35 U.S.C. §§ 181-188, by the order of secrecy and/or for the use of the invention by the Government for the period of the delay, but not to exceed five years.

## 5.3.2. 22 U.S.C. § 2761(e)

### Charges; reduction or waiver

#### 5.3.2.1. Summary of the Law

This section provides that, after September 30, 1976, letters of offer for the sale of defense articles or for the sale of defense services shall include appropriate charges for a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment.<sup>1</sup>

Recoupment is based on the theory that if the Government pays for the development of a product, other purchasers should share in those costs when they buy the product. DOD implements recoupment in two ways. If a product is sold to a foreign government under a foreign military sales (FMS) arrangement, DOD recovers the recoupment charge directly from the foreign government. If the product is sold by the contractor directly to a foreign or domestic customer, or if a foreign company is licensed to manufacture the product, the contractor adds the recoupment charge to its contract and pays it to the Government.<sup>2</sup>

#### 5.3.2.2. Background of the Law

Recoupment was initiated by Secretary of Defense McNamara in 1963 when he directed that the Polaris Sales Agreement with the United Kingdom include a surcharge to cover a pro rata share of DOD's Research, Development, Test, and Evaluation (RDT&E) investment in the Polaris missile.<sup>3</sup>

In 1965, Secretary McNamara expanded this concept by including a nonrecurring cost (NRC) recoupment for the sale of C-130 and F-4 aircraft sold to the United Kingdom. In a June 1965 memorandum from the Assistant Secretary of Defense for International Security Affairs (ASD/ISA) to the military departments, Secretary McNamara stated that "on major weapons sales . . . arrange for the price to include an appropriate charge for all research and development costs."

DOD formalized this policy in DOD Directive 2140.2, Recovery of Nonrecurring Costs Applicable to Foreign Sales, March 15, 1967.<sup>4</sup> This directive called for recoupment of nonrecurring costs of development and production whenever an item of major defense equipment

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<sup>1</sup>22 U.S.C. § 2761(e)

<sup>2</sup>See Ralph C. Nash, Jr. & John Cibinic, *Recoupment: A Policy Enigma*, 6 N&CR 18 (Mar. 1992).

<sup>3</sup>Some individuals will attest that recoupment has been around since the 1950s. In 1957, the Navy Bureau of Aeronautics negotiated a recoupment clause in a development contract with the Hiller Helicopter Company. The clause was apparently used because the Navy believed that Hiller would subsequently sell a commercial version of the helicopter. There was a comparable commercial helicopter that had been developed with private funds by the Bell Helicopter Company. The Navy reasoned that recoupment was necessary to prevent Hiller from obtaining an unfair competitive advantage in the commercial marketplace.

<sup>4</sup>DOD Directive 2140.2 (Mar. 15, 1967).

(MDE) was sold to a foreign government by DOD or one of its customers.<sup>5</sup> The directive also required the use of a contract clause implementing the requirement for MDE.<sup>6</sup> The directive was limited, however, in that it did not apply to domestic commercial sales or foreign licenses. Moreover, MDE was defined as RDT&E in excess of \$25 million or a production investment in excess of \$100 million. ASD/ISA was charged with monitoring implementation of the directive in order to "avoid unfavorable impact on the Foreign Military Sales Program and the balance-of-payments problem."

In 1972, the thresholds for MDE doubled.<sup>7</sup> During that year, the Commission on Government Procurement recommended elimination of recoupment, except under unusual circumstances approved by the agency head.<sup>8</sup> The Commission voiced a concern that contractors might not undertake Federal research and development because of insufficient opportunity for commercial exploitation.<sup>9</sup> The Commission stated recoupment would be a disincentive to the participation of potential contractors and would impair the eventual availability of the results of Government-sponsored technology in the marketplace.<sup>10</sup>

Subsequently, in 1974, the directive was revised to split the recoupment charge into two segments, one for nonrecurring development costs and the other for nonrecurring production costs.<sup>11</sup> The directive stated that normally the development cost recoupment charge should be no more than 4% of the contract price.<sup>12</sup> Non-MDE threshold was defined as production costs, both nonrecurring and recurring exceeding \$5 million.<sup>13</sup> Also, during this year, the White House Council on International Economic Policy (CIEP) issued Decision Memorandum No. 23.<sup>14</sup> This memorandum announced that President Nixon had approved a CIEP recommendation that NRC recoupments be sought on product sales and that there be a "fair market recovery" on technology sales.<sup>15</sup> This memorandum was implemented only by DOD, Department of Energy, and NASA.

Congress first adopted the recoupment policy in the Arms Export Control Act of 1976 (Pub. L. No. 94-329). The Act contains a provision at 22 U.S.C. § 2761(e)(1)(B) requiring that FMS agreements include "a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment."<sup>16</sup> Congress obviously knew the Act was more limited than earlier DOD Policy and thus clearly intended to obtain recoupment only on FMS and MDE. DOD, however, implemented this statute by revising DOD Directive 2140.2.<sup>17</sup> The directive greatly expanded the requirement for recoupment by applying it to domestic

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<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>37 *Fed. Reg.* 21482 (1972).

<sup>8</sup>REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Vol 2, p. 28 (Dec. 1972).

<sup>9</sup>*Id.* at 29.

<sup>10</sup>*Id.*

<sup>11</sup>DOD Directive 2140.2 (Jan. 23, 1974)

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>Decision Memorandum No. 23 (Aug. 2, 1974).

<sup>15</sup>*Id.*

<sup>16</sup>22 U.S.C. § 2671(e).

<sup>17</sup>DOD Directive 2140.2 (Jan. 5, 1977).



commercial sales and all sales of technology.<sup>18</sup> It also reduced the threshold for recoupment of development costs to equipment where there was a research and development investment in excess of \$5 million.<sup>19</sup>

In 1977, President Carter issued his Arms Policy (PD-13)<sup>20</sup> aimed at reducing arms exports. As part of an implementing White House directive to eliminate incentives for making arms sales, DOD changed its policy and procedures on the use of NRC recoupments. Prior to PD-13, recoupments were credited to the RDT&E appropriation accounts of the military departments and were reusable. After PD-13, recoupments were deposited into the Miscellaneous Receipts of the Treasury.

Recoupment further expanded in 1979 when Defense Acquisition Circular (DAC) 76-20 mandated a recoupment clause in all RDT&E or production contracts over \$1 million.<sup>21</sup> The revised clause also expressly excluded the recoupment amount from the Contract Disputes Clause.<sup>22</sup>

The Office of Federal Procurement Policy published a proposed policy letter on NRC recoupments in 1980. The intent of the policy letter was to implement CIEP Decision Memorandum No. 23 by providing criteria and guidelines. Industry opposed the policy letter and it was never issued in final form.<sup>23</sup>

The House Government Operations Committee issued a report in 1981 criticizing DOD's administration of NRC recoupments in both FMS and commercial exports.<sup>24</sup> The report also criticized the lack of specific criteria for waivers.<sup>25</sup> The Committee recommended that DOD should: (1) evaluate whether to reduce the \$5 million threshold; (2) consider adopting a flat rate surcharge on non-MDE; and (3) include the values of, and reasons for, waiver of NRC in the required quarterly FMS reports to Congress.<sup>26</sup>

In 1984, the chairman of the House Foreign Affairs Committee requested a report from the GAO on DOD's implementation of the NRC recoupment requirement on commercial sales. The GAO report concluded that the Arms Export Control Act did not require recouping a pro rata share of NRC on commercial sales by contractors, nor did any other statute. The GAO stated, however, that it was appropriate for DOD to collect an NRC recoupment on commercial sales even though not legislatively mandated. Moreover, unless the regulations were amended or

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<sup>18</sup>*Id.*

<sup>19</sup>*Id.* ASPR implemented revised DOD Directive 2140.2 on Aug. 15, 1977.

<sup>20</sup>President's Decision No. 13 (May 1977).

<sup>21</sup>DAC 76-20 (Sept. 17, 1979).

<sup>22</sup>*Id.*

<sup>23</sup>45 *Fed. Reg.* 44604 (1980).

<sup>24</sup>H. Rep. No. 214. (July 31, 1981).

<sup>25</sup>*Id.* The 1987 DOD Appropriation Act included a rider requiring advance notification of proposed waivers to the Appropriations Committee. This rider was re-enacted in each of the subsequent six years and then dropped. The notifications did not result in any follow-up congressional inquiries.

<sup>26</sup>*Id.* Also in 1981, the Arms Export Control Act was amended to provide for establishment of the Special Defense Acquisition Fund (SDAF). One of the sources of capital for the SDAF is the NRC recoupment.

determined to be invalid by the judiciary, contractors must follow the regulations. Congress took no action on this report.

DOD Directive 2140.2 was again revised on August 5, 1985.<sup>27</sup> The revised directive further expanded the scope of recoupment by covering modification kits and major components of MDE items. The revision also reduced the thresholds for non-MDE to \$2 million. The directive called for assessment of recoupment charges on items of equipment which are "substantially different" from items developed on DOD contracts if they have some commonalty. This was the first departure from the concept of "essentially similar." Lastly, this directive included greater guidance on the computation of recoupment charges.

In February 1986, the GAO reported to the Secretary of Defense that DOD did not have a workable system to identify and monitor commercial sales to ensure that NRC recoupments were being paid. In March, the House Operations Committee held hearings on NRC recoupments. The DOD Inspector General (DODIG) testified that DOD elements were having difficulty determining the correct charges. The established procedures were also inadequate. The DODIG expressed doubt as to the soundness of going to a flat rate for MDE. A GAO witness stated Congress would probably have to change the law if it wanted to implement a flat rate for MDE. A Defense Security Assistance Agency witness opposed the flat rate proposal.

On July 27, 1987, DOD Directive 2140.2 was again amended to provide more specific guidance for re-examining the computation of the NRC charge when significant changes in the data bases occurred. Also, DOD in-house nonrecurring costs were added to the recoupment pools. To implement this directive, DOD issued DFARS Part 271 on March 22, 1989. This supplement interprets the policy to cover "derivative items," meaning items with at least 10% common parts. A standard recoupment clause was also included in DFARS 252.271-7001.<sup>28</sup> This policy is broad in that it covers a large number of situations with commensurate accounting requirements and unknown subcontract impacts.<sup>29</sup> There has been considerable negative reaction from industry on the current policy.

As a result of the negative industry reaction, DOD published a proposed new policy at 32 CFR Part 165 to revise DOD Directive 2140.2. DOD also proposed a new DFARS Subpart 215.70 to replace Part 270 on October 25, 1991.<sup>30</sup> This revision would reduce the scope of the recoupment policy. In particular, the revision would cover only major end items with development costs of over \$50 million or total production costs of over \$200 million and technical data packages or technology associated with such items. It would also redefine "derivative items" to include only items with 50% commonalty. The Office of Management and Budget (OMB) ruled that the recoupment regulations are a "major rule," thereby requiring a Regulatory Impact Analysis estimating the costs and benefits of the rule in comparison with

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<sup>27</sup>DOD Directive 2140.2 (Aug. 5, 1985).

<sup>28</sup>In the 1991 revision to the DFARS, the policy is now in Subpart 270 and the clause is in DFARS 252.270-7000.

<sup>29</sup>Ralph C. Nash, Jr. & John Cibinic, *Recoupment: A Policy Enigma*, 6 N&CR 18 (Mar. 1992).

<sup>30</sup>56 *Fed. Reg.* 55250 *et seq.* (1991).

alternatives. As a result, DOD requested public comments on the cost/benefit issue on November 26, 1991.<sup>31</sup>

On January 13, 1992, the Defense Acquisition Regulatory (DAR) Council stopped implementation of DOD's proposed rule governing recoupment of nonrecurring costs on sales of U.S. products and technologies.<sup>32</sup> Although pleased with this measure, "industry still felt that a recoupment policy of any kind harmed U.S. competitiveness."<sup>33</sup> Both OMB and the President's Council on Competitiveness agreed with industry.

On June 19, 1992, the White House released a press report announcing a national policy of no recoupment.<sup>34</sup> The first stage of the new policy abolishes recoupment on any product (other than MDE) exported for military uses. The second stage of the policy supports the elimination of recoupment fees on MDE exported for military uses pursuant to 22 U.S.C. § 2761(e) of the Arms Export Control Act. This new policy is based on the historic political changes of the past three years, such as the end of the Cold War and the accompanying downsizing of the U.S. military. Recognizing the change in the world environment, the new policy hopes to facilitate efforts by defense-oriented companies to shift toward commercial activities. The policy change is "expected to eliminate a major barrier to the free flow of technology between the commercial and defense sectors of U.S. business."<sup>35</sup> The new policy will also enhance the ability of American firms to compete for billions of dollars of business that they might otherwise lose. This will hopefully avoid significant layoffs and preserve tens of thousands of American jobs.

In response to the President's direction, on July 2, 1992, DOD published an interim rule which eliminated the requirement to insert the recoupment clause in new DOD contracts other than those for FMS or commercial sales of MDE.<sup>36</sup> DOD also published a proposed rule for public comment which would delete the requirement with respect to new contracts for commercial sales of MDE.<sup>37</sup> Thus, when this rule is adopted recoupment will be eliminated except for FMS of MDE, which cannot be eliminated until section 21(e)(2) of the Arms Export Control Act is repealed.

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<sup>31</sup>56 *Fed. Reg.* 59931. (1991).

<sup>32</sup>56 *Fed. Reg.* 55264 (1991).

<sup>33</sup>*Recoupment of Nonrecurring Costs*, 32 *Cont. Mgmt.* 32 (Aug. 1992).

<sup>34</sup>The President's new policy on recoupment was developed by the DOD and OMB's Office of Federal Procurement Policy in consultation with the Council on Competitiveness, the President's Export Council, and the Department of State.

<sup>35</sup>*Recoupment of Nonrecurring Costs*, 32 *Cont. Mgmt.* 36 (Aug. 1992).

<sup>36</sup>32 CFR Part 165, *Recoupment of Nonrecurring Costs on Sales or Licensing of U.S. Items*, 57 *Fed. Reg.* 29619 (1992). See also Memorandum from Deputy Secretary of Defense, Donald J. Atwood (Oct. 7, 1992).

<sup>37</sup>32 CFR Part 165, *Recoupment of Nonrecurring Costs on Sales or Licensing of U.S. Items*, 57 *Fed. Reg.* 29618 (1992).

### **5.3.2.3. Law in Practice**

Recoupment operates like a sales tax imposed only on U.S. companies. Because U.S. companies must add a recoupment charge to the price of their products, recoupment reduces U.S. defense industry competitiveness both in the U.S. and abroad.

In today's environment, many defense-oriented companies are attempting to redirect their efforts toward commercial products. The recoupment surcharge may make the product noncompetitive, thereby hindering integration and commercialization. This problem should largely dissipate under the President's new policy.

There is also an administrative burden associated with recoupment. Although this burden will be reduced under the first stage of the new policy, the costly paperwork and regulatory compliance requirements on MDE items will continue to be substantial.

### **5.3.2.4. Recommendations and Justification**

#### **Repeal**

Because of the historic changes in the world environment, recoupment should be repealed in its entirety. This recommendation will facilitate the transfer of technology between Government and commercial markets; aid integration of contractors' Government and commercial operations; increase U.S. competitiveness in worldwide markets; and enhance national security by preserving the industrial base.

Under the statute, when a contractor sells products or technologies developed under a Government contract or derivatives of them to a non-Government customer, the contractor must pay a fee, similar to a sales tax, to the U.S. Government. The recoupment surcharge may make the product noncompetitive and thus prevent a contractor from selling the product. Thus, recoupment may act as a disincentive to defense-oriented companies which may be attempting to redirect efforts toward commercial products. Eliminating recoupment will give defense contractors an incentive to develop products and technologies with larger markets.

There is an argument that without recoupment, a contractor might gain a competitive advantage by spinning commercial items out of Government funded research and development. This argument has several flaws. First, much of the Government funded research and development will have little application to any commercial derivative. Second, a company still has the costs of product modification in developing a commercial product. Finally, this argument acts counter to the goal of maximizing the development of dual use technologies.

The first stage of the President's new policy of abolishing recoupment on any product other than MDE will benefit defense-oriented companies attempting to redirect efforts toward commercial products. This proposal supports the second stage of the President's new policy by recommending 22 U.S.C. § 2761(e) be eliminated in its entirety.

Eliminating recoupment is necessary to make U.S. companies more competitive in worldwide markets. Since it appears DOD intends to reduce contracts for the production of military equipment, many production lines will be kept open only through foreign sales. Repealing the statute would enhance the ability of American companies to compete for billions of dollars of business they might otherwise lose. A national policy of no recoupment also enhances national security by strengthening defense-oriented U.S. companies, thereby preserving an industrial base.

There is also an administrative burden associated with recoupment. Although this burden will be reduced under the new policy, the costly paperwork and regulatory compliance requirements on MDE items will continue to be substantial. By eliminating recoupment, businesses can reinvest money otherwise expended for paperwork and regulatory compliance into developing new products and technologies.

#### **5.3.2.5. Relationship to Objectives**

This recommendation will encourage U.S. defense companies to develop products in the commercial market, thereby furthering the goal of commercial integration. The recommendation will also strengthen U.S. defense companies by making them more competitive in the international market.

#### **5.3.2.6. Proposed Statute**

##### **22 U.S.C. § 2761. Charges; reduction or waiver**

(e)(1) Letters of offer for the sale of defense articles or for the sale of defense services that are issued pursuant to this section or pursuant to section 2762 of this title shall include appropriate charges for:

(A) administrative services, calculated on an average percentage basis to recover the full estimated costs (excluding a pro rata share of fixed base operation costs) of administration of sales made under this Act to all purchasers of such articles and services as specified in section 43(b) and section 43(c) of the Act [22 U.S.C. § 2792(b),(c)];

~~(B) a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment (except for equipment wholly paid for either from funds transferred under section 503(a)(3) of the Foreign Assistance Act of 1961 [22 USCS § 2311(a)(3)] or from funds made available on a nonrepayable basis under section 23 of this Act [22 USCS § 2763]) ; and~~

~~(B) (C) the recovery of ordinary inventory losses associated with the sale from stock of defense articles that are being stored at the expense of the purchaser of such articles.~~

~~(2) The President may reduce or waive the charge or charges which would otherwise be considered appropriate under paragraph (1)(B) for particular sales that would, if made,~~

~~significantly advance United States Government interests in North Atlantic Treaty Organization standardization, standardization with the Armed Forces of Japan, Australia, or New Zealand in furtherance of the mutual defense treaties between the United States and those countries, or foreign procurement in the United States under coproduction arrangements.~~

(2) (3)(A) The President may waive the charges for administrative services that would otherwise be required by paragraph (1)(A) in connection with any sale to the Maintenance and Supply Agency of the North Atlantic Treaty Organization in support of:

(i) a weapon system partnership agreement; or

(ii) a NATO/SHAPE project.

(B) The Secretary of Defense may reimburse the fund established to carry out section 43(b) of this Act [22 U.S.C. § 2792(b)] in the amount of the charges waived under subparagraph (A) of this paragraph. Any such reimbursement may be made from any funds available to the Department of Defense.

(C) As used in this paragraph:

(i) the term "weapon system partnership agreement" means an agreement between two or more member countries of the Maintenance and Supply Agency of the North Atlantic Treaty Organization that:

(I) is entered into pursuant to the terms of the charter of that organization; and

(II) is for the common logistic support of a specific weapon system common to the participating countries; and

(III) the term "NATO/SHAPE project" means a common-funded project supported by allocated credits from North Atlantic Treaty Organization bodies or by host nations with NATO Infrastructure funds.

(ii) the term "NATO/SHAPE project" means a common-funded project supported by allocated credits from North Atlantic Treaty Organization bodies or by host nations with NATO Infrastructure funds.

### 5.3.3. 5 U.S.C. § 552

#### **Public Information: agency rules; opinions, orders, records, and proceedings**

##### 5.3.3.1. Summary of the Law

The Freedom of Information Act (FOIA) provides for the disclosure of agency records and information to the public (including foreign companies and governments) and some of this information is inevitably technical information of value to contractors. The basic premise of the FOIA is "that all records of agencies of the Federal Government must be accessible to the public unless specifically exempt from this requirement."<sup>1</sup>

The FOIA establishes requirements for disclosure by: (1) publication in the Federal Register (section 552(a)(1)); (2) availability for public inspection and copying (section 552(a)(2)); or (3) release pursuant to a request for access from "any person" (section 552(a)(3)).

An agency's failure to comply with requirements for disclosure under sections 552(a)(1) and (2) may lead to invalidation of related agency actions. In some cases, reliance on failure to comply with FOIA's publication requirements will provide a basis for invalidating agency action that would not be subject to attack on the rule making requirements of the Administrative Procedure Act (5 U.S.C. § 553).<sup>2</sup>

All records not covered by sections 552(a)(1) and (2) are to be made public unless exempted from mandatory disclosure by section 552(b) upon proper identification and request according to established agency rules. Nine exemptions permit an agency to withhold access to records requested under section 552(a)(3).

For purposes of Government procurement, the three exemptions most often relied upon by agencies for denying FOIA requests are: matters specifically exempted from disclosure by statute (section 552(b)(3)); trade secrets and commercial or financial information (section 552(b)(4)); and interagency or intra-agency memorandums or letters (section 552(b)(5)).

The FOIA allows the agency supplying the requested information to charge a reasonable fee set by regulation to cover the cost of searching, duplicating, and reviewing the information. The FOIA provides that the fee charged by agencies for supplying requested information can vary depending on whether the information is to be used for commercial or noncommercial purposes. The agency may also waive or reduce the fee.

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<sup>1</sup>*Litigation Under the Federal Open Government Laws* 1 (Allan Robert Adler ed., American Civil Liberties Union, 17th ed.).

<sup>2</sup>*Id.* at 3-5.

### 5.3.3.2. Background of the Law

The FOIA was enacted September 6, 1966 by Pub. L. No. 89-554 to provide the public with access to Government records.<sup>3</sup> This was the first time that there was a statutory right of access by any person to Federal agency records. Prior to the enactment of the FOIA, requests for information from the Federal Government were made pursuant to section 3 of the Administrative Procedure Act (APA). This law provided that "official records" could be made available to "persons properly and directly concerned" with the information. Section 3, however, was often used as authority for withholding, rather than disclosing, information. Congress enacted the FOIA largely to prevent agencies from using section 3 to unduly restrict the release of public information.

### 5.3.3.3. Law in Practice

DOD reported to Congress that during 1991 it processed a total of 129,437 FOIA requests.<sup>4</sup> Of the total requested, DOD fully denied 7,709 and partially denied 1,993 on the basis of the FOIA exemptions. DOD's total operating cost associated with the 1991 FOIA requests was \$23,962,169.67. The fees collected for records provided to the public amounted to \$1,593,410.78. DOD report stated that the average processing cost of a single case during 1991 was \$185.<sup>5</sup>

### 5.3.3.4. Recommendations and Justification

#### Retain

Although the total operating cost associated with processing FOIA requests is very expensive, public policy dictates that the FOIA remain intact.

The FOIA establishes a presumption that records of the Federal Government are accessible to the public.<sup>6</sup> As stated above, prior to the passage of the FOIA, the Government's posture was to withhold rather than to disclose information to the public. Individuals seeking information were required to show a need for the information.<sup>7</sup> The "need to know" philosophy has been replaced by a "right to know" policy. This right is viewed as outweighing the administrative costs associated with the Act.

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<sup>3</sup>President Johnson threatened a veto of the legislation after the Senate passed the bill. The House wrote a report that gave a broader interpretation to the exemptions. However, the House then passed the exact text as approved by the Senate.

<sup>4</sup>See Freedom of Information Act Program CY 1991, Report to Congress (prepared by the Office of the Assistant Secretary of Defense (Public Affairs) and the Directorate for Freedom of Information and Security Review).

<sup>5</sup>*Id.*

<sup>6</sup>A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records, 4th Report by the Committee on Government Operations, 2 (Government Printing Office, Washington, D.C., 1991).

<sup>7</sup>*Id.*



### **5.3.3.5. Relationship to Objectives**

Although compliance with FOIA requires the expenditure of significant funds and effort by skilled procurement and legal personnel, it does not otherwise have any adverse effect on DOD procurement. Thus, retention of the Act has no impact on the objectives of the Panel.

#### 5.3.4. 10 U.S.C. § 130

### Authority to withhold from public disclosure certain technical data

#### 5.3.4.1. Summary of the Law

This section provides that "the Secretary of Defense may withhold from public disclosure any technical data with military or space application in the possession of, or under the control of, DOD, if such data may not be exported lawfully outside the U.S. without an approval, authorization, or license under the Export Administration Act of 1979 (50 U.S.C. App. 2401-2420) or the Arms Export Control Act (22 U.S.C. § 2751 *et seq.*)."<sup>1</sup> Technical data, however, may not be withheld under this section if regulations promulgated under either Act authorize the export of such data pursuant to a general, unrestricted license or exemption in such regulations.<sup>2</sup>

#### 5.3.4.2. Background of the Law

This section was enacted by the Department of Defense Authorization Act for FY1984, Pub. L. No. 98-94. The purpose of the legislation was to withhold from public disclosure certain kinds of valuable technical data with military or space application which are in the possession of or under the control of DOD.<sup>3</sup> Congress was concerned that "blueprints and military specifications for weapons and other military equipment, drawings, plans, technical data" could in many cases be released to foreign countries and foreign competitors under the Freedom of Information Act (FOIA).<sup>4</sup> The FOIA, in effect, was enabling foreign nationals to obtain data which they could not obtain under export control laws. The provisions of the statute apply to certain kinds of technical data that, if they were to be exported, could not be exported lawfully outside the U.S. without approval, authorization or license under either the Arms Export Control Act or the Export Administration Act.<sup>5</sup> Thus, by relating the Secretary's authority to withhold data to the export control laws, valuable technical data with military or space application could be protected.

#### 5.3.4.3. Law in Practice

This statute is implemented by DOD Directive 5230.25 "Withholding of Unclassified Technical Data from Public Disclosure."<sup>6</sup> Initially, when the statute was enacted, small businesses expressed concern that the broadened power of the Government over technical data might inhibit competition for military spare parts contracts.<sup>7</sup> One lobbying group argued that the law would

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<sup>1</sup>10 U.S.C. § 130.

<sup>2</sup>*Id.*

<sup>3</sup>H. Rep. No. 352, 98th Cong., 1st Sess. 250.

<sup>4</sup>Omnibus Defense Authorization Act, 1984, S. Rep. No. 174, 98th Cong. 1st Sess. 260.

<sup>5</sup>*Id.* at 261.

<sup>6</sup>DOD Directive 5230.25 (Nov. 6, 1984).

<sup>7</sup>Aviation Week & Space Technology at 26 (Aug. 29, 1983).

hurt small businesses by providing an obstacle to obtaining technical data, while large businesses and data brokers would not be affected.<sup>8</sup> There was also a concern among small businesses that the implementing regulations would not adequately limit DOD's power to withhold data. These concerns were allayed by the implementing DOD Directive.<sup>9</sup> The scope of the Directive specifically provides that the provision "does not introduce any additional controls on the dissemination of technical data by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other mutual agreements."<sup>10</sup>

#### **5.3.4.4. Recommendations and Justification**

##### **Retain**

This law effectively ensures that the nation's export control laws are not by-passed by releasing certain technical data information with military or space application under FOIA that would require approval, authorization, or a license under export control laws. The statute also serves the purpose of protecting U.S. companies in worldwide competition as well as protecting information whose release would adversely impact on the national security. The law should, therefore, be retained.

#### **5.3.4.5. Relationship to Objectives**

This law serves the best interests of DOD because it protects U.S. companies in worldwide competition and also protects information whose release would adversely impact on the national security.

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<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>DOD Directive 5230.25 (Nov. 6, 1984).

### **5.3.5. 10 U.S.C. § 2328**

#### **Release of technical data under the Freedom of Information Act: recovery of costs**

##### **5.3.5.1. Summary of the Law**

This section provides that the Secretary of Defense, if required to release technical data under 5 U.S.C. § 552, shall release such technical data to a person requesting the release if the person pays all reasonable costs attributable to search, duplication, and review.<sup>1</sup>

Section 2328(b) provides that an amount received under this provision shall: (1) be retained by DOD or the element of DOD receiving the amount; and (2) be merged with and made available for the same purpose and the same time period as the appropriation from which the costs incurred in complying with requests for technical data were paid.<sup>2</sup>

Section 2328(c) provides that the Secretary of Defense shall waive the payment of costs required by subsection (a) which are in an amount greater than the costs that would be required for such release of information under 5 U.S.C. § 552 if: (1) the request is made by a citizen of the U.S. or a U.S. corporation and the citizen or corporation certifies that the technical data requested is required in order to submit an offer (or determine whether it is capable of submitting an offer) to provide the product to which the technical data relates to the U.S. or a contractor of the U.S.; (2) the release of technical data is requested in order to comply with the terms of an international agreement; or (3) the Secretary determines, in accordance with 5 U.S.C. § 552(a)(4)(A)(iii), that such waiver is in the interests of the U.S.<sup>3</sup>

##### **5.3.5.2. Background of the Law**

The House amendment to the Defense Authorization Act for Fiscal Year 1987 contained a provision (section 935) that would allow the Government to charge a fee for technical data released under the Freedom of Information Act (FOIA). The fee would be an amount equal to the true administrative cost of searching for and reproducing the technical data. The provision further required that such data would be released at no additional cost to any requester who was a U.S. citizen or U.S. corporation if such citizen or corporation certified that the data was needed in order to bid on or perform a Government contract. The Conference Report to the law noted that "volumes of technical data have been requested when the requester did not require the data to bid on a government contract or to determine whether it would bid on a future requirement."<sup>4</sup> The conferees stated that "the Government ought to be able to recover the full cost of dedicating personnel and equipment to provide such data."<sup>5</sup> This legislation was also intended to protect

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<sup>1</sup>10 U.S.C. § 2328(a).

<sup>2</sup>10 U.S.C. § 2328(b).

<sup>3</sup>10 U.S.C. § 2328(c).

<sup>4</sup>H. Rep. 1001, 99th Cong., 2d Sess., at 513 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6572.

<sup>5</sup>*Id.*

high tech firms that submit technical data information as part of their bid on a contract from data brokers. Data brokers file FOIA requests to obtain technical data and then sell the information to other entities. This may include competitors of the firm submitting the bid, thereby depriving the submitting firm of its competitive edge. The report specifically stated that this provision was not intended to affect the standards for releasing data.<sup>6</sup>

During 1985-86, the Navy was faced with an enormous volume of FOIA requests for technical data. The technical data repositories responding to the FOIA requests were not recovering the full costs incurred. Additionally, amounts received were required to go to the U. S. Treasury rather than be used by the agency. To remedy this situation, Congress enacted 10 U.S.C. § 2328.

#### **5.3.5.3. Law in Practice**

Parties requesting technical data information pursuant to this statute are required to pay all reasonable costs attributable to search, duplication, and review. 32 C.F.R. 518.92 defines reasonable costs as the full costs to the Government of rendering the service, or the fair market value of the service, whichever is higher. The regulation further states that full cost includes both direct and indirect costs to conduct the search and duplicate the records to be responsive to the request. Thus, the fees charged for the retrieval of technical data are generally higher than the fees charged for the retrieval of general public information under the FOIA statute. The statute also permits waiver of this larger fee if the request is made by a U.S. company.

#### **5.3.5.4. Recommendation and Justification**

##### **Retain**

This statute should be retained because it discourages the unnecessary release of defense contractors' technical data under FOIA. The statute also reduces the number of dedicated Government personnel and equipment necessary to provide such data. Lastly, by permitting waiver of the larger fee if the request is made by a U.S. company, the statute carries out the policy of ensuring that U.S. companies are not placed at a disadvantage in competing with foreign companies. Thus, the law serves the best interests of DOD.

#### **5.3.5.5. Relationship to Objectives**

This law meets the Panel's goal of serving the best interests of DOD.

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<sup>6</sup>*Id.*

## **5.4. Government Use of Private Patents, Copyrights and Trade Secrets**

### **5.4.0. Introduction**

The Panel reviewed three statutes dealing with Government use of private patents, copyrights and trade secrets: 28 U.S.C. § 1498, 10 U.S.C. § 2386, and 10 U.S.C. § 7210. It found that these statutes give DOD necessary access to private technology but that they can be improved in several ways to ensure that owners of that technology are treated fairly when the Government must use their technology.

28 U.S.C. § 1498(a) provides that the sole remedy of a patent owner whose patent has been used by the Government or its contractors, with authorization and consent, is to sue the Government in the U.S. Court of Federal Claims for reasonable compensation. This, in effect, gives the Government the right of eminent domain over patents and the Government has exercised this right very widely -- giving authorization and consent to use private patents on almost all Government contracts. The Panel found two situations where such broad authorization and consent does not meet our objectives. It therefore recommends that the statute be amended to permit the Secretary of Defense to issue regulations providing for the withholding of authorization and consent when it would meet the Panel's objectives.

In the first situation, under current policy, when a patent owner claims that a procurement will require use of its patent, the contracting officer grants authorization and consent and may include a patent indemnity clause in the contract in an attempt to ensure that the infringing contractor is ultimately liable if the Government is required to pay compensation for the infringement. This creates a legal process where the patent owner sues the Government. The Government may in turn sue the infringing contractor -- a circumstance that does not appear to have induced infringing contractors to include this ultimate liability in their price. The result is that the infringing contractor gains an unfair advantage against the patent owner in competing for the work, since its price will not contain the cost of developing the invention. The Panel has concluded that a fairer competitive situation would occur if the contracting officer, in these circumstances, withheld authorization and consent with the result that the patent owner could sue the infringing contractor directly for damages. This would provide a strong inducement to the infringing contractor to include that amount in its price -- equalizing the competitive situation. The Panel has also recommended the addition of language to 35 U.S.C. § 283 to ensure that no injunction could be granted in these circumstances. This will ensure that the procurement could not be blocked by the patent owner.

In the second situation, under current policy, when a commercial item is procured, the contracting officer grants authorization and consent and includes a patent indemnity clause, resulting in the same convoluted system of remedies. The Panel has concluded that in most purchases of commercial items, the Government would be better served by merely withholding authorization and consent and letting commercial processes determine the winner of the procurement. This meets the Panel's objective of using commercial practices to the greatest extent possible in buying commercial items.

The Panel is aware that this may discourage some companies, including small businesses, from participating in some procurements, but believes that fair treatment of the patent owner warrants adoption of this statutory change. However, a number of Government commentators strongly argue that the benefits of competition outweigh the objectives sought under the proposed change.

10 U.S.C. § 2386 permits DOD to acquire rights in intellectual property, including the settlement of claims for rights previously taken, when such acquisition is necessary to carry out its mission. The Panel concludes that this statute serves a necessary purpose and should be retained, but that some of its terminology is obsolete. For instance, it describes one category as "designs, processes, and manufacturing data." The Panel recommends that these words be amended to use the current terminology -- "technical data and computer software." The Panel also recommends that the fourth category, permitting the purchase of releases (settlements of claims for past use), be broadened to give the Department greater flexibility. This will ensure that all such claims can be settled when that will further the procurement mission of the Department.

10 U.S.C. § 7210 is a Navy-unique statute that duplicates 10 U.S.C. § 2386. The Panel recommends that it be repealed.

## 5.4.1. 28 U.S.C. § 1498

### Patent and copyright cases

#### 5.4.1.1. Summary of the Law

Section 1498(a) provides that whenever a patented invention is used or manufactured by or for the U.S., without a license or lawful right, the owner's remedy is against the U.S. in the Claims Court for reasonable and entire compensation.<sup>1</sup> This section specifies that use or manufacture of a patented invention by a contractor with the authorization or consent of the Government is construed as use or manufacture for the U.S.<sup>2</sup>

Section 1498(b) provides similar protection for copyright owners where either the U.S. or a contractor, corporation, or any other person acting with the authorization or consent of the Government infringes an owner's copyright.<sup>3</sup>

The unauthorized use of a patented invention by the Government is considered a taking of the property by eminent domain. Specifically, Congress has taken the patent owner's right of injunctive relief and provided, instead, a right of reasonable and entire compensation. Thus, section 1498 limits the patent owner's remedies. In effect, this statute subjects the patents involved to compulsory licensing in favor of the Government.

#### 5.4.1.2. Background of the Law

Section 1498 is based on section 68 of Title 35 (June 25, 1910, Ch. 423). Section 68 marked the first time that patent owners were granted a specific remedy for the Government's use of their inventions. The 1910 Act provided "that whenever an invention . . . covered by a patent of the U.S. shall hereafter be used by the U.S. without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims . . ." <sup>4</sup> The intent of the statute was to enlarge the jurisdiction of the Claims Court so that it could hear suits against the U.S. for patent infringement and award reasonable compensation to the patent owner.<sup>5</sup> Prior to this Act, Government use of patented inventions, without license or right, was considered an unauthorized act of the Federal employee supervising the activities. This individual was liable for patent infringement. There was no injunctive relief, however, against either the Government or its employee.<sup>6</sup>

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<sup>1</sup>28 U.S.C. § 1498(a).

<sup>2</sup>*Id.*

<sup>3</sup>28 U.S.C. § 1498(b).

<sup>4</sup>Act of June 25, 1910, Pub. L. No. 61-305 [H.R. 24649].

<sup>5</sup>H. Rep. 1288.

<sup>6</sup>Discussion in Nash and Rawicz, *Patents and Technical Data* at 589 (1983).



The Supreme Court considered the scope of this Act in *Crozier v. Krupp*.<sup>7</sup> In *Crozier*, the Court held that this "statute . . . provides for the appropriation of a license [on behalf of the Government] to use inventions [and that] the appropriation [is] sanctioned by the . . . compensation for which the statute provides [for exercising the] power of eminent domain . . ."<sup>8</sup>

In *Cramp & Sons v. International Curtis Marine Turbine Co.*,<sup>9</sup> a private independent contractor used a patented invention in the performance of its contract with the Government. The Court held that use by a contractor was not a "use by the U.S. without license" under the 1910 Act.<sup>10</sup> Accordingly, the contractor was held liable for damages for patent infringement. As a result of this case, Congress passed the Act of July 1, 1918.<sup>11</sup> The purpose of this amendment was to prevent the halting of a contractor's work by means of an injunction. In *Richmond Screw Anchor Co. v. United States*,<sup>12</sup> the Court held that this amendment precluded suits against contractors regarding unauthorized use of patented inventions in production for the Government. The Court also held that under the 1918 amendment, the patent owner's only remedy was a suit against the Government in the Claims Court. The Court stated:

The purpose of the amendment was to relieve the contractor entirely from liability of every kind for the infringement of patents in manufacturing anything for the Government and to limit the owner of the patent and his assigns and all claiming through or under him to suit against the U.S. in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture. The word 'entire' emphasizes the exclusive and comprehensive character of the remedy provided.<sup>13</sup>

The 1918 amendment also introduced the concept of "authorization and consent" as a prerequisite to applicability of 28 U.S.C. § 1498(a). Procuring agencies use standard Authorization and Consent Clauses in most contracts.<sup>14</sup> These clauses provide a mechanism which forces the patent owner to sue the Government, while at the same time, prevents the disruption of manufacturing or research and development activities by prohibiting the patent owner from obtaining injunctive relief from the Government.

#### 5.4.1.3. Law in Practice

Section 271 of Title 35, U.S. Code provides that "whoever without authority makes, uses, or sells any patented invention, within the U.S. during the term of the patent therefor, infringes

<sup>7</sup>*Crozier v. Krupp*, 224 U.S. 290 (1912).

<sup>8</sup>*Id.* at 305.

<sup>9</sup>*Cramp & Sons v. International Curtis Marine Turbine Co.*, 246 U.S. 28 (1917).

<sup>10</sup>*Id.*

<sup>11</sup>Act of July 1, 1918, 40 Stat. 705.

<sup>12</sup>*Richmond Screw Anchor Co. v. United States*, 275 U.S. 331 (1928).

<sup>13</sup>*Id.* at 343. The Richmond case has not been interpreted to mean that the Government may not shift liability of patent infringement back to the contractor by use of a Patent Indemnity Clause.

<sup>14</sup>FAR part 52.227.1.

the patent."<sup>15</sup> Under this statute, the patent owner can obtain injunctive relief (section 283) and/or monetary damages (section 284).

Section 1498 of Title 28, U.S. Code, on the other hand, protects a Government contractor from suit for patent infringement when the use is: (1) for the Government; and (2) with the authorization or consent of the Government. Under this statute, the patent owner is precluded from filing suit against the infringer. The patent owner's only relief is against the Government for monetary damages. The patent owner cannot obtain injunctive relief against the Government. The Government, in particular DOD, wanted to ensure that manufacturing and research and development activities would not be disrupted by a patent infringement claim. Thus, by limiting the patent owner's remedy to "reasonable and entire compensation," the Government is assured of continued contract performance even when there is a patent infringement claim.

Because the patent owner's only recourse is against the Government, the infringer is insulated from suit. The infringer also has a competitive advantage over the patent owner or licensee because the infringer can offer a price which does not include recovery of the costs of making the invention. FAR 27.203-1(b)(2) permits the use of a patent indemnity clause when a patent owner contends that infringement will occur. This procedure, however, has not been a satisfactory method of equalizing the competitive position of these parties.

#### **5.4.1.4. Recommendations and Justification**

##### **I**

**Amend 28 U.S.C. § 1498 to provide the Secretary of Defense with the authority to issue regulations prescribing when a contracting officer may withhold authorization or consent.**

##### **II**

**Amend 35 U.S.C. § 283 to prohibit a claimant from obtaining injunctive relief where the infringement has occurred in the performance of a Government contract.**

Section 1498(a) protects the Government contractor from suits for patent infringement when the use is: (1) for the Government; and (2) with the authorization or consent of the Government. The purpose of the authorization or consent clause is to limit the patent owner's remedy to suit against the Government for monetary damages, thereby preventing the halting of a contractor's work by means of an injunction. It has been the policy of the Government when implementing this statute to insert blanket "authorization or consent" clauses into most contracts.

This proposal provides the Secretary of Defense with the flexibility to vary this policy by issuing regulations prescribing when a contracting officer may withhold authorization or

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<sup>15</sup>35 U.S.C. § 271.

consent.<sup>16</sup> The purpose of this recommendation is to ensure that the patent owner has the ability to effectively compete in the Government market. Two possible circumstances where withholding authorization or consent would be appropriate are: (1) where the patent owner comes forward claiming that award would infringe his patent; and (2) where the procurement is for a commercial product.

In the first instance, if a patent owner came forward asserting the patent, then the contracting officer could elect not to insert the "authorization or consent" clause in the solicitation. Since the infringer would no longer be protected from suit, the infringing offeror would have to factor the costs of an infringement suit into his offer. This price factor would bring the infringer's offer more in line with the patent owner's offer. Presently, an infringing offeror can sell an infringing product to the Government at a lower price than the inventor, thereby excluding the inventor from the Government market.<sup>17</sup> Although a patent indemnification clause is often contained in a Government contract, this may not induce infringers to include a meaningful factor into their offer to compensate for the potential liability. Making infringing offerors quantify the risk of suit will assist the patent owner to effectively compete in the Government market. Small businesses expressed concern over this proposal stating that they would not be able to compete against large defense contractors or critical aircraft spare parts if this proposal were adopted.<sup>18</sup> This issue will have to be addressed more fully as will the possible unintentional consequences of the Panel's recommendations.

The second instance where a contracting officer may want to withhold authorization or consent is where the procurement is for a commercial product. Generally, contractors do not infringe on commercial products because of the protection provided in section 2-312 of the Uniform Commercial Code. Under this provision, the seller warrants that:

- (1) the title conveyed shall be good, and its transfer rightful; and
- (2) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

Patent owners should be provided the same protection for commercial products sold to the Government as that given in section 2-312 of the Uniform Commercial Code. This proposal would improve the Government's commercial buying practices. Buying commercial products

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<sup>16</sup>In response to a memorandum from the Panel to the acquisition community, both NASA and the Air Force stated that the proposed statutory change to section 1498 was unnecessary because the Secretary already has the authority to issue regulations prescribing when a contracting officer may withhold authorization or consent. See Memorandum from Dave Beck, Competition and Program Operations Division, Office of Procurement, NASA Headquarters (Oct. 19, 1992); Memorandum from the Office of the General Counsel, Department of the Air Force (Oct. 14, 1992); and Memorandum from Headquarters Air Force Materiel Command (Oct. 26, 1992). Although this is true, the proposed statute would directly address the waiver procedure option which could then be fully addressed in regulation.

<sup>17</sup>Even a licensee is at a disadvantage with the infringing offeror because the licensee will have to factor the price of the license into the bid proposal.

<sup>18</sup>Letter from Paul Seidman, Seidman & Associates (Oct. 19, 1992).

allows the Government to "take advantage of the broad based competition that occurs in the commercial market place."<sup>19</sup> Some of the benefits of buying in the commercial market include "lower costs resulting from price competition and scale economics, short lead-times provided by deliveries from existing production lines, and increased surge capacity available from a broadened industrial base."<sup>20</sup> Only by assimilating commercial practices when buying commercial products can the Government take full advantage of the commercial marketplace.

#### **5.4.1.5. Relationship to Objectives**

This proposal would improve the Government's commercial product buying practice by giving the patent owner the same protection against infringement as that provided in the commercial market. The recommendation would also better enable the patent owner to compete in the Government marketplace.

#### **5.4.1.6. Proposed Statute**

##### **28 U.S.C. § 1498. Patent and copyright cases**

(a) 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 United States Claims Court 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. The Secretary of Defense is authorized to issue regulations prescribing when a contracting officer may withhold authorization or consent. The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used.

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<sup>19</sup>Statement of Allan V. Burman, Administrator for Federal Procurement Policy, before the Subcommittee on Legislation and National Security of the Committee on Government Operations, U.S. House of Representatives (Oct. 31, 1991) at 2.

<sup>20</sup>*Id* at 3.

**35 U.S.C. § 283. Injunction**

Except where the infringement has occurred in the performance of a Government contract, the  
The several courts having jurisdiction of cases under this title [35 U.S.C. §§ 1 et seq.] may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

## 5.4.2. 10 U.S.C. § 2386

### Copyrights, patents, designs, etc., acquisition

#### 5.4.2.1. Summary of the Law

This law authorizes the military departments to settle claims and procure rights in intellectual property. It provides that funds appropriated for a military department, available for making or procuring supplies, may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:

- Copyrights, patents, and applications for patents;
- Licenses under copyrights, patents, and applications for patents;
- Designs, processes, and manufacturing data; and
- Releases, before suit is brought, for past infringement of patents or copyrights.<sup>1</sup>

#### 5.4.2.2. Background of the Law

The Act of 1910<sup>2</sup> gave patent owners a judicial remedy against the Government for the unauthorized use of patented inventions. It was not, however, until the enactment of the Royalty Adjustment Act of 1942<sup>3</sup> that Government departments and agencies were expressly permitted to administratively settle claims for the unauthorized use of patented (and unpatented) inventions. Prior to 1942, some Government agencies had the authority to purchase future licenses to use patents. There was no law, however, which permitted a Government agency to administratively settle a claim after the occurrence of such use.

Section 3 of the Royalty Adjustment Act expressly authorized the heads of Government departments and agencies to enter into agreements to settle certain claims against the Government. It provided that:

The head of any department or agency of the Government which has ordered the manufacture, use, sale, or other disposition of an invention, whether patented or unpatented, and whether or not an order has been issued in connection therewith pursuant to section 1 hereof, is authorized and empowered to enter into an agreement, before suit against the U.S. has been instituted, with the owner or licensor of such invention, in full settlement and compromise of any

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<sup>1</sup>10 U.S.C. § 2386.

<sup>2</sup>35 U.S.C. § 68 (June 25, 1910, Ch. 423).

<sup>3</sup>Royalty Adjustment Act of October, 56 Stat. 1013 (1942).

claim against the U.S. accruing to such owner or licensor under the provisions of this Act or any other law by reason of such manufacture, use, sale, or other disposition, and for compensation to be paid such owner or licensor based on manufacture, use, sale, or other disposition of said invention.<sup>4</sup>

Most commentators assume that the Royalty Adjustment Act expired on April 1, 1953,<sup>5</sup> based on the view that the Act was primarily a war emergency measure which expired on April 1, 1953. In order to save this authority for DOD, section 609 of the Department of Defense Appropriation Act of 1954 was passed to provide express authority for making agreements previously authorized by section 3 of the Royalty Adjustment Act. This new law also provided for making agreements covering only past use. The Act of August 10, 1956, repealed the provisions of section 609 and codified at 10 U.S.C. § 2386.

A 1957 Comptroller General Opinion<sup>6</sup> stated that the authority to release past infringements was limited to acquisitions "before suit is brought." The Comptroller General further stated that "the responsibility for determining the action to be taken with respect to the compromise and settlement of such claims pending after suit is brought . . . [is] . . . vested in the Attorney General of the U.S. pursuant to section 5 of Executive Order No. 6166."<sup>7</sup> This Executive Order provides that it is the Department of Justice's (DOJ) decision to prosecute, defend, compromise, appeal, or abandon any prosecution or defense.

#### 5.4.2.3. Law in Practice

Section 2386 is an administrative remedy that permits DOD to acquire rights in intellectual property. The Panel found that the law serves a necessary purpose and should be retained. However, the law is drafted using somewhat obsolete terms. For instance, the law describes one category as "designs, processes, and manufacturing data." Also, the law allows releases under both sections 2386(1) and (2), but not section 2386(3).

#### 5.4.2.4. Recommendations and Justification

### I

**Amend 10 U.S.C. § 2386(3) by substituting the words "technical data and computer software" for "designs, processes, and manufacturing data."**

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<sup>4</sup>Although the Royalty Adjustment Act was primarily a war emergency measure, section 3 was intended as permanent legislation.

<sup>5</sup>In *International Telephone & Telegraph Corp. v. United States*, 210 Ct. Cl. 410, 536 F.2d 1351, 191 U.S.P.Q. 739 (1976), the court held that section 3 of the Royalty Adjustment Act of 1942 had not expired. The court stated that Congress did not intend to repeal, and did not repeal, section 3 of the Act. Moreover, the court stated that the enactment of 10 U.S.C. § 2386 did not repeal section 3 by implication.

<sup>6</sup>37 Comp. Gen. 199, B-132729 (1957).

<sup>7</sup>*Id.* at 202. See also *Sullivan v. United States*, 348 U.S. 170, 172.

The term "designs, processes, and manufacturing data" is outdated. Both FAR and DFARS define technical data broadly to include all data which is of scientific or technical nature, other than computer software.<sup>8</sup> The phrase "designs and processes" covers computer software. Thus, section 2386(3) should be amended by substituting the words "technical data and computer software" for "designs, processes, and manufacturing data."

## II

**Amend 10 U.S.C. § 2386(4) to include the phrase "or for unauthorized use of technical data or computer software."**

Section 2386(4) authorizes military departments to settle copyrights and patents (sections 2386(1) and (2), respectively), but does not mention technical data and computer software as identified in section 2386(3). The law should authorize military departments to settle all three types of claims. Adding the phrase "or for unauthorized use of technical data or computer software" to the end of the clause would allow military departments to settle technical data claims and provide uniformity to the statute.

## III

**Amend 10 U.S.C. § 2386(4) by deleting the words "before suit is brought."**

The proposed amendment merely deletes the constraint "before suit is brought" in order to allow the agency maximum flexibility to settle patent infringement matters even after suit has been filed. Very few claims pursuant to section 2386 are settled at the agency level. The Intellectual Property Law Section of the Army Materiel Command stated that only one minor claim out of approximately 40 was settled at the agency level within a five year period.

Agencies wishing to negotiate a settlement after a claimant files suit are precluded from doing so because they no longer have authority over the matter. Thus, the agency often loses interest in the case once the claimant files suit because the agency is powerless to try to negotiate a settlement. Also, regardless of the outcome, once suit is filed, any settlement claim will not come out of the agency's appropriated funds.<sup>9</sup> As a consequence, once suit is filed, DOJ must start at the beginning of the negotiation process with the claimant. This results in further delay in the resolution of the matter.

This proposal will allow the Department broader flexibility to settle suits, thereby ensuring that all such claims can be settled when that will further the procurement mission of the Department.

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<sup>8</sup>See FAR 27.401 and DFAR 227.401(18).

<sup>9</sup>Pursuant to 28 U.S.C. § 1498, when an agency voluntarily settles a patent claim, it must pay that claim out of its appropriated funds. On the other hand, if the agency declines to settle and the claimant files suit, the claim is ultimately paid out of the Permanent Judgment Appropriation.



#### 5.4.2.5. Relationship to Objectives

This proposal updates the wording of the law to current terminology. The proposal also gives the Department greater flexibility to settle claims by deleting the words "before suit is brought."

#### 5.4.2.6. Proposed Statute

##### **Copyrights, patents, designs, etc., acquisition**

Funds appropriated for a military department available for making or procuring supplies may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:

(1) Copyrights, patents, and applications for patents.

(2) Licenses under copyrights, patents, and applications for patents.

(3) Technical data ~~Designs, processes, and manufacturing and computer software.~~

(4) ~~Releases, before suit is brought,~~ for past infringement of patents or copyrights or for unauthorized use of technical data or computer software.

### **5.4.3. 10 U.S.C. § 7210**

#### **Purchase of patents, patent applications, and licenses**

##### **5.4.3.1. Summary of the Law**

This law provides that the Secretary of the Navy may buy letters patent, applications for letters patent, and licenses under either letters patent or applications for letters patent.<sup>1</sup> The law further provides that the "purchases shall be made from appropriations available for the purchase or manufacture of the equipment or material to which the purchased letters patent, applications, or licenses pertain. Section 7210(b) authorizes the Secretary of Defense to delegate the authority of the Navy, with or without the authority to make successive redelegations."<sup>2</sup>

##### **5.4.3.2. Background of the Law**

This statute was enacted on 2 August 1946 by the Naval Appropriations Pay Readjustment Act, Pub. L. No. 79-604.

##### **5.4.3.3. Law in Practice**

The Office of the Chief of Naval Research stated that the Navy no longer uses this statute and recommended its repeal.

##### **5.4.3.4. Recommendation and Justification**

#### **Repeal**

This is a Navy-unique statute that duplicates 10 U.S.C. § 2386. According to the Office of the Chief of Naval Research, all of the military services use 10 U.S.C. § 2386 for the acquisition of patents. Thus, because the law is redundant with section 2386, it should be repealed in its entirety.

##### **5.4.3.5. Relationship to Objectives**

This proposal serves the best interests of DOD by eliminating a redundant law from the U.S. Code.

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<sup>1</sup>10 U.S.C. § 7210(a).

<sup>2</sup>10 U.S.C. § 7210(b).

**Chapter 6  
Standards of Conduct**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

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## 6. STANDARDS OF CONDUCT 1

6.0. Introduction.....	1
6.1. Fraud.....	7
6.1.0. Introduction.....	7
6.2. Criminal Fraud.....	9
6.2.0. Introduction.....	9
6.2.1. 18 U.S.C. § 286.....	11
6.2.2. 18 U.S.C. § 287.....	13
6.2.3. 18 U.S.C. § 371.....	15
6.2.4. 18 U.S.C. § 1001.....	17
6.2.5. 18 U.S.C. § 1031.....	19
6.2.6. 18 U.S.C. §§ 1341, 1343, and 1346.....	21
6.3. Civil Fraud.....	23
6.3.0. Introduction.....	23
6.3.1. 31 U.S.C. §§ 3729-32.....	25
6.3.2. 31 U.S.C. §§ 3801 - 12.....	51
6.3.3. 41 U.S.C. § 604.....	53
6.4. Ethics.....	55
6.4.0. Introduction.....	55
6.5. Gifts and Gratuities.....	61
6.5.0. Introduction.....	61
6.5.1. 18 U.S.C. § 201.....	63
6.5.2. 18 U.S.C. § 202.....	67
6.5.3. 18 U.S.C. § 203.....	69
6.5.4. 18 U.S.C. § 209.....	73
6.5.5. 5 U.S.C. § 7353.....	75
6.5.6. 41 U.S.C. § 423(a)(2),(b)(2).....	77
6.5.7. 10 U.S.C. § 2207.....	81
6.6. Employment Discussions.....	83
6.6.0. Introduction.....	83
6.6.1. 18 U.S.C. § 208.....	87
6.6.2. 10 U.S.C. § 2397a.....	91
6.6.3. 41 U.S.C. § 423 (a)(1), (b)(1), (c).....	95

6.7. The Revolving Door .....	99
6.7.0. Introduction .....	99
6.7.1. 18 U.S.C. § 207.....	103
6.7.2. 18 U.S.C. § 281.....	109
6.7.3. 37 U.S.C. § 801.....	113
6.7.4. 10 U.S.C. § 2397.....	115
6.7.5. 10 U.S.C. § 2397b.....	117
6.7.6. 10 U.S.C. § 2397c.....	121
6.7.7. 41 U.S.C. § 423f.....	123
6.8. Protection of Procurement Information .....	127
6.8.0. Introduction .....	127
6.8.1. 18 U.S.C. § 1905.....	131
6.8.2. 41 U.S.C. § 423 (a)(3), (b)(3), (d).....	133
6.9. Certifications, Training, and Remedies .....	143
6.9.0. Introduction .....	143
6.9.1. 41 U.S.C. § 423e.....	145
6.9.2. 41 U.S.C. § 423g,h,j,m.....	149
6.9.3. 41 U.S.C. § 423k,l.....	153
6.9.4. 18 U.S.C. § 218.....	155
6.10. Procurement Policy .....	157
6.10.0. Introduction .....	157
6.10.1. 41 U.S.C. § 401.....	159
6.10.2. 41 U.S.C. § 403.....	163
6.10.3. 41 U.S.C. § 405.....	165
6.10.4. 41 U.S.C. § 405a.....	169
6.10.5. 41 U.S.C. § 405b.....	171
6.10.6. 41 U.S.C. § 406.....	173
6.10.7. 41 U.S.C. § 407.....	175
6.10.8. 41 U.S.C. § 408.....	177
6.10.9. 41 U.S.C. § 409.....	179
6.10.10 41 U.S.C. § 410.....	181
6.10.11 41 U.S.C. § 411.....	183
6.10.12 41 U.S.C. § 412.....	185
6.10.13 41 U.S.C. § 414.....	187
6.10.14 41 U.S.C. § 415.....	189
6.10.15 41 U.S.C. § 418b.....	191
6.10.16 41 U.S.C. § 421.....	193

6.11. Other Related Statutes .....	195
6.11.0. Introduction .....	195
6.11.1 18 U.S.C. § 431.....	197
18 U.S.C. § 432.....	197
41 U.S.C. § 22 .....	197
6.11.2. 18 U.S.C. § 641.....	199
6.11.3. 31 U.S.C. § 1352.....	201
6.11.4. 10 U.S.C. § 2408.....	205
6.11.5. 10 U.S.C. §§ 2409 - 09a.....	207
6.11.6. 18 U.S.C. § 874.....	209
6.11.7. 41 U.S.C. §§ 51 - 58 .....	211
6.11.8. 5 U.S.C. Appendix 5 §§ 401 - 408.....	215
6.11.9. 5 U.S.C. Appendix 6 §§ 101 - 111.....	219
6.11.10 10 U.S.C. § 2393.....	223

## 6. STANDARDS OF CONDUCT

### 6.0. Introduction

In this chapter the Panel has assembled and reviewed those statutes that directly or indirectly affect the defense acquisition process by imposing limitations upon the conduct of Government employees, contractor representatives, or contractors.

The chapter title was chosen, notwithstanding its connotation of administrative regulations and procedures, because the Panel's study included a sweep of topics extending far beyond the criminal provisions of Title 18. It ranged from the fraud and bribery section of that title to the statutory rulemaking powers of the Office of Government Ethics, for the reason that so many of the statutes in this area have become, over time, interwoven with threads of administrative interpretation and supplementation. The Panel thus chose to open its review from the broadest possible perspective, looking not just at the role played by each law standing in isolation, but at their interrelationships and cumulative contributions to the sound conduct of defense procurement.

Through a series of formal announcements and solicitations, the Panel sought views from both Government and industry. The majority of the statutes under consideration involved not just defense procurement, but were also laws of general application, prompting the Panel to be sensitive to their histories of amendment, enforcement, and judicial interpretation, and especially to the boundaries of its own charter.

The laws governing criminal and civil fraud, for example, represent carefully adjusted balances of public and private interests. Many of them have Civil War antecedents, and if redrafted today would, in all likelihood, emerge in starkly different form and vocabulary. With rare exception, however, they remain current and serve well. During the course of its deliberations, the Panel progressively narrowed the initial scope of its study and ultimately focused on only a very limited number of issues that were, in its judgment, of sufficient concern to warrant recommendations to Congress.

Subchapter 6.2 includes the laws concerning criminal fraud that were reviewed by the Panel. 18 U.S.C. §§ 286 and 287 address the submission of fraudulent claims against the United States and engaging in a conspiracy to do so. The Panel recommends no changes to those provisions, nor to the general prohibitions against conspiracy to defraud the Government at 18 U.S.C. § 371. The False Statements Act, 18 U.S.C. § 1001, also plays a prominent role in many procurement related prosecutions but raises no special problems of application or interpretation meriting attention.

The Major Fraud Act of 1988, 18 U.S.C. § 1031, addresses fraud in contracts or subcontracts of \$1 million or more. In the Panel's opinion, this provision has not been in effect long enough to judge its effect fairly. The Panel also made no recommendation regarding the mail fraud statutes at 18 U.S.C. §§ 1341, 1343, and 1346.

Subchapter 6.3 includes the Panel's review of the civil fraud provisions. It recommends no changes to the false claims provisions of the Contract Disputes Act at 41 U.S.C. § 604, nor to the Program Fraud Civil Remedies Act at 31 U.S.C. §§ 3801-12. The novel administrative enforcement procedures of the latter required extensive implementation within DOD and have not been in effect or used long enough to assess their effectiveness.

The Panel's review of the False Claims Act, 31 U.S.C. §3729-3732, developed a number of issues on which there proved to be considerable Government and industry interest, most particularly regarding the procedures at Section 3730 for *qui tam* suits initiated by Government employees or private citizens. By amendments made to these procedures in 1986, Congress provided additional financial incentives for the filing of false claims suits by private parties. Those changes have generated significant numbers of new cases, sizable Government recoveries, and questions as to whether in some respects the 1986 amendments may have overadjusted the balance of incentives and benefits inherent within the law.

On this topic the Panel sought views from industry, the Department of Justice, and agency personnel who participate in the Government's review of cases when they are filed. There was unanimity that the *qui tam* provisions serve a valuable function, and there was considerable agreement that their principal weakness was in their potential for manipulation by industry and Government employees seeking to maximize their personal share of recoveries. The Panel was sensitive to the fact that these special procedures were enacted to serve far beyond the limited confines of defense procurement, and for that reason it approached its review and resulting recommendations with particular deliberation.

The Panel's first recommendation is to limit the authority of Government employees to bring *qui tam* suits on the basis of information acquired during the course of their Government work. As interpreted in some federal courts, the law currently permits a Government auditor, for example, to file a *qui tam* suit against a firm he is auditing, and to receive a substantial portion of the Government's eventual recovery. Because situations such as that bear the potential for abuse and for inescapable conflicts of interest, the Panel suggests forbidding suits that rely upon information obtained during the course of the employee's official duties.

The Panel also suggests a change to balance the competing interests of Government, industry and *qui tam* plaintiffs in cases involving voluntary disclosures. It recommends that there be no right to sue if the *qui tam* plaintiff learned of the grounds for his suit from information conveyed to the Government as part of a voluntary disclosure program. The Panel makes an analogous recommendation that would forbid suits based upon information generated from a Government audit or investigation.

Finally, the Panel suggests that provision be made to permit the court to adjust recoveries awarded to *qui tam* plaintiffs who played a role in the fraud, or were deliberately slow to report it. The Panel considered, but on the strength of experience to date did not adopt, suggestions for creating additional procedural protections against frivolous *qui tam* suits, or for imposing a fixed dollar ceiling on plaintiffs' recoveries.



Apart from those *qui tam* matters, the Panel received comments addressing a number of perceived conflicts between the efficient resolution of contract disputes and the contemporaneous resolution of fraud issues relating to the same contract or dispute. Industry representatives contend that the resolution of fraud questions causes long delays and introduces uncertainty into the disputes process, whereas the Government understandably attaches a great deal of priority to the opportunity to perform a thorough investigation into suspected wrongdoing.

One factor long at the root of this conflict is the lack of a single forum that can resolve both contract claims and related fraud claims. The jurisdictional allocation today vests contract disputes resolution in the Claims Court and boards of contract appeals, places civil and criminal fraud cases in the district courts, and gives the Claims Court jurisdiction over Government fraud counterclaims asserted against contractor claims. There is also a natural tension present in such cases among the rights and interests of the parties. The question, then, is one of striking the appropriate balance.

Following its review, the Panel arrived at three proposed adjustments. First, to clarify what is often a threshold issue of board jurisdiction, the Panel recommends amending the Contract Disputes Act (CDA) to clarify that the process for obtaining or bypassing the contracting officer's final decision is available even in cases where fraud is suspected. Then, to facilitate resolving contractor claims and related Government assertions of fraud in a single forum, the Panel proposes two additional amendments to the CDA: first, it recommends giving boards the authority to transfer a pending appeal to the Claims Court when fraud is at issue, and second, it recommends amending the exclusive jurisdiction of the boards to permit trial of a board matter as a counterclaim in a district court fraud action that has been brought by the Government.

The Panel's final recommendation in this subchapter addresses the potential under the False Claims Act for the imposition of unreasonably excessive penalties. The mathematical calculations prescribed by the FCA hold the prospect, especially in the mass production settings prevalent in defense acquisition, of multiplying the effect of a single underlying false record or report into damages well in excess of the Government's actual harm and of ruinous proportions to a contractor. To lessen this concern, which was cited by many as a disincentive to becoming a Government contractor, the Panel has recommended an amendment authorizing the court to adjust FCA penalties whenever it finds they are disproportionate to the actual damages suffered by the Government.

The next segments of the chapter, beginning at 6.4, turn to the array of ethics laws that affect those engaged in defense procurement, both on behalf of Government and on behalf of industry. A handful of statutory restrictions governed this topic from the Civil War until quite recently, when the defense build-up of the 1980s was punctuated by a number of events that drew extensive public attention. The pricing of military diodes, ashtrays, and hammers coincided not only with revelations of corporate dog boarding at Government expense, but with reports that defense plant representatives and even senior departmental officials had accepted post-Government jobs with defense firms they had only recently supervised.

Concern came to be expressed that those phenomena might be related and that defense officials might occasionally be tempted to deal less than vigorously with firms they hoped would hire them in the future, precipitating several new ethics restrictions applicable to defense acquisition. The "Ill Wind" prosecutions renewed questions about the sufficiency of the laws and prompted additional legislation. Addressing related issues in slightly different terms, most of those provisions were concerned with the potential for conflicts of interest, or "appearances" of conflicts. The additional assurance they contributed toward public trust in Pentagon spending during the 1980s was judged at the time to merit whatever additional costs they added and the bookkeeping they required.

In what is now a different decade and a different procurement environment, the Panel believes it may be time to reassess the contribution of some of those provisions. In subchapter 6.5, the Panel has analyzed six legal restrictions and one comprehensive regulation, all of which potentially govern the receipt of a gift by a defense employee engaged in procurement: the bribery statute at 18 U.S.C. § 201(b); the criminal gratuities statute at 18 U.S.C. § 201(c); the gift provisions of the procurement integrity amendments to the OFPP Act at 41 U.S.C. §§ 423(a)(2) and (b)(2); the supplementation of salary statute at 18 U.S.C. § 209; the civil gratuities statute at 10 U.S.C. § 2207; the recently enacted gift statute at 5 U.S.C. § 7353; and the new executive branch standards of conduct regulations promulgated by the Office of Government Ethics (OGE) at 5 C.F.R. § 2635.

The Panel concluded that the new OGE regulations satisfy a long-standing need by imposing an enforceable and uniform rule on all executive branch employees, and that the special gift provisions at 41 U.S.C. §§ 423(a)(2) and (b)(2) are now essentially redundant and ought to be repealed to prevent potentially confusing overlap with the new uniform rules.

Subchapter 6.6 analyzes the restrictions imposed upon an employee's outside employment discussions by 18 U.S.C. § 208(a), 10 U.S.C. § 2397a, and 41 U.S.C. §§ 423 (a)(1), (b)(1), and (c). The Panel's review suggests that the latter provisions were enacted primarily to correct technical shortcomings in the basic Government-wide law, 18 U.S.C. § 208(a). The Panel believes those deficiencies are today even more comprehensively addressed by OGE at 5 C.F.R. § 2635. For that reason, the Panel recommends repeal of those two provisions to avoid confusing inconsistencies among their differing procedural requirements for recusal and disqualification.

"Revolving door" laws are analyzed next, including the military criminal selling statute at 18 U.S.C. § 281; the military civil selling statute at 37 U.S.C. § 801; the post-employment and reporting provisions of 10 U.S.C. §§ 2397, 2397b, and 2397c; and the post-employment portion of the procurement integrity amendments to the OFPP Act at 41 U.S.C. § 423(f).

For the reasons described in its analysis, the Panel recommends that all of those provisions be repealed. The two antiquated military statutes largely duplicate provisions of 18 U.S.C. § 207, and the others have proven to exact an enormous enforcement burden to regulate a very limited number of persons. Within the large family of revolving door laws, the chief independent contribution of the post-employment restrictions of 10 U.S.C. § 2397b and 41 U.S.C. § 423(f) is to prevent key employees and officials from switching sides in situations that might disadvantage

the Government through their behind-the-scenes assistance to a contractor. As an alternative that might better reach the same end, the Panel suggests a new subsection that could be added to the main body of Government post-employment laws at 18 U.S.C. § 207.

Next, at subchapter 6.8, are the provisions on protection of sensitive procurement information, including the Trade Secrets Act at 18 U.S.C. § 1905 and the information protection provisions of the procurement integrity amendments to the OFPP Act at 41 U.S.C. §§ 423(a)(3), (b)(3), and (d). The Panel concluded that the information protection provisions of section 423 fill a necessary and useful role in protecting bid and evaluation data during the procurement process, but that they suffer in clarity from having been drafted to fit the other definitions and objectives of the OFPP amendments. Here, too, the Panel believes that the current protections could be better executed through enactment of a comprehensive single-purpose law, a draft of which is offered as an alternative.

Subchapter 6.9 includes brief analyses of other portions of the procurement integrity amendments to the OFPP Act, including the certification requirements of 41 U.S.C. § 423(e); the provisions in section 423(l) mandating special training on the restrictions of section 423; and the requirements for issuing "safe harbor" legal opinion under section 423(k). The Panel concluded that these requirements are disproportionately burdensome, contribute very little in return, and should be repealed.

The remaining subsections of section 423 prescribing penalties are also recommended for repeal. The final analysis included in this subchapter is of 18 U.S.C. § 218, permitting the Government to void contracts in relation to which there has been a final conviction under one of the integrity sections of Title 18. The Panel recommends that 18 U.S.C. § 218 be retained.

For administrative convenience alone, the Panel has next included in this chapter, at 6.10, its analysis of major portions of the OFPP Act that were not analyzed in other chapters of this report, from 41 U.S.C. § 401 setting forth OFPP's mission through section 405 describing the power of the Administrator, to section 421 establishing the Federal Acquisition Regulations Council. The Panel's purpose was to inquire and to consider whether the basic authorities of OFPP seemed to be working effectively when they were viewed, not from the usual Government-wide perspective, but from the more parochial vantage point of defense acquisition. The Panel concluded they were, and recommended only amending a dollar threshold and the definition of technical data to conform to other recommendations being made by the Panel.

The final subchapter, 6.11, includes miscellaneous provisions that relate even less directly to defense procurement, three of which the Panel recommends be considered for repeal. The first of those is the Byrd Amendment at 31 U.S.C. § 1352, which forbids recipients of Federal grants and contracts from using appropriated funds to lobby for the award of contracts. The same substantive requirements exist elsewhere, and the Panel urges Congress, in its next review of this subject, to relieve DOD of the unproductive record keeping requirements imposed by this provision.

The Panel recommends a housekeeping action that would promptly reactivate the suspended whistle blower protection provision at 10 U.S.C. § 2409 to avoid a lapse in coverage, and finally recommends the repeal of 10 U.S.C. § 2408 regarding the debarment of persons convicted of felonies. The worthy objectives of the latter provision have become mired in administrative paperwork and could be better achieved through reliance on the established suspension and debarment process.

The Panel recommends the remainder of the statutes in this section be retained or, in one case, "no action" be taken because the provision does not primarily concern the acquisition process.

## 6.1. Fraud

### 6.1.0. Introduction

In analyzing the statutes selected for review from Title 18, the Panel was mindful that criminal law is an area which has significant effects that go far beyond DOD. Those public and private activities include other agencies of the Government, contractors, and grantees who do business with those civilian agencies and, most profoundly, millions of ordinary citizens. The Panel's review was, therefore, limited to those statutes which had only the greatest effect on defense procurement. Although eight separate sections of Title 18 were closely analyzed in this way, the Panel found no basis for recommending legislative changes. In some cases the laws were of such relatively recent vintage that there was insufficient historical evidence on which to base any recommendation for change. The Panel therefore recommends that no action be taken by the Congress on these criminal laws on the basis of their relationship to the defense procurement process.

In the area of civil fraud, the Panel primarily focused its review on one aspect of the False Claims Act. Congress passed the first false claims statute in 1863 to address widespread procurement fraud in the provisioning of the Union Army. Although it has been amended on numerous occasions since the Civil War, a key provision of this statute has been the authority it conveys upon a private citizen to bring a law suit on behalf of the Government -- a *qui tam* action. Although the law had largely fallen into disuse, it was revived in 1986 when Congress amended it in order to broaden the Government's ability to detect and prosecute fraud, including procurement fraud. The fundamental concept behind the *qui tam* amendments was to create incentives for individuals to assist the Government by identifying fraudulent practices on the part of Federal contractors, typically those involved in various forms of defense production. Consistent with previous practice, those persons could share in the recovery of damages due the Government.

There is no question that these recent amendments have had a profound and beneficial effect. Over 400 *qui tam* actions have been filed since 1986 with the Government recovering substantial damages. From its review, the Panel concluded that the fundamental basis for the amended law was sound, but compiled a number of suggestions for improving the effectiveness of the law's implementation.

## **6.2. Criminal Fraud**

### **6.2.0 Introduction**

This subchapter includes the Panel's review of the principal criminal fraud statutes that potentially affect defense procurement. These include: 18 U.S.C. §§ 286 and 287 on false claims and conspiracy to commit false claims; 18 U.S.C. § 371 on conspiring to defraud the Government; and 18 U.S.C. §§ 1341, 1343, and 1346 on mail fraud. The Panel made no recommendations on those provisions.

The Panel reviewed 18 U.S.C. § 1001, the False Statements Act, whose versatility has made it one of the primary criminal statutes used to prosecute procurement fraud cases. The Panel made no recommendations regarding that provision, nor regarding 18 U.S.C. § 1031, the section of the Major Fraud Act specifically aimed at contracts or subcontracts valued over \$1 million. The Panel felt that there had been an insufficient experience under that section to assess its effect.

The Panel reached a similar conclusion regarding the Program Fraud Civil Remedies Act at 31 U.S.C. §§ 3801-12. That Act provides an administrative procedure for pursuing false claims whose value is less than \$150,000, including formal hearing before an administrative law judge and the right to judicial review. Very few cases have been prosecuted by the Government under this alternate procedure, affording the Panel insufficient experience upon which to base any recommendations regarding its utility and effect.

## 6.2.1. 18 U.S.C. § 286

### Conspiracy to defraud the Government with respect to claims

#### 6.2.1.1. Summary of the Law

This statute makes it a crime to conspire to defraud the United States or any of its agencies or departments by obtaining or aiding to obtain payment or allowance of a false claim. The penalty for violation of this statute is \$10,000, or not more than 10 years imprisonment, or both.

#### 6.2.1.2. Background of the Law

This provision is based on a Civil War era statute,<sup>1</sup> and most recently from the Act of March 4, 1909, ch. 321 § 35, 35 Stat. 1095. The section appeared in its present form in the 1948 codification of the criminal statutes.

#### 6.2.1.3. Law in Practice

Section 286 is a "specific" conspiracy statute which requires agreement to defraud the Government through a particular device, that of submitting false claims. In other respects, the proof required is the same as for 18 U.S.C. § 371, the general statute proscribing conspiracy to defraud the Government. In 1991, the Court of Appeals for the 11th Circuit in *United States v. Lanier*<sup>2</sup> upheld a conviction of a section 8(a) small business contractor and a Small Business Administration official for violation of both sections 286 and 371. This ruling was based upon the Supreme Court decision in *Albernaz v. United States*<sup>3</sup> which found the dual conviction of defendants under two specific conspiracy statutes as not in conflict with the Double Jeopardy clause of the Constitution, notwithstanding the fact that there was evidence of only one conspiracy.

No comments were received regarding this provision.

#### 6.2.1.4. Recommendation and Justification

##### No Action

The Panel makes no recommendation concerning this statute. Although it is used to enforce criminal penalties against those who commit procurement fraud, it is a statute of general application and poses no special problems within the scope of the Panel's objectives to streamline the acquisition process.

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<sup>1</sup>Act of March 21, 1862, ch. 67, 12 Stat. 696, 698, revised by R.S. 5438, as amended by Act of Aug 30, 1908, ch. 235, 35 Stat. 555.

<sup>2</sup>920 F.2d 887 (11th Cir. 1991).

<sup>3</sup>467 U.S. 333 (1981).

#### **6.2.1.5. Relationship to Objectives**

While this provision is beyond the immediate scope of the Panel's objectives, it promotes the integrity of defense procurement without being unduly burdensome.



## 6.2.2. 18 U.S.C. § 287

### False, fictitious or fraudulent claims

#### 6.2.2.1. Summary of the Law

This statute, commonly known as the Criminal False Claims Act, makes it a crime knowingly to present a false claim to any person or officer in the civil or military service of the United States or any of its agencies or departments.

#### 6.2.2.2. Background of the Law

Congress passed the first false claims statute, which contained both civil and criminal provisions, in 1863 as a result of Civil War era procurement scandals.<sup>1</sup> The civil and criminal provisions were separated and codified in 1878 without substantial change. The present statute is based on the Act, March 4, 1909, ch. 321 § 35, 35 Stat. 1095, and it appeared in its current form in the 1948 codification of the criminal statutes. The False Claims Amendments Act of 1986<sup>2</sup> increased penalties to require imprisonment for not more than five years and a fine of not more than \$10,000 or both, and the Department of Defense Authorization Act, 1986, increased the potential fine for violations related to defense contracts to \$1 million.<sup>3</sup>

#### 6.2.2.3. Law in Practice

Along with the False Statements Act, the False Claims Act is probably the most important criminal statute in combating procurement fraud. The False Claims Act has been used in prosecutions of many different procurement fraud schemes including defective pricing, product substitution, progress payment, and labor cost mischarging fraud.

A conviction under the act requires proof that a claim was presented against the Government; that the claim was false, fraudulent, or fictitious; and that the defendant submitted the claim knowing that it was such. Generally, it is not required that the Government prove that the defendant had the intent to defraud.<sup>4</sup> The common statutory history and subsequent judicial interpretations seem to support a common definition of "claim" for both the civil and criminal statutes.<sup>5</sup> This definition has evolved from decisional law<sup>6</sup> and in conjunction with 18 U.S.C. § 2,

<sup>1</sup>Act of March 2, 1863, ch 67, 12 Stat. 696.

<sup>2</sup>Pub. L. No 99-562, § 7, 100 Stat. 3169 (1986).

<sup>3</sup>Pub. L. No. 99-145, Title IX, § 931, 99 Stat. 699 (1985).

<sup>4</sup>*United States v. Maher*, 582 F.2d 842, (4th Cir. 1978 cert. denied 439 U.S. 1115, 1979), *United States v. Blecker*, 657 F.2d 629 (4th Cir 1981), cert. denied, 454 U.S. 1150 (1982) and *United States v. Milton*, 602 F.2d 231 (9th Cir. 1979).

<sup>5</sup>*United States v. Winchester*, 407 F. Supp. 261, 272 (D. Del. 1975). See also, W. Bruce Shirk, Bennett D. Greenberg, and William S. Dawson III, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts*, 37 CATH. U. L. REV. 935, 975 (1988).

<sup>6</sup>*United States v. Cohn*, 270 U.S. 339, 70 L. Ed. 616, 46 S. Ct. 251 (1926). In *Cohn*, the Supreme Court, defining "claim" under the predecessor of section 287, stated 'a 'claim upon or against' the Government relates solely to the

the aiding and abetting statute, includes claims which are presented to the Government through an intermediary.<sup>7</sup>

Concerning the imposition of both criminal and civil penalties for false claims, the Supreme Court ruled in *United States v. Halper*<sup>8</sup> that civil penalties imposed on top of criminal penalties may in some cases be so harsh that they are violative of the Fifth Amendment's double jeopardy clause. This has been an important consideration in the recovery of damages and in the comprehensive settlement of False Claims Act cases.

No comments were received regarding this provision.

#### **6.2.2.4. Recommendation and Justification**

##### **No Action**

The Panel makes no recommendation concerning this statute. Although it is used to enforce criminal penalties against those who commit procurement fraud, it is a statute of general application and poses no special problems within the scope of the Panel's objectives to streamline the acquisition process.

#### **6.2.2.5. Relationship to Objectives**

While this provision is beyond the immediate scope of the Panel's objectives, it promotes the integrity of defense procurement without being unduly burdensome.

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payment or approval or a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability.

<sup>7</sup>*United States v. Beasley*, 550 F. 2d 261, 271, (5th Cir. 1977)

<sup>8</sup>109 S.Ct. 1842 (1989).

### 6.2.3. 18 U.S.C. § 371

## Conspiracy to commit offense or to defraud the United States

### 6.2.3.1. Summary of the Law

This statute makes it a crime for two or more persons to conspire to commit any offense against or defraud the United States or any of its agencies in any manner and for any purpose, and for one or more persons to do any act to bring about the object of the conspiracy. The penalty for commission of the offense is a fine of not more than \$10,000, or imprisonment for not more than five years, or both, except that if the object of the conspiracy is a misdemeanor, the penalty shall not exceed the maximum penalty for that misdemeanor.

### 6.2.3.2. Background of the Law

This statute is based on a statute which was enacted in 1867.<sup>1</sup> Its present form is derived from the Act of March 4, 1909, ch. 321 § 178a, 35 Stat. 1096. The statute appeared in its present form in the 1948 codification of the criminal statutes.

### 6.2.3.3. Law in Practice

Section 371 is one of the most versatile and frequently used statutes in prosecuting procurement fraud. This "general conspiracy statute" has been used to prosecute any conspiracy that "interferes with a lawful Government function."<sup>2</sup> Thus, conspiracy to commit a crime against or to defraud the United States has been charged in a wide variety of procurement fraud schemes from bid rigging<sup>3</sup> and conversion of Government property<sup>4</sup> to more general schemes to impede governmental functions such as collusion to impede the proper operation of a procurement system for awarding defense contracts.<sup>5</sup> It was repeatedly charged in the "Ill Wind" cases and resulted in convictions of corporate as well as individual defendants.<sup>6</sup>

A conviction under section 371 requires proof of an agreement between two or more persons to commit a crime against or to defraud the United States (impede lawful governmental

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<sup>1</sup>Act of March 2, 1867, ch. 169, 14 Stat. 484.

<sup>2</sup>*Hammerschmidt v. United States*, 265 U.S. 182 (1984), and *Dennis v. United States*, 384 U.S. 855 (1966).

<sup>3</sup>In *United States v. Little*, Crim No. 88-00502 (1988), a bidder conspired to rig bids on a \$39 million Defense Logistics Agency contract for camouflage coats, agreeing to withdraw its low bid so that its co-conspirator could obtain part of the contract. After it was determined to be low bidder, it refused to participate in a pre-award survey and was rejected for award by DLA, which then awarded a contract to its co-conspirator. Subsequently, the firm obtained a subcontract from the co-conspirator on another contract.

<sup>4</sup>In *United States v. McAusland* Cr. No. 91-5874 (E.D. Va. 1992) and *United States v. Pafort*, No 91-5875 (E.D. Va. Cr. 1992), involving corporate marketing executives who paid a private consultant for source selection sensitive documents on three high-tech DOD procurements.

<sup>5</sup>*United States v. Vicenzi*, Cr. No 87-222-N, 1988 U.S. Dist. LEXIS 17436.

<sup>6</sup>*United States v. Unysts* and *United States v. Melvyn R. Paisley* (E.D. Va.).

functions) and proof of an overt act by one of the conspirators in furtherance of the conspiracy.<sup>7</sup> In 1988, the Court of Appeals for the 11th Circuit in *United States v. Lanier*<sup>8</sup> upheld a conviction of a section 8(a) small business contractor and a Small Business Administration official for violations of both 18 U.S.C. § 286 (conspiracy to defraud the Government by submitting false claims) and section 371. This ruling was based upon a 1988 Supreme Court decision which upheld the dual conviction of defendants under two specific conspiracy statutes as not in conflict with the Double Jeopardy clause of the Constitution.

No comments were received concerning this statute.

#### **6.2.3.4. Recommendation and Justification**

##### **No Action**

The Panel makes no recommendation concerning this statute. Although it is used to enforce criminal penalties against those who commit procurement fraud, it is a statute of general application and poses no special problems within the scope of the Panel's objectives to streamline the acquisition process.

#### **6.2.3.5. Relationship to Objectives**

While this provision is beyond the immediate scope of the Panel's objectives, it promotes the integrity of defense procurement without being unduly burdensome.

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<sup>7</sup>*United States v. Schmick*, 904 F. 2d 936 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 782, 112 L. Ed. 2d 845 (1991), *United States v. Allred*, 867 F. 2d 856 (5th Cir. 1959).

<sup>8</sup>920 F.2d 887 (11th Cir. 1991).

## 6.2.4. 18 U.S.C. § 1001

### Statements or entries generally

#### 6.2.4.1. Summary of the Law

The False Statements Act makes it a crime in any matter within the jurisdiction of the United States to knowingly and willfully falsify, conceal, or cover up by trick, scheme, or device a material fact, or make a false, fictitious, or fraudulent statement or representation, or use a false writing or document, knowing it to contain a false, fictitious, or fraudulent statement or entry. The penalty for commission of the offense is a fine of not more than \$10,000, or imprisonment for not more than five years, or both.

#### 6.2.4.2. Background of the Law

The false statements statute is based upon a Civil War era statute.<sup>1</sup> It was revised in 1908 by Act of May 30, 1908, ch. 235, 35 Stat. 565 and appeared in its contemporary form as the Act, March 4, 1909, ch. 321 § 35, 35 Stat. 1095.

#### 6.2.4.3. Law in Practice

The False Statements Act has been a mainstay in the prosecution of Government procurement fraud. The majority of schemes to defraud the Government probably involve some type of false statement or entry. Under section 1001, the Government has supported false statement prosecutions in such diverse types of fraud cases as defective pricing, cost mischarging, product substitution, and schemes to misappropriate Government documents. The statute has also been interpreted as a "catch all" to encompass a prohibition on false representations which might substantially impair the basic functions entrusted by law to a Federal agency.<sup>2</sup>

In order to successfully prosecute a false statement case, the Government must prove that the defendant submitted a false statement or made a false entry; that the defendant knew the statement was false; that the statement was made knowingly and willfully and with the intent to deceive (which may be established in some jurisdictions by a reckless disregard for and an avoidance of the truth); that the statement was material; and finally, that the statement concerned a matter within the jurisdiction of the United States.<sup>3</sup> The act is especially useful in prosecuting procurement fraud cases because it does not require a demand for, or payment of, money<sup>4</sup> and for that reason can support a conviction where the Government discovers the fraud before a claim has been made or paid.

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<sup>1</sup>Act of March 2, 1863, ch. 67, 12 Stat. 696, 698.

<sup>2</sup>*United States v. Facchini*, 832 F.2d 1159 (9th Cir. 1987), *aff'd in part and rev'd on reh'g*, 874 F. 2d 638 (9th Cir. 1989), *see also United States v. Corsino*, 812 F2d 26 (1st Cir. 1987).

<sup>3</sup>*United States v. Carrier*, 654 F.2d 559 (9th Cir. 1981).

<sup>4</sup>*United States v. Bedore*, 455 F. 2d 1109 (9th Cir. 1972).

No comments were received concerning this statute.

#### **6.2.4.4. Recommendation and Justification**

##### **No Action**

The Panel makes no recommendation concerning this statute. Although it is used to enforce criminal penalties against those who commit procurement fraud, it is a statute of general application and poses no special problems within the scope of the Panel's objectives to streamline the acquisition process.

#### **6.2.4.5. Relationship to Objectives**

While this provision is beyond the immediate scope of the Panel's objectives, it promotes the integrity of defense procurement without being unduly burdensome.

## **6.2.5. 18 U.S.C. § 1031**

### **Major fraud against the United States**

#### **6.2.5.1. Summary of the Law**

A section of the Major Fraud Act of 1988,<sup>1</sup> this statute makes it a crime knowingly to execute or attempt to execute a scheme with the intent to defraud the United States or to obtain money or property by false or fraudulent pretenses, representations, or promises in any procurement of property or services as a prime contractor, subcontractor, or supplier to the United States where the value of the contract or subcontract is \$1 million or more. The statute establishes maximum penalties of \$1 million or 10 years imprisonment, generally, but a fine of \$5 million for an offense if the loss to the Government or gain to the defendant is \$500,000 or more, or if the offense involves conscious or reckless risk of serious personal injury.

The Act contains a "whistle blower" provision which gives a contractor employee who suffers retaliation for assisting in a prosecution a right of civil action against the offending employer.

The Act also provides that under special circumstances, at the discretion of the Attorney General of the United States, payments not exceeding \$250,000 be made to persons furnishing information related to a possible prosecution under the Act. However, no payment may be made under this provision unless the individual is the "original source."

#### **6.2.5.2. Background of the Law**

This statute was section 2(a) of the Major Fraud Act of 1988.<sup>2</sup> It was amended in 1989 to provide for payment of rewards for information at the discretion of the Attorney General.<sup>3</sup>

#### **6.2.5.3. Law in Practice**

There are no reported cases involving prosecution under the Act, and no comments were received by the Panel.

#### **6.2.5.4. Recommendation and Justification**

##### **No Action**

This criminal statute is so new that any assessment of its effectiveness would be premature. As it generally takes many months to investigate and prosecute a case involving the

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<sup>1</sup>Pub. L. No. 100-700, § 2a, 102 Stat. 4631 (1988).

<sup>2</sup>*Id.*

<sup>3</sup>Major Fraud Act Amendments of 1989, Pub. L. No. 101-123, § 3(a), 103 Stat. 759 (1989).

probable complexity of those which would be prosecuted under this Act, it is felt that this statute has not been in effect long enough to judge its merit fairly. The Panel recommends no action on that basis.

#### **6.2.5.5. Relationship to Objectives**

While this provision is beyond the immediate scope of the Panel's objectives, it promotes the integrity of defense procurement without being unduly burdensome.



## 6.2.6. 18 U.S.C. §§ 1341, 1343, and 1346

### Mail fraud statutes

#### 6.2.6.1. Summary of the Law

The mail fraud statutes make it a crime to use the mails in the case of 18 U.S.C. § 1341, or wire, radio, or television, in the case of 18 U.S.C. § 1343, having devised a scheme or artifice to defraud, to obtain money or property by false pretenses or promises. Section 1341 also makes it a crime under such circumstances to sell, loan, exchange, alter, give away, distribute, supply, furnish, or procure for unlawful use any counterfeit article to execute any scheme or artifice to defraud. Section 1346 defines "scheme or artifice to defraud" to include a scheme or artifice to deprive another of the "intangible right of honest services." The penalty for commission of the offense (excluding an offense involving a financial institution) is a fine of not more than \$1,000 or imprisonment for not more than five years, or both.

#### 6.2.6.2. Background of the Law

Section 1341 is based on an 1872 statute<sup>1</sup> which was codified in 1909.<sup>2</sup> The statute appeared in its present form in the 1940 codification of the criminal statutes and prior to that time only minor changes had been made to it. Section 1343 was added in 1952 by ch. 879 § 18(a), 66 Stat. 722 and amended in 1956 by ch. 561, 70 Stat. 523. Section 1346 was added by Pub. L. No. 100-690 Title VII § 7603, 102 Stat. 4508. Congress' intent in passing section 1346 was to override the 1987 decision of the Supreme Court which vacated the "intangible rights theory" of mail and wire fraud.<sup>3</sup>

#### 6.2.6.3. Law in Practice

The mail and wire fraud statutes have been significant and versatile tools in the prosecution of defense procurement fraud cases. Wire fraud charges were among the numerous different counts alleged in several "Ill Wind" prosecutions.<sup>4</sup> Two successful prosecutions involving mail fraud have been cited by the Department of Defense Inspector General's Office between April 1991, and March 1992.<sup>5</sup>

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<sup>1</sup>Act of June 8, 1872, ch. 335, 17 Stat. 323. This original mail fraud statute was a new section of a recodification of the postal laws enacted to stem the practice in which the mails were used to solicit the purchase of counterfeit bills which were never delivered.

<sup>2</sup>The Act, March 4, 1909, ch. 321 § 215, 35 Stat. 1130, based on R.S. 5480, as amended by the Act, March 2, 1889, ch. 393 § 1, 25 Stat. 873, revised from the Act June 8, 1872, ch. 335, 17 Stat. 323 and repealed by the Act of March 4, 1909 ch. 321 § 341, 35 Stat. 1153.

<sup>3</sup>*McNally v. United States*, 483 U.S. 350 (1987).

<sup>4</sup>*United States v. United Technologies*, *United States v. Teledyne*, *United States v. Sullivan*, *United States v. Lachner*, and *United States v. Berlin*. (E.D. Va.).

<sup>5</sup>DEPARTMENT OF DEFENSE INSPECTOR GENERAL: SEMI-ANNUAL REPORT TO THE CONGRESS, Apr. 1, 1991 to Sept. 30, 1991 3-21 (discussing Wilderness Electronics) and DEPARTMENT OF DEFENSE INSPECTOR GENERAL:

No comments were received concerning these statutes.

#### **6.2.6.4. Recommendation and Justification**

##### **No Action**

The Panel makes no recommendation concerning these statutes. Although they are used to enforce criminal penalties against those who commit procurement fraud, they are statutes of general application and pose no special problems within the scope of the Panel's objectives to streamline the acquisition process.

#### **6.2.6.5. Relationship to Objectives**

While these provisions are beyond the immediate scope of the Panel's objectives, they promote the integrity of defense procurement without being unduly burdensome.

## **6.3. Civil Fraud**

### **6.3.0. Introduction**

The Panel concluded that the objectives and basic structure of the *qui tam* provision are sound, but suggests several amendments that it believes would contribute to the law's overall effectiveness. In brief, the Panel recommends limiting the authority of Government employees to bring *qui tam* suits on the basis of information acquired during the course of their duties; limiting the right of plaintiffs to sue on the basis of information generated from a Government audit or investigation, or information conveyed to the Government as part of a voluntary disclosure; and enabling the court to adjust the recoveries of culpable plaintiffs.

Addressing the subject of effective contract dispute resolution in situations where fraud allegations or investigations are pending, the Panel recommends amendments to the Contract Dispute Act that would clarify the process for obtaining or bypassing the contracting official's final decision when fraud is suspected; authorizing boards of contract appeals to transfer proceedings to the Claims Court when fraud is at issue; and to permit trial of a board matter as a counterclaim in a district court fraud action that has been brought by the Government.

Finally, the Panel recommends an amendment to the FCA that would address the law's current potential for the assessment of excessive penalties disproportionate to the damages actually suffered by the Government

## 6.3.1. 31 U.S.C. §§ 3729-3732

### False Claims Act

#### 6.3.1.1. Summary of the Law

The False Claims Act, 31 U.S.C. §§ 3729-3732 (often referred to as the Civil False Claims Act to distinguish it from its criminal counterpart at 18 U.S.C. § 287), permits the recovery of triple the amount of damages suffered by the United States and civil penalties of \$5,000 to \$10,000 per violation against any person who:<sup>1</sup>

- Knowingly presents a false or fraudulent claim (or causes it to be presented) to an officer or employee of the United States for payment or approval;
- Knowingly makes, uses or causes a false record to be made or used to get a fraudulent claim paid; or
- Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

An action under the False Claims Act (FCA) can be brought by the United States (through the Department of Justice (DOJ)) or by a private party acting in the name of the United States.<sup>2</sup> The latter action is called a "*qui tam*" action<sup>3</sup> and the plaintiff, a "relator." Jurisdiction under the FCA resides in the Federal District Courts.<sup>4</sup>

#### 6.3.1.2. Background of the Law

Congress passed the first false claims statute in 1863 to address procurement fraud in provisioning the Union Army during the Civil War.<sup>5</sup> The 1863 Act contained both civil and criminal provisions, which were codified separately in 1878 without substantial change. As enacted, the Act provided for *qui tam* suits, which could be based on public information, with the *qui tam* relator entitled to up to 50% of any recovery.<sup>6</sup> In 1943, reading the Act literally, the Supreme Court held in *United States ex rel. Marcus v. Hess*,<sup>7</sup> that any person, even a relator whose only knowledge of the basis for the action came from information available to the Government, could bring a *qui tam* suit. Congress responded quickly by amending the Act to

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<sup>1</sup>31 U.S.C. § 3729(a).

<sup>2</sup>31 U.S.C. § 3730(b).

<sup>3</sup>The latter had its genesis in English law enforcement. "*Qui tam pro domino rege quam pro se imposito sequitur*," the full Latin term, means "who brings the action as well for the king as for himself."

<sup>4</sup>31 U.S.C. § 3732(a).

<sup>5</sup>Act of March 2, 1863, ch. 67, 12 Stat. 696; see generally, Note, *The False Claims Act, Qui Tam Relators and the Government: Which Is the Real Party in Interest*, 43 STANFORD L. REV. 1061, 1063-68 (1991)

<sup>6</sup>*Id.* at 1066.

<sup>7</sup>317 U.S. 537 (1943). In this case, the government indicted Hess, who then entered a plea of *nolo contendere*. The relator based a *qui tam* suit on the public indictment, plea and subsequent fine in the criminal case.

require a relator to contribute new information, not known to the public, as a condition to bringing suit.<sup>8</sup> The 1943 amendment also cut the maximum amount a relator could obtain to 25% of any recovery and provided for the first time that the Government could take over the *qui tam* action.<sup>9</sup> If the Government took over the suit, moreover, the *qui tam* relator got nothing.<sup>10</sup>

Few *qui tam* actions were brought until the *qui tam* provisions of the FCA were substantially modified in 1986.<sup>11</sup> The 1986 amendments were aimed in large part at reducing procurement fraud through the increased risk of detection and financial loss for accounting fraud and intentional shipment of nonconforming goods. The legislative history of the 1986 amendments singled out a 1981 GAO study, which had concluded:

For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . The sad truth is that crime against the Government often *does* pay.<sup>12</sup>

Accordingly, in the 1986 amendments, Congress sought to combat fraud by increasing the incentives to those who had direct knowledge of it -- typically, the employee of the Federal contractor who would be induced by the potential rewards of the *qui tam* suit into becoming a relator -- to make that knowledge public.<sup>13</sup> The 1986 amendments were intended by Congress to broaden the FCA by overturning restrictive judicial interpretations of the Act. The amendments:

- Increased damages available under the Act from double to treble the amount of actual damages and increased the penalty assessed for each false claim from \$2,000 to a range of \$5,000 to \$10,000;
- Amended § 3729(a)(1) to clarify that specific intent to defraud was not an element that had to be proved against the defendant;
- Modified the *qui tam* provisions to ensure that a relator got a substantial percentage of any recovery even if the Government intervened, thereby increasing the incentive to private citizens to detect and report fraud, particularly procurement fraud;<sup>14</sup> and

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<sup>8</sup>See Note *supra* note 5, at 1066.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>Pub. L. 99-562, §§ 3,4 100 Stat. 3154 (1986). The FCA was recodified in 1982 as part of an overall reorganization of Title 31, see Pub. L. 97-258, 96 Stat. 978 (1982), and was amended in 1988 with the addition of what is now 31 U.S.C. § 3730(d)(3), see Pub. L. 100-700, § 9, 102 Stat. 4638 (1988).

<sup>12</sup>S. REP. NO. 345, 99th Cong., 2d Sess. 3 (1986), quoting a GAO Report entitled, *Fraud in Government Programs: How Extensive is it? How Can it be Controlled?*, at cover (1981), reprinted in 1986 U.S.C.C.A.N. 5266, 5268.

<sup>13</sup>See, e.g., S. REP. NO. 345, at 2, 1986 U.S.C.C.A.N. 5267.

<sup>14</sup>Prior to the amendment, the relator could recover up to 25% of a judgment, but only if the Government did not intervene. The 1986 amendments entitled the relator to 25% or 30% of a recovery if the Government did not intervene and 15% to 25% of the recovery otherwise (with reduction to 10% where the action was based in substantial part on public information).

- Lengthened the period during which suit could be brought to the latter of 6 years after the violation or 3 years after the facts were known or should have been known by the United States, but no longer than 10 years after the violation.

### 6.3.1.3. Law in Practice

The Government has a clear interest in deterring fraud and recovering taxpayer dollars improperly obtained by contractors. The FCA is one important tool in furthering this interest.<sup>15</sup> However, the Government -- and particularly DOD -- also has an interest in overseeing the administration of the FCA by both DOJ and *qui tam* relators to ensure that the Act will in operation further the sound procurement practices fundamental to the buyer-seller relationship and ensure that the stringent penalty structure of the Act does not cause damage to the defense technology and industrial base. Deterrence and punishment of fraud are important goals, but they must be carefully balanced against the need to encourage sound and efficient acquisition practices.

The FCA has been highly effective as a tool for recovering monetary damages for fraud. Civil actions by DOJ brought in the last decade against the "top 100" defense contractors have netted \$630 million in damage recoveries.<sup>16</sup> In addition, the numbers of *qui tam* cases filed have increased rapidly since the 1986 FCA amendments, from 33 in FY 1987 to 90 in FY 1989.<sup>17</sup> During a seven-month period ending April 1, 1992, 57 more cases were filed,<sup>18</sup> bringing to 407 the number of *qui tam* actions filed since the 1986 amendments.<sup>19</sup> As of the date of this report, 75 of these cases were still under investigation; 150 had been dismissed or were not being pursued; and 66 had been taken over by DOJ. Of the cases assumed by DOJ, 37 had been settled or judgments obtained, with a total recovery of \$147 million (representing 13.5% of DOJ's total fraud recoveries during this period). In these cases, the total distribution to relators was \$14.5 million.

In a 1991 study, Professor William E. Kovacic of George Mason University suggested that the efficiency of the *qui tam* mechanism was attributable to three basic factors: its unique ability to draw upon first-hand information in uncovering fraud; its augmentation of Government enforcement through the use of private citizens; and its encouragement of oversight efforts by

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<sup>15</sup>The FCA is, of course, only one tool. In addition to the FCA, criminal statutes prohibit fraud against the government (e.g., 18 U.S.C. §§ 286, 287, 301, 1001) and, under any of these, the Government may be paid a fine of up to twice the amount of the gain to a criminal defendant or twice the amount of the Government's loss. See 18 U.S.C. § 3571(d). In addition, the Government also has a common law civil claim for fraud, which includes the right to obtain punitive damages. See, e.g., *United States v. Rockwell International Corp.*, 795 F. Supp. 1131 (N.D. Ga. 1992)

<sup>16</sup>See *At a Glance: Defense Procurement Fraud: Information and Plea Agreements and Settlements*, 20 CORP. CRIME REPORTER, App. II at 11 (October 12, 1992).

<sup>17</sup>See THE WASHINGTON POST, March 19, 1990, at F-1.

<sup>18</sup>See 56 FCR 267 (8/19/91).

<sup>19</sup>Statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, before the Subcom. on Civil and Constitutional Rights, Comm. on the Judiciary, U.S. House of Representatives, April 1, 1992, at 19 [hereafter "Gerson Statement"]. The DOJ reports that 30 of the 407 cases "were filed by the same entity and are related."

procurement agencies.<sup>20</sup> However, he also pointed to potential problem areas with the FCA. Possible adverse management impacts upon defense contractors included: interference by disgruntled employees with legitimate management choices; other deliberate or accidental misconstruing of benign conduct; and deliberate delays by contractor employees in the identification of problem areas in order to increase subsequent *qui tam* awards. Because of the potential for *qui tam* actions, corporate information-sharing presented a heightened risk, which tended to restrict information-sharing not only within the contractor's organization, but also externally to suppliers and Government agencies. Sharing of information with the Government has become especially risky in light of the standing granted public employees to file independent *qui tam* actions, a standing which created a clear potential for significant conflicts of interest.<sup>21</sup> Finally, the Kovacic study noted that the FCA confronted "firms with distinctive costs that they do not incur in commercial markets," inhibiting entry into the Federal marketplace and possibly encouraging the exit of those already there.<sup>22</sup>

A Defense Systems Management College study of why firms are leaving the defense market also identified the highly adversarial climate between contractors and the DOD -- and the general lack of trust between these parties -- evidenced by the increased use of criminal and civil fraud as a regulatory mechanism, as a factor causing firms to leave the defense market.<sup>23</sup> Similarly, a defense industrial base study performed by the Center for Strategic and International Studies reported that one of the principal reasons firms refuse to do business with DOD is fear of crushing liability "for reporting errors or other perceived legal or regulatory abuses."<sup>24</sup>

Concern that the FCA as currently administered may impair other important contract administration and industrial base goals caused the Panel to focus its attention on three aspects of this statute:

- the functioning of *qui tam* procedures;
- the relation of the FCA to the Contract Disputes Act (CDA) process; and
- the level of penalties potentially assessable in FCA cases.

The Panel approached its review of these topics with caution and a keen appreciation that laws such as the FCA were enacted as protection against a universe of conduct extending far beyond defense procurement. The FCA is a law of general application that is routinely used throughout the Government in a host of non-defense areas. For example, the Act's *qui tam* procedures, which often attract notoriety when defense contractors are involved, are apparently being applied in significant numbers to health care programs and related fields. While the three topics outlined above clearly touch the defense acquisition process, the Panel is sensitive that its

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<sup>20</sup>William E. Kovacic, *The Citizen Whistleblower Suit as a Monitoring Device in Government Contracting*, unpublished paper presented to the Western Economic Association Annual Conference, Seattle WA, July, 3, 1991, at 15-20. (Cited with permission of the author).

<sup>21</sup>*Id.* at 21-34.

<sup>22</sup>*Id.* at 35.

<sup>23</sup>See generally the report of the DSMC Defense Industrial Base workshop on "Why Firms Are Leaving the Defense Market."

<sup>24</sup>CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, INTEGRATING COMMERCIAL AND MILITARY TECHNOLOGIES FOR NATIONAL STRENGTH 15 (March 1991).

review springs from a vantage point that is necessarily limited and, therefore, narrow. Consistent with its congressional mandate, the Panel has outlined on the following pages the rationale for several amendments that it believes would promote the best interests of DOD as those interests are affected by this statute. It does so in the hope that those recommendations will be balanced against larger policy objectives to ensure that the utility of this law is not adversely affected in non-defense situations.

### A. *Qui Tam* Procedures

The FCA creates a complex procedure for the initiation of a *qui tam* action. The *qui tam* plaintiff must bring the action in the name of the Government. The complaint, along with "written disclosure of substantially all material evidence and information the person possesses," must be served on the Government, which has at least 60 days to decide whether or not to take over the action.<sup>25</sup> A copy of the complaint must be filed *in camera* with the court and remain under seal for at least 60 days. The complaint may not be served on the defendant until the court so orders. In that event, the complaint is unsealed and served upon the defendant, who is given 20 days to respond.<sup>26</sup>

If the Government chooses to proceed with the action, it has the primary responsibility for prosecuting the action, although the *qui tam* plaintiff has the right to continue as a party.<sup>27</sup> The *qui tam* plaintiff still retains the right to receive from 15% to 25% of the recovery from the action or settlement of the claim.<sup>28</sup> If the Government declines to take over the action, "the person bringing the action shall have the right to conduct the action," and no person other than the Government may intervene or bring a related action based on the same underlying facts.<sup>29</sup> Moreover, if the Government declines to take over, the *qui tam* plaintiff is entitled to receive up to 30% of the proceeds recovered, along with attorneys' fees, expenses, and costs.<sup>30</sup>

There are some limits on who can be a *qui tam* plaintiff. Originally, in *United States ex. rel. Marcus v. Hess*, the FCA was interpreted to permit suit to be brought even by persons who learned of the essential allegations from a public source, including newspapers or Government documents. The 1986 Amendments narrowed the class of *qui tam* plaintiffs by barring actions based on information disclosed in suits to which the Government was already a party<sup>31</sup> or on information publicly disclosed in the course of Government hearings, audits or reports (unless the relator was the original source of the information disclosed).<sup>32</sup>

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<sup>25</sup>The government is entitled to extensions of time in which to make its decision. See 31 U.S.C. § 3730(b)(2).

<sup>26</sup>*Id.* §§ 3730(b)(1), (b)(2), (b)(3).

<sup>27</sup>*Id.* §§ 3730(b)(4), (c)(1).

<sup>28</sup>*Id.* § 3730(d)(1).

<sup>29</sup>*Id.* §§ 3730(b)(4), (b)(5).

<sup>30</sup>*Id.* § 3730(d)(2).

<sup>31</sup>*Id.* §§ 3730(e)(3)-(e)(4).

<sup>32</sup>*Id.* § 3730(e)(4).



Government,<sup>33</sup> the bar<sup>34</sup> and industry<sup>35</sup> raised a number of concerns about *qui tam* practice, including the following: <sup>36</sup>

- Limiting actions by Government employees;
- Tightening the prohibition against certain "parasitic" actions (i.e., those based on information generated by others);
- Tightening limitations on compensation to relators who had themselves acted culpably as to the events supporting an FCA action;
- Tightening requirements on information to be provided by relators to the Government upon filing of a *qui tam* suit; and
- Placing a ceiling on total compensation to a relator.

#### **Limiting actions by Government employees**

At the present time, Government employees from the President to a contract auditor can file a *qui tam* action based on official knowledge, so long as that knowledge qualifies as an "original source." That broad interpretation of FCA has, however, been the subject of controversy. At the moment, there is a split of authorities as to whether the FCA should in fact be construed to permit a Government employee to initiate a *qui tam* action based on knowledge obtained from his or her Government employment. In *United States ex rel. Leblanc v. Raytheon Co.*, 913 F.2d 17 (1990), the First Circuit affirmed a dismissal of a *qui tam* action, ruling that LeBlanc did not have independent knowledge of the information underlying the claim as required by the Section 3730 (e)(4). In *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (1991), on the other hand, the Eleventh Circuit held that a Government employee was not barred from bringing a *qui tam* action based on information he acquired in the course of his Government employment.

This issue has been a principal focus of the DOJ. As stated by Assistant Attorney General Stuart Gerson:

We simply must preclude: inherent conflicts of interest among federal employees that the potential of large *qui tam* rewards would create; the incentive for Government employees

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<sup>33</sup>The Panel solicited comments from a wide variety of Government agencies, which responded both formally and informally. The Panel received especially informative letters from the Department of Justice, dated September 25, 1992, the Inspector General of the Department of Defense, dated October 15, 1992, the Department of the Air Force dated September 29, 1992, and NASA dated September 22, 1992.

<sup>34</sup>See letters from the American Bar Association's Section of Public Contract Law ("ABA") dated July 2, 1990, March 17, 1992, April 8, 1992 and July 22, 1992.

<sup>35</sup>See letters from (i) the Council of Defense and Space Industry Associations ("CODSIA") dated August 24 and September 10, 1992 and related communications from General Dynamics and Sundstrand Corporation dated July 22 and September 28, 1992, respectively; (ii) Chamber of Commerce dated September 4, 1992; (iii) FMC Corporation dated September 28, 1992; (iv) Hughes Corporation dated September 24, 1992; (v) Litton Industries dated June 12, 1992 (enclosing an article entitled "False Claims Act Erosion of Effective Contract Dispute Resolution:") and September 23, 1992.

<sup>36</sup>The Panel pursuant to notices met on three occasions with interested persons to receive comments on standards of conduct. On each occasion, the False Claims Act and its *qui tam* provisions were principal topics of discussion.

assigned to investigations to understate the significance of the cases that they are working on in the hope that the Government will not follow up, leaving the way open for a *qui tam* case; morale problems in Government service among employees assigned to non-fraud investigations or smaller dollar value investigations; and the misallocation of Government resources through individual decisions by Government employees to spend official time on cases they hope could lead to potential personal recoveries rather than on other assigned duties.

We also must forestall any incentive for Government employees to misappropriate Government audits, investigative reports, and other documents that could provide the basis for personal *qui tam* suit before the case has been referred to the Department of Justice and before a considered decision can be made about whether the case warrants criminal, civil or administrative action.

These are not speculative concerns. . . .<sup>37</sup>

DOJ recommends that a person not be allowed to initiate a *qui tam* action based in any part upon information obtained from federal Government employment. This recommendation was carried over into S.2785, 102d Cong., 2d Sess. (introduced March 26, 1992), and is consistent with a recommendation by CODSIA on this point.<sup>38</sup>

#### **Tightening The Prohibition Against Certain Actions Based On Public Information**

As summarized above, the FCA (31 U.S.C. § 3730(e)(3) and (4)) prohibits some suits which result from publicly available information. DOJ noted that these provisions, which it referred to as a "parasitic suit bar," are in some cases inadequate, stating that:

... *qui tam* suits should not be permitted while there is an open Department of Justice or Inspector General investigation into the allegations.<sup>39</sup>

As further explained by the General Counsel of Hughes Corporation:

[When there is an open Government investigation] the relator brings nothing to these suits and should not be authorized -- or encouraged, as is the case with current law -- to dictate allocation

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<sup>37</sup>Gerson Statement at 9.

<sup>38</sup>See CODSIA letter dated August 24, 1992. The House Bill, H.R. 4563, 102d Cong., 2nd Sess., proposed a far less restrictive provision.

<sup>39</sup>Gerson Statement at 13-15.

of Government resources and litigation policy in such circumstances.<sup>40</sup>

### **Barring Actions Based On Voluntary Disclosures**

The DOD and DOJ have encouraged the development of an ethical culture within defense contractors, including voluntary compliance programs (e.g., DCAA's Contractor Risk Assessment Guide) and voluntary disclosures of situations in which there is reason to believe that a violation of law, regulation, or contract has occurred. Industry has responded positively to these initiatives by, among other things, promulgating its own Defense Industry Initiatives at the time of the Packard Commission Report. It has subsequently adopted enhanced compliance and ethics programs as well as voluntarily making a significant number of formal and informal disclosures.

FCA actions generally, and *qui tam* actions particularly, could undermine the objectives of such voluntary disclosure programs, if such actions can be based on information derived from the disclosure. In this regard, the DOD Inspector General commented:

We support the proposal to create a jurisdictional bar to *qui tam* lawsuits based on information obtained from or as a consequence of a submittal by a contractor for purposes of qualifying under or fulfilling a procuring agency's voluntary disclosure program. In our opinion, it would encourage more participation in the program and save participants from being exposed to expensive and time-consuming litigation.<sup>41</sup>

CODSIA has made a similar recommendation,<sup>42</sup> and other commenters have expressed a concern that the threat of FCA actions on matters which are disclosed voluntarily is a serious deterrent to voluntary disclosures.

### **Tightening Restrictions On Compensation To Culpable *Qui tam* Relators**

The False Claims Act allows a court to reduce a relator's compensation, if he or she planned or initiated the fraud.<sup>43</sup> This, however, leaves unaffected many others who may have been culpable -- those who, although not conceivers of a scheme, were active participants. DOJ has testified to Congress that

... We have several cases where the fraud is long-standing and the private person bringing the suit, while perhaps not planning or initiating the fraud, actively furthered it or delayed bringing it to the

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<sup>40</sup>Letter dated September 24, 1992, from John J. Higgins, Senior Vice President and General Counsel, Hughes Corporation, to Col. Susan McNeill, DSMC.

<sup>41</sup>Letter dated October 15, 1992, from Derek J. Vander Schaaf to Col. Susan McNeill, DSMC. DOJ also supports this position. See Gerson Statement at 15.

<sup>42</sup>See CODSIA letter dated August 27, 1992, *supra* note 35.

<sup>43</sup>31 U.S.C. § 3730(d)(3).

Government's attention, which had the effect of increasing the Government's loss and his potential *qui tam* reward.<sup>44</sup>

### **Tightening Requirements On Information To Be Provided By Relators**

As noted above, the FCA requires a *qui tam* relator to provide to DOJ information supporting his or her complaint at the time the complaint is first filed with the Court. However, in actual practice, it appears that a number of relators have filed largely "boilerplate" complaints and have not been able to substantiate the allegations made in the complaint in the information provided to DOJ. In testimony to Congress, DOJ has stated:

An uncomfortable number of the *qui tam* suits filed present no evidence, no information based on personal knowledge, or are "kitchen sink" complaints containing every conceivable broad allegation without any specific evidence whatsoever. In these cases, where no new evidence is presented, none of the policy justifications for diverting large amounts of money that would otherwise go to the Treasury are present.<sup>45</sup>

### **Limiting Compensation To Relators**

DOJ has asked Congress to cap the compensation payable to a relator:

While we are fully aware that certain commendable persons risk their incomes and professional lives to bring fraud to our attention, we continue to believe that there is some absolute amount of recovery, be it \$1 million or 5 million, beyond which no additional people will be encouraged to come forward. As the universe of filed cases increases, such caps may be appropriate.

### **B. Relationship of Civil Fraud Actions to the Contract Disputes Act**

The Contract Disputes Act (CDA) was enacted November 1, 1978,<sup>46</sup> implementing recommendations made by the Commission on Government Procurement in December 1972. These recommendations were reflected in Senate Report 95-1118, 95th Cong., 2d Sess. (August 15, 1978), which accompanied the CDA. The Report described the Act's purpose as follows:<sup>47</sup>

The Contract Disputes Act of 1978 provides a fair, balanced, and comprehensive statutory system of legal and administrative

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<sup>44</sup>Gerson Statement at 17-18.

<sup>45</sup>*Id.* at 18-19.

<sup>46</sup>Pub. L. 95-563.

<sup>47</sup>At 1; see also H.R. REP. NO. 1556, 95th Cong., 2d Sess. (9/8/78), which accompanied the CDA explained its purpose as follows (p. 5): "... to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to Government contracts."

remedies in resolving Government contract claims. The act's provisions help to induce resolution of more contract disputes by negotiation prior to litigation; equalize the bargaining power of the parties when a dispute exists; provide alternate forums suitable to handle the different types of disputes; and ensure fair and equitable treatment to contractors and Government agencies.

For contractor claims against the Government, the CDA process is initiated by the filing of a written claim with the contracting officer<sup>48</sup> and a final decision on that claim. If the claim is not allowed, the contractor has a right to appeal the contracting officer's final decision to the Court of Federal Claims (Claims Court)<sup>49</sup> or a board of contract appeals<sup>50</sup> for a de novo determination. CDA § 605(a) concludes with the following sentence:

... This section shall not authorize any agency head to settle, compromise, pay or otherwise adjust any claim involving fraud.

This provision has been interpreted by some Government agencies to preclude final decisions by a contracting officer if fraud is suspected or charged. Many private sector sources, including the American Bar Association (ABA) and CODSIA have expressed concern about the impact on processes under the CDA<sup>51</sup> when fraud is suspected or alleged.

Under the CDA, boards of contract appeals and the Claims Court have primary and exclusive jurisdiction over appeals of final contracting officer decisions on contract claims, with further appeal possible to the United States Court of Appeals for the Federal Circuit. This structure was intended to provide uniform, fair, and comparatively prompt resolution of such disputes. On the other hand, the district courts have jurisdiction over civil and criminal fraud actions. The Claims Court may hear fraud allegations, but only as counterclaims brought by the United States against an action initiated by a contractor.

Information publicly available on recent FCA cases indicates that many of them center on disputed interpretations or applications of procurement laws, regulations, and contract provisions. But for the allegations of fraud, many of these cases would present contract disputes for which a board of contract appeals or the Claims Court would have exclusive jurisdiction under the CDA.

This creates a tension between the dispute rights of the contractor and the interest of the United States (or a relator) in prosecuting fraud. As stated in a letter from the General Counsel of Litton Industries, Inc.:

From a Government contractor's standpoint, one of the primary concerns I have had over the years is the apparent erosion of the

<sup>48</sup>41 U.S.C. § 605(c) contemplates that claims over \$50,000 will be certified.

<sup>49</sup>41 U.S.C. § 609(a) as amended to substitute the United States Claims Court for its predecessor, the United States Court of Claims.

<sup>50</sup>41 U.S.C. § 606.

<sup>51</sup>41 U.S.C. §§ 601 *et seq.*

effectiveness of the disputes mechanism provided for in Government contracts through the CDA. Under the present state of the law, a mere allegation by either the Government or its *qui tam* relator that the contract dispute involves fraud is enough to remove the dispute resolution from the contractually bargained for disputes resolution forum and place that dispute before a Federal District Court. This action is contrary to the expectation of the parties, which is that all contract disputes and all contract claims will be resolved through specialized fora.<sup>52</sup>

Two proposals for reconciling the tension between the CDA and the FCA were considered by the Panel:<sup>53</sup>

- **Permit transfer of cases from the boards of contract appeals to the claims court when fraud is alleged.** The Claims Court has jurisdiction over fraud counterclaims, while the boards of contract appeals do not. As a result, if fraud is suspected in a dispute pending in the Claims Court under the CDA, the allegations of fraud can be resolved by the Claims Court in a single proceeding. On the other hand, where fraud is suspected in a board proceeding, either that proceeding must be stayed pending resolution of the fraud issue in a district court or the fraud issue can be resolved in a three-step procedure. The board first renders judgment on the contract claim, the Government then refuses to pay any adverse judgment, and the contractor is forced to sue on the judgment in the Claims Court – at which point fraud counterclaims are alleged and resolved.<sup>54</sup> A number of commenters suggested that the CDA be amended to permit boards of contract appeals to transfer pending disputes to the Claims Court to allow all issues relating to the claim and to the alleged fraud to be resolved in one proceeding.
- **Permit the CDA process to go forward without a contracting officer's final decision if the contracting officer lacks authority to issue a decision because of a pending allegation of fraud.** On July 2, 1990, the ABA's Section of Public Contract Law wrote to the FAR Secretariat about concerns over "the jurisdictional overlap of the Contract

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<sup>52</sup>Letter of September 23, 1992, from Norman L. Roberts to Robert B. Wallick, Steptoe & Johnson. A similar statement was made by the General Counsel of Hughes Corporation. See letter of September 24, 1992, from John J. Higgins to Col. Susan McNeill, DSMC.

<sup>53</sup>The Panel also considered the suggestion that the boards of contract appeals be authorized by statute to receive from the district courts and resolve questions concerning government contract law. Commenters suggested that situations arise in fraud actions in the district courts when the expertise of a board of contract appeals or of the Claims Court could materially advance the conclusion of the fraud action. For example, in *United States v. General Dynamics Corporation*, No. CR 85-1 123-FFF (C. D. Cal.), an issue arose as to the meaning of the contract document and the District Court attempted to refer questions concerning the meaning of that document to the ASBCA. The ASBCA, however, concluded it did not have authority under the CDA or under its charter to act on such a reference. See *Appeal of General Dynamics Corp.*, 87-1 BCA ¶ 19,607. Creation of a certified question procedure would appear to be possible without statutory amendment by changing the charter of a board. Following review, the Panel did not adopt the suggestion to create such jurisdiction by statute.

<sup>54</sup>In the Claims Court, the Government may also seek forfeiture of the contract claim under 28 U.S.C. § 2514

Disputes Act and the False Claims Act...,<sup>55</sup> explaining that it perceived a very disturbing trend.<sup>56</sup>

...when suspicions or allegations [of fraud] by the Government or a *qui tam* relator are grounded in disputed interpretations or applications of acquisition statutes, regulations, contract provisions, custom and practice or course of dealing between the contracting parties. Many of the contract disputes involving these issues which could be resolved under the CDA<sup>[57]</sup> are being framed as FCA issues and being decided by judges and juries in U.S. District Courts. The result will be a very damaging loss of predictability in the procurement programs<sup>[58]</sup> plus loss of the benefit of the expertise which exists in the CDA resolution and adjudication process.

On August 22, 1990, the Civil Division of DOJ responded to and sharply differed with that view. Many of these points were repeated in a letter to the Panel in which DOJ reiterated its opposition to any proposal which made stays mandatory rather than discretionary because this would result in "fragmented litigation over fraud and non-fraud contract disputes."<sup>59</sup> The DOJ argued for its own legislative proposal, which had the objective of consolidating fraud and non-fraud claims in a single forum. That proposal would:

(1) require mandatory stays of board proceedings during the pendency of a related fraud investigation upon application by the Attorney General; and (2) upon the Government's request, require the Claims Court to remove any contract dispute from the board to that Court so that the fraud and contract issues may be litigated in one forum.<sup>60</sup>

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<sup>55</sup>The ABA's concerns were repeated in 1992 letters to the Panel, and are reflected in CODSIA's comments. During hearings on February 5 and 6, 1986 on False Claims Act Amendments before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 99th Cong., 2nd Sess., the potential overlap between the CDA and the FCA was addressed in a discussion by Congressman Kindness and Asst. Atty General Willard, at 161-162.

<sup>56</sup>ABA letter, at 1-2.

<sup>57</sup>The ABA letter, in a footnote 1, explained at this point that "The Contract Disputes Act is a remedy available to prime contractors (and prime contractors acting for subcontractors). The False Claims Act may be invoked against persons with whom the government does not have privity of contract. In those situations, there would be no jurisdictional overlap between the two Acts."

<sup>58</sup>In a footnote 2 the ABA letter further explained that, "Often a *qui tam* action challenges an interpretation or practice that has been established for a considerable period and is continuing. Moreover, the same interpretation or practice may be broadly followed among other contractors. Loss of predictability -- and the uncertainties of a protracted *qui tam* litigation -- is harmful to the procurement process and its contractors under those circumstances."

<sup>59</sup>Letter from Stuart E. Schiffer, Deputy Assistant Attorney General, U.S. Dep't of Justice, to Donald M. Freedman, Executive Secretary, Acquisition Law Advisory Panel, September 25, 1992, at 3.

<sup>60</sup>*Id.*, at 4.

### C. The potential for excessive FCA penalties

Under 31 U.S.C. § 3729(a), a person who submits a false claim

... is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that-

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days...;

(B) such person fully cooperated...; and

(C) at the time such person furnished the United States with the information ..., no criminal prosecution, civil action, or administrative action had commenced,

the court may assess not less than 2 times the amount of damages. .

FCA plaintiffs frequently argue that a \$10,000 penalty is triggered by virtually every incorrect document made by a defendant, whether or not the document was ever submitted to the Government as part of a payment request -- for example: in the case of incorrect charging for direct labor costs, for each time card; or in the case of an incorrect overhead rate, for each invoice, billing, or proposal which incorporates the rate; or for an incorrect application of a specification requirement, to each and every internal or external document premised upon that interpretation. Such interpretations can potentially result in unconscionable penalty assessments -- in the hundreds of millions and even the billions of dollars. These penalties can be disproportionate to any possible harm involved and can threaten a contractor's survival.

#### 6.1.4. Recommendations and Justification

##### *Qui tam* Procedures

##### I

##### **Prohibit *Qui tam* Suits Based On Information Obtained by the Relator in the Course or Scope of Official Government Duties or Employment**

The Panel agrees with the concerns expressed by DOJ, the Inspector General of DOD, and industry that permitting *qui tam* suits by present or former Government employees undermines the proper administration of the law. Additionally, it may contribute to potential conflicts of interest between Government employees and the interest of a Government agency in carrying out its



programs and responsibilities. Accordingly, the Panel recommends an amendment to 31 U.S.C. § 3730(e) to add a new subsection (5), as follows:<sup>61</sup>

(5) No court shall have jurisdiction over an action under subsection (b) that is based, in whole or in part, upon information obtained in the performance of Federal Government employment.

## II

### Tighten The Prohibition Against Parasitic Suits

The Panel found persuasive the argument of DOJ and various industry commenters that *qui tam* suits should not be permitted where they are founded on information generated during the course of an ongoing Government audit or investigation. In such cases, the *qui tam* relator adds nothing of value to the enforcement of federal law and complicates the process of litigation. In addition, the Panel believes that relators claiming independent knowledge of events that have been the subject of an audit, investigation, hearing, litigation, or report, should be required to make full disclosure to the Government of substantially all information supporting a proposed *qui tam* action as a condition of permitting suit. This requirement, in substantially the same language as § 3730(b)(2), will ensure that the relator actually is an original source. Accordingly, the Panel recommends an amendment to 31 U.S.C. § 3730(e)(4) as follows:

(4)(A) No court shall have jurisdiction over an action under this section based upon (i) the ~~public~~-disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [*sic*] Accounting Office report, hearing, audit, or investigation, or from the news media, (ii) any document created by the federal Government, (iii) facts in the possession of the Department of Justice, or (iv) matters which are or have been the subject of any investigation or audit by or on behalf of the federal Government, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which material allegations to be made in any action brought under this section are based and has voluntarily provided the substantially all evidence and information supporting such allegations to the Government before filing an action under this section which is based on such allegations ~~the information~~.

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<sup>61</sup>The Department of Justice suggested that it might be desirable to provide an award "to encourage federal employees who learn of fraud in the course of their employment to live up to their responsibilities to report fraud". Gerson Statement at 11. The Panel concluded that this objective could be achieved using existing award systems.

### III

#### Prohibit *Qui tam* Actions Based On Voluntary Disclosures

The Panel believes that permitting *qui tam* actions to be based on information contained in a voluntary disclosure or information generated during the process of preparing such a disclosure should not be allowed as the basis for a *quit tam* action. Any other rule would seriously undermine the effectiveness of voluntary disclosure programs that have proven to be an effective tool for promoting contractor self-governance. Accordingly, the Panel recommends amending 31 U.S.C. § 3730(e) to add a new subsection (6), as follows:

(6) No court shall have jurisdiction over an action under subsection (b) of this section that is based in material part upon information obtained from or as a consequence of the preparation or submittal by a contractor for purposes of a voluntary disclosure under a Government voluntary disclosure program.

### IV

#### Limiting Compensation To Culpable Defendants

The FCA does not today permit a court to reduce the compensation due a relator who has played an important role in a fraud, but was not an originator of the fraud. The Panel believes that the Court should have discretion in setting fees to consider the culpability of the relator and reduce the fee if the court finds the relator to be seeking to profit by his or her own wrongdoing. Accordingly, the Panel recommends an amendment to 31 U.S.C. § 3730(d) by adding a new subsection (5), as follows:

(5) A court may reduce or eliminate the compensation which would otherwise be due a relator under this subsection (d) if the relator actively furthered the violations which are the subject of an action brought under subsection (b). A court may reduce or eliminate compensation which would otherwise be due a relator under this subsection (d) if the relator has failed promptly to bring violations to the Government's attention after the relator was aware of facts establishing such violations.

#### Other

The Panel does not believe that a case has been made for an absolute limit on the compensation due a relator. Under the FCA, the maximum amount that can be paid to a relator is 30% of the judgment.<sup>62</sup> While such sums may be large absolutely, they are not out of line with contingent fees typically charged in other complex cases, such as civil antitrust or security fraud actions. Moreover, as the DOJ's own statistics show, fees awarded to relators to date have been

<sup>62</sup>See 31 U.S.C. § 3730(d).

approximately 10% of amounts recovered. In the absence of repeated specific instances of abuse, no change seems warranted at this time.

Similarly, the Panel does not believe that statutory amendment to combat frivolous suits -- beyond that stated under Recommendation II above -- is required. Rule 9(b) of the Federal Rules of Civil Procedure requires allegations sounding in fraud to be stated with particularity. Where a "kitchen sink" complaint has been filed, it should be subject to dismissal under Rule 9. Similarly, DOJ has the authority to dismiss a frivolous action under 31 U.S.C. § 3730(c)(2)(A).<sup>63</sup> In addition, under the proposed amendment to § 3730(e)(4), a suit may also be dismissed if a relator has failed to substantiate that he or she is an "original source" by providing evidence and information supporting the material allegations of the proposed suit. If a complaint is "boilerplate" because it is in fact based only on the hope that an ongoing investigation will produce information from which the relator can profit, the proposed language should raise a bar.

### **Contract Disputes Act Amendments**

#### **V**

#### **Permit Disputes To Be Processed In The Absence Of A Contracting Officer's Final Decision Within The Discretion Of A Board Or The Claims Court**

Although the Panel heard conflicting views on whether boards of contract appeals should be allowed to go forward while allegations of fraud have been made, the Panel believes that a fundamental purpose of the CDA -- to provide a fair and balanced process for resolving disputes -- should not be overturned lightly.

First, the CDA dispute system is an integral part of every DOD contract. As discussed above, the CDA was intended to "equalize the bargaining power of the parties" to a Government contract and to "ensure fair and equitable treatment to contractors" as well as Government agencies.<sup>64</sup> Accordingly, absent compelling circumstances, contractors are entitled to the benefits of that Act. Second, like other citizens, the overwhelming majority of Government and contractor personnel and organizations are honest, competent, and well intentioned, and systems should not be designed on the presumption that contractors are otherwise. Third, the Panel was informed that one of the principal barriers to commercial-military integration is the fear among civilian companies of incurring enormous penalties -- or at least enormous attorneys fees -- for honest mistakes in performing a Government contract. Stripping companies of normal contractual remedies upon the hint of fraud would merely reinforce that fear. While suspicions of fraud may ultimately be cleared, that event may not occur until after a considerable passage of time, with consequent financial and other penalties to the contractor. On the other hand, the punishment of fraud is obviously important to the overall integrity of DOD procurement.

Under current law, when a matter is pending in a board of contract appeals (or the Claims Court) on appeal from a contracting officer's decision, the question of whether to proceed with

<sup>63</sup>See, e.g., *Julliano v. Federal Asset Disposition Ass'n*, 736 F. Supp. 348 (D.D.C. 1990).

<sup>64</sup>S. REP. NO. 118, 95th Cong., 2d Sess. 1 (1978).

the contract action is determined by the board (or the Court) after balancing the strength of the Government's (or relator's) fraud case, and any prejudice that may arise to the Government's criminal case through discovery in the board action, against the prejudice of delay to the contractor. The boards and the Court are capable of striking an appropriate balance between the need for effective fraud prosecution and the contractor's right to speedy dispute resolution: they should be trusted to achieve a fair and equitable result.<sup>65</sup>

Today, however, there is confusion as to whether a board or the Court may proceed with the processing of a claim when the contracting officer has refused to issue a final decision because of the pendency of an allegation of fraud. Even though CDA § 605(c) provides a statutory process for allowing a contractor to seek a final decision -- or to proceed without one when a decision is tardy or refused -- section 605(a) is interpreted by many contracting officers to preclude the rendering of a final decision where there are outstanding allegations of fraud and the Government has reportedly argued in some cases that such a refusal does not trip the provisions of § 605(c). The Panel believes that the CDA should be amended to clarify that the process for obtaining or bypassing the contracting officer's decision contained in CDA § 605(c) is available even when fraud is suspected or alleged. Therefore, the Panel recommends that § 605(c) be amended as follows:

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required, including refusal by the contracting officer to issue a decision on a claim because of a suspicion or allegation of fraud, will, notwithstanding the provisions of subsection (a), be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

## VI

### **Amend the CDA to Permit Transfer to the Claims Court and to Permit Claims to be Heard as Counterclaims in District Courts**

As discussed above, current law regarding the jurisdiction of the boards of contract appeals and the federal district courts offers no single forum which can resolve both contractor claims against the Government and fraud claims against the contractor when fraud is suspected in the claim itself or in the contract upon which the claim is founded. By contrast, when a contractor claim is pending in the Claims Court, that Court can resolve that claim and any related

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<sup>65</sup>DOJ has commented negatively on the outcome of board consideration of its stay motions, but has not cited any support other than one decision of the Transportation Board of Contract Appeals, which does not appear to reflect the settled law in other boards or the Claims Court.

claims of fraud in the same proceeding. The Panel believes that coordination of the litigation of board cases and related fraud allegations -- which today can only be achieved through stays of one or the other proceeding -- should be facilitated by two procedural amendments to the CDA: first, the boards should be given authority to transfer a pending appeal to the Claims Court; and, second, the exclusive jurisdiction of the boards should be broadened to permit trial of a board matter as a counterclaim in a district court fraud action.

It is the Panel's belief that the first remedy should be available when there is a pending claim in a board and should be discretionary with the board. Since a transfer to the Claims Court would defeat the contractor's right to choose a forum to hear its claim, transfer should be used only when sought by the contractor or the board finds that the efficiency of a single proceeding in the Claims Court outweighs the contractor's interest in having the board decide the claim. Implementation of this recommendation requires adding a new subsection (j) to 41 U.S.C. § 607:

**(j) Transfer to the Court of Federal Claims**

In order to provide a complete remedy in a single forum, when a board is advised that a pending appeal may be tainted by fraud or that fraud may taint the contract under which a pending appeal is brought, upon the motion of either party, a board of contract appeals in its discretion may transfer an appeal to the United States Court of Federal Claims. All pleadings in the appeal shall be transferred to the Court of Federal Claims and shall be deemed to have been filed in that Court as of the date such pleadings were filed in the board. The Court of Federal Claims shall be bound by, and shall not reopen, any decision of the board rendered in the matter being transferred except for good cause shown.

The second remedy is to be used when a fraud claim is filed in a district court and the facts of that claim overlap substantially with the facts of a contractor's claim, so that efficiency would be served by a single trial of both matters. In such circumstances, the contractor should be allowed to file its claim as a counterclaim in the district court if a counterclaim is otherwise permissible under the Federal Rules of Civil Procedure. Implementation of this recommendation requires the following amendment to 41 U.S.C. § 606:

**[41 U.S.C. §] 606. Contractor's right of appeal to board of contract appeals**

**(a)** Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

**(b)(1)** If an action for fraud or false claims has been filed against the contractor by the United States in a federal district court and a

claim asserted by the contractor under a contract would constitute a mandatory or permissive counterclaim in the district court, a contractor may, within ninety days from the date of receipt of a contracting officer's final decision under section 605, appeal such decision by bringing a counterclaim in the district court. If an appeal on such claim is already pending in a board of contract appeals, the contractor may within the time for filing counterclaims in the district court action withdraw its board action and refile its appeal as a counterclaim in the federal district court.

(2) The right of appeal created in this subsection is in addition to the right created in subsection (a).

(3) In the event that a contracting officer refuses to issue a final decision under section 605 because of the pendency of a fraud or false claims action or investigation, then within 90 days of such refusal, the contractor may proceed under paragraph (1) without obtaining such decision.

### **Excessive FCA Damages**

## **VII**

### **Amend the FCA to Avoid Unreasonable Penalties**

As discussed above, there is dispute as to what constitutes a "claim" for the purpose of assessing a penalty under the FCA. As the Supreme Court has written, "[t]he legislative history of the Act offers little guidance on how properly to determine the number of forfeitures." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). While *Bornstein* equated the number of penalties with the number of prohibited acts committed by the defendant, which was less than the number of false documents submitted to the Government, it did not purport to finally resolve the definition of "claim." Moreover, the history of the 1986 amendments suggests that Congress intended to penalize each invoice submitted under a contract obtained by fraud and perhaps each false entry in each invoice.<sup>66</sup> Nonetheless, that history also shows that Congress' main concern was to ensure that there would be some substantial penalty for fraud even where there were no actual damages and that Congress never contemplated the situation in which truly ruinous damages would be imposed on a contractor who was also being taxed with significant treble damages.<sup>67</sup>

However a claim is defined, it is clear that the number of claims -- and hence the number of potential penalties -- bears no necessary relationship to the amount of damages suffered by the Government. This is particularly so in Government contracting. For example, when the basis of an FCA suit is an error in an overhead account, each invoice submitted by a contractor under every open contract can be classified as a "false claim," which the result is that potentially hundreds of contracts, thousands of claims, and millions of dollars may be in issue even though

<sup>66</sup>See S. REP. NO. 99-562, *supra* note 12, at 9-10, 1986 U.S.C.C.A.N. at 5274-75.

<sup>67</sup>See *id.* at 17, 1986 U.S.C.C.A.N. at 5282.

actual damages are far less. While the Supreme Court has ruled that Congress may create an action seeking damages totally unrelated to actual harm as a "civil" matter, it has also noted that there is a potential for great disproportionality between actual damages and a potential FCA judgment, a disparity which can in fact amount to criminal punishment.<sup>68</sup> See *United States v. Halper*, 490 U.S. 435, 446-51 (1989).<sup>69</sup>

While the United States should recover fully for any damages it may suffer because of a false claim, the treble damages provisions of the FCA are intended to ensure such recovery.<sup>70</sup> The penalty provisions are intended to deter fraudulent conduct, especially when actual damages would be nominal. Where actual damages are not nominal, the trebling of those damages deters as well as compensates, with the result that deterrence is multiplied without any consideration of the impact of such multiplied deterrence -- and the fear of potentially enormous financial risk -- on contractors who are essential to the industrial base. Based on evidence presented to the Panel, the Panel believes that the fear of ruinous liability for innocent errors or even culpable mistakes of a single or small group of employees is causing companies to leave (or consider leaving) defense contracting and is deterring successful commercial contractors from entering the defense market.

As discussed at length in Chapter 8 of this Report, deterrence of entry into the defense market is at cross-purposes with efforts within DOD to reduce the barriers to commercial-military integration in order to protect and foster an adequate industrial base during the current defense build-down. Because of this effect, and the fact that Congress in 1986 did not appear to foresee the potential for crushing liability created by the enhanced FCA penalty provisions, the Panel recommends an amendment to the FCA permitting a court to scale down civil penalties that are disproportionate or excessive. In this regard, the Panel also notes that the FCA has a higher penalty structure than that used in other enforcement regimes in which a high premium is placed on deterring wrongful conduct, such as securities fraud (single damages, no penalties), price-fixing (treble damages, no penalties), or racketeering (treble damages, no penalties). Why Government contractors should face stiffer penalties than those who fix prices or commit racketeering through murder and arson for profit is not explained in the FCA's legislative history.

In order to promote commercial-military integration, therefore, the Panel recommends that 31 U.S.C. § 3729(a) be amended to permit courts to limit the total penalties that may be assessed when the total authorized statutory recovery would be disproportionate to actual damages suffered by the Government,<sup>71</sup> by adding a new subparagraph, as follows:

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<sup>68</sup> In extreme cases, FCA penalties might also violate the excessive fines clause of the Constitution. See generally Note *supra* note 2, at 1089-92.

<sup>69</sup> In *Halper*, actual damages were found by the district court to be \$585. The United States sought penalties of \$130,000. See 490 U.S. at 435. Today, the penalties in the *Halper* situation would be \$325,000 to \$650,000.

<sup>70</sup> See *United States v. Halper*, 490 U.S. 435, 444 (1989), citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943).

<sup>71</sup> The Panel intends that this proportionality rule apply only to the statutory penalties and not to a court's power to award double or treble actual damages.

**[31 U.S.C. §] 3729. False claims**

**(a) Liability for certain acts.--Any person who--**

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

\*\*\*

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person; provided, however, (i) a court may reduce the civil penalties authorized under this section if and to the extent that actual damages exceed a nominal amount and the court finds the aggregated amount of such penalties is disproportionate or excessive given the actual damages suffered by the United States or (ii) except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person.

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

**(b) Knowing and knowingly defined.-- \* \* \* \***



### 6.3.1.5 Relationship to Objectives

These recommendations are consistent with the Panel's objectives concerning acquisition laws which promote financial and ethical integrity in ways that are not unduly burdensome but which also permit sound procurement practices. They are also consistent with the Panel's objectives concerning the expeditious and fair resolution of contract disputes as well as those concerning the reduction of barriers to commercial-military integration.

### 6.3.1.6 Proposed Statute

#### [31 U.S.C. §] 3729. False claims

(a) **Liability for certain acts.**--Any person who [violates the Act] \*\*\* is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person; provided, however, (i) a court may reduce the civil penalties authorized under this section if and to the extent that actual damages exceed a nominal amount and the court finds the aggregated amount of such penalties is disproportionate or excessive given the actual damages suffered by the United States or (ii) except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person.

A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.**-- \* \* \* \*

#### [31 U.S.C. §] 3730. Civil actions for false claims

(a) **Responsibilities of the attorney general.**--\* \* \* .

(b) **Actions by private persons.**--\* \* \* .

(c) **Rights of the parties to *Qui tam* actions.**--\* \* \* .

(d) **Award to *Qui tam* plaintiff.**--(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially

contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(5) A court may reduce or eliminate the compensation which would otherwise be due a relator under this subsection (d) if the relator actively furthered the violations which are the subject of an action brought under subsection (b). A court may also reduce or eliminate compensation which would otherwise be due a relator under this subsection (d) if the relator has failed promptly to bring violations to the Government's attention after the relator was aware of facts establishing such violations.

**(e) Certain actions barred.--**(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the

action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section [sic] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon (i) the public-disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, (ii) any document created by the federal Government, (iii) facts in the possession of the Department of Justice; or (iv) matters which are or have been the subject of any investigation or audit by or on behalf of the federal Government, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which material allegations to be made in any action brought under this section are based and has voluntarily provided the substantially all evidence and information supporting such allegations to the Government before filing an action under this section which is based on such allegations the information.

(5) No court shall have jurisdiction over an action under subsection (b) that is based, in whole or in part, upon information obtained in the performance of Federal Government employment.

(6) No court shall have jurisdiction over an action under subsection (b) of this section that is based in material part upon information obtained from or as a consequence of the preparation or submittal by a contractor for purposes of a voluntary disclosure under a Government voluntary disclosure program.

(f) Government not liable for certain expenses.--\* \* \*

(g) Fees and expenses to prevailing defendant.--\* \* \*

(h) \* \* \*

[41 U.S.C. §] 605. Decision by contracting officer --\* \* \*

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required, including refusal by the contracting officer to issue a decision on a claim because of a suspicion or allegation of fraud, will, notwithstanding the provisions of subsection (a), be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

**[41 U.S.C. §] 606. Contractor's right of appeal to board of contract appeals**

(a) Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

(b)(1) If an action for fraud or false claims has been filed against the contractor by the United States in a federal district court and a claim asserted by the contractor under a contract would constitute a mandatory or permissive counterclaim in the district court, a contractor may within ninety days from the date of receipt of a contracting officer's final decision under section 605 appeal such decision by bringing a counterclaim in the district court. If an appeal on such claim is already pending in a board of contract appeals, the contractor may within the time for filing counterclaims in the district court action withdraw its board action and refile its appeal as a counterclaim in the federal district court.

(2) The right of appeal created in this subsection is in addition to the right created in subsection (a).

(3) In the event that a contracting officer refuses to issue a final decision under section 605 because of the pendency of a fraud or false claims action or investigation, then within 90 days of such refusal, the contractor may proceed under paragraph (1) without obtaining such decision.

**[41 U.S.C. § ] 607. Agency boards of contracts appeals**

**(a) Establishment; consultation; Tennessee Valley Authority**

\* \* \*

**(b) Appointment of members; chairman; compensation**

\* \* \*

**(c) Appeals; inter-agency arrangements**

\* \* \*

**(d) Jurisdiction**

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

**(e) Decisions**

\* \* \*

**(f) Accelerated appeal disposition**

\* \* \*

**(g) Review**

\* \* \*

**(h) Procedural guidelines**

\* \* \*

**(i) Proceeding when fraud is alleged**

If fraud is suspected or alleged in connection with a claim for which an appeal is pending before the United States Court of Federal Claims or board of contract appeals, the Court or board may in its discretion proceed with the processing of the claim even if the contracting officer refuses to render a final decision.

**(j) Transfer to the Court of Federal Claims**

In order to provide a complete remedy in a single forum, when a board is advised that a pending appeal may be tainted by fraud or that fraud may taint the contract under which a pending appeal is brought, upon the motion of either party, a board of contract appeals in its discretion may transfer an appeal to the United States Court of Federal Claims. All pleadings in the appeal shall be transferred to the Court of Federal Claims and shall be deemed to have been filed in that Court as of the date such pleadings were filed in the board. The Court of Federal Claims shall be bound by, and shall not reopen, any decision of the board rendered in the matter being transferred except for good cause shown.

## **6.3.2. 31 U.S.C. §§ 3801 - 12**

### **Administrative Remedies for False Claims and Statements**

#### **6.3.2.1. Summary of the Law**

The Program Fraud Civil Remedies Act of 1986 provides the United States with an administrative remedy for false claims and statements and with a process for the collection of penalties for fraud or false statements of \$150,000 or less.

Section 3802 establishes a civil penalty of not more than \$5,000 for each false claim, statement, or omission of material fact which would amount to a false claim or statement. In the case of false claims, that section also provides for an assessment of not more than twice the amount of the false claim.

Section 3803 sets up a three-part procedure of investigation, determination, and administrative hearing prior to a finding of liability. That section also provides that notice of the agency's intention to refer the allegation for hearing be given to the Attorney General and permits administrative review in accordance with the statute.

Section 3804 provides that the official investigating the allegations be vested with documentary subpoena power and that the "presiding" (hearing) officers have the power to subpoena testimony and documents. This section also gives district courts jurisdiction to issue an enforcement order for any subpoena, buttressed by the potential sanction of contempt of court.

Section 3805 provides for judicial review in accordance with the statute, and section 3806 sets out procedures for the collection of civil penalties and assessments.

Section 3808 provides a statute of limitations of six years after the claim or statement was made, or three years to begin enforcement action on a penalty.

#### **6.3.2.2. Background of the Law**

The Program Fraud Civil Remedies Act was established as a new chapter to Title 37 of the U.S. Code in 1986 through the Budget Reconciliation Act of that year.<sup>1</sup> The enunciated purpose of the statute was to provide an administrative remedy for Federal agencies experiencing such problems and to provide due process protections to those subject to such administrative remedies.<sup>2</sup>

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<sup>1</sup>Pub. L. No. 99-509, § 6103, 100 Stat. 1934, (1986).

<sup>2</sup>*Id.*

### **6.3.2.3. Law in Practice**

This statute has been implemented in DOD Directive 5505.5, dated August 30, 1988, and through regulations of the various services.<sup>3</sup>

A September, 1991 GAO report studied the implementation of the Act in eight Federal agencies. The GAO found that as of September 30, 1990, seven of those agencies had referred a total of 41 cases to the Department of Justice for approval of administrative action.<sup>4</sup> Thirty-nine of these cases had been approved as of May 31, 1991, resulting in resolution in the total amount of \$327,604.<sup>5</sup> As of the date of the report, DOD had resolved only one case out of 105 reviewed and 15 referrals.<sup>6</sup> A recent inquiry to the DOD Inspector General's Office indicated that, as of December 21, 1992, no further DOD cases have been resolved.<sup>7</sup>

The GAO report provided a survey of reasons for what it perceived was a failure to use administrative remedies under the Act more frequently. Many of the responses referred to the cumbersome, time consuming and costly nature of the Act's procedures in relationship to the amount which could be recovered.<sup>8</sup>

### **6.3.2.4. Recommendation and Justification**

#### **No Action**

Because this statute was not implemented in all of the services until fairly recently, the Panel felt that there is insufficient experience with the entire process to be able to critically evaluate how it functions. There have been no hearings under the statute in DOD, and in only one case has DOD collected penalties. For those reasons, no action is recommended.

### **6.3.2.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement without being unduly burdensome.

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<sup>3</sup>See, e.g., Air Force Regulation 123-2.

<sup>4</sup>PROGRAM FRAUD: IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986, GAO/AFMD-91-73, Sept. 13, 1991.

<sup>5</sup>*Id.* at 6.

<sup>6</sup>*Id.*

<sup>7</sup>Telephone interview with David Stuart, Office of the DOD IG (December 21, 1992).

<sup>8</sup>PROGRAM FRAUD: IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986, GAO/AFMD-91-73 18-19, Sept. 13, 1991.

### 6.3.3. 41 U.S.C. § 604

#### Fraudulent claims

##### 6.3.3.1. Summary of the Law

This statute is a section of the Contract Disputes Act.<sup>1</sup> It dictates that if it is determined that, due to a misrepresentation of fact or fraud, a contractor is unable to support any part of a claim, the contractor will be liable to the Government for an amount equal to that part which is unsupported in addition to all of the costs of reviewing that part of the claim. A contractor is liable under this section for six years from the misrepresentation of fact or fraud.

##### 6.3.3.2. Background of the Law

This section was made part of the Contract Disputes Act to discourage the practice of "horse-trading," whereby a claim is inflated and submitted as a negotiating tactic.<sup>2</sup> The statute was also meant to be separate from, and used in concert with, other remedies such as those provided by the False Claims Act.<sup>3</sup>

##### 6.3.3.3. Law in Practice

This statute has been implemented in FAR 33.209, which requires the contracting officer to refer evidence that any part of a claim is unsupported due to fraud to the agency official responsible for fraud investigations.

Questions have arisen whether the contracting officer has the authority to issue a final decision concerning a contractor's liability under this statute and whether the boards of contract appeals have jurisdiction over disputes concerning enforcement of this statute. While there have been differing board decisions on the issue, one of the most recent cases decided by the Department of Transportation Contract Appeals Board held that the legislative history indicated that the Congress did not intend the board to be totally devoid of jurisdiction in this area, and that although the board may not have jurisdiction to decide whether fraud occurred, it may have jurisdiction to consider issues that are related to, but are actually separate from, fraud issues pending in a concurrent FCA proceeding.<sup>4</sup> The effect of fraud proceedings on CDA jurisdiction is explored at greater length in the discussion of the FCA at Chapter 6.3.1. The Panel makes no recommendation to amend 41 U.S.C. § 604.

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<sup>1</sup>Contract Disputes Act of 1978, Pub. L. No. 95-563, § 5, 92 Stat. 2384, (1978).

<sup>2</sup>S. REP. NO. 1118, 95th Cong. 2d Sess. 20 (1978).

<sup>3</sup>*Id.*

<sup>4</sup>See *TDC Management Corp.*, 90 BCA 22,627 (DOTBCA 1990).



#### **6.3.3.4. Recommendation and Justification**

##### **Retain**

This statute should be retained as it affords the Government an additional administrative remedy to recover the costs of unsupportable claims or portions of claims, as well as an avenue to recover the costs of their review.

#### **6.3.3.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement without being unduly burdensome.

## **6.4. Ethics**

### **6.4.0. Introduction**

Few topics have drawn more persistent attention during the past decade than the laws prescribing the ethical conduct of those engaged in acquisition. Defense contracting has long been prominent in public attention if only for its enormity. More recently conflicts of interest, of any sort and suspected at any level of American government, have come to merit headlines. Whenever these themes have crossed, the ethical conduct of defense procurement officials has become the lightning rod for extraordinary attention, frequently unwarranted suspicion, and a number of ill-starred efforts to enact corrective legislation.

The Panel's review of this topic is not original. It follows in the path of studies pursued in far greater detail by ethics commissions and procurement commissions over several decades; by a host of public and private organizations that contributed to the development of major ethics reform legislation enacted in 1962, 1978, and 1989; and by a long series of independent studies and congressional reviews.

The most recent comprehensive study was conducted by the President's Commission on Federal Ethics Law Reform, whose 1989 report<sup>1</sup> became the foundation for the Ethics Reform Act of the same year. That 1989 Act made a multitude of thoughtful changes to the principal body of federal ethics laws contained in 18 U.S.C. Sections 201-209, and has been applauded for harmonizing those sections into an effective and understandable set of rules. In passing the 1989 Act, however, Congress stopped short of adopting several recommendations that would have repealed a number of procurement-related ethics statutes. Instead, after a period of suspension that did not yield agreement on appropriate changes, those provisions have returned to effect and were a major focus of this Panel's consideration.

Every study of the federal ethics laws has concluded by acknowledging the futility of relying upon legal compulsion to promote ethical government. Ethics do not lend themselves to legislation because laws cannot begin to define the endless variations of fact and circumstance that separate proper from improper behavior. Ethics is fundamentally a code of conduct -- by definition, an ethos. It can be imbued by instruction and by example, but individual laws can at best function as occasional out-of-bounds flags; they cannot regulate the play.

Ethics laws have also proven to be extraordinarily difficult to write. As the Bar of the City of New York characterized the problem in its landmark 1960 report, most ethics laws tend to be anticipatory, and we have proven to be chronically inept at writing anticipatory laws.<sup>2</sup>

A law forbidding bank robbery, for example, is perfectly straightforward; it punishes precisely the act sought to be discouraged -- robbing banks. But it is an entirely different

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<sup>1</sup>REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR, 1989.

<sup>2</sup>REPORT OF THE SPECIAL COMMISSION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND THE FEDERAL SERVICE, 1960.

challenge to draft clear and enforceable laws that will discourage persons from being tempted to rob banks, or, more difficult yet, from appearing to the public as if they might be tempted to rob them.

Yet that is precisely the indirection we apply in most of our contemporary ethics legislation: we identify suspicious persons and instruct them to stay away from banks. Unable to articulate precisely what mischief concerns us in the event a military officer takes a retirement job with a defense contractor, we simply forbid him from taking a job. Other officials, whom we distrust slightly less, we oblige to submit periodic reports of their whereabouts. In trying to incorporate specificity into two recent procurement ethics laws the result was hopelessly incomprehensible. Upon later acknowledging as much and failing to agree on anything clearer, the solution was further indirection by providing applicants a guaranteed interpretation of the law issued by a government lawyer.<sup>3</sup>

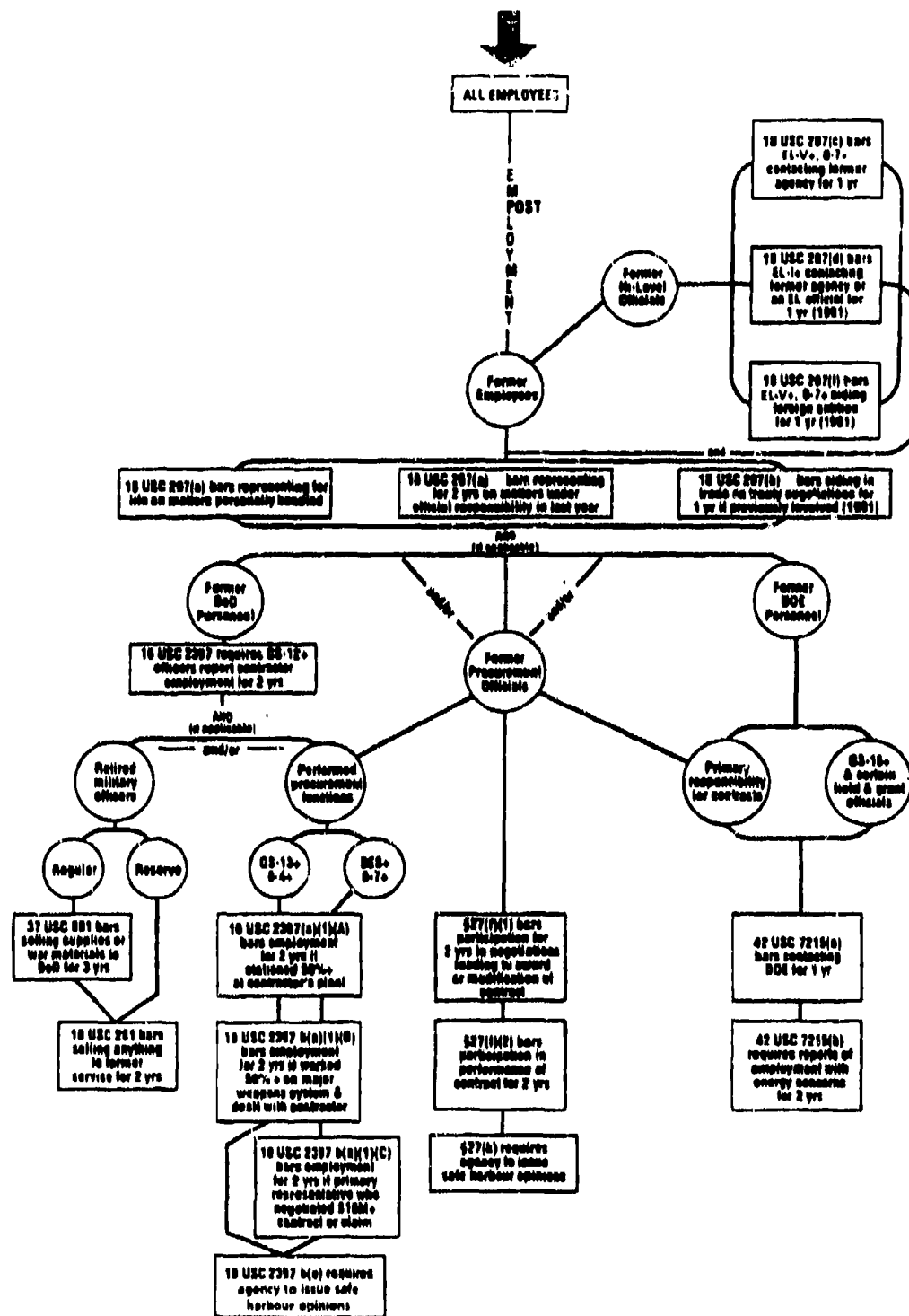
Predictably, the ethics laws are frequently responses to isolated problems. They may be enacted with less than perfect appreciation of their full effect and utility, and once enacted they are invariably difficult to repeal. Reproduced below are two charts depicting those applicable to defense acquisition. Some are laws of general application and others affect only persons engaged in acquisition, or defense acquisition, or who merely retired as military officers. These charts effectively illustrate the way piecemeal legislation has, with the very best of intentions, erected a complex pyramid of laws addressing the same or closely related conduct. They begin at the top with the ethics laws of general application and descend into progressively greater specificity and detail. As described by the Director of the Office of Government Ethics:

Little by little, rule by rule, we have addressed a problem here and a problem there with a quick statutory fix, stacking one on top of another until we have reached a point today that an employee who sincerely wants to do the right thing simply cannot understand what it is he has to do to comply. When we began to recognize that even sophisticated employees could not possibly cope, we actually did not then try to simplify the law. Instead what we ended up doing was enhancing the practice of the attorneys in the agencies. We gave confused employees statutory entitlements to safe harbor opinions to make sure they would not be fired, fined, or prosecuted in some way.<sup>4</sup>

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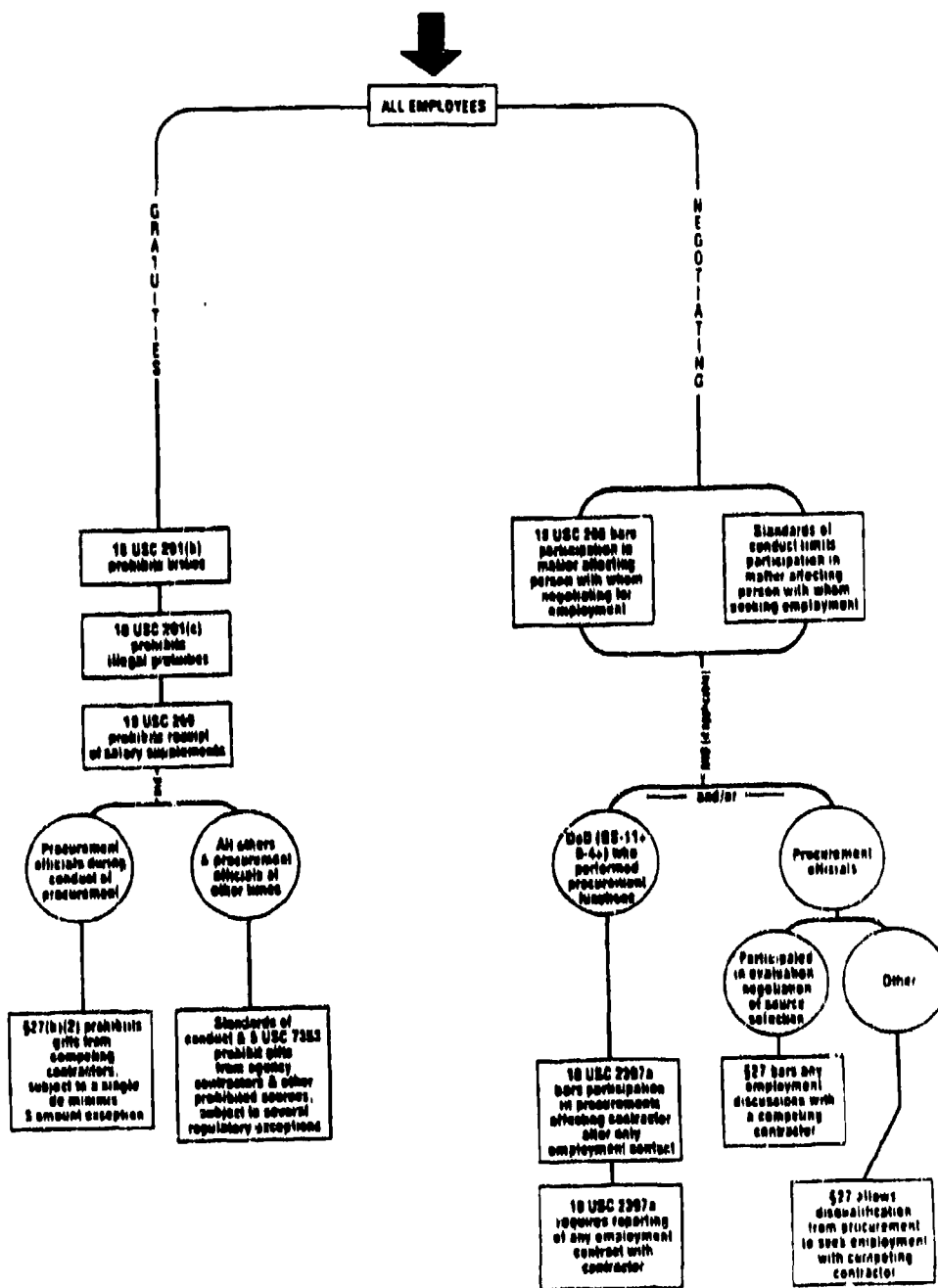
<sup>3</sup>These "safe harbor" opinions interpret provision of 10 U.S.C. § 2397b and 41 U.S.C. § 423.

<sup>4</sup>Testimony of Stephen D. Potts before the Investigations Subcommittee of the Committee on Armed Services, House of Representatives, Hearings on Revolving Door Issues and Post-Employment Restrictions, May 9, 1991, H.R. 102-32, 102d Congress, 1st Session.



SOURCE: OFFICE OF GOVERNMENT ETHICS

Fig. 6-A: Restrictions Governing Post-Government Employment



SOURCE: OFFICE OF GOVERNMENT ETHICS

FIG. 6-B: RESTRICTIONS GOVERNING GIFTS AND EMPLOYMENT DISCUSSIONS

Nearly all these laws overlap another in some particular, and whereas a degree of redundancy might otherwise be tolerable, the propriety of a given event becomes nearly impossible to measure when two laws apply competing tests to the same situation. Each of these laws, standing alone, serves a useful purpose, but all of them together, working just slightly at cross purposes, have generated an appreciable impediment to defense acquisition.

As with many of the procedures and requirements addressed in this report, industry and Government have come to tolerate these special ethics restrictions as another unavoidable cost of doing business with the Government, or of working for it. Thousands of legal opinions have been exchanged and tens of thousands of certifications have been executed and filed, the dollar costs of which will never be precisely measured.

But in many ways these laws all inflate the cost of Government. Some of them, like portions of the Office of Federal Procurement Policy Act, cripple the conduct of legitimate business with imprecise limitations on information exchange and high penalties for error. Some are identified as contributing to the steady worsening of Government recruitment that the Volcker Commission called the "quiet crisis."<sup>5</sup>

And most of these special-purpose restrictions are working the margins of enforcement. They apply to but a fraction of situations that are not already addressed by general-purpose statutes elsewhere. Yet in their earnest efforts to reach that final fraction and cure the abuse of the moment, they cast a net so wide that it snares and hobbles a larger population.<sup>6</sup> As characterized in a recent report by the National Academy of Sciences:

The recent efforts to create a scandal-proof government have gone so far that they, on balance, do more harm than good . . . . Some of these ethics reforms, especially recent attempts to purify the procurement process by imposing broad post-government employment restrictions, afford little ethical protection at very high cost -- a bad bargain for the government and a bad bargain for the public.<sup>7</sup>

In reviewing these laws the Panel has been sensitive not just to their direct and indirect effects on the acquisition process, but to the important role they play in maintaining the confidence in defense management that is so crucial to public support for all defense programs. Public perceptions of impropriety must be addressed just as surely as actual conflicts of interest.

The Panel has been equally impressed, however, by the unanimity of opinion that the present maze of pyramided laws has surpassed even the most conscientious efforts to understand them. The vast majority of government and industry employees want to follow the law -- and to do so to the letter -- but they are confronted with a labyrinth of restrictions so unclear, and bearing such catastrophic penalties, that the safest conduct is often to do nothing at all.

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<sup>5</sup>NATIONAL COMMISSION ON THE PUBLIC SERVICE, LEADERSHIP FOR AMERICA: REBUILDING THE PUBLIC SERVICE, THE REPORT OF THE NATIONAL COMMISSION ON THE PUBLIC SERVICE, (1989).

<sup>6</sup>Describing the "Ill Wind" investigations to an audience of federal law enforcement officials, chief prosecutor Henry E. Hudson, United States Attorney for the Eastern District of Virginia, stated: "I begin all my speeches on Ill Wind the same way. If Ill Wind proved anything, it is that there is not wholesale corruption in defense procurement. Ninety-nine percent of all men and women involved with procurement in our Department of Defense are honest, decent, hard-working people. Ill Wind is about that other one percent. That's all." Speech at the Attorney General's Procurement Fraud Conference, Washington, D.C., May 24, 1990.

<sup>7</sup>REPORT OF THE NATIONAL ACADEMY OF SCIENCES, SCIENCE AND TECHNOLOGY: LEADERSHIP IN AMERICAN GOVERNMENT; ENSURING THE BEST PRESIDENTIAL APPOINTMENTS 32.

Laws so fundamental to good Government should not be its most obscure, nor should they require, as lamented by the Director of the Office of Government Ethics, the regular guidance of a Philadelphia lawyer.<sup>8</sup> We believe there are a number of changes that could be made to clarify these rules without weakening them.

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<sup>8</sup>*Hearing Before the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, 102d Cong., 1st Sess. (1991).*

## **6.5. Gifts and Gratuities**

### **6.5.0. Introduction**

Defense procurement employees are subject to the following remarkable accumulation of laws and regulations on the acceptance of gifts:

- 18 U.S.C. § 201(b), the bribery statute, which forbids accepting something of value in return for an official act;
- 18 U.S.C. § 201(c), the criminal gratuities statute, which forbids accepting something of value because of official duties;
- 5 U.S.C. § 7353, the recently enacted civil gift statute, which forbids accepting something of value from specified sources seeking Government business;
- 41 U.S.C. §§ 423(a)(2) and (b)(2), which forbid gifts from competing contractors to procurement officials during the conduct of a procurement;
- 18 U.S.C. § 209, which forbids outside supplementation of salary for performing Government duties;
- 10 U.S.C. § 2207, which, through the gratuities clause, provides for contract termination and administrative penalties against contractors who extend gifts to officials; and
- 5 C.F.R. § 2635, the new standards of conduct regulation, whose gift rules apply to all executive branch employees.

As directed by executive order, the Office of Government Ethics (OGE) recently issued a single standards of conduct regulation applicable uniformly to every employee and military officer of the executive branch.<sup>1</sup> It addresses at length the acceptance of gifts and gratuities, constructs for the first time a comprehensive set of rules applicable equally to patent examiners and contract negotiators and, under OGE's broad regulatory charter, provides for consistent gift interpretations under 5 U.S.C. § 7353 and 18 U.S.C. § 201(c). Thus, by virtue of law and newly issued regulation, every executive branch employee except those in procurement, regardless of rank or responsibilities, will shortly be subject to the same set of understandable gift rules.

Those employees with procurement responsibilities face an additional restriction. 41 U.S.C. § 423(a)(2) forbids a competing contractor from offering, and subsection (b)(2) forbids a procurement official from accepting, anything of value during the conduct of a procurement. These portions of the procurement integrity amendments to the OFPP Act rely for their definitions on a unique set of terms prescribed by law and amplified in the Federal Acquisition

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<sup>1</sup>Fed. Reg. Vol. 57, No. 153 of Friday, Aug. 7, 1992, to be codified at 5 C.F.R. § 2635.



Regulation.<sup>2</sup> "Procurement Officials" for these purposes are a small but variable subset of those involved in procurement; they acquire their special status and become subject to the restrictions of section 423 by performing any of several specified procurement duties within a calendar period that embraces the "conduct of a procurement."

Endeavoring to rationalize the rules then in effect, the FAR initially applied an agency's regular gift rules under section 423(b)(2), but by amendment in 1989, Congress rejected that approach and specified that there be only a "single uniform Government-wide exclusion at a specific dollar amount."<sup>3</sup> The FAR thereafter fixed that amount at \$10.

Under the uniform OGE regulations recently issued, all other executive branch employees and procurement officials will soon work under common rules recognizing that factors like personal and family relationships, awards, conferences, and professional gatherings realistically deserve special treatment. The new rules also discard pages of fine print exceptions in favor of a flat rule permitting *de minimis* gifts and defining *de minimis* as \$20, with a \$50 annual cap on gifts from any one source. On the other hand, for the periods they are also subject to section 423, some of these employees will be subject to the OGE rules plus the far narrower gift rules in the FAR that under no circumstances permit more than a \$10 gratuity during the conduct of a procurement.

The Panel believes the rules should be uniform. Heretofore, agencies had been free to set their own rules on the acceptance of gratuities, and the restrictions of section 423 appear to have been intended to bring a degree of consistency to widely varying agency standards. With the recent enactment of 5 U.S.C. § 7353 and the publication of the uniform OGE rules at 5 C.F.R. § 2635, that objective is achieved. Vested with the responsibility to make such a determination, OGE found no reason to treat procurement personnel under a special or more restrictive gift rule, and on that the Panel agrees.

Because of the confusion that will arise after the OGE rules take effect on February 3, 1993, the Panel recommends that sections 423(a)(2) and (b)(2) promptly be repealed. The Panel believes there remain more than sufficient incentives for contractor compliance with the OGE rules, including the suspension and debarment process; the procedures for contract termination and assessment of administrative penalties under 10 U.S.C. § 2207 and the Gratuities clause; and civil or criminal prosecution for illegal supplementation of salary under 18 U.S.C. § 209. With the additional effect of the criminal bribery and gratuities provisions at 18 U.S.C. § 201(b) and (c) and the gift statute at 5 U.S.C. § 7353, more than adequate protection would remain.

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<sup>2</sup>48 C.F.R. 3.104.

<sup>3</sup>Pub. L. No. 101-189, Div. A, Title VIII § (a)(4), 103 Stat. 1496.

## **6.5.1. 18 U.S.C. § 201**

### **Bribery of public officials and witnesses**

#### **6.5.1.1. Summary of the Law**

This statute contains both the criminal bribery provision and the criminal gratuities provision.

Section (b), the bribery statute, prohibits anyone from:

(1) corruptly giving or promising to give anything of value to a public official or a selected public official, or promising that official to give something of value to a third party with the intent to influence him to do any official act, to commit fraud on the United States, or to do or omit doing anything in violation of that person's lawful duty, and

(2) as a public official corruptly demanding, receiving, or accepting anything of value personally or for a third party in return for doing any official act, for committing fraud on the United States, or doing or omitting to do anything in violation of his lawful duty.

Section (c), the gratuities statute, prohibits anyone from:

(1) giving or promising to give anything of value to a public official or a selected public official for any act performed or to be performed by that official or,

(2) as a public official or former or selected public official seeking, receiving or agreeing to accept anything of value personally for any official act or for testimony as a witness (not to include reasonable compensation for time lost or standard expert witness fees).

The penalty for commission of these acts is imprisonment for not more than two years and/or a fine under Title 18.

#### **6.5.1.2. Background of the Law**

The bribery and gratuities statutes which existed before consolidation in the Bribery, Graft and Conflicts of Interest Act of October 23, 1962,<sup>1</sup> consisted of 13 sections which were applicable to various categories of Federal employees including Members of Congress, judges,

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<sup>1</sup>Pub. L. No. 87-849, 76 Stat. 1119 (1962).

and other officials.<sup>2</sup> The aim of the 1962 consolidation was to bring these categories together under a single term "public official" which would include officers and employees of the three branches of Government.<sup>3</sup> The revision also introduced the concept of forbidding bribery for acts which would benefit a third party, and contained a prohibition for bribery for testimony at a proceeding or trial.<sup>4</sup>

The statute was amended in 1970 to add the District of Columbia Delegate to the definition of "public official,"<sup>5</sup> and in 1986<sup>6</sup> to conform the statute to clarifications made in the Bank Bribery Amendment of 1985.

### 6.5.1.3. Law in Practice

By the terms of subsection (b) of the statute, bribery is characterized by a corrupt intent. There must be an established expectation on the part of the offeror or solicitor of the bribe that it will bring about the official act that the offeror of the bribe desired.<sup>7</sup> The act of bribery must take place while one is, or has been selected to be, a public official,<sup>8</sup> and where there is an understanding that there is a *quid pro quo* for the bribe in the actions of the public official.<sup>9</sup> In contrast, the gratuities statute may be used in situations where proof of corrupt intent falls short or where there is no understanding or expectation of a specific *quid pro quo* on the part of both the offeror of the bribe and the public official.<sup>10</sup>

The provisions of 5 C.F.R. § 2635 subpart B, implement the statutory ban on accepting gratuities. Subpart B specifically states that unless a gift is accepted in return for being influenced to perform an official act, gifts accepted under the standards and exceptions enumerated in that subpart "shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. § 201(c)(1)(B)."<sup>11</sup>

No comments were received concerning this statute and the Panel has not uncovered any problems which should be remedied through a statutory change.

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<sup>2</sup>S. REP. NO. 2213, 87 Cong., 2d Sess., reprinted in 1962 U.S.C.C.A.N. 3852, 3857.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Pub. L. No. 91-405, Title II, § 204(d)(1), 84 Stat. 853 (1970).

<sup>6</sup>Pub. L. No. 99-646, § 46, 100 Stat. 3601-3604 (1986).

<sup>7</sup>*U.S. v. Brewster*, 506 F.2d 62, (D.C. Cir. 1974), *U.S. v. Niederberger*, 580 F.2d 63(3rd Cir. 1978) cert. denied, 439 U.S. 980 (1978).

<sup>8</sup>*U.S. v. Loschivo*, 531 F.2d 659(2d Cir.1976).

<sup>9</sup>*U.S. v. Evans*, 572 F.2d 455, (5th Cir. 1987) cert. denied 439 U.S. 870 (1978).

<sup>10</sup>*Id.*

<sup>11</sup>5 C.F.R. § 2635.202.

#### **6.5.1.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 18 U.S.C. § 201 (b) and (c) be retained. These provisions are the foundation for most of the Federal standard against bribes and gratuities.

#### **6.5.1.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement without being unduly burdensome.

## 6.5.2. 18 U.S.C. § 202

### Definitions

#### 6.5.2.1. Summary of the Law

This section contains definitions applicable to various sections in Chapter 11, Title 18.

Subsection (a) defines a "special Government employee"<sup>1</sup> as an officer or employee of the executive or legislative branch who is retained, designated, appointed, or employed to perform with or without compensation, for not to exceed 130 days in any period of one year. A reserve officer of the armed forces or National Guard is a special Government employee while on active duty solely for training, but when voluntarily serving a period of extended active duty in excess of 130 days is an officer of the United States under sections 203, 205 through 209, and 218; however, if he is serving involuntarily he is a special Government employee. For the purposes of these sections, an enlisted member of the Armed Forces is not a special Government employee.

Subsection (b) defines "official responsibility"<sup>2</sup> as the direct administrative or operating authority, whether intermediate or final, and either exerciseable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

Subsection (c) excludes the President and Vice President of the United States, Members of Congress, and Federal judges from the terms "officer" and "employee."<sup>3</sup>

Subsections (d) defines "Member of Congress" and Subsection (e) specifies which entities are included in the "executive branch," the "judicial branch," and the "legislative branch."

#### 6.5.2.2. Background of the Law

The Bribery, Graft and Conflicts of Interest Act of October 23, 1962, consisted of 13 sections applicable to various categories of Federal employees, including Members of Congress, judges, and other officials.<sup>4</sup> The aim of the 1962 consolidation was to bring these categories together under common terminology that would include officers and employees of the three branches of Government.<sup>5</sup> Congress recognized that most of the conflict of interests laws which existed before the act were enacted in the 19th century when serving as a temporary or intermittent employee was rare and the conflict of interest laws were directed at regular Government employees.<sup>6</sup> However, Congress noted in enacting rules for intermittent

<sup>1</sup>The definition of "special Government employee" applies to §§ 203, 205, 208 and 209 of Title 18.

<sup>2</sup>The definition of "official responsibility" applies to §§ 205, and 207 of Title 18.

<sup>3</sup>The terms "officer" and "employee" apply to §§ 203, 205, 207 through 209, and 218 of Title 18.

<sup>4</sup>Pub. L. No. 87-849, 76 Stat. 1119 (1962).

<sup>5</sup>S. REP. NO. 2213, 87 Cong., 2d Sess., reprinted in 1962 U.S.C.C.A.N. 3852, 3856.

<sup>6</sup>*Id.* at 3854

Government employees that significant studies had pointed out that this group of prospective employees had been reluctant to serve because they would have to comply with the same, more restrictive, conflict of interest standards as long term employees.<sup>7</sup> The challenge was to find a way to facilitate the employment of intermittent employees, which would allow Congress to abandon the practice of granting ad hoc statutory exemptions, without relaxing ethical standards or allowing conflicts of interest to exist.<sup>8</sup> Thus, Congress, for the first time, comprehensively addressed the problem by creating a new group of temporary officials and employees who, based upon their limited number of days of Government service within a specific period, would be designated as "special Government employees," specifying standards that are less in some cases than regular employees.

The term "official responsibility" was defined in the original act.<sup>9</sup> The statute was amended in 1970 to add the District of Columbia Delegate to the definition of "public official,"<sup>10</sup> and in 1986, to conform the statute to clarifications made in the Bank Bribery Amendments Act of 1985.<sup>11</sup>

#### **6.5.2.3. Law in Practice**

The definition of "special Government employee" has been incorporated into the recently published Office of Government Ethics Standards of Ethical Conduct regulation in section 2635.102.<sup>12</sup> No comments were received concerning this statute and the Panel is aware of no problems that should be remedied through a statutory change.

#### **6.5.2.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 18 U.S.C. § 202 be retained. It provides definitions vital to the construction of the bribery, gratuities, and conflict of interest statutes.

#### **6.5.2.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement programs without being unduly burdensome.

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<sup>7</sup>*Id.* at 3854-54.

<sup>8</sup>*Id.* at 3857-58.

<sup>9</sup>Pub. L. No. 87-849 § 202(b), 76 Stat. 1119 (1962).

<sup>10</sup>Pub. L. No. 91-405, Title II § 204(d)(1), 84 Stat. 852 (1970).

<sup>11</sup>Pub. L. No. 99-646 § 46, 100 Stat. 3601 (1986).

<sup>12</sup>5 C.F.R. § 2635.102(l).

### **6.5.3. 18 U.S.C. § 203**

## **Compensation to Members of Congress, Officers, and Others in Matters Affecting the Government**

### **6.5.3.1. Summary of the Law**

Section (a) of the statute prohibits officers and employees of the three branches of Government, as well as Members of Congress, Delegates, Resident Commissioners, and Federal Judges, from demanding, seeking, or agreeing to accept compensation for representational services in relation to any proceeding, application, request for a ruling or determination, contract claim, controversy, charge, accusation, or arrest in which the United States is a party or has a direct and substantial interest before any agency, department, court, officer, or military commission. Subsection (a)(2) prohibits anyone from knowingly giving, promising, or offering compensation to these persons for representational services. Subsections b(1) and (2) prohibit these activities relating to officers and employees of the District of Columbia. Subsection (c) provides that the prohibitions above shall apply to special Government employees only in relation to the particular matter in which the special Government employee participated personally and substantially, or which was pending in the department or agency in which the employee was serving, and shall not apply at all if the employee served no more than 60 days.

The penalty for commission of these acts is set out in section 216 of Title 18.

### **6.5.3.2. Background of the Law**

This provision was enacted as a part of the Bribery, Graft and Conflicts of Interest Act of October 23, 1962.<sup>1</sup> It replaced the former section 18 U.S.C. § 281 which had its origins in a statute which was a reaction to Civil War influence peddling scandals.<sup>2</sup> The legislative history of this very early ethics statute indicates that Congress was concerned with preventing Government officials from being paid to "advocate" before departments and bureaus of the Government.<sup>3</sup> The new section repeated the older section's prohibition on Government officials receiving compensation for influence peddling while in office but made a new exemption for special Government employees.<sup>4</sup>

Subsequent amendments expanded the coverage of section 203 to employees and officials of the District of Columbia Government<sup>5</sup> and added certain limited exceptions to the section's applicability.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 87-849, 76 Stat. 1119 (1962).

<sup>2</sup>Act of June 11, 1864, ch. 119, 13 Stat. 123.

<sup>3</sup>*United States v. Myers*, 692 F.2d 823, 854 (2nd Cir.1982).

<sup>4</sup>Pub. L. No. 87-849, § 203(c) 76 Stat. 1119 (1962).

<sup>5</sup>Pub. L. No. 99-646, § 47(a), 100 Stat. 366 (1986).

<sup>6</sup>Pub. L. No. 101-194, § 402(10), 103 Stat. 1748 (1989) added subsections(d) and (e). Subsection (d) exempts certain representations made on behalf of family members or to carry out the duties of an executor or guardian.

### 6.5.3.3. Law in Practice

Section 203 is distinguished from other statutes prohibiting public corruption and conflict of interests by its emphasis upon prohibiting receiving or giving compensation for "representational services." However, courts have differed in the breadth of their reading of the meaning of what constitutes representation *before* an agency. In *United States v. Evans*,<sup>7</sup> the Fifth Circuit Court of Appeals gave what is now section 203(a)(1) a broad reading, finding that a Department of Health Education and Welfare (HEW) student loan collection supervisor could be justly convicted of violating that section based upon evidence that the supervisor had received money from a student loan collection agency with which he dealt throughout his employment at HEW. The only evidence of representational activity was the defendant's attempt to facilitate the employment of the collection agency's managers at HEW. The court held that section 203 should be broadly construed to accomplish its legislative purpose which was to perpetuate the meaning of its predecessor statute.<sup>8</sup> The court also found that the gravamen of this offense is not an intent to be corrupted or influenced, but simply the acceptance of unauthorized compensation.<sup>9</sup> In *United States v. Myers*,<sup>10</sup> the Second Circuit Court of Appeals reversed the "ABSCAM" conviction of a former member of Congress under a more narrow reading of the section. The court found that what is now section 203(a)(1) should apply only to services involving an appearance before a Federal agency and not simply for the rendering of advice concerning agency proceedings, in this case, the coaching of an alien prior to his meeting with immigration officials.<sup>11</sup> That court did suggest, however, that as long as the services were performed before a Federal agency the receipt of compensation would be proscribed for informal as well as formal appearances before Government agencies.<sup>12</sup>

No comments were received concerning this statute, and the Panel is unaware of any special problems which should be remedied through a statutory change.

### 6.5.3.4. Recommendation and Justification

#### Retain

The Panel recommends that 18 U.S.C. § 203 be retained. Together with 18 U.S.C. § 205 and ethical principles prohibiting the use of public office for private gain, the statute protects against the misuse of official influence while in public office.

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Subsection (c) exempts special Government employees in cases where they are acting for another person concerning a grant or a contract if the agency head concerned certifies that such action is required in the national interest. Subsection (f) was added by Pub. L. No. 101-280 § 5(b)(5), which exempts statements made as testimony under oath or statements required to be made under penalty of perjury.

<sup>7</sup>572 F.2d 455 (5th Cir. 1978).

<sup>8</sup>*Id.* at 480.

<sup>9</sup>*Id.* at 481.

<sup>10</sup>92 F.2 823 (2d Cir.1982).

<sup>11</sup>*Id.* at 857.

<sup>12</sup>*Id.* at 858.



#### **6.5.3.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement programs without being unduly burdensome.

## **6.5.4. 18 U.S.C. § 209**

### **Salary of Government officials**

#### **6.5.4.1. Summary of the Law**

This statute prohibits anyone, with the exception of special Government employees, from receiving any contribution or supplement to salary as compensation for services as an officer or employee of the executive branch, independent agency, or the District of Columbia from any source other than the United States, or a state, county, or municipality. The statute also makes it an offense for anyone to pay, make a contribution to, or supplement the salary of an officer or employee of the above entities. The statute includes several exceptions, including those for pensions, health plans, and other benefits from a former employer. The penalty for violation is imprisonment and/or a fine as set out in Title 18.

#### **6.5.4.2. Background of the Law**

Section 209(a) replaced and modified a similar statute which prohibited a Government employee from receiving salary in connection with Government service from a private source. It was also one of the reformed statutes which were contained in the Bribery, Graft and Conflicts of Interest Act of October 23, 1962.<sup>1</sup> The revised language which banned accepting salary "as compensation for" services clarified existing language which was too vague and did not express the congressional intent.<sup>2</sup>

The amendments since enactment have, for the most part, added additional exceptions to the prohibition against salary supplementation. A 1989 amendment addressed its penalties at 18 U.S.C. § 216.<sup>3</sup>

#### **6.5.4.3. Law in Practice**

At its essence, 18 U.S.C. § 209(a) prevents Government employees from serving two masters. The prohibition of this statute is against being compensated twice for the performance of the employee's official duties. Gifts given for purposes other than for the performance of official acts, compensation for outside employment, and pension benefits from a former employer are not within the ambit of this statute. The statute forbids remuneration with the intent to compensate the employee for the performance of official duties<sup>4</sup> while employed as a public official.<sup>5</sup> Special Government employees are exempted.

The Panel received no comments concerning this provision.

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<sup>1</sup>Pub. L. No. 87-849 § 1(a), 76 Stat. 1119, 1125 (1962).

<sup>2</sup>S. REP. NO. 2213, 74 Cong. 2d Sess., reprinted in 1962 U.S.C.C.A.N 3852, 3863.

<sup>3</sup>Pub. L. No. 101-194, Title IV, § 406, 103 Stat. 1753 (1989).

<sup>4</sup>*U.S. v. Boeing, Inc.*, 845 F.2d 476 (4th Cir. 1988)

<sup>5</sup>*U.S. v. Muntain*, 610 F.2d 1964 (D.C. Cir. 1979).

#### **6.5.4.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 18 U.S.C. § 209 be retained. Its limitations on the supplementation of Federal salaries are instrumental portions of the Government's ethics rules and principles.

#### **6.5.4.5. Relationship to Objectives**

This provision promotes the continued integrity of defense procurement programs without being unduly burdensome.

## **6.5.5. 5 U.S.C. § 7353**

### **Gifts to Federal Employees**

#### **6.5.5.1. Summary of the Law**

This statute prohibits members of Congress, and officers and employees of the executive, legislative, or judicial branches from soliciting or accepting anything of value from a person seeking official action from, doing business with, or conducting activities regulated by the individual's employer. The statute also prohibits soliciting or accepting anything from anyone whose interests may be "substantially affected by the performance or nonperformance of the individual's official duties." Under the statute, the "supervising ethics office" of each branch is authorized to issue implementing instructions.

#### **6.5.5.2. Background of the Law**

This statute was added to Title 5 in November, 1989, as section 303(a) of the Ethics Reform Act of 1989.<sup>1</sup> It was amended in 1990 to make minor technical corrections.<sup>2</sup> The statute is virtually identical to section 101(d) of Exec. Order No. 12674, issued in April, 1989, in its restriction of gifts from outside sources.

#### **6.5.5.3. Law in Practice**

This statute has been comprehensively implemented in the new Office of Government Ethics regulation, Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, subpart B.

No comments were received addressing this provision.

#### **6.5.5.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 5 U.S.C. § 7353 be retained. It provides part of the statutory framework of civil restrictions governing the acceptance or solicitation of gratuities in Federal employment and is an important factor in ensuring integrity in defense procurement. Retention is crucial to the Panel's recommendation elsewhere in this chapter that the parallel gift restrictions at 41 U.S.C. § 423 (a)(2) and (b)(2) can be repealed.

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<sup>1</sup>Pub. L. No. 101-194, § 303(a), 103 Stat. 1746 (1989).

<sup>2</sup>Pub. L. No. 101-280, § 4(d), 104 Stat. 158 (1990).

#### **6.5.5.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement without being unduly burdensome.

## 6.5.6. 41 U.S.C. § 423(a)(2),(b)(2)

### Procurement integrity (Gratuities)

#### 6.5.6.1. Summary of the Law

Subsection (a)(2) prohibits a "competing contractor"<sup>1</sup> or its agents and employees, during a procurement, from knowingly offering gratuities or any thing of value to a "procurement official."<sup>2</sup> Subsection (b)(2) prohibits a procurement official, during the conduct of a procurement, from soliciting or accepting gratuities from a competing contractor. Section 423 also mandates in subsection (p) that implementing regulations define the term "thing of value" to include "a single uniform Government-wide exclusion at a specific minimal dollar amount."

#### 6.5.6.2. Background of the Law

These subsections were part of the 1988 Procurement Integrity amendments to the Office of Federal Procurement Policy reauthorization legislation. The legislative history on these two subsections is limited, but the report accompanying the House bill states that its goal was to "insist that all contracting persons conduct business in an 'arms length' fashion."<sup>3</sup> Furthermore, the report states this end would be achieved by "prohibiting contractors from offering Federal procurement officials jobs or other things of value during the course of a procurement." "It is hard for Government negotiators to remain independent," the report continues, "when they are being wined, dined and offered lucrative jobs by contractor personnel."<sup>4</sup>

#### 6.5.6.3. Law in Practice

These sections are implemented by FAR 3.104-3, 104-4, and 104-6, which for the most part restate the statute. "Gratuity" is defined in FAR 3.104-4(f)(1) as "any gift, favor, entertainment, or other item having monetary value." Services, conference fees, vendor promotional training, transportation, lodging and meals, discounts not available to the general public, and loans other than from a financial institution are defined as gratuities by this FAR section. Under the present FAR implementation, unsolicited items under \$10 in value are exempted from this definition.

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<sup>1</sup>A competing contractor is defined in 423(p) as any entity that is, or is reasonably likely to become, a competitor for, or recipient of, a contract or subcontract under such procurement, or any person acting on its behalf.

<sup>2</sup>A procurement official is defined in 423(p) as any civilian or military official or employee of an agency who has participated personally and substantially in any of the following activities: (i) the drafting of specifications; (ii) review and approval of specifications; (iii) the preparation or issuance of a solicitation; (iv) the evaluation of bids or proposals; (v) the selection of sources; (vi) the review and approval of an award, modification, or extension; (vii) any other specific procurement actions as specified by regulation.

<sup>3</sup>H.R. REP. No. 911, 100th Cong., 2d Sess. 18 (1988).

<sup>4</sup>*Id.*

The difficulty with the gratuities provisions of section 423 is that they overlap with other statutes and will soon overlap with a broad executive branch regulation. As directed by the President in Executive Order 126734, the Office of Government Ethics (OGE) recently issued a single standards of conduct regulation applicable uniformly to every employee of the executive branch (57 Fed. Reg. 35006, Aug. 7, 1992, 5 C.F.R. § 2635). It addresses at length the acceptance of gifts and gratuities, constructs for the first time a comprehensive set of rules applicable equally to patent examiners and contract negotiators, and under OGE's broad regulatory charter provides for consistent gift interpretations under 5 U.S.C. § 7353 and 18 U.S.C. § 201(c). Under those uniform regulations, which will become effective on February 3, 1993, all other executive branch employees and most procurement personnel will soon work under common rules recognizing that factors like personal and family relationships, awards, conferences, and professional gatherings realistically deserve special treatment. The new OGE rules also discard pages of fine-print exceptions in favor of a flat rule defining de minimis as \$20, with a \$50 annual cap on gifts from any one source. On the other hand, for the period they are subject to section 423, some procurement employees will be subject to the OGE rules plus the narrower gift rules in the FAR that under no circumstances permit more than a \$10 gratuity during the conduct of a procurement.

The Panel believes the rules should be uniform. Previously, agencies had been free to set their own rules on the acceptance of gratuities, and the restrictions of section 423 appear to have been intended to bring a degree of consistency to widely varying agency standards. With the enactment of 5 U.S.C. § 7353 and the publication of the uniform OGE rules at 5 C.F.R. § 2635, that objective is achieved. Vested with the responsibility to make such a determination, OGE found no reason to treat procurement personnel under a special or more restrictive rule, and on that the Panel agrees. Because of the confusion that will arise after OGE rules take effect on February 3, 1993, the Panel recommends that sections 423(a)(2) and (b)(2) be repealed.

In commenting on the gratuities provisions of section 423, the Council of Defense and Space Industry Association also expressed the widely held belief that there are sufficient statutory curbs against improper gratuities:

The prohibitions against gratuities are overly stringent and redundant to 18 U.S.C. 201 or other statutes. Specifically, it has always been illegal to offer, give, request or accept a gratuity.<sup>5</sup>

The Panel believes there is sufficient law and regulation in the area of gratuities without section 423(a)(2) and (b)(2), and that repeal of those sections is necessary to achieve the end of a single Government-wide standard that will apply in all circumstances.

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<sup>5</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Robert Wallick and Harvey Wilcox (August 18, 1992).

#### **6.5.6.4. Recommendation and Justification**

##### **Repeal**

Subsections 423(a)(2) and 423(b)(2) should be repealed because they are duplicative of other statutes and regulations that adequately regulate the same conduct. Effective February 3, 1993, executive branch employees will be subject to uniform rules pertaining to gratuities under OGE's new ethics regulation. If these subsections of section 423 are not repealed, procurement officials will be subject to the uniform OGE rules, to the different section 423 rules during the conduct of a procurement, and then again to the OGE rules. Perpetuation of the section 423 rules after February 3 will be confusing and extremely unfair to the persons affected. Such overlap cannot be justified as an ethics measure and will be most inefficient.

#### **6.5.6.5. Relationship to Objectives**

Repeal of these provisions would ensure uniform standards applicable to all Government officials, and, through clarity and simplicity, would promote the integrity of defense procurement.



## 6.5.7. 10 U.S.C. § 2207

### Expenditure of appropriations: limitation

#### 6.5.7.1. Summary of the Law

This statute prohibits money appropriated to DOD from being spent on a contract other than a contract for personal services, unless certain contractual provisions are included. These provisions give the United States the right to terminate a contract if it is determined that the contractor offered or gave a gratuity to obtain a contract or to receive favorable treatment. This law also permits the United States to collect exemplary damages in an amount at least three, but not more than ten, times the cost incurred by the contractor in giving gratuities.

#### 6.5.7.2. Background of the Law

This law was passed as part of the DOD Appropriation Act of 1955.<sup>1</sup> There was no mention of this provision in the Senate or House of Representatives Reports. The law was amended in 1962, but all changes were technical and did not affect the substance of the sections.<sup>2</sup>

#### 6.5.7.3. Law in Practice

This statute is generally referred to as the Gratuities Act. The substance of this law has been implemented by the contract clause at FAR 52.203-3<sup>3</sup>, entitled "Gratuities." The procedures for exercising the Government remedies under the clause are set forth in DFARS, Appendix D, which prescribes notice and hearing procedures that must be followed.<sup>4</sup> This statute and its parallel regulation were cited by the 10th Circuit in 1991, *Francis E. Heydt v. U.S.*, the case of a contract canceled by the Government following a determination that the contractor had paid a gratuity to receive the contract.<sup>5</sup>

The Department of Defense Inspector General (DODIG) cited the recent *Heydt* case as an example of the continued relevance of this statute.<sup>6</sup> It also stated that this statute is necessary to promote financial and ethical integrity in the defense procurement program.<sup>7</sup> The Council of

<sup>1</sup>Department of Defense Authorization Act of 1955, Pub. L. No. 83-458, § 719, 68 Stat. 353.

<sup>2</sup>Act of September 7, 1962, Pub. L. No. 83-458, § 207(a), 76 Stat. 520.

<sup>3</sup>48 C.F.R. § 52.203-3.

<sup>4</sup>48 C.F.R. § 271, Appendix D.

<sup>5</sup>In *Francis E. Heydt Co. v. United States et. al.*, 948 F.2d 672 (10th Cir. 1991), the plaintiff defense contractor supplied the Defense Personnel Support Center with night camouflage desert trousers. That agency discovered that the contractor had paid a gratuity to an agency official before accepting the final two shipments. Following the acceptance of the shipments, a notice of proposed debarment was sent to the contractor and the agency recommended termination of the contract under § 2207 and applicable FAR sections. The case was decided on procedural grounds unrelated to the contract termination issue.

<sup>6</sup>Letter from Derek J. VanderSchaaf, Deputy Inspector General, Department of Defense to Acquisition Law Task Force (July 1, 1992).

<sup>7</sup>*Id.*

Defense and Space Industry Associations (CODSIA) noted that this law conflicts with several others, including the bribery statute at 18 U.S.C. § 201, the Procurement Integrity Act, and the Anti-Kickback Act. CODSIA states that only DOD is subject to the exemplary damages provision addressed in FAR clause 52.203-3. and recommends repeal.<sup>8</sup> The Defense Contract Management District Northeast (DCMDN) of the Defense Logistics Agency recommends an amendment making the termination right of the Government exercisable regardless of the reason for the gratuity from the contractor.<sup>9</sup>

#### **6.5.7.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 10 U.S.C. § 2207 be retained notwithstanding that it is infrequently used and that its exemplary damages provision is unique. This provision offers an administrative alternative in many circumstances that might otherwise require resolution through criminal proceedings. Its requirement for an administrative hearing assures due process to the contractor and prudent application by the Government. Retention of this statute will promote the financial and ethical integrity of defense procurement.

Exemptions related to a recommended simplified acquisition threshold are discussed in detail in chapter 4.1.

#### **6.5.7.5. Relationship to Objectives**

This statute promotes the ethical integrity of defense procurement without being unduly burdensome.

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<sup>8</sup>Letter from CODSIA to Gary Quigley and Jack Harding (Aug. 7, 1992).

<sup>9</sup> Letter from Bruce Krasker, Counsel, Defense Contract Management District Northeast, Defense Logistics Agency to Robert Burton, Office of General Counsel, Defense Logistics Agency (Aug.4, 1992)

## **6.6. Employment Discussions**

### **6.6.0. Introduction**

Largely unnoticed among more conspicuous ethics amendments made in 1962 was a modest but significant addition to 18 U.S.C. § 208(a), the basic provision that forbids every executive branch employee from taking official action in any matter in which the official has a financial interest. The amendment expanded that section to forbid taking official action affecting the financial interest of any person with whom an employee is "negotiating or has an arrangement concerning prospective employment." By careful formulation, the 1962 amendment perpetuated the tenet that Federal ethics laws resolve conflicts by restricting the employee's official duties, not his personal economic interests.<sup>1</sup>

The term "negotiating" thereafter was the topic of numerous interpretive opinions rendered by the Attorney General, and later by the Office of Government Ethics (OGE), both of which wrestled with the law's applicability to the grayer shades of negotiating, such as exploratory luncheon conversations about employment. But the law left no middle ground in enforcement: If disqualification from duties had been required by law, the Government's only remedy was criminal prosecution.

Those earlier uncertainties about the scope of section 208(a) appear to be fully resolved by the issuance of OGE's new standards of conduct regulation. An entire chapter of that regulation has for the first time given executive branch employees and military officers a comprehensive manual on the rules governing job seeking. Those include uniform requirements and procedures for employee disqualification that satisfy section 208(a) as well as all other ethical considerations.<sup>2</sup>

Years before that regulation was issued, however, public attention to the "revolving door" in the defense sector prompted congressional concern that section 208(a) might not foreclose a great many preliminary and potentially seductive job discussions during which the industry participants avoided outright "negotiations." In response, Congress enacted two additional restrictions.

The first of those was 10 U.S.C. § 2397a, passed as an amendment to the FY 1986 Defense Authorization Act to complement the reporting requirement at 10 U.S.C. § 2397 for defense employees moving between Government and industry jobs. Its stated purpose was to fill the voids left by 18 U.S.C. § 208(a) and to prescribe a "clear set of circumstances when disqualification is required" during job hunting.<sup>3</sup>

It did so by requiring GS-11s and O-4s (and above) who had performed any of several defined "procurement functions" involving a contractor either to terminate job discussions with that firm immediately when they are first broached, or formally to report the job discussions and

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<sup>1</sup>Bayless Manning, FEDERAL CONFLICTS OF INTEREST LAW 109 (1964).

<sup>2</sup>Subpart F, 5 CFR 2635.601-606.

<sup>3</sup>S. REP. NO. 41, 99th Cong., 1st Sess. (1985).

to disqualify themselves from further official duties affecting that firm until the discussions terminate.

In large part, section 2397a was viewed at the time as merely codifying defense ethics practices already in use regarding official disqualifications required by 18 U.S.C. § 208(a). It was also perceived as having the virtue of establishing a procedure for imposing administrative penalties that might prove more useful than criminal enforcement under section 208. In practice, however, the elaborate mechanism for administrative penalties has not been used, and the 1989 Ethics Reform Act adopted an alternative structure of civil penalties to better assist in enforcing section 208 and other ethics portions of Title 18.<sup>4</sup> Under those amendments the Government may even sue in Federal court to enjoin improper conduct.

Further, the section 2397a requirement for employee disqualification missed the mark. Whereas it requires employee disqualification after defense contracts have been awarded, it imposes no such requirement while sources are actively being selected or contract prices are being negotiated. Because it has no specified termination, it potentially applies for years after the contract is closed or the employee's duties no longer involve contact with the contractor. By contrast, the new OGE regulations at 5 C.F.R. § 2635 require disqualification during all periods the employee is engaged in official duties potentially affecting the contractor, and they cease to apply when that period of potential conflict has concluded.

The second congressional attempt to fill perceived gaps in section 208 coverage came in 1988 as part of the procurement integrity amendments to the OFPP Act. Those restrictions, which appear in 41 U.S.C. § 423 (a)(1), (b)(1), and (c), apply throughout the executive branch of Government.

With consistent and nearly parallel objectives, section 423 was drafted as a stand-alone procurement ethics code, but as a consequence it also introduced a confusingly different set of standards and principles. The restrictions of section 423 are triggered by a two-phase test that requires the Government employee to have performed any of several specified procurement duties during a specified time frame between the initiation of a procurement and contract award. Upon meeting both tests, the employee becomes a "procurement official" and both he and competing contractors become subject to various restrictions and potentially severe penalties.

The section 423 restrictions on job seeking are unique because they invert the theory of both 10 U.S.C. § 2397a and the OGE regulations implementing section 208(a). Under the latter, a Government employee interested in job hunting must disqualify himself from ongoing official business with a contractor, but once isolated from the contractor's business he is permitted to explore outside employment opportunities because the public is protected from the opportunity for self-dealing.

With the addition of section 423, however, the employee may disqualify himself under the standard OGE procedures only before duties have made him a "procurement official." If the official acquired that status because of participating in the procurement during its preparation and

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<sup>4</sup>Pub. L. No. 101-194, § 407, 103 Stat. 1753, codified at 18 U.S.C. § 216.

solicitation stages, the official must make written application to the activity head for permission to disqualify himself. Approval of the request is entirely discretionary, and under procedures prescribed in the FAR, it must balance factors such as the employee's importance to the timely conclusion of the procurement on schedule.<sup>5</sup>

On the other hand, if the employee is a "procurement official" because of participation in the source selection or negotiation stages of the procurement, then the employee is totally ineligible to be disqualified, must continue with his official duties through the remainder of the procurement, and must postpone all employment discussions with the contractor until the day following contract award.

These provisions illustrate the problems of statutory layering. Sections 2397 and 423 are each thoughtfully shaped patches for gaps perceived in a permanent provision of law, but by their individuality and detail they replicate so much of it that the effect has been to subject employees to three distinct sets of overlapping rules: one that applies permanently, one that applies occasionally, and one that may switch on and off. Each is triggered by different conduct, is defined in different terms, imposes a different restriction, and threatens a different penalty.

With the issuance of the OGE regulations at 5 C.F.R. § 2635, the Panel believes the negotiating restrictions of sections 2397a and 423 have lost their former utility. Through its authority to issue rules bearing administrative enforcement sanctions, OGE has effectively and, the Panel believes, more appropriately addressed the technical shortcomings of section 208(a) without formulating a separate set of overlapping, and occasionally competing, standards. Violations of section 208(a) now subject employees to civil penalties under section 216 as well as to criminal penalties, and in flagrant cases contractors can be prosecuted under the aiding and abetting provisions of 18 U.S.C. § 2.

Effective February 3, 1993, the OGE regulations will apply to all executive branch employees and military officers engaged in procurement. Beginning then, the chief substantive contributions of sections 2397a and 423 will be the individual formalities by which they require disqualification by Government employees. Government and industry comment on these provisions uniformly ranked clarity in the applicable rules as their foremost priority. Because the new uniform rules at 5 C.F.R. 2635 have been drafted to provide comprehensive executive branch treatment of this subject, the Panel believes that clarity and enforceability would best be achieved by repeal of sections 2397a and 423(a)(1), (b)(1), and (c).

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<sup>5</sup>FAR 3.104-6.

## 6.6.1. 18 U.S.C. § 208

### Acts affecting a personal financial interest

#### 6.6.1.1. Summary of the Law

18 U.S.C. § 208 generally prohibits public officials from self-dealing while employed by the Government. It prohibits officers and employees of the executive branch from participating personally and substantially through decision, approval, disapproval, recommendation, advice, investigation, or otherwise in a proceeding, application, or request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter which, to their knowledge, affects their own financial interest or that of their spouses, minor children, general partners, or organizations in which they are serving or entities with which they are negotiating or have a future employment arrangement. Penalties are set forth in 18 U.S.C. § 216.

#### 6.6.1.2. Background of the Law

The original section 208 was modeled on a former section of Title 18 (18 U.S.C. § 434) which disqualified a Government employee who had an interest in the profits or contracts of a business entity from dealing with that entity. The genesis of section 434 (now section 208(a)) was an 1868 statute which applied to conflicts of interest involving "the transaction of business." A phrase taken from a New York Bar Association Model Code conflict of interest provision pertaining to transactions involving the Government was incorporated in a major revision of the Bribery, Graft and Conflicts of Interest Act of October 23, 1962<sup>1</sup>, the first comprehensive conflict of interest statute passed by Congress. The aim of that statute, as it applied to revision of the conflict of interest laws, was two-fold: to simplify and strengthen existing law, and to adapt the conflict of interest laws to satisfy Governmental requirements for part-time civil servants who had specialized technical and scientific expertise sometimes demanded by Government.<sup>2</sup> The new section not only prohibited participation in matters in which the official had a financial interest, but also prohibited his participation in matters in which an immediate family member, close organizational associate, or one with whom the official was negotiating or had an arrangement concerning prospective employment, had an interest.<sup>3</sup>

Recognizing that conflicts of interest may not only involve business interests and business transactions, but also "organizational" interests, Congress broadened the definition to encompass conflicts resulting from associations with universities, foundations, nonprofit research entities and other similar organizations.<sup>4</sup> Those 1962 amendments also added a provision authorizing *ad hoc* agency waiver of insignificant interests or otherwise in accordance with agency regulations.<sup>5</sup>

<sup>1</sup>Pub. L. No. 87-849, § 1(a) 76 Stat. 1119, 1124 (1962).

<sup>2</sup>S. REP. NO. 2213, 87 Cong. 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3862.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 3863.

Subsequent amendments made the section applicable to directors and employees of Federal Reserve Banks<sup>6</sup> and to employees of the District of Columbia Government.<sup>7</sup>

In March 1989, the President's Commission on Federal Ethics Law Reform made numerous significant recommendations, many of which were subsequently enacted in the Ethics Reform Act of 1989.<sup>8</sup> One of the provisions in the legislation clarified section 208's applicability to various disqualifying financial interests which had been troublesome, such as partnership interests. The amendments also restructured authorities and streamlined the procedure for granting waivers under certain circumstances, such as service on Federal advisory committees.<sup>9</sup> It further made the Office of Government Ethics (OGE), in consultation with the Attorney General, the agency responsible for issuing the executive branch-wide waivers contemplated by section 208(b)(2).

### 6.6.1.3. Law in Practice

OGE's Government-wide implementation of relevant portions of section 208 is contained in its recently-published regulation at 5 C.F.R. § 2635. That regulation has gone into detail concerning both disqualifying financial interests (subpart D) and employment negotiations (subpart F), and provides definitions for the significant terms contained within the statute as well as requirements and disqualification procedures satisfying section 208(a).

The Panel considered 18 U.S.C. § 208 chiefly for its role in the procurement process, and most especially for its effect on negotiations for future employment by procurement personnel. The statute has survived legal challenges that the terms "negotiating" and "arrangement for future employment" are impermissibly vague.<sup>10</sup> Nevertheless, concern in Congress that the full panoply of job seeking activity was not covered by the criminal statute has prompted the enactment of additional restrictions, such as 10 U.S.C. § 2397a and 41 U.S.C. § 423(a)(1) and (b)(1) which are addressed elsewhere. The implementation of section 208(a) in the new 5 C.F.R. 2635 regulations should satisfy those concerns. The new OGE guidance not only requires disqualification when an employee is "negotiating," as interpreted in the case law, but also following the dispatch of an unsolicited communication regarding possible employment, such as sending a resume, or making a response other than a rejection to an unsolicited job offer.<sup>11</sup>

No comments were received specifically addressing this provision.

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<sup>6</sup>Pub. L. No. 95-188, § 205, Title II § 205, 91 Stat. 1388 (1977) and the Ethics Reform Act of 1989, Pub. L. No. 101-194, Title IV § 405, 103 Stat. 751 (1989).

<sup>7</sup>Pub. L. No. 101-194, Title IV § 405, 103 Stat. 1751 (1989).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>See *U.S. v. Hedges* 912 F.2d 1397 (11 Cir. 1990); *U.S. v. Schaltenbrand*, 930 F.2d 1554 (11 Cir. 1991); *U.S. v. Conlon*, 481 F. Supp. 654 (D.D.C. 1979).

<sup>11</sup>5 C.F.R. § 2635.603

#### **6.6.1.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 18 U.S.C. § 208 be retained without change. It provides the foundation for the basic rules and uniform regulations governing conflicting financial interests of Government employees.

#### **6.6.1.5. Relationship to Objectives**

This statute promotes the integrity of defense procurement programs without being unduly burdensome.



## **6.6.2. 10 U.S.C. § 2397a**

### **Requirements relating to private employment contacts between certain Department of Defense procurement officials and defense contractors**

#### **6.6.2.1. Summary of the Law**

This section mandates the reporting of "contacts" regarding future employment opportunities made by defense contractors to certain middle and senior level defense officials who have performed a procurement function on a contract awarded by DOD. The section also mandates that the defense official disqualify himself from all participation in the performance of a procurement function on that contractor's contracts if employment opportunities have not been rejected. Should the Secretary of Defense determine the official has failed to make the required report or has failed to disqualify himself in accordance with this section, the statute requires that the person not accept or continue employment with that contractor for 10 years from the date of termination of Government service. For violation of this provision, the Secretary of Defense may impose an administrative penalty of \$10,000 or less depending on the circumstances. The statute also provides that designated agency ethics official should be consulted and may issue written opinions concerning the necessity for disqualification. Further, the statute establishes a rebuttable presumption that failure of an official to disqualify himself from procurement functions is not a violation if the official received a written opinion that disqualification was unnecessary.

#### **6.6.2.2. Background of the Law**

Section 2397a was introduced in the 1986 DOD Authorization Act<sup>1</sup> in response to what Congress perceived to be increased public attention over the number of DOD civilian employees and military officers leaving DOD and going directly to work for major defense contractors whom they monitored while employed by the Government.<sup>2</sup> Congress added section 2397a at the same time it strengthened reporting requirements in section 2397. In consideration of this amendment, the Senate Armed Services Committee reviewed and heard testimony on various statutes that were concerned with regulating the "revolving door" including the military selling statutes and the criminal statutes 18 U.S.C. §§ 207 and 208.

The Committee concluded that the most relevant criminal statute, 18 U.S.C. § 208, did not squarely address its paramount concern -- preliminary employment discussions or "contacts" -- because it was aimed at employment contacts that rose to the level of negotiations over a particular job.<sup>3</sup> The Committee did not believe early employment contacts were addressed by section 208, nor that any other statute prohibited employees from seeking employment with contractors affected by their official duties. After considering several alternatives, including an

<sup>1</sup>Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, Title XI § 923(a)(1), 99 Stat. 695 (1985)

<sup>2</sup>S. REP. NO. 41, 99th Cong. 1st Sess. 210 (1985).

<sup>3</sup>*Id.*

outright ban on employment for certain officials with certain contractors, the Committee compromised on section 2397a, which required that only those with personal and substantial participation in the performance of a procurement function report contacts or disqualify themselves from further participation in contract functions.<sup>4</sup>

Under the compromise, an initial contact did not have to be reported or acted upon if the employee terminated the contact immediately; but, if the employee pursued the employment discussions, he would have to disqualify himself. Disqualification was already a practice within DOD<sup>5</sup> and in codifying this process in section 2397a, Congress felt it was providing a "clear set of circumstances when disqualification is required."<sup>6</sup>

This section was suspended for one year from December 1, 1989,<sup>7</sup> and again from December 1, 1990 to May 31, 1991<sup>8</sup> to afford the Administration further opportunity to present its case for repeal. Failing agreement by the Congress and DOD, on amendment or repeal, it returned to effect.

### 6.6.2.3. Law in Practice

The expressed purpose of section 2397a was to fill voids left by 18 U.S.C. § 208(a) and to prescribe a "clear set of circumstances when disqualification is required" during job-hunting. It did so by requiring GS-11s and O-4s (and above) who had performed any of several defined "procurement functions" regarding a contractor either to terminate job discussions with that firm immediately when they are first broached, or formally to report the job discussions and to disqualify themselves from further official duties affecting that contractor until the discussions terminate.

In large part, section 2397a was initially viewed as merely codifying defense ethics practices already in use regarding official disqualifications required by 18 U.S.C. § 208(a). It was also perceived as having the virtue of establishing a procedure for imposing administrative penalties that might prove more useful than criminal enforcement under section 208.

In practice, however, its mechanism for administrative penalties has not been used, and its requirement for employee disqualification has not been effective. Whereas section 2397a requires employee disqualification after defense contracts have been awarded, it imposes no such requirement while sources are actively being selected or contract prices are being negotiated; and because it has no specified termination, it potentially applies for years after the contract is closed or the employee's duties no longer involve contact with the contractor. By contrast, the new Office of Government Ethics regulations at 5 C.F.R. § 2635 require disqualification during all

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<sup>4</sup>*Id.* at 210-211.

<sup>5</sup>DOD Directive 5500, 7 VII(D), *noted in id.*, at 212.

<sup>6</sup>*Id.*

<sup>7</sup>Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat 1759 (1989).

<sup>8</sup>National Defense Authorization Act for 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 815(a)(2), 104 Stat. 1485, 1597 (1990).

periods the employee is engaged in official duties potentially affecting the contractor, and they cease to apply when that period of potential conflict has concluded.

#### **6.6.2.4. Recommendations and Justification**

##### **Repeal**

With the issuance of the OGE regulations at 5 C.F.R. § 2635, the Panel believes the negotiating restrictions of section 2397a have lost their utility. Through its authority to issue rules bearing administrative enforcement sanctions, OGE has effectively and, the Panel believes, more appropriately, addressed the technical shortcomings of section 208(a) without formulating a separate set of overlapping standards. Violations of section 208(a) now subject employees to civil penalties under 18 U.S.C. § 216 as well as to criminal penalties. In flagrant cases contractors can be prosecuted under the aiding and abetting provisions of 18 U.S.C. § 2.

Effective February 3, 1993, the OGE regulations will apply to all executive branch employees engaged in procurement. Beginning then, the chief substantive contribution of section 2397a will be the formality by which it requires disqualification by Government employees. Government and industry comment on these provisions uniformly ranked clarity in the applicable rules as their foremost priority. Because the new uniform rules at 5 C.F.R. § 2635 have been drafted to provide comprehensive executive branch treatment of this subject, the Panel believes that clarity and enforceability would best be achieved by repeal of section 2397a.

#### **6.6.2.5. Relationship to Objectives**

Repeal of this statute would clarify existing rules and ensure uniform standards applicable to all Government employees, thereby promoting continued integrity of defense procurement programs.

### 6.6.3. 41 U.S.C. § 423 (a)(1), (b)(1), (c)

#### Procurement integrity (Employment discussions)

##### 6.6.3.1. Summary of the Law

Subsection (a)(1) prohibits a "competing contractor"<sup>1</sup> or its agents and employees from knowingly offering employment or business opportunities to "procurement officials" "during the conduct of a procurement."<sup>2</sup> Subsection (b)(1) prohibits "procurement officials" from soliciting or accepting employment or business opportunities from a "competing contractor" "during a procurement." Under (c), procurement officials may talk to a competing contractor concerning employment under conditions which would be prohibited by (b) if the head of the agency approves a written proposal from the employee for disqualification from the procurement while the employment possibility is still open. The head of the procuring activity may also determine the length of the recusal period, including a finding that recusal is necessary for a reasonable time after the discussions terminate. When a procurement official is offered employment during the procurement process, recusal is forbidden if the official has participated personally and substantially in bid or proposal evaluation, source selection, or negotiations.

##### 6.6.3.2. Background of the Law

These subsections were part of the 1988 Procurement Integrity amendments to the Office of Federal Procurement Policy (OFPP) reauthorization. The limited legislative history on these three subsections suggests their goal was to "insist that all contracting persons conduct business in an 'arms length' fashion."<sup>3</sup> "It is hard for Government negotiators to remain independent," the report continues, "when they are being wined, dined and offered lucrative jobs by contractor personnel."<sup>4</sup> The recusal provision, subsection (c), was added as an amendment to the OFPP Act at section 27.<sup>5</sup> This amendment, worked out by a conference agreement, added subsection (c) to "make it clear that the Act permits recusal of procurement officials in appropriate circumstances."<sup>6</sup> Congress was also concerned that regulations contain specific criteria relating the recusal request to the specific procurement situation and desired that such things as the timing

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<sup>1</sup>A competing contractor as defined in section 423(p) means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, or any person acting on its behalf.

<sup>2</sup>A procurement official is defined in section 423(p) as any civilian or military official or employee of an agency who has participated personally and substantially in any of the following activities: (i) the drafting of specifications; (ii) review and approval of specifications; (iii) the preparation or issuance of a solicitation; (iv) the evaluation of bids or proposals (v) the selection of sources; (vi) the review and approval of an award, modification, or extension; (vii) any other specific procurement actions as specified by regulation.

<sup>3</sup>H.R. REP NO. 911, 100th Cong., 2d Sess. 30 (1988).

<sup>4</sup>*Id.*

<sup>5</sup>National Defense Authorization Act for 1990 and 1991, Pub. L. No. 101-189, Div. A, Title VIII, Part B, § 814(c), 103 Stat. 1352, 1495-1 (1989).

<sup>6</sup>H.R. CONF. REP. NO. 331, 101 Cong., 1st Sess. 605 (1989).

of the request and the degree to which the official was involved in key procurement actions be considered in the decision to disqualify.<sup>7</sup>

### 6.6.3.3. Law in Practice

These sections are implemented by FAR 3.104-3, 104-4, and 104-6.

The restrictions of section (b)(1) have created a confusing and burdensome overlap with other statutes and regulations. Two of those laws, 18 U.S.C. § 208 and 10 U.S.C. § 2397a, are primarily concerned with employment discussions. The first, 18 U.S.C. § 208, prohibits an officer or employee from participating personally and substantially "through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise" in a "contract, claim, controversy . . . or other particular matter in which . . . any person or organization with whom he is negotiating, or has an arrangement with concerning prospective employment, has a financial interest." If the official is prevented from participating in a particular matter he must, under the Office of Government Ethics (OGE) regulation implementing this provision of section 208, disqualify himself from "any matter which will have a direct and predictable effect on the financial interest of the prospective employer."<sup>8</sup> The regulation requires disqualification even when the employee's conduct falls short of actual negotiations, and proscribes involvement in particular contract matters even if an employee has merely sent out a mass mailing of resumes to several prospective employers, including the one which might be considered a competing contractor under section 423.

The second statute, 10 U.S.C. § 2397a, requires defense officials in mid to high level grades who have participated in a procurement function, including some functions regarded as contract administration duties, to promptly report to their supervisor any contact concerning future employment and to disqualify themselves from all participation in the performance of procurement functions related to that contractor. Essentially, each of these statutes addresses the same conduct.

Sections 423 (a)(1) and (b)(1) are the third and most narrow application of the same fundamental restriction. For defense personnel, these provisions appear to be subsumed by the other two statutes and their regulatory implementation. The section 423 restrictions on job-seeking are unique because they invert the theory of both 10 U.S.C. § 2397a and the OGE regulations implementing section 208(a). Under the latter, a Government employee interested in job-hunting must disqualify himself before he may explore outside employment opportunities. With the addition of section 423, however, the employee may disqualify himself under the standard OGE procedures only before duties have made him a "procurement official." If the employee acquired that status because of participation in the procurement during its preparation and solicitation stages, the employee must make written application to the activity head for permission to disqualify himself. Approval of the request is entirely discretionary, and under the procedures prescribed in FAR 3.104-6 it must balance factors like the employee's importance to the conclusion of the procurement on schedule.

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<sup>7</sup>*Id.*

<sup>8</sup>Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.602 (1992).

On the other hand, if the employee is a "procurement official" because of participation in the source selection or negotiation stages of the procurement, then the employee is totally ineligible to be disqualified, must continue with official duties through the remainder of the procurement, and must simply postpone all employment discussions with the contractor until the day following contract award.

As the Council of Defense and Space Industry Associations stated in its formal comment upon the employment discussions issue, "The law should be modified to purge overlapping 'revolving door' laws. Current standards-of-conduct laws are too complex for those covered to understand."<sup>9</sup>

In addition to the civil penalties outlined in section 423 for paragraphs (a)(1) and (b)(1), 18 U.S.C. § 216 establishes civil penalties to accompany the criminal penalties for violation of section 208. This seems to make the civil penalties for violation of these subsections unnecessary. With regard to (a)(1), any contractor who offers employment to a Government employee working on a procurement affecting that contractor's interest may also be guilty of violating 18 U.S.C. § 201, which prohibits offering a bribe or an illegal gratuity.

#### **6.6.3.4. Recommendation and Justification**

##### **Repeal**

With the issuance of the OGE regulations implementing 18 U.S.C. § 208(a) at 5 C.F.R. § 2635, the Panel believes the procurement integrity restrictions have lost their necessity and former utility. The OGE rules will effectively and, the Panel believes, more appropriately address the technical shortcomings of section 208(a) without formulating a separate set of overlapping rules. Violations of Section 208(a) now subject employees to civil penalties under 18 U.S.C. § 216, as well as to criminal penalties and administrative sanctions.

The new OGE regulations will become effective February 3, 1993, after which the chief substantive contribution of sections 423 (a)(1) and (b)(1) will be the procedural requirements they prescribe for employee disqualification. Because the new OGE rules have been drafted to provide comprehensive and uniform treatment of this topic, the Panel believes that clarity and enforceability would best be promoted by repeal of these provisions as well as repeal of section 2397a.

#### **6.6.3.5. Relationship to Objectives**

Repeal of these provisions would clarify existing rules and ensure uniform standards applicable to all Government employees, thereby ensuring continued integrity in defense procurement programs.

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<sup>9</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Robert Wallick and Harvey Wilcox (Aug. 18, 1992).

## **6.7. The Revolving Door**

### **6.7.0. Introduction**

The Panel undertook its consideration of the so-called "revolving door" laws with sensitivity that its charter to review laws inadvertently impeding the buyer-seller relationship did not so obviously embrace laws deliberately impeding the private employment of former procurement officials. The Panel pursued this topic only when it became clear that the piecemeal accretion of special prohibitions and penalties, albeit focused on private, post-Government conduct, may have generated such a degree of distraction, and such a mounting disincentive for capable persons to serve in responsible procurement positions, that review was imperative.

The Panel is aware of the enormous attention given to this topic in 1991 by several committees of the Congress, especially the Senate Committee on Governmental Affairs, the House Committee on Government Operations, and both committees on Armed Services.<sup>1</sup> Bills proposed by OFPP and OGE, and several alternatives that originated in those committees, shared a consensus that the subject has become overly complex but diverged irreconcilably in their approaches to a solution. The Panel urges Congress to renew this debate, although perhaps with a different approach.

The pyramid of post-employment laws facing departing defense employees has been addressed with increasing frequency<sup>2</sup> and is graphically portrayed in the chart at Fig. 6-B of the Ethics introduction.

Every executive branch employee is first subject to the lifetime representation restriction of 18 U.S.C. § 207(a)(1) as to any matter the employee handled personally, and to the two year representation restriction of section 207(a)(2) as to matters that were under the employee's responsibility during his final year of service. Those provisions address what in 1962 Congress viewed as the most pressing concerns: using Governmentally acquired knowledge against the Government, and using personal stature and contacts to open Government doors. Their remedy was to limit what the employee might do, but not where the employee might work.

Next, employees who during their final year participated in trade or treaty negotiations are barred by 18 U.S.C. § 207(b) for a year from assisting any other party in those proceedings. Officers and employees at the upper rates of Senior Executive Service (SES) pay are subject to two more restrictions: a one year ban imposed by section 207(f) on assisting any foreign entity before the Government, and a one year "cooling off period" imposed by section 207(c) on anything but purely personal or social contact with their former agencies.

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<sup>1</sup>Hearing before the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, February 26, 1991, S. Hrg. 102-59, 102d Congress, 1st Session; Hearing before the Investigations Subcommittee, House Committee on Armed Services, May 9, 1991, H.R. Hrg. 102-21, 102d Congress, 1st Session.  
<sup>2</sup>*Id.*; REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR 53-78 (1989); REPORT OF THE NATIONAL ACADEMY OF SCIENCES, SCIENCE AND TECHNOLOGY: LEADERSHIP IN AMERICAN GOVERNMENT, ENSURING THE BEST PRESIDENTIAL APPOINTMENTS 75-87, 1992.

Emitting yet an additional "cooling off" restriction applicable only to cabinet members, 18 U.S.C. § 207 thus imposes five basic post-employment restrictions upon all executive branch employees. Atop those, then, are the special purpose rules applicable only to defense or procurement personnel.

In nearly indecipherable terms, three of those restrictions are imposed by 10 U.S.C. § 2397b. In brief, the first reaches middle level employees who perform specified procurement duties on a major weapons system for more than half their working days during their final two years, and do so through contact with the contractor. The second applies to middle level employees who spend a majority of working days during their final two years performing the same types of procurement duties at a plant owned or operated by the contractor. The third addresses senior employees who in their last two years served as one of the Government's primary representatives in negotiating a \$10 million contract or claim with the contractor. Under section 2397b, these employees are forbidden from accepting compensated employment with the contractor for two years after separation.

Added to those eight rules are two imposed by the procurement integrity amendments at 41 U.S.C. § 423(f). Applying a different construction and definition of procurement duties and procurement official, section 423(f) becomes applicable when an employee's participation occurs during the conduct of a procurement; in that event he may not, for two years, assist in performing that contract or in negotiating changes to it.

Then, if the procurement official is a military officer, he is subject to two final restrictions. For two years 18 U.S.C. § 281 forbids him from selling "anything" to his former service, and for three years 37 U.S.C. § 801 forbids him from selling "supplies or war materials" to any DOD component. Thus in the officer's case, he must understand and comply carefully with 12 different restrictions on post-Government employment.

The Director of the Office of Government Ethics (OGE) has proposed repealing all seven of these special procurement related restrictions. He has testified that they are largely redundant of Government-wide restrictions already in place, and that the widespread confusion they have introduced is counterproductive to an effective executive branch ethics program.<sup>3</sup> Throughout Government these restrictions are counted high in the growing list of disincentives to Government service.<sup>4</sup>

There appears to be broad agreement that the two military selling statutes are relics of another era; 37 U.S.C. § 801 is a Korean War enactment and 18 U.S.C. § 281 originated during the Civil War. Both clearly have been superseded in purpose by the analogous provisions of section 207 that forbid any retirees, for specified periods of time, from making representations back to the Government on matters they had handled or that were under their supervision. Periodic recommendations for repeal traditionally meet no objection, but these laws remain on the books as minor hostages in the broader debate about simplifying the entire topic. The Panel

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<sup>3</sup>Statement of Stephen D. Potts, presented to Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Feb. 26, 1991, S.Hrg. 102-59, 102d Congress, 1st Session.

<sup>4</sup>REPORT OF THE NATIONAL ACADEMY OF SCIENCES 83-85.



agrees that 18 U.S.C. § 281 and 37 U.S.C. § 801 serve no useful purpose and that their repeal should proceed without relation to any other changes under consideration.

The five post-employment restrictions imposed by sections 2397b and 423(f), on the other hand, impose unique conditions that are not duplicated elsewhere. Proposals for their repeal have been greeted with little congressional enthusiasm because of concern that, while they may not be artful, they still serve a necessary function.

The three convoluted restrictions of section 2397b were enacted largely in response to public attention drawn by the press in the middle 1980s to the private employment of several defense officials, including the assistant secretary of a military service who accepted employment with a division of a major defense contractor shortly after handling a multimillion dollar dispute with another division of the same firm. This employment did not abridge the 18 U.S.C. § 207 rules against switching sides on particular matters, but the fact of his employment, like that of plant representatives and program managers, was perceived as inappropriate and as posing at least the appearance of a conflict.

For all its complexity, however, section 2397b reaches only a tiny percentage of procurement officials: those few who work at a contractor's plant, concentrate on a single weapons program, or handle a \$10 million dispute. The thousands of legal opinions issued to comply with this provision suggest the number to be about 2% of the population exploring employment, in which event it may be exceeded by the number of Government lawyers devoted to its enforcement.

Closely following the disclosures of Ill Wind, the two post employment restrictions imposed by section 423(f) seem to have been added to guard against the release of source selection and procurement-sensitive information, but in that they are not uniformly successful. By their breadth they also tend to foreclose the legitimate use of former employees' talent and expertise in areas of common interest. An engineer who had participated in formulating the specifications may be forbidden from designing production tooling at a time when the objectives of the Government and the contractor are aligned, and a logistician may be barred from assisting on a Government directed change as to which his earlier knowledge of the competition is valueless.

It is the Panel's opinion that neither section 2397b nor 423(f) merits the toll either exacts on Government efficiency. By their complexity both provisions command grossly disproportionate portions of Government and corporate administrative attention, and by their overreaching they have become disincentives to Government service. The Panel does not share the premise reflected by these restrictions that the potential for conflicts arising out of the award of contracts exceeds that arising in other executive endeavor, as in regulating banks or licensing drugs.

It is even less clear that this potential for conflict deserves blanket prohibitions on private employment that in the history of Federal ethics laws are unique for their severity. These provisions convey a damaging and unwarranted impression that procurement officials are among

the least worthy of public trust. It is the Panel's recommendation, therefore, that sections 2397b and 423(f) be repealed.

From the long record of congressional debate on these laws the Panel recognizes that there are many differing views on their merit. To the extent that they were initially enacted out of concern that through cordial treatment Government employees might curry favor with prospective private employers, the Panel believes those concerns are met by the comprehensive new OGE regulations under section 208(a).

The remaining thread of commonality between the two laws appears to be a concern that non-public information might be used to the Government's disadvantage through behind-the-scenes assistance that is not effectively restricted by the representation bar of section 207(a)(1). If that remains a concern, the Panel believes it would more fittingly be addressed in section 207, where it would join the main body of Federal post-employment restrictions and could draw from a common framework of terms and definitions.

Congress recently used this approach when it added section 207(b) to meet concerns about switching sides in trade or treaty negotiations, and from that pattern the Panel has drafted a procurement counterpart section 207(x) as a potential alternative to sections 2397b and 423(f). This new provision would apply to any employee who under section 207(a)(1) is already barred for life from representation back to the Government because of personal and substantial participation on a procurement; it would forbid that person from giving a private employer behind-the-scenes assistance on the strength of non-public information he had acquired about that procurement. If drafted without the over attention to minutiae that has crippled sections 2397b and 423(f), the Panel believes this proposal represents a model that could be refined to address the concerns those laws sought to correct.

## **6.7.1. 18 U.S.C. § 207**

### **Restrictions on former officers, employees, and elected officials of the executive and legislative branches**

#### **6.7.1.1. Summary of the Law**

This statute prohibits certain acts by former Government employees that constitute or might constitute the unfair use of prior Government employment. Sanctions provided in the law include prison terms, fines, and administrative remedies.

Section 18 U.S.C. § 207(a)(1) prohibits any person for life from representing anyone else before the Government on matters the he handled personally and substantially while a Government official.

Section 207(a)(2) prohibits any person for two years from representing anyone else before the Government on matters that had been under his official responsibility during the last year of Government service.

Other sections which may apply to DOD employees are 18 U.S.C. § 207(b), which prohibits anyone for one year from assisting others in trade or treaty negotiations the employee had been engaged in during his final year of Government service; 18 U.S.C. § 207(f), which for one year prohibits former senior officials from assisting foreign entities before the Government; and 18 U.S.C. § 207(c), which prohibits former senior officials for one year from making any communication or appearance before his former agency.

#### **6.7.1.2. Background of the Law**

Section 207 was part of the first comprehensive conflict of interest statute passed by Congress. Congress determined that a new statute was necessary because existing laws were confusing, inadequate, and had become a hindrance to the Government.<sup>1</sup> As enacted in 1962, section 207 replaced two earlier statutes that dealt with conflicts of interest. The first, 18 U.S.C. § 284, prohibited former Government employees, for a two-year period after termination of Government employment, from prosecuting a claim against the United States involving any subject matter with which the employee was connected during Government employment. The second, 5 U.S.C. § 99, prohibited a former employee of an executive department, for a two-year period, from prosecuting any claim pending in any department during the former employee's Government employment. Section 207 was intended to close the "revolving door" between Government service and private industry.

The Ethics In Government Act of 1978, Pub. L. No. 95-521, as amended by Pub. L. No. 96-28, strengthened the post-employment restrictions of section 207. The 1978 amendment

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<sup>1</sup>S. REP. NO. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853.

added a one-year "cooling off" period during which a former senior Government official is prohibited from representing anyone other than the United States before an agency in which he had served during his final year on any matter pending before the agency. The amendment also extended to two years the prohibition against representing private parties on matters that had been under the former employee's official responsibility during his last year of Government service. The amendment maintained the lifetime ban that prohibits a former official from acting in matters in which the official had been personally and substantially involved at any time during Government service. General rulemaking, formulation of general policy or standards, administrative matters, and legislative activities are not covered by the ban.

The Act addressed a number of perceived deficiencies in the standards for present and former Government employees: (1) the failure of executive departments to tailor regulations to individual agency and employee responsibilities; (2) ineffective procedures to ensure collection, review, and control of financial disclosure statements; (3) ineffective and untimely resolution of conflict of interest issues; and (4) the lack of a centralized supervisory authority. It mandated the creation of an Office of Government Ethics (OGE) under the Office of Personnel Management, (OPM) charging OGE with developing rules and regulations for the executive branch, monitoring agency compliance, issuing advisory opinions, requiring agency corrective actions, and developing and recommending further rules and regulations to be promulgated by the President or OPM. Additionally, the 1978 Act established the mechanism for the appointment of independent counsels and established the requirement for public disclosure of the financial interests of senior Government officials.

The Ethics Reform Act of 1989, Pub. L. No. 101-194, made a number of additional changes, including extension of the post-employment "revolving door" restrictions of section 207 to the legislative branch and extending the authority of OGE to limit the one-year "no contact" ban on former Government officials to a separate statutory agency or bureau within a department or agency. The amendment made it clear that limitation does not apply to a former head of the designated agency or bureau or to any officer or employee whose official responsibilities included supervision of the designated agency or bureau.

### 6.7.1.3. Law in Practice

For the purposes of this review the Panel considered the most relevant subsections of section 207 to be subsections (a)(1) and (2). The basic prohibition in section 207(a) is on representational activities carried out "with the intent to influence."<sup>2</sup> "Representation" is broadly defined to include formal or informal appearances, and oral or written communications. The OGE regulation at 5 C.F.R. § 2637.201, implementing section 207 as in effect prior to its most recent amendments, defines representation as "acting as agent or attorney, or other representative in an appearance, or communication with intent to influence."<sup>3</sup> An appearance is said to occur when an individual is "physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application."<sup>4</sup> A

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<sup>2</sup>18 U.S.C. § 207(a)(1).

<sup>3</sup>5 C.F.R. § 2637.201(b).

<sup>4</sup>*Id.* at 201(b)(3).

recent judicial interpretation of virtually the identical predecessor to section 207(a) held that a former employee's delivery of a bid package to his former agency did not constitute an "appearance" within the meaning of this restriction, and that the former employee did not deliver the bid with the intent to influence.<sup>5</sup> In an earlier case, on the other hand, a former employee's mere presence at a meeting related to tax cases, which had been within the employee's supervisory responsibility before retiring, constituted representation within the meaning of this restriction.<sup>6</sup>

The question deliberated by the Panel was whether this basic Government-wide ban on representational appearances or communications was alone sufficient to address concerns regarding the revolving door in the context of defense procurement. In arriving at its own recommendations to repeal a number of the defense-specific ethics laws reviewed by the Panel in this chapter, the President's Commission on Federal Ethics Law articulated several thoughtful tests:

Restrictions on the activities of former Government employees are intended to ensure the integrity of the Government's decision-making process, and thereby to protect the public interest. At the same time, post-employment statutes should not be unduly onerous so as to become a disincentive to Government service by qualified individuals. The Commission envisioned three specific functions that we believe should be served by the imposition of post-employment restrictions.

First, the restrictions should be fashioned in such a manner as to prohibit the use of improper influence by departed employees.

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A second related function of post-employment restrictions is the creation of a protective shield for sensitive Government information.

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Third, the post-employment restrictions may in some respects augment the restrictions on current employees in section 208 and help provide an additional protective function by discouraging current employees from letting thoughts of future employment possibilities shape their official conduct against Government interests while in office.<sup>7</sup>

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<sup>5</sup>*Robert E. Derektor of Rhode Island, Inc. v. U.S.*, 762 F. Supp. 1019, 1099 (D.R.I. 1991).

<sup>6</sup>*U.S. v. Coleman*, 805 F.2d 474 (3rd Cir. 1986).

<sup>7</sup> TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 53 (1989).

Applying similar standards, the Panel concluded that the Government-wide effect of section 207 was generally sufficient to protect against improper influence and to discourage temptations for Government employees to alter their conduct in a fashion that might further their prospects of future employment. Elsewhere in this report, however, the Panel has addressed the numerous additional restrictions imposed by federal law on the post-Government employment of employees and officials engaged in defense procurement. These include 18 U.S.C. § 281(a), 37 U.S.C. § 801, 10 U.S.C. § 2397b, and 41 U.S.C. § 423(f), all of which the Panel recommends be repealed as duplicative and, by their overlapping effect and inconsistent terminology, confusing even to those charged with their enforcement.

The Panel is fully aware, however, that concerns have been expressed that two of those provisions -- 10 U.S.C. § 2397b and 41 U.S.C. § 423(f) -- may constitute critical statutory protection against the improper use by a former Government employee of nonpublic Government information through later behind-the-scenes assistance to a defense contractor. Activity such as that is not proscribed by the representation limitations of section 207. To satisfy that concern, therefore, the Panel recommends that the repeal of sections 2397b and 423(f) be accompanied by enactment of a new "aiding and advising" restriction such as that reflected in the following draft. The Panel suggests that 18 U.S.C. § 207 is the appropriate location for such a new provision, which could address the offending conduct with specificity but entirely within the framework of existing section 207 restrictions and relying upon its established terms and definitions. A model for such a specially-tailored provision is section 207(b), added by Congress in 1989 to meet concerns about officials switching sides in on-going trade or treaty negotiations.

#### **6.7.1.4. Recommendation and Justification**

##### **Amend**

Elsewhere in this report, the Panel has recommended the repeal of 10 U.S.C. § 2397b and 41 U.S.C. § 423(f). Their repeal should be accompanied by enactment of an alternative restriction on the use of nonpublic procurement information by former procurement employees and officials, which the Panel recommends be incorporated as an amendment to 18 U.S.C. § 207. Such a provision would establish a one year "cooling off" period for former officers or employees of the executive branch during which they would be barred from representing, aiding, or advising others on the basis of non-public information gained through personal and substantial participation in a procurement during their last year of Government service. In that manner it would address public and Congressional concerns that non-public information might be used to the Government's disadvantage through "behind the scenes" communications and assistance from an employee who has participated personally and substantially in a procurement, but would do so without the degree of complexity and confusion presently introduced by 10 U.S.C. § 2397b and 41 U.S.C. § 423(f).

### 6.7.1.5. Relationship to Objectives

The proposed amendment to 18 U.S.C. § 207 would promote integrity in defense procurement by applying a standard framework of established terms and definitions that are familiar and more easily understood.

### 6.7.1.6. Proposed Statute

#### 18 U.S.C. §207(x) One-year restriction on certain procurement personnel

(1) Any person who is a former officer or employee of the executive branch of the United States (including any independent agency) and is subject to the restrictions contained in subsection (a)(1) by reason of personal and substantial participation in a procurement within the one-year period preceding the date on which his or her service with the United States terminated, and who had access to information concerning such procurement that is exempt from disclosure under section 552 of title 5, which is so designated by the appropriate department or agency, and which the person knew or should have known was so designated, shall not, on the basis of that information, knowingly represent, aid, or advise any other person (except the United States) concerning such procurement for a period of one year after his or her service or employment with the United States terminates. Any person who violates this subsection shall be punished as provided in section 216 of this title.

(2) The term "procurement" means the acquisition of property and services as defined at 41 U.S.C. § 403.

## 6.7.2. 18 U.S.C. § 281

### **Restriction on retired military officers regarding certain matters affecting the Government**

#### 6.7.2.1. Summary of the Law

Subsection (a) of this statute makes it unlawful for a period of two years after retirement for a former military officer to be compensated for representing any person in the sale of goods or services to the military service from which the officer retired. The statute also prohibits a officer for two years after retirement from prosecuting or assisting the prosecution of a claim to the officer's former service involving a matter with which the officer was directly connected while on active duty. The penalty for violating either provision is a fine<sup>1</sup> or imprisonment for not more than one year.

#### 6.7.2.2. Background of the Law

This section began as part of a law that made it a Federal offense for members of Congress and other Government officials to receive pay "in relation to any contract, claim or controversy in which the U.S. was a party."<sup>2</sup> The section was actually meant to exempt retired officers from the broader conflict of interest statute, with the proviso that the retired officers not be allowed to sell anything to the department from which they retired. In 1987, the permanent ban on selling to the retiree's own department was reduced to two years.<sup>3</sup>

This section was suspended for one year from December 1, 1989,<sup>4</sup> and again from December 1, 1990, to May 31, 1991,<sup>5</sup> to afford the Administration further opportunity to present its case for repeal. Failing agreement by the Congress and DOD on amendment or repeal, it returned to effect.

#### 6.7.2.3. Law in Practice

Although not specifically provided, this statute applies only to retired regular officers, none of whom have ever been successfully convicted of violating this section. Prior to its revision reducing the selling ban to two years, there was a reluctance to bring actions under this section because of concerns that it was unenforceable.<sup>6</sup> The 1987 amendments have lessened these

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<sup>1</sup>The fine for violation of this statute is set out in Title 18.

<sup>2</sup>18 U.S.C. § 203, (1940 ed.).

<sup>3</sup>Department of Defense Authorization Act, 1988, Pub. L. No. 100-180, Div. A Title VIII, § 822(b)(1) 101 Stat. 1132 (1987).

<sup>4</sup>Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1759 (1989).

<sup>5</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 315(a)(2), 104 Stat. 1485, 1597 (1990).

<sup>6</sup>ABA MONOGRAPH, PERSONAL CONFLICTS OF INTEREST 101 (1990).



concerns, but to the knowledge of the Panel no successful prosecution has resulted since the law was amended.

The Section of Public Contract Law of the American Bar Association firmly expressed its position that this statute should be repealed, stating:

The 1987 changes to this provision, Pub. L. No. 100-180, 101 Stat. 1019 (1978), can only be classified as a mistake. When faced with the issue of "clarifying" or repealing this provision, Congress simply made the wrong choice. There is no justification for this additional restriction for retired military officers.<sup>7</sup>

It appears from the accompanying conference report of the committees on the judiciary that the conferees believed, notwithstanding their efforts to provide temporary corrections for this provision, that the Committees should undertake a comprehensive review of section 281 and related provisions at some future date.<sup>8</sup> The Panel suggests that it is time to review this statute again, with a view toward its prompt repeal.

#### **6.7.2.4. Recommendation and Justification**

##### **Repeal**

This statute raises the same concerns as 37 U.S.C. § 801 in that it singles out retired regular officers for treatment different from other separated and retired Government officials. As DOD urged to the committees in 1986, the purpose of the repeal would be "to treat retired regular officers on the same basis as former civilian employees, retired reserve officers, enlisted military members, and former military personnel (who have not retired)."<sup>9</sup> That rationale has not changed. In singling out only a small class of former officials to prevent them from selling to their former service, the statute is unduly burdensome. There are few other statutes which isolate former personnel of other executive agencies in such a way through similar restrictions. Furthermore, this statute overlaps the criminal revolving door statute, 18 U.S.C. § 207, which was amended by the 1989 Ethics Reform Act to become a single comprehensive post-employment statute applicable to former executive and legislative branch personnel. Section 207 establishes a lifetime bar to representation before a department or agency on the same contract. For these reasons, it is recommended that this statute, together with 37 U.S.C. § 801, be repealed. Repeal of this section would eliminate inequity and confusion in the standards which apply to Government officials who happen to be retired military officers.

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<sup>7</sup>Letter from the Section of Public Contract Law, American Bar Association, signed by Karen Hastie Williams, Chair (Aug. 25, 1992).

<sup>8</sup>H.R. CONF. REP. NO.446, 100th Cong. 2d Sess. 665.(1986).

<sup>9</sup>*Id.*

#### **6.7.2.5. Relationship to Objectives**

Repeal of this statute would make the standards that apply to all former Government officials more equitable, and through increased clarity would ensure continued integrity of defense procurement programs.

### 6.7.3. 37 U.S.C. § 801

#### Restriction on payment to certain officers

##### 6.7.3.1. Summary of the Law

This section<sup>1</sup> provides that a retired regular officer may not be paid from any appropriation for three years after retirement, if he is selling for himself or others or is contracting or negotiating to sell supplies or war materials to DOD, the Coast Guard, the National Oceanic and Atmospheric Administration, or the Public Health Service.

##### 6.7.3.2. Background of the Law

This section was derived from a Navy pay statute,<sup>2</sup> and subsequently became part of the "Supplemental Appropriations Act, 1952."<sup>3</sup> It was re-enacted shortly thereafter as section 1309 of the Act of August 7, 1953,<sup>4</sup> and combined in 1962 with an 1896 provision which prohibited Navy officers from being compensated if employed by any person furnishing naval supplies or war materials to the United States.<sup>5</sup> Prior to its inclusion in Title 37, it was codified in Title 10.<sup>6</sup>

##### 6.7.3.3. Law in Practice

Under this statute, the Comptroller General and the Court of Claims have broadly interpreted selling to embrace a wide variety of activities, but the statute has been held to apply only to the sale of goods and not services.<sup>7</sup> Regulations which define selling for purposes of 37 U.S.C. § 801 are found in 32 C.F.R. § 40.7(c)(2).

##### 6.7.3.4. Recommendation and Justification

#### Repeal

This statute, along with 18 U.S.C. § 281, singles out retired regular officers for treatment different from other separated and retired Government officials. In doing so, it is unfairly burdensome on retired officers, and overlaps other statutes which encompass similar conduct.<sup>8</sup>

<sup>1</sup>Only section (b) of this statute remains active; section (a), which prohibited regular Navy and Marine officers from being paid by the Government if employed by a person furnishing naval supplies or war materials to the United States, was repealed by Pub L. No. 101-194, 103 Stat 1756 (1989).

<sup>2</sup>Act of July 22, 1935, ch. 402 § 9, 49 Stat. 490 (1935).

<sup>3</sup>Ch. 664, § 1309, 65 Stat. 757 (1951).

<sup>4</sup>67 Stat. 437 (1953).

<sup>5</sup>5 U.S.C. § 59c. The Navy version of this section had been codified in 10 U.S.C. § 6112(b) and was similar in application to 37 U.S.C. § 801(a), its repealed companion section, which prohibited regular Navy and Marine Corps officers from being employed by any person selling war materials to the United States.

<sup>6</sup>10 U.S.C. § 6112, 70A Stat. 381(1956).

<sup>7</sup>41 Comp. Gen. 677, (1962).

<sup>8</sup>18 U.S.C. §§ 207 (a)(1), (a)(2).

As the Ethics Officer for the Air Force Materiel Command commented, "A wide variety of individuals and agencies are involved in procurements, yet except for the case of 'particular matters' under 18 U.S.C. § 207 and specific contracts under 41 U.S.C. § 423, only retired military officers are prohibited from selling back to their agencies."<sup>9</sup>

#### **6.7.3.5. Relationship to Objectives**

Repeal of this statute would make the standards which should and must apply to all former Government officials more equitable and through increased clarity and simplicity, ensure continued ethical integrity of defense procurement programs.

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<sup>9</sup>Letter from Major Edward E. Hunt, III, Director, Ethics and Fraud Remedies, Headquarters Air Force Materiel Command, Department of the Air Force (July 9, 1992) forwarded in a letter from Brigadier General James C. Roan, Jr., Staff Judge Advocate, Headquarters Air Force Materiel Command to the Acquisition Law Task Force (July 21, 1992).

#### 6.7.4. 10 U.S.C. § 2397

### Employees or former employees of defense contractors; reports

#### 6.7.4.1. Summary of the Law

This section establishes requirements for former middle and senior-level military and civilian employees of DOD to file reports if employed by, or if there are substantial changes in employment by, a major defense contractor at an annual salary of \$25,000 or more, within two years of leaving DOD. For violations of its provisions, this section also provides for a maximum administrative penalty of \$10,000 as determined by the Secretary of Defense.

#### 6.7.4.2. Background of the Law

This section was originally introduced by Senator William Proxmire in 1969 as part of the Senate version of the FY 1970 DOD Authorization Act.<sup>1</sup> Its purpose was to be a "sunshine" provision that would make information on the "revolving door" available to the public and to Congress. It was substantially amended in 1985 to increase the salary limit from \$15,000 to \$25,000, to reduce the number of reporting years from three to two, and to expand the content of the reports.<sup>2</sup> The 1985 amendment also required the former employee to report any disqualification required during Federal employment as a result of employment discussions with the current contractor employer.<sup>3</sup>

#### 6.7.4.3. Law in Practice

The statute is implemented by 32 C.F.R. § 40.12 (DOD Directive 5500.7, 8-1 through 8-5). Service-wide reports are collected by the Defense Data Management Center and forwarded to Congress. DOD indicates that because the reporting periods differ from those required by section 2397c, it has difficulty using these reports as an effective tool to detect violations of post-employment restrictions.<sup>4</sup> Furthermore, DOD reports there have been no administrative fines assessed under this statute.<sup>5</sup> Consideration given to repeal of section 2397 during action on the 1992 Defense Authorization Act failed when agreement could not be reached on amendments to the Procurement Integrity provisions of 41 U.S.C. § 423.<sup>6</sup>

In May 1991, the DOD Inspector General (DODIG) wrote to Senator Carl Levin, "[T]he reporting requirement imposed by 10 U.S.C. § 2397 does not accomplish the purposes suggested

<sup>1</sup>Amendment to S.2546, 91st Cong., 1st Sess. (1969), enacted in Pub. L. No. 91-121, 83 Stat.210 (1969).

<sup>2</sup>Department of Defense Authorization Act, FY86, Pub. L. No. 99-145, 99 Stat. 583, 693 (1985).

<sup>3</sup>§ 2397(b)(3)(I).

<sup>4</sup>Interview with Robert Stoss, DOD Standards of Conduct Office (Aug. 6, 1992).

<sup>5</sup>*Id.*

<sup>6</sup>65 C.F.R. 619 (Nov. 11, 1991).

by Congress when this statute was enacted. I urge you to repeal the statute, which will free investigative resources to concentrate on cases of significant merit."<sup>7</sup>

Most of the comments received concerning this section concurred with the Panel's proposal for its repeal because it, along with its companion sections, section 2397a, b, and c, contributed to a complicated and confused system of overlapping conflict of interest provisions.<sup>8</sup> The National Security Agency's Central Security Service stated, for example, the repeal of section 2397 would "alleviate stacking of employment search and post-employment limitations which have created a maze of confusing restrictions."<sup>9</sup>

#### **6.7.4.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this section. Because its requirements apply only to DOD personnel and not to officials of other Government agencies, these provisions run contrary to the objective of having uniform Government-wide ethics standards, including common post-employment standards. The statute does not appear to be an effective enforcement tool in detecting post-employment violations, and is a burden to DOD in its requirements to collect and maintain records.

#### **6.7.4.5. Relationship to Objectives**

Repeal of this statute would equalize the standards that apply to all former Government officials, and through increased clarity would ensure continued integrity of defense procurement programs.

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<sup>7</sup>Letter from Susan Crawford, Department of Defense Inspector General, to Senator Carl Levin (May 16, 1991).

<sup>8</sup>See, e.g., Memorandum from Colonel Paul C. Smith, Chief, Contract Law Division, Army Office of the Judge Advocate General, to Colonel Susan McNeill, Acquisition Law Task Force (Sep. 21, 1992).

<sup>9</sup>Letter from R.N. Fielding, Legislative and Regulatory Counsel, National Security Agency, Central Security Service (Oct. 1, 1992).

## **6.7.5. 10 U.S.C. § 2397b**

### **Certain former Department of Defense procurement officials: limitations on employment**

#### **6.7.5.1. Summary of the Law**

This section provides that a defense official who has performed a procurement function:

(a) who is in the grade of GS-13 or O-4 pay equivalent or above, and who, on a majority of his working days during the two-year period ending on the date of separation from DOD, performed a procurement function at a site or plant that is contractor-owned or -operated and which was the principal location of that employee's performance; or

(b) who is in the same grade as in (a) and who, on a majority of his working days during the above two-year period, performed a procurement function related to a major defense system and, in so doing, participated personally and substantially and in a manner involving decision-making responsibilities with respect to a contract for that system through contact with the contractor; or

(c) who during the above two-year period as a Senior Executive Service member or an O-7 pay equivalent, or above, acted as the primary representative of the United States in negotiating a contract or an unresolved claim over \$10 million,

may not accept compensation from a contractor for two years from the date of separation from DOD service. Any person in the above categories who knowingly accepts compensation under the prescribed circumstances is subject to a civil fine of not more than \$250,000. In addition, any person who offers or pays such compensation and who knew or should have known that such action would violate this section is also subject to a civil fine of not more than \$500,000. The law also provides that affected persons may request an opinion from the "designated agency ethics official" of the DOD agency from which the official separated concerning the applicability of section 2397b. This opinion must be issued not later than 30 days after receipt of a request containing all relevant information. A favorable opinion based upon full disclosure of all relevant facts would create a conclusive presumption that the employee's acceptance of the compensation is not a violation of the restriction.

#### **6.7.5.2. Background of the Law**

Section 2397b was enacted together with section 2397c in the Joint Resolution Making Continuing Appropriations (1986) as part of a DOD procurement reform package that included

the introduction of the procurement executive concept, and whistle blower protection statutes for DOD and contractor employees.<sup>1</sup> The statute was thereafter re-enacted in the same form.<sup>2</sup> The ban on compensation was in part motivated by the "switching sides" of several prominent defense officials among whom was an assistant military service secretary who went to work for a major defense firm shortly after being involved in a multimillion dollar dispute with a separate division of the same company. Although in this case no law was violated, the perceived conflict of interest raised public concern.

Originally proposed for repeal as part of the Ethics Reform Act of 1989, this section was instead suspended for one year from December 1, 1989,<sup>3</sup> and again from December 1, 1990 to May 31, 1991<sup>4</sup> to afford the Administration further opportunity to present its case for repeal. Failing agreement by the Congress and DOD on amendment or repeal, it returned to effect.

### 6.7.5.3. Law in Practice

32 CFR § 40.14 implements this provision and closely follows its language. DOD reports thousands of opinions have been written under section (e)(1) by the various branches of DOD and the military services since this law went into effect.<sup>5</sup> However, to date, procedures have not been specifically established to levy fines, nor have fines been levied under the administrative payment provisions.<sup>6</sup>

A 1990 GAO report recognized that although procedures had been established to comply with the provisions of sections 2397b, few former DOD employees were limited by that section from defense contractor employment because they had not spent most of their working days with any one system or plant. The report also found that only five per cent of the ethics opinions written under this section concluded that the individuals concerned might be prohibited from accepting compensation from potential defense contractor employers.<sup>7</sup> It has been estimated, in fact, that section 2397b may apply to only 2% of DOD procurement personnel.<sup>8</sup>

In analyzing continuing need for this statute the Panel has concluded that the primary standard for post-employment restrictions should be 18 U.S.C. § 207, which makes employees subject to a lifetime ban on matters which were handled personally and a two year restriction on matters that were under an employee's official responsibility. Section 2397b is unique in Federal ethics legislation for the severity of the restrictions imposed. Rather than limiting post-

<sup>1</sup>By H.J. Res. 738, Pub. L. No. 99-500, 100 Stat 1783-156(1986).

<sup>2</sup> It was reenacted twice: Act of Nov. 14, 1986, Pub. L. 99-591, Title I, § 101(c), 100 Stat 3341-156, and by the Defense Authorization Act, Fy 1986, Pub. L. 99-661, Div. A, Title IX, Part C § 931(a)(1) 100 Stat. 3936,(1986). The Defense Corrections Act of 1987, 101 Stat. 275, provided that the three enactments would be codified only once.

<sup>3</sup>Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat 1759 (1989).

<sup>4</sup>National Defense Authorization Act, Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 815(a)(2), 104 Stat. 1597(1990).

<sup>5</sup>Interview with Robert Stoss, DOD Standards of Conduct Office, Aug. 6, 1992.

<sup>6</sup>*Id.*

<sup>7</sup>GAO REPORT NSIAD 90-103, DOD REVOLVING DOOR, (1990).

<sup>8</sup>SECTION BY SECTION ANALYSIS OF THE PROPOSED PROCUREMENT ETHICS REFORM ACT OF 1990 11 (May 9, 1990).



Government conduct, such as sales representation or consulting, it imposes an absolute bar on private employment with certain contractors as to whom the employee has had official responsibilities.

Elsewhere in this report, the Panel recommends repeal of 41 U.S.C. § 423(f). The Panel recommends repeal of section 2397b as well, and suggests that repeal be accompanied by enactment of an alternative restriction on the use of nonpublic procurement information by former procurement employees and officials. The Panel recommends incorporating such a restriction at 18 U.S.C. § 207, establishing a one year "cooling-off" period to prohibit former officers or employees of the executive branch from representing, aiding, or advising others on the basis of nonpublic information gained through personal and substantial participation in a procurement during the last year of Government service. Such an amendment would address public and congressional concerns that nonpublic information not be used to the Government's disadvantage through "behind-the-scenes" communications and assistance from an employee who has participated personally and substantially in a procurement, but without the complexity and confusion presently introduced by 10 U.S.C. § 2397b and 41 U.S.C. § 423(f).

#### **6.7.5.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of 10 U.S.C. § 2397b, together with repeal of 41 U.S.C. § 423(f), and the substitution instead of a new aiding or advising subsection as proposed in the analysis accompanying 18 U.S.C. § 207. Notwithstanding that section 2397b applies to but an extremely limited number of DOD personnel, it has generated thousands of requests for "safe harbor" opinions because most defense contractors decline to hire former DOD employees without having this opinion. DOD issued over 4,300 such opinions in just one 19-month period.<sup>9</sup> The resources expended in implementing this statute far outweigh its benefits, representing a heavy overhead burden that DOD must bear during a period of shrinking resources. Enactment of an alternate provision such as that proposed at 18 U.S.C. § 207 would more effectively and clearly address the principal objective being served by the present law.

#### **6.7.5.5. Relationship to Objectives**

Repeal of this statute would equalize the standards that should and must apply to all former Government officials and through increased clarity would ensure continued ethical integrity of defense procurement programs.

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<sup>9</sup>*Id.* Furthermore, in only 4% of those opinions did DOD find that the law even potentially applied.

**6.7.6. 10 U.S.C. § 2397c**

**Defense contractors: requirements concerning former  
Department of Defense officials**

**6.7.6.1. Summary of the Law**

This section mandates that each DOD contract in excess of \$100,000 include a provision by which the contractor agrees not to compensate certain former defense officials in violation of section 2397b. Knowing violation of this contract provision would subject a contractor to liquidated damages of \$100,000 or three times the compensation paid to the former employee. Contractors having at least \$10 million in contracts with DOD are also required by this law to submit a report, on April 1, covering former DOD officers or employees who, within the previous calendar year, were paid by the contractor within two years of leaving DOD. Knowing failure to file this report subjects a person to an administrative penalty not to exceed \$10,000.

**6.7.6.2. Background of the Law**

This section and section 2397b were introduced in the Joint Resolution Making Continuing Appropriations (1986) as part of a DOD procurement reform package that included the introduction of the procurement executive concept, and whistle blower protection statutes for DOD and contractor employees.<sup>1</sup> The statute was re-enacted permanently in the Fiscal Year 1987 Defense Authorization Act in the same form.<sup>2</sup>

**6.7.6.3. Law in Practice**

This statute is implemented by 48 C.F.R. § 252.170-1 and 48 C.F.R. § 252.7002. Procedures for adjudicating administrative penalties under this statute are set out in 32 C.F.R. § 40.15. Under this statute, reports are collected and sent to the Defense Data Management Center for compilation and reporting to Congress.<sup>3</sup>

A February 1990 GAO report measured compliance with this section against a list of individuals meeting the statute's requirements who held security clearances and worked for DOD contractors.<sup>4</sup> The report found that only 60% of those with clearances who met the qualifications were reported by their employers within the two years before the study. GAO speculated this result may have been due in part to the recency of the requirement.<sup>5</sup>

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<sup>1</sup>H.J. Res. 738, 99th Cong. Sess. Pub. L. No. 99-500, 100 Stat 1783-156(1986) as corrected by Act of November 14, 1986, Pub. L. No. 99-591, Title I, § 101(c), 100 Stat 3341-156.

<sup>2</sup>National Defense Authorization Act, Fiscal Year 1987, Pub. L. No. 99-661, Div. A, Title IX, Part C. § 931(a)(1) 100 Stat. 3936, (1986).

<sup>3</sup>Interview with Robert Stoss, DOD Standards of Conduct Office, Aug. 6, 1992.

<sup>4</sup>GAO REPORT NSIAD 90-103, DOD REVOLVING DOOR, Feb., 1990.

<sup>5</sup>*Id* at 4.

The provision has not been effective as an enforcement tool to identify those who may be violating post-employment restrictions. Reporting periods are not the same for the section 2397 and section 2397c reports, a problem which makes it difficult for DOD officials to correlate data in both reports to ensure that all employment subject to post-employment restrictions is being reported.<sup>6</sup> Furthermore, information provided in the section 2397c report is not specific enough concerning job responsibilities to be an effective tool for enforcement of violations of section 2397b(a)(1).<sup>7</sup> There have been no reported administrative penalties assessed under this provision.

The view of many in the DOD contractor community is that these reports are burdensome and of little utility.<sup>8</sup> About half of the contractors contacted in the GAO study responded that requiring more than one report on a covered former DOD employee was burdensome.<sup>9</sup> DOD responded in that report that many other companies, especially those with few managers and decentralized staffs, also found the requirement burdensome.<sup>10</sup> An additional difficulty cited in the report was that the April 1 reporting date required the employer to submit two or sometimes three reports to cover the required two year period.<sup>11</sup> More recently, corporate employers of military reservists called to active duty in the Persian Gulf were confronted with the anomalous obligation of being required to re-start the two-year reporting cycle when covered employees were released from active duty and returned to their civilian jobs.<sup>12</sup>

#### **6.7.6.4. Recommendation and Justification**

##### **Repeal**

As in the case of section 2397, actual practice under this statute indicates it is unduly burdensome and does not further its intended purpose. The Panel's recommendation for repeal is also consistent with its recommendation for repeal of section 2397b. Retention of the statute would not bring the Government closer to the goal of a Government-wide ethics standard, nor would it foster the Panel's goal of recommending simple, understandable, and effective legislation.

#### **6.7.6.5. Relationship to Objectives**

Repeal of this statute would equalize the standards which apply to all former Government officials, and through increased clarity would ensure continued integrity of defense procurement programs.

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<sup>6</sup>Interview with Robert Stoss, DOD Standards of Conduct Office, Aug. 6, 1992.

<sup>7</sup>*Id.*

<sup>8</sup>GAO REPORT NSIAD 90-103, DOD REVOLVING DOOR, Feb., 1990 6.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>Advisory memorandum from Terrence O'Donnell, DOD General Counsel, dated March 15, 1991.

## 6.7.7. 41 U.S.C. § 423

### Procurement integrity

#### (f) Restrictions resulting from procurement activities of procurement officials

##### 6.7.7.1. Summary of the Law

Subsection (f) of the 1988 procurement integrity amendments to the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. § 423(f)) added two additional "revolving door" restrictions to those already applicable to persons engaged in defense acquisition. For two years, subsection (f) prohibits a procurement official from leaving the Government and participating for a competing contractor in subsequent negotiations on that contract, or from participating in the performance of that contract. Those restrictions also apply to: first and second tier subcontractors in excess of \$100,000; subcontractors who significantly assisted the prime in negotiations of the prime contract; subcontractors personally directed to the prime contractor by the procurement official; and subcontractors reviewed or approved by the procurement official. Waivers may be granted by the President in certain limited circumstances.

##### 6.7.7.2. Background of the Law

Subsection (f) was originally section 27(e) of the 1988 amendments to the OFPP Act. It was amended and renumbered by Pub. L. No. 101-189<sup>1</sup> to codify its application to post-Government employment with subcontractors. Originally proposed for repeal as part of the Ethics Reform Act of 1989, this provision was suspended for one year from December 1, 1989,<sup>2</sup> and again from December 1, 1990 to May 31, 1991<sup>3</sup> to afford the Administration additional opportunity to present its case for repeal. Failing agreement on amendment or repeal, it then returned to effect. It is implemented at FAR 3.104-7.

##### 6.7.7.3. Law in Practice

There has been growing acknowledgment that the current pyramid of post-employment laws facing defense employees is complex and nearly impossible to understand.<sup>4</sup>

Every executive branch employee is first subject to the lifetime representation restriction of 18 U.S.C. § 207 (a)(1) as to any matter handled personally and substantially, and to the two-

<sup>1</sup>National Defense Authorization Act for 1990 and 1991, Pub. L. No. 101-189, Div. A, Title VIII, Part B, § 814(c), 103 Stat. 1495-1 (1989).

<sup>2</sup>Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1759 (1989)

<sup>3</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Title VIII, § 815(a)(2), 104 Stat. 1597 (1990).

<sup>4</sup>*Hearings before Investigative Subcommittee of House Armed Services Committee on Revolving Door Issues and Post Employment Restriction, May 9, 1991: REPORT OF THE PRESIDENT'S COMMISSION OF FEDERAL ETHICS LAW REFORM 53-78 (1989)).*

year representation restriction of section 207 (a)(2) as to matters that were under the employee's official responsibility during his final year in office. Those restrictions address what in 1962 Congress believed were the two most serious concerns: using one's Governmentally acquired knowledge about an on-going case or proceeding against the Government, and using personal stature and contacts to open Government doors.

Next, employees who during their final year participated in trade or treaty negotiations are barred by 18 U.S.C. § 207 (b) for a year from assisting any other party in those proceedings. Officers and employees at the upper rates of SES pay are subject to two more restrictions: a one-year ban imposed by section 207 (f) on assisting any foreign entity before the Government, and a one-year "cooling-off period" imposed by section 207 (c) on anything but personal or social contact with their former agencies.

Omitting yet an additional "cooling-off" restriction applicable only to cabinet members, 18 U.S.C. § 207 thus imposes five basic post-employment restrictions upon executive branch employees. Atop those are the special-purpose rules applicable only to defense or procurement personnel, three of which are imposed by 10 U.S.C. § 2397b.

In brief, the first section 2397b restriction affects middle level employees who perform specified procurement duties on a major weapons system for more than half their working days during their final two years, and do so through contact with the contractor. The second applies to mid-level employees who spend a majority of working days during their final two years performing the same types of procurement duties at a plant owned or operated by the contractor. The third addresses senior employees who in their last two years served as one of the Government's primary representatives in negotiating a \$10 million contract or claim with the contractor. Under section 2397b all of these employees are forbidden from accepting compensated employment with the contractor for two years after separation.

If the procurement official is a military officer, he is subject to two additional restrictions. For two years after retirement 18 U.S.C. § 281 forbids him from selling "anything" to his former service, and for three years 37 U.S.C. § 801 forbids the former officer from selling "supplies or war materials" to any DOD component. In the officer's case, therefore, he must understand and comply carefully with 10 different restrictions on post-Government employment.

Then, atop those 10 restrictions were added the final two procurement integrity limitations imposed by section 423 (f). Applying still different standards and different definitions of procurement duties and procurement officials, the section 423 (f) restrictions become applicable when the employee's participation occurs during the conduct of a procurement. For two years after that Government participation, they forbid the employee from switching sides in negotiations on that contract, or even performing work under the contract.

It is the Panel's conclusion that section 423 (f), like 10 U.S.C. § 2397b, burdens the acquisition community with narrow rules whose complexity and confusion far exceed their benefit. Also like section 2397b, section 423 (f) is a burden less for the substance of the post employment restriction it imposes than for the time and effort required to interpret it. Untold

numbers of Government lawyers have been assured employment by the statutory requirement to issue "safe harbor" legal opinions interpreting sections 423(f) and 2397b, notwithstanding that many of these opinions are issued only because they have become routine employment credentials regardless of the employee's precise duties. Section 423 (f) is so imprecise that requesting a safe harbor opinion has proven to be a prudent measure for all employees whose duties related even obliquely to procurement.

Comments on this topic received by the Panel are consistent with those expressed by Government and industry representatives during congressional reconsideration of procurement-related ethics rules by the Senate Committee on Governmental Affairs in 1991: that those restrictions add little of substance to the basic set of Federal post-employment laws, but through their ambiguity and severity contribute significant disincentives to public service.<sup>5</sup>

#### **6.7.7.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends that section 423 (f) be repealed. It is one of several specially-enacted ethics restrictions that the Office of Government Ethics has found by their complexity and confusion to be counterproductive to an effective executive branch ethics program.<sup>6</sup> Elsewhere in this report, the Panel has recommended repeal of 10 U.S.C. § 2397b. The Panel believes that the principal remaining function of these two provisions is to protect against the improper use of inside information acquired during the conduct of a procurement. It was the Panel's conclusion that such a limitation could be enacted far more effectively by an alternative provision such as we have suggested as an amendment to 18 U.S.C. § 207. The Panel's proposed amendment would establish a one year "cooling off" period to prohibit former officers and employees of the executive branch from representing, aiding, or advising others on the basis of non-public information gained through personal and substantial participation in a procurement during their last year of Government service. The Panel believes such a provision would effectively address public and congressional concerns regarding "behind-the-scenes" communications and assistance following Government service without introducing the complexity and confusion presently surrounding 10 U.S.C. § 2397b and 41 U.S.C. § 423 (f).

#### **6.7.7.5. Relationship to Objectives**

Repeal of this statute would allow the same standards that should and must apply to all former Government officials to be applied equally to "procurement officials" and would ensure, through increased clarity and simplicity, continued ethical integrity of defense procurement programs.

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<sup>5</sup>*Procurement Integrity Act: Hearing before the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, 102 Cong. 1st Sess. (1991) (Statements of Terrence O'Donnell, General Counsel, DOD, and Stuart J. Evans, Assistant Administrator, NASA).*

<sup>6</sup>Statement of Stephen D. Potts, presented to Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, February 26, 1991, S.Hrg. 102-59, 102d Congress, 1st Session.

## **6.8. Protection of Procurement Information**

### **6.8.0. Introduction**

At the heart of the procurement integrity amendments to the Office of Federal Procurement Policy (OFPP) Act are its post-III Wind restrictions on disclosure of proprietary or source selection information during the conduct of a procurement. As with the procurement integrity restrictions on gifts and job searches, these special rules protecting procurement-sensitive information apply only during the interval between the initiation of a procurement and the eventual award of a contract. During that period, section 423(a)(3) forbids a competing contractor to seek such information, subsection (b)(3) forbids a procurement official to disclose it, and subsection (d) forbids its release by any person, except as authorized by the contracting officer.

18 U.S.C. § 1905, the Trade Secrets Act, has long protected proprietary corporate information from unauthorized release by Government officials, but not all portions of a competitor's proposal are certain to qualify for its protection. Likewise, the FAR governs the release of certain information relating to competitors' proposals and the Government's internal evaluation. Additional uniform rules on the dissemination of acquisition information will soon be published pursuant to section 822 of the National Defense Authorization Act for FY 1991-1992. Until the enactment of the procurement integrity provisions in section 423, however, no single provision of Federal law broadly forbade the unauthorized release of all such information, or trafficking in such information once it had been released.

Despite its laudable objectives and purpose, however, no single portion of the procurement integrity amendments to Title 41 seems to have generated more uncertainty or anxiety in the procurement community. By virtue of their complexity and the severity of the penalties for noncompliance, the information disclosure restrictions have imposed what some have characterized as a "code of silence" on both Government and industry personnel during the course of a procurement, during which the former have often feared to offer and the latter feared to seek even the most routine information without specific authorization or, frequently, legal guidance.

As characterized by a senior NASA official, "if there is any doubt about whether a document or information should be discussed during a source selection, it does not get communicated."<sup>1</sup> To guard against the enormous penalties for error, some corporations and Government activities are said to have furnished their representatives with "Miranda cards" that coach them through a litany of preliminary questions each ought to ask the other before safely addressing the business at hand.

The law's complexity has been illustrated in numerous examples, such as the commercial firm in its first Government competition innocently inquiring whom its competition was, or the

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<sup>1</sup>*Hearings before the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, 102d Cong, 1st Sess. (1991), (statement of Stuart J. Evans, NASA Assistant Administrator for Procurement).*

frustration of applying the rule to a sole source negotiation. And after several years of trying, it is obvious that a "bright line" defining the commencement of a procurement is beyond reach. Millions of public notices cannot practicably be published announcing that date, yet without some such notice, Government personnel at a field purchasing activity cannot know that a purchase request has been drafted at headquarters, thereby triggering a new set of rules under section 423 applicable to its relations with potential competitors. Those competitors, at the same time, may be conducting other business with the field activity on similar procurements, exchanging related data and information, and they are even less able to know that a new procurement has started.

In addition to requirements for filing compliance certifications, the law also requires contracting officers to maintain a list of every person authorized in that procurement to have access to proprietary or source selection information. That list is required notwithstanding that access by many people is beyond the contracting officer's control, as when audits or investigations are performed, or when GAO protests are filed. A complete list is beyond reach and an incomplete list is of dubious value.

The Panel believes the information protection provisions of section 423 are potentially useful but require amendment. Protection is clearly important because unauthorized access to a competitor's bid or proposal information can jeopardize the integrity of the procurement process and deprive both Government and competitors of a fair competition. Just as clearly, however, that protection should not come at the expense of the regular discourse and routine exchange of information that is the essence of negotiated procurement. The public is not served by rules and penalties so threatening that paralysis begins to make the bargaining process of competitive negotiation take on the rigid formality of sealed bidding.

The underlying problem, in the Panel's view, is that the information protection restrictions of section 423 had to be artificially adapted to the procurement integrity lexicon of procurement officials, competing contractors, and conduct of a procurement. The Panel believes the same rules would be clearer, and far stronger, if they were drafted to address the character of the information to be protected rather than the status of the persons handling it.

In 1991 a substitute provision was proposed by OFPP and the Office of Government Ethics (OGE) and considered by the Senate together with several other alternatives to the current provisions of section 423.<sup>2</sup> Under this substitute, contractor bid or proposal information and source selection information would be protected from unauthorized disclosure until the relevant contract is awarded. The protected information would be defined with specificity and clarity, and trafficking would bear criminal, civil, and administrative penalties.

The Panel reviewed other possibilities, including the view expressed during congressional hearings that problems with the procurement integrity provisions could be cured by better

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<sup>2</sup>The "Procurement Ethics Reform Act," S. 2775, submitted to the 101st Congress on June 20, 1990, and resubmitted to the 102d Congress on February 14, 1991, introduced as S. 458 on February 21, 1991.



implementing regulations.<sup>3</sup> With due respect for those views, the Panel disagrees. The stifling burden of the information protection provisions of section 423 comes from its overall and needless complexity, and it is the uncertainty caused by that complexity that has made its effect so chilling: Has a procurement started somewhere, or concluded? Has one become a procurement official? Is a firm a competing contractor on that procurement? Those are useless elements in a law whose objective is to forbid stealing and trading in inside information.

The Panel believes the alternative proposed by OFPP and OGE would satisfy the information protection objectives of procurement integrity but in far more understandable terms. The coverage is in some respects slightly broader, and it does not burden the procurement process with certification and record keeping requirements of questionable value. The Panel believes this bill is far superior to the current law and deserves thoughtful reconsideration by the Congress.

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<sup>3</sup>*Hearings before the Senate Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, 102d Cong, 1st Sess. (1991), (statement of Stuart J. Evans, NASA Assistant Administrator for Procurement).*

## **6.8.1. 18 U.S.C. § 1905**

### **Disclosure of confidential information generally**

#### **6.8.1.1. Summary of the Law**

The statute prohibits an officer or employee of the United States from unlawfully disclosing trade secrets or other confidential information provided to the Government. The statute imposes a maximum penalty of \$1,000 and one year imprisonment for violation.

#### **6.8.1.2. Background of the Law**

The present form of the statute has evolved from provisions in the Tariff Acts of 1894<sup>1</sup> and 1930<sup>2</sup> and the Revenue Act of 1926.<sup>3</sup> The last major revision occurred in 1948<sup>4</sup> with technical amendments in 1980.<sup>5</sup>

#### **6.8.1.3. Law in Practice**

The statute imposes criminal penalties for violation. In practice, it has effectively served to ensure those doing business with the Government that corporate proprietary information will not be disclosed or released to competitors. The Procurement Integrity Provisions, 41 U.S.C. § 423 *et seq.*, have added criminal, civil, and administrative penalties for the unlawful disclosure of source selection or proprietary information in connection with the award of a Government contract. These provisions are implemented in DFARS subpart 203. The Procurement Integrity Provisions do not conflict with 18 U.S.C. § 1905, although their restrictions overlap to a limited degree. Both provisions potentially prohibit a Government employee from unlawfully disclosing pricing information or other proprietary information during the source selection process.

#### **6.8.1.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this statute, which is one of the foundations of the Government's information protection authorities.

#### **6.8.1.5. Relationship to Objectives**

Retention of this statute will promote the integrity of the defense procurement system without being unduly burdensome.

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<sup>1</sup>Ch. 28, Stat. 509, 557 (1894).

<sup>2</sup>Pub. L. No. 71-361, Ch. 497, 46 Stat. 590 (1930).

<sup>3</sup>Pub. L. No. 69-20, Ch. 27, 44 Stat. 9 (1926).

<sup>4</sup>Act of June 25, 1948, Pub. L. No. 80-771, Ch. 645, 62 Stat. 683, 791.

<sup>5</sup>Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154, 1158.

**6.8.2. 41 U.S.C. § 423 (a)(3), (b)(3), (d)**

**Procurement integrity (Disclosure of information)**

**6.8.2.1. Summary of the Law**

Subsection (a)(3) prohibits a "competing contractor,"<sup>1</sup> its agents, or employees, from knowingly obtaining proprietary or source selection information from "procurement officials"<sup>2</sup> except as authorized, during a procurement. Subsection (b)(3) prohibits procurement officials from knowingly disclosing proprietary or source selection information, except as authorized, to a competing contractor during a procurement. Subsection (d) prohibits any person with authorized or unauthorized access to proprietary or source selection information during a procurement from knowingly disclosing such information, directly or indirectly, to those not authorized to receive it. "Proprietary information" is defined in subsection (p)(6) of section 423 as:

- (1) information contained in a bid or proposal;
- (2) cost or pricing data; or
- (3) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency or the contracting officer.

"Source selection information" is defined in subsection (p)(7) as:

[I]nformation determined by the head of the agency or the contracting officer to be information --

(a) the disclosure of which, to a competing contractor, would jeopardize the integrity or successful completion of the procurement concerned; and

(b) which is required by statute, regulations, or order to be secured in a source selection file or other restricted facility to prevent such disclosure.

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<sup>1</sup>A competing contractor is defined in section 423(p) means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, or any person acting on its behalf.

<sup>2</sup>A procurement official is defined in section 423(p) as any civilian or military official or employee of an agency that has participated personally and substantially in any of the following activities: (i) the drafting of specifications; (ii) review and approval of specifications; (iii) the preparation or issuance of a solicitation; (iv) the evaluation of bids or proposals; (v) the selection of sources; (vi) the review and approval of an award, modification, or extension; (vii) any other specific procurement actions as specified by regulation.

### 6.8.2.2. Background of the Law

Subsections (a)(3), (b)(3) and (d) were a part of the section 27 procurement integrity amendments added by the 1988 reauthorization of the Office of Federal Procurement Policy<sup>3</sup> (OFPP). The original section corresponding to subsection (a)(3) contained a prohibition on disclosure of information which would give a competing contractor "an unfair competitive advantage . . . or would otherwise undermine or harm the Government's negotiating position with regard to the procurement concerned."<sup>4</sup> That provision was refined and supplanted by the definition of source selection information incorporated by the 1989 amendments.

### 6.8.2.3. Law in Practice

These sections are implemented by FAR 3.104-3, 3.104-4, and 3.104-5. FAR 3.104-5 contains a requirement that proprietary information be appropriately marked with a prescribed legend. The recently published Office of Government Ethics (OGE) Standards of Ethical Conduct Regulation, which implements Exec. Order No. 12674, also proscribes the release of "non-public" information, or allowing the use of non-public information to further a private interest, "whether through advice or recommendation or by knowing unauthorized disclosure."<sup>5</sup> That ethics regulation defines non-public information, in part, as "information which is designated confidential by an agency; or which has not actually been disseminated to the general public and is not authorized to be made available to the public on request."<sup>6</sup>

Comments from both Government and industry generally support a prohibition on the release of procurement information and the applications of firm sanctions.<sup>7</sup> One of the major problems noted with the current disclosure provisions, however, is that the period of prohibition on the release and the definition of protected information needs to be "clearly and tightly defined to avoid any chilling on normal interaction and discussion between Government employees and industry."<sup>8</sup> There was also a concern expressed that well-meaning or inadvertent disclosure not be subject to punishment and that information which should be disclosed at appropriate times and for appropriate purposes not be impeded.

The effect of the information protection portions of the procurement integrity amendments has obviously been to stiffen the working relationship of Government and industry personnel during the conduct of a procurement, and to impose what has been characterized as a "code of silence" under which the exchange of routine negotiating information may become a threatening

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<sup>3</sup>Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679 § 6a, 102 Stat 4063 (1988).

<sup>4</sup>*Id.*

<sup>5</sup>57 Fed. Reg. 35, 960 (to be codified at 5 C.F.R. § 2635).

<sup>6</sup>*Id.*

<sup>7</sup>Memorandum to the Members of the Flowdown and Cost and Pricing Data Task Forces from Debbie von Opstal (April 28, 1991) and letter from Major Edward E. Hunt III, Director, Ethics and Fraud Remedies, Headquarters Air Force Materiel Command, Department of the Air Force (July 9, 1992) forwarded in a letter from Brigadier General James C. Roan, Jr., Staff Judge Advocate, Headquarters Air Force Materiel Command to the Acquisition Law Task Force (July 21, 1992)( hereinafter, HQ AFMC letter of July 9, 1992).

<sup>8</sup>HQ AFMC letter of July 9, 1992.

concern to both parties.<sup>9</sup> Commenters offered illustrations of the high risks of innocent error such as inexperienced commercial firms making inquiries concerning the identities of their competition, of applying the rules to sole source negotiations, or the situation when one component of a military department initiates a procurement without another component's knowledge. Lists of persons authorized to have access to that information are required to be kept by the contracting officer, yet the contracting officer is not in a position to control all those whose duties may require access, such as auditors, and he cannot prevent the inadvertent disclosure of information by those who are beyond his control.

The Panel agrees that the information protection provisions of section 423 are potentially useful, but believes they require amendment to serve efficiently. Protection is clearly important because unauthorized access to a competitor's bid or proposal information or to source selection information can jeopardize the integrity of the procurement process and deprive both Government and competitors of a fair competition. Just as clearly, however, that protection should not come at the expense of the regular discourse and routine exchange of information that is the essence of negotiated procurement.

The underlying problem, in the Panel's view, is that the information protection restrictions of section 423 had to be artificially fitted around the other procurement integrity provisions and their unusual definitions of procurement officials, competing contractors, and conduct of a procurement. The Panel believes the same basic disclosure restrictions would be clearer, and far more effective, if they were drafted to address the nature of the information to be protected rather than the status of the persons handling it.

In 1991, a substitute provision was proposed jointly by OFPP and OGE and considered by the Senate among several other alternatives to the current provisions of section 423.<sup>10</sup> Under this substitute, contractor bid or proposal information, and source selection information, would be protected from unauthorized disclosure until the relevant contract is awarded. The protected information would be defined with specificity and clarity, and trafficking would bear criminal, civil, and administrative penalties.

The Panel believes this alternative would satisfy the information protection objectives of section 423 but in far more understandable terms. The coverage is in some respects even broader, yet it does not burden the procurement process with documentary requirements of doubtful value. Most especially, the clarity of the rules would not have the chilling effect generated by the many uncertainties of the current law.

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<sup>9</sup>See, e.g., *Procurement Integrity Act: Hearing before the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs*, 102 Cong., 1st Sess. (1991) (Statements of Stuart J. Evans, Assistant Administrator, NASA).

<sup>10</sup>Procurement Ethics Reform Act of 1990, S. 2775, submitted to the 101st Congress on June 20, 1990, and resubmitted on February 14, 1991, introduced as S. 458 on February 21, 1991, into the 102nd Congress

#### 6.8.2.4. Recommendations and Justification

**Repeal 41 U.S.C. §§ 423(a)(3), (b)(3) and (d), and enact in their place Sec. 3. of the OFPP-OGE proposed legislation.**

The alternative set forth below was originally formulated by the Office of Federal Procurement Policy and the Office of Government Ethics, coordinated and concurred in throughout the executive branch, including the Department of Justice and the Inspectors General, and strongly supported by industry associations. It was drafted to focus on the information to be protected, rather than the status of persons who might disclose or obtain the information, or the particular stage of a procurement when the sensitive information might be generated. It would prohibit the knowing and willful pre-award disclosure of bid or proposal information and source selection information by anyone who, by reason of his office, employment or relationship with the Government, has access to such information. It would thus address the concerns expressed about the current law and not inhibit legitimate and productive exchanges of information during the procurement process.

The Section on Public Contract Law of the American Bar Association (ABA) stated that it believes that this proposal is "a significant step in the right direction."<sup>11</sup> The ABA suggested that it could be improved by deleting penalty provisions that duplicate those of criminal statutes and by formally designating the individuals covered by the statute. The Panel received similar comments from other sources, including a number of Government agencies, supporting adoption of this provision as an alternative to procurement integrity but offering minor suggestions and refinements to its terms.<sup>12</sup>

Rather than incorporate any of those changes at this time, the Panel has endorsed and recommends enactment of the OFPP-OGE bill in the form originally proposed and coordinated throughout Government and industry. It does so because that version is known and understood, and because the first step is obviously to reopen the debate on this topic. The Panel believes that the role and utility of these procurement integrity provisions deserve reconsideration by Congress, and urges adoption of the alternative drafted by OFPP and OGE.

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<sup>11</sup>Letter from the Karen Hastie Williams, Chair, Section of Public Contract Law, American Bar Association to Colonel Susan McNeill (Aug. 25, 1992).

<sup>12</sup>See e.g. letter from Ira Kemp, Associate Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force (Acquisition)(Sept. 25, 1992), Letter from D. Evelyn Lyon Attorney, Office of the Associate General Counsel (Contracts), National Aeronautics and Space Administration to Donald M. Freedman, DOD Advisory Panel on Streamlining and Codifying Acquisition Law (Sept. 22, 1992), letter from R.N. Fielding, Legislative and Regulatory Counsel, National Security Agency, Central Security Service to Colonel Susan P. McNeill, Section 800 Advisory Panel (Oct. 1, 1992). *But see* letter from Paul C. Smith, Chief, Contract Law Division, Office of the Judge Advocate General (Sept. 2, 1992) (suggesting changes to wording in the proposed provision, but also expressing the belief that the substitute provision is unnecessary and duplicative of 18 U.S.C. §§ 371 and 641).

#### 6.8.2.5. Relationship to Objectives

Repeal of this statute and passage of the proposed alternative would remedy the weaknesses in the present statute and promote the same end with far greater clarity.

#### 6.8.2.6. Proposed Statute

##### **Disclosing and Obtaining Contractor Bid or Proposal Information or Source Selection Information.**

##### Sec. 27. Disclosing and obtaining contractor bid or proposal information or source selection information.

(a) A present or former officer or employee of the United States, or a person who is acting or has acted for, or on behalf of, or who is advising or has advised the United States with respect to a Federal agency procurement and who --

(1) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information, and

(2) other than as provided by law, knowingly and willfully discloses that information before the award of a Federal agency procurement contract to which the information relates, is subject to the penalties and administrative actions set forth in subsection (d).

(b) Whoever, other than as provided by law, knowingly and willfully obtains contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates is subject to the penalties and administrative actions set forth in subsection (d).

(c) Whoever, other than as provided by law, knowingly and willfully violates the terms of a protective order, issued by the Comptroller General or the board of contract appeals of the General Services Administration in connection with a protest against the award or proposed award of a Federal agency procurement contract, by disclosing or obtaining contractor bid or proposal information or source selection information is subject to the penalties and administrative actions set forth in subsection (d).

(d) The penalties and administrative actions for an offense under subsection (a), (b), or (c), are as follows:

##### (1) Criminal penalties.

(A) Whoever engages in the conduct constituting the offense shall be imprisoned for not more than one year or fined in the amount set forth in 18 U.S.C. § 3571, or both.

(B) Whoever engages in the conduct constituting the offense for the purpose of either --

(i) exchanging the information covered by subsections (a), (b), and (c), for anything of value, or

(ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract.

shall be imprisoned for not more than five years or fined in the amount set forth in 18 U.S.C. 3571, or both

(2) Civil penalties. The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under subsection (a), (b), or (c). Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) Administrative actions. If a Federal agency receives information that a contractor or a person has engaged in conduct constituting an offense under subsection (a), (b), or (c), the Federal agency shall consider one or more of the following actions, as appropriate:

(A) Canceling the Federal agency procurement when a contract has not been awarded;

(B) Declaring void and rescinding a contract in relation to which there has been either--

(i) a conviction for an offense under subsection (a), (b), or (c), committed by the contractor or someone acting for the contractor, or

(ii) a determination by the head of the agency based upon clear and convincing evidence that the contractor or someone acting for the contractor has engaged in such conduct.

If such action is taken, the United States is entitled to recover in addition to any penalty prescribed by law, the amount expended under the contract;

(C) Initiating suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation. In this regard,



engaging in conduct constituting an offense under subsection (a), (b), or (c), affects the present responsibility of a Government contractor or subcontractor; or

(D) Initiating adverse personnel action, pursuant to the procedures in chapter 75 of title 5, United States Code, or other applicable law or regulation.

(e) For purposes of this section:

(1) The term "contracting officer" means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

(2) The term "contractor bid or proposal information" means the following information submitted to a Federal agency as part of, or in connection with, a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data;

(B) Indirect cost and direct labor rates;

(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation; or

(D) Information marked by the contractor as "contractor bid or proposal information," in accordance with applicable law or regulation.

(3) The term "Federal agency" has the meaning given that term in section 3 of the Federal Property and Administrative Services Act (40 U.S.C. 472).

(4) The term "Federal agency procurement" means the competitive acquisition by contract of supplies or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

(5) The term "protest" means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to section 111 of the Federal Property and Administrative Services Act (40 U.S.C. 759) or subchapter V of chapter 35 of title 31, United States Code.

(6) The term "source selection information" means the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids or lists of those bid prices prior to public bid opening;

(B) Proposed costs or prices submitted in response to a Federal agency solicitation or lists of those proposed costs or prices;

(C) Source selection plans;

(D) Technical evaluation plans;

(E) Technical evaluations of proposals;

(F) Cost or price evaluations of proposals;

(G) Competitive range determinations which identify proposals that have a reasonable chance of being selected for award of a contract;

(H) Rankings of bids, proposals, or competitors;

(I) The reports and evaluations of source selection panels or boards or advisory councils; or

(J) Other information marked as "source selection information" based upon a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

(f) No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging an offense under subsection (a), (b), or (c), of this section, nor may the Comptroller General or the board of contract appeals of the General Services Administration consider such an allegation in deciding such a protest, unless that person reported information to the Federal agency responsible for the procurement that he believed constituted evidence of the offense no later than ten working days after he first discovered the possible offense.

(g) This section does not:

(1) Restrict the disclosure of information to or its receipt by any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) Restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) Restrict the disclosure or receipt of information relating to the Federal agency procurement after it has been canceled by the Federal agency prior to contract award unless the Federal agency plans on resuming the procurement;

(4) Authorize the withholding of information from nor restrict its receipt by the Congress, a committee or subcommittee thereof, the Comptroller General, a Federal agency, or an Inspector General of a Federal agency;

(5) Authorize the withholding of information from nor restrict its receipt by any board of contract appeals of a Federal agency or the Comptroller General in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(6) Limit the applicability of the requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

(h) Government-wide regulations and guidelines deemed appropriate to carry out this Act shall be issued in the FAR by DOD, the General Services Administration, and the National Aeronautics and Space Administration, in coordination with the Federal Acquisition Regulatory Council. Proposed regulations and guidelines shall be issued within 120 days after the date of enactment. Implementing regulations and guidelines shall be issued within 180 days of enactment.

## **6.9. Certifications, Training, and Remedies**

### **6.9.0. Introduction**

This section includes the certification, training, and remedies portions of the procurement integrity amendments to the OFPP Act. Certification and training requirements of section 423 contribute little genuine substance, yet impose extraordinary demands on Government and contractor personnel and resources. The Panel recommends that they be repealed, together with the related provisions which establish contractual, administrative, and criminal penalties for violation of section 423.

The certification requirements at 423(e) prohibit award of a Federal contract or contract modification unless the contractor employee responsible for the bid or modification certifies that he has no information concerning possible violations of the major substantive sections of 423 which have been discussed in this chapter. The responsible contractor employee must, in the alternative, disclose any information he has concerning possible violations of those sections. Similar provisions also apply to Government contracting officers.

The certification requirements of section 423 impose a significant overhead burden in the daily conduct of defense contracting, and have been an issue of concern in Government and industry from their enactment. The education function performed by requiring certification has no doubt been successful, but the Panel questions whether their benefits outweigh the paperwork and record-keeping burdens they impose on both Government and industry, and whether the certification process may gradually be reduced to a meaningless routine that diminishes its original purpose.

Subsection (k) permits a procurement official or former procurement official to receive advice from his agency ethics officials regarding the propriety of conduct under the standards imposed by section 423, and subsection (l) mandates Government ethics training programs to educate procurement officials regarding section 423(b), (c), and (e), and requires certifications reciting familiarity with those provisions. The Panel has recommended that subsections (k) and (l) be repealed together with the underlying provisions (a), (b), (c), (d), and (f) of section 423, because they place an undue burden on industry and present and former Government procurement personnel.

Subsections (g), (h), and (j) establish contractual, administrative, and criminal penalties for violation of section 423. They recite the most common remedies -- contractual, administrative, civil, and criminal -- as well as adverse personnel actions for civilian Government employees. Subsection (m) provides for the use of any other remedy that exists under the law.

As the Panel has recommended the repeal of subsections 423(a), (b), (c), (d), and (f), it recommends that the corresponding remedies provisions be repealed. The Panel's recommended alternative legislation governing the protection of procurement sensitive information contains a separate penalty provision.

Section 218 of Title 18 also allows for an agency to void or rescind contracts and other transactions in accordance with regulations established under the President's authority. The Panel has recommended that this statute be retained.

## **6.9.1. 41 U.S.C. § 423**

### **Procurement integrity (e) Certification and enforcement matters**

#### **6.9.1.1. Summary of the Law**

For contract actions over \$100,000, subsection (e) prohibits a Federal agency from awarding a contract for property or services to a competing contractor or from agreeing to a modification or contract extension unless the contractor employee responsible for the bid or modification certifies that he has no information concerning possible violations of subsections (a), (b), (d), or (f) of section 423, or he discloses any information he has concerning possible violations of those sections. In addition, the responsible contractor employee must certify that each contractor employee who has participated personally and substantially in the procurement has certified that he is familiar with, and will comply with, the requirements of section 423(a) and will report any violation of that section. Subsection (e) requires that no contract award or agreement to any modification take place unless the contracting officer certifies to the head of the agency that the contracting officer has no information concerning violations of section 423 or certifies that all such information has been disclosed. Under this subsection, the head of the agency may request these certifications from the contractor or contracting officer at any time.

#### **6.9.1.2. Background of the Law**

Subsection (e) was part of the original section 27 amendments to the Office of Federal Procurement Policy Act, later amended by Pub. L. No. 101-189.<sup>1</sup> The contractor certification was intended to ensure that:

[W]hen an official or an employee of the winning contractor signs a contract, he or she will also be certifying to that company's compliance with the Act.<sup>2</sup>

#### **6.9.1.3. Law in Practice**

From the date of their enactment, the certification requirements of 41 U.S.C. § 423(e) have been questioned in Government and industry for their utility and cost. These certificates, which are in addition to those required of procurement officials under subsection 423(l), require an official of each competing contractor to vouch that the substantive provisions of section 423 have been honored or that possible violations have been reported. Thereafter, they require the contracting officer, before awarding the contract or executing the modification, to attest that he is

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1990 and 1991, Pub. L. No. 101-189, § 814(c), 103 Stat. 1495-1 (1989).

<sup>2</sup>H.R. REP. NO. 911, 100th Cong., 2d Sess. 23 (1988).

aware of no violations, or that all information regarding suspected violations has been duly reported.

The Panel received a number of comments on this provision. The Air Force Deputy Assistant Secretary for Contracting stated that "the certification requirements of the procurement integrity provisions have created a burdensome process for completion, review, and record keeping for both industry and Government."<sup>3</sup> The Center for Strategic and International Studies (CSIS) cited the requirement for certification as imposing a burdensome compliance obligation that is inconsistent with the goal of integration of DOD towards purchasing commercial items with simplified procedures. CSIS recommends, accordingly, that fixed price transactions for commercial items be exempted from subsection (e).<sup>4</sup> The Council of Defense and Space Industry Associations (CODSIA) has also expressed concern that the form and format of procurement integrity certifications have become a bid-responsiveness or offeror-responsibility issue.<sup>5</sup> CODSIA recommends that the failure to properly execute the certificate be treated as a minor informality if there is no showing of intent or willfulness, and recommends individual certifications be eliminated. Overall, CODSIA finds that the benefits from certification do not outweigh the burdensome paperwork and increased cost associated with implementation.<sup>6</sup>

In the event of a violation of one of the substantive provisions at 41 U.S.C. § 423(a), (b), (d), or (f), the availability to the Government of a subsection 423(e) certificate attesting otherwise would, depending upon the facts and evidence surrounding its execution, at best afford the Government a secondary or collateral tool for enforcement. The Panel has not been informed of any cases in which a certificate alone has been instrumental to the Government. And as suggested by the United States Attorney responsible for the "Ill Wind" prosecutions, the deliberate criminal conduct prevalent in those cases would not likely be deterred by the requirement to sign a certificate.<sup>7</sup>

The principal function served by the certificates under subsection 423(e) has been educational. They have required Government and contractor personnel alike to understand the substantive requirements of the law fully, and have impressed the gravity of the Government's resolve that its procurements be conducted with the highest ethical standards. In those respects the certification requirements have clearly been successful.

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<sup>3</sup>Memorandum from Brigadier General Robert W. Drewes, Deputy Assistant Secretary (Contracting), Office of the Assistant Secretary of the Air Force (Acquisition) to Major Soesbe, Acquisition Law Task Force (July 3, 1992).

<sup>4</sup>Letter from Debra van Opstal, Deputy Director, Science and Technology Program, Center for Strategic and International Studies to Robert D. Wallick (June 4, 1992).

<sup>5</sup>Letter from the Council of Defense and Space Industry Associations (CODSIA) to Robert Wallick and Harvey Wilcox (Aug. 18, 1992). Letter, from Jack Harding, Raytheon Company, to Robert D. Wallick, (June 19, 1992).

<sup>6</sup>CODSIA letter, Aug. 18, 1992.

<sup>7</sup>"It is naive to think that legislation is going to cure the conduct you had in Ill Wind. Certifications aren't going to change anything. Ill Wind was a classic instance of old-fashioned lying, cheating, stealing and robbing. Only by fundamentally changing the moral and ethical climate of our society will you ever reach that one per cent who were involved." Address by Henry E. Hudson, United States Attorney, Eastern District of Virginia, at the Attorney General's Defense Procurement Fraud Conference, Washington, D.C., May 24, 1990.

The question now arises whether their perpetuation merits their obvious burden to the acquisition process, and it is the Panel's view that they do not. Having successfully introduced the various procurement integrity restrictions to the contracting community, the certification requirements now risk declining into a routine exercise in administrative paperwork that diminishes their original purpose. By a variety of educational means employed by OFPP, DOD, GSA, the Department of Justice, and individual purchasing activities, those doing business with the Government are informed of current issues and of the Government's expectations regarding contract compliance. Relying upon avenues such as those would help to ensure that ethical compliance in defense procurement does not become trivialized by a gradual perception that the Government's standards can be fully satisfied by the periodic submission of another standard form.

#### **6.9.1.4. Recommendation and Justification**

##### **Repeal**

Elsewhere in the report the Panel has concluded that, to eliminate duplication and to promote clarity, subsections (a), (b), (d), and (f) of section 423 be repealed, in which event the certification requirements of subsection (e) would serve no further use. Fully apart from Congressional action on those recommendations, however, the Panel believes that subsection (e) places a substantial burden on both Government and industry personnel with little discernible return to the public. The process of execution, review, and retention of these certifications entails time and resources that can be applied better elsewhere. Accordingly, the Panel recommends that subsection (e) of section 423 be repealed.

#### **6.9.1.5. Relationship to Objectives**

Repeal of this statute would remove an undue burden on both Government and industry by eliminating its requirements to execute certifications that are making, at best, a marginal contribution to the integrity of defense procurement.



## **6.9.2. 41 U.S.C. § 423**

### **Procurement integrity**

#### **(g) Contractual penalties**

#### **(h) Administrative actions**

#### **(j) Criminal Penalties**

#### **(m) Remedies not exclusive**

### **6.9.2.1. Summary of the Law**

The subsections above establish contractual, administrative, and criminal penalties for violation of section 423. Contractual penalties include denial of payment or default termination but leave room for any other appropriate contractual action. Administrative penalties include voiding or rescinding the contract, default termination, sanctions, and the initiation of suspension or debarment proceedings. Federal civilian employees in violation of section 423 are subject to appropriate adverse personnel actions. Civil fines up to \$100,000, or up to \$1 million for competing contractors which are not individuals, may be levied for violations of subsections (a), (b), (d), and (f). Criminal penalties for receiving or disclosing proprietary or source selection information are imprisonment for not more than five years or a fine in accordance with Title 18. Subsection (m) provides for any other remedy for violation of this section existing in any other law.

### **6.9.2.2. Background of the Law**

The substance of these provisions was included in the original section 27 amendments made in 1988 to the Office of Federal Procurement Policy Act,<sup>1</sup> later amended with regard to the penalties prescribed for the disclosure of proprietary or source selection information.<sup>2</sup>

### **6.9.2.3. Law in Practice**

FAR 3.104-11 provides implementing instructions on processing violations of section 423. The contractual and administrative remedies set forth in subsections (g) and (h), such as cancellation of a solicitation or termination of a contract, are generally understood to be Government remedies that exist independently of section 423. Their recitation in this provision serves primarily to alert the contracting parties to their potential applicability in the event of a violation and not as enabling authority for their use. Subsection (j), by contrast, prescribes explicit civil and criminal penalties applicable to entities and individuals for violation of specified portions of section 423, and subsection (m) clarifies that the remedies prescribed are not exclusive of those available under other provisions of law.

<sup>1</sup>Office of Federal Procurement Policy Amendments of 1988, Pub. L. No. 100-629 § 6(a), 102 Stat. 4063(1988).

<sup>2</sup>National Defense Authorization Act for Fiscal Year 1990 and 1991, Pub. L. No. 101-189. Div. A, Title VIII § 819, 103 Stat. 1352, 1495.

For the reasons set forth in other sections of this chapter, the Panel has recommended that the substantive portions of section 423 to which these remedies apply either be repealed as duplicative of other authority or, in three cases, repealed and replaced with a different statute. It is the Panel's view, for example, that subsections 423(a)(2) and (b)(2) have effectively been superseded by the recent enactment of the civil gift statute at 5 U.S.C. § 7353 and the promulgation by the Office of Government Ethics (OGE) of uniform regulations at 5 C.F.R. 2635 interpreting that law and the criminal gratuities statute at 18 U.S.C. § 201(c). Those rules will apply uniformly throughout the executive branch and have, we believe, satisfied the primary objective of subsections 423(a)(2) and (b)(2).

Similarly, the Panel has recommended the repeal of subsections 423(a)(1), (b)(1), and (c), which deal with employment discussions between procurement officials and competing contractors. The recently-issued OGE regulations have for the first time comprehensively addressed this topic and effectively closed the gap that had been perceived in the interpretation of the basic Government-wide restriction at 18 U.S.C. § 208(a). In addition, civil penalties for violation of section 208 (a) were recently made available at 18 U.S.C. § 216.

The Panel has also recommended repeal of the "revolving door" restriction at subsection 423 (f). That provision has proven to be difficult to interpret and is to a great extent duplicative of other restrictions of law. One aspect of subsection 423(f) not squarely addressed by other authority is the additional protection it may afford the Government against the misuse of inside information by former procurement personnel through "behind-the-scenes" assistance to a contractor. The Panel believes that objective would be better met by enactment of a more direct and comprehensive restriction incorporated within the main body of post-employment restrictions at 18 U.S.C. § 207.

Finally, the Panel has recommended the repeal of subsections 423(a)(3), (b)(3), and (d), governing the unauthorized disclosure of sensitive procurement and source selection information. The Panel found that these provisions have an important role and function but that they suffer in clarity by virtue of being drafted to conform with portions of section 423 having other objectives. In that instance the Panel has recommended repeal and enactment of a stand-alone information protection provision bearing its own penalty provisions that largely replicate those contained in section 423.

#### **6.9.2.4. Recommendation and Justification**

##### **Repeal**

Each of the substantive restrictions of section 423 to which the remedies provisions apply has been recommended for repeal or, in three cases, for repeal and enactment of an alternative containing its own penalty provisions. In the event those recommendations of the Panel are adopted, subsections 423 (g), (h), (j), and (m) would serve no further purpose.

#### **6.9.2.5. Relationship to Objectives**

Repeal of these sections would make the standards which should and must apply to all present and former Government officials more equitable and would ensure, through increased clarity and simplicity, the continued ethical integrity of defense procurement programs.

### **6.9.3. 41 U.S.C. § 423**

#### **Procurement integrity**

##### **(k) Ethics advice**

##### **(l) Training**

#### **6.9.3.1. Summary of the Law**

Subsection (k) of section 423 provides for implementing regulations which would allow a procurement official or former procurement official to request and receive advice within 30 days from a designated agency ethics official regarding whether the official is or would be precluded by section 423 from a specific activity. This subsection requires the requesting official to furnish all information relevant to the determination. Subsection (l) requires the Federal agency head to establish a procurement ethics training program which, at a minimum, would provide explanations of subsection (b), (c), and (e), and which would require each procurement official to certify that he is familiar with those provisions, will not engage in conduct prohibited by those subsections, and will report any conduct that appears to violate subsection (a), (b), (d), or (f).

#### **6.9.3.2. Background of the Law**

Subsections (k) and (l) were 1989 amendments to the original 1988 section 27 amendments to the Office of Federal Procurement Policy (OFPP) Act.<sup>1</sup>

#### **6.9.3.3. Law in Practice**

FAR 3.104-8 and 3.104-12 implement subsections (k) and (l) respectively. These provisions reflect an effort, following many initial questions raised about the scope and applicability of portions of the procurement integrity amendments to the OFPP Act, to provide clarity and certainty to those subject to its restrictions and penalties. Subsection (l) requires procurement officials to certify that they are familiar with three key provisions of section 423 and that they will report suspected violations of four enumerated provisions. This is a "one-time" certification, which in DOD ordinarily follows a written indoctrination in the relevant provisions.

The "safe harbor" opinions required by subsection 423(k) are intended to afford procurement personnel with assurance regarding the applicability of the law's substantive provisions, including its "revolving door" provisions. Provided that the employee fully discloses relevant details in requesting such a determination, those opinions may be relied upon in the employee's future endeavors. Because most of them require close analysis of the applicable facts and circumstances, they demand individual preparation and the attention of experienced Government attorneys.

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<sup>1</sup>National Defense Authorization Act for Fiscal Year 1990 and 1991, Pub. L. No. 101-189 Div. A, Title VIII § 814, 103 Stat. 1352, 1495 (1989).

While DOD does not maintain running department-wide statistics on the numbers of opinions issued, their ready availability under the law and the sizable penalties for violations under section 423 apparently have prompted prospective employers to require them of former defense employees almost as a matter of course. While similar "safe harbor" opinions are also prescribed to interpret provisions of 10 U.S.C. § 2397, they are not available to interpret other post-employment statutes that also may apply to departing defense employees.

#### **6.9.3.4. Recommendation and Justification**

##### **Repeal**

The separate "training" requirement of subsection (l) is in addition to Government-wide ethics training requirements imposed by the Office of Government Ethics and as implemented in most agencies involves sending a summary of the relevant provisions of the law obtaining attestations that they have been understood. The employee's affirmative obligations to comply with the law and contribute to its enforcement are not dependent upon his written agreement to do so. The provision at subsection (k) requiring the issuance of "safe harbor" legal opinions is a costly and inefficient approach to curing the many substantive shortcomings of the Procurement Integrity amendments, all of which the Panel believes are better addressed by repeal. Subsections (k) and (l) should be repealed together with the corresponding provisions (a), (b), (d), (e), and (f) of section 423 because they impose an undue burden on industry and present and former Government procurement personnel.

As proposed in the other sections of this chapter, the chief substantive provisions of section 423 have been recommended for repeal or for repeal and substitution by alternative legislation. In the event those recommendations of the Panel are adopted, subsections 423(k) and (l) would serve no further purpose.

#### **6.9.3.5. Relationship to Objectives**

Repeal of this statute would make the standards that apply to all present and former Government officials more equitable and would ensure, through increased clarity and simplicity, the continued integrity of defense procurement.

#### 6.9.4. 18 U.S.C. § 218

### Voiding transactions in violation of chapter; recovery by the United States

#### 6.9.4.1. Summary of the Law

Section 218 permits the President of the United States, or an agency or department head, under regulations prescribed by the President, to void and rescind any of the transactions listed in the statute, including any contract in relation to which there has been a final conviction for any violation of Chapter 11 of Title 18 (18 U.S.C. § 201 *et seq.*). The statute also gives the Government the right, in addition to any other remedy prescribed by law, to recover the amount expended or the value of the thing delivered as a result of the transaction.

#### 6.9.4.2. Background of the Law

This statute was first enacted as a section of the Bribery, Graft and Conflicts of Interest Act of October 23, 1962.<sup>1</sup> It was intended to give the Government the statutory right to void and rescind contracts as well as to preserve any other legal remedies including the right of the Government to void contracts based upon the principles of equity enunciated in *United States v. Mississippi Valley Generating Co.*<sup>2</sup>

#### 6.9.4.3. Law in Practice

Section 218 was implemented by Exec. Order No. 12448,<sup>3</sup> which delegated to department and agency heads the authority to declare void and rescind the transactions enumerated in section 218. The Executive Order also gave agency and department heads the authority to issue regulations providing for written notice and an opportunity to submit information or have a hearing on the matter before issuance of a final written decision.

It is clear from the statute and its history that the Government may also exercise other remedies in law in conjunction with the statute, including common law recovery upon theories of breach of a fiduciary duty and constructive trust.<sup>4</sup> In line with this reasoning, at least one court has found that the essence of section 218 is not that the defendant received money in violation of a conflict of interest statute, but that the money was paid in breach of fiduciary duty to the Government, as evidenced by the violation of the conflict of interest statute.<sup>5</sup>

No comments were received concerning this statute, and the Panel has not uncovered any problems which should be remedied through a statutory change.

<sup>1</sup>Pub. L. No. 87-849, 76 Stat. 1119 (1962).

<sup>2</sup>364 U.S. 520 (1961).

<sup>3</sup>48 Fed. Reg. 51281, Nov. 4, 1983.

<sup>4</sup>*United States v. Eilberg*, 507 F. Supp. 267 (D.E.D.Pa. 1980).

<sup>5</sup>*United States v. Podell*, 436 F. Supp. 1039, 1041-2 (D.S.D.N.Y.1977).

#### **6.9.4.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that 18 U.S.C. § 218 be retained. It provides a statutory basis for rescinding transactions that violate bribery, gratuity, and conflict of interest laws.

#### **6.9.4.5. Relationship to Objectives**

This provision promotes the continued ethical integrity of defense procurement programs.

## **6.10. Procurement Policy**

### **6.10.0. Introduction**

Years of study and debate over the wisdom and need for centralized, Government-wide procurement policy and rulemaking concluded with the 1974 legislation creating the Office of Federal Procurement Policy (OFPP). Much of the impetus was a high-level study commissioned by the 91st Congress to recommend methods "to promote the economy, efficiency, and effectiveness" of executive branch procurement. Congress conceived of the OFPP as a source of central executive branch leadership, guidance, and direction for procurement policies and regulations guiding nearly one quarter of all Government spending.

When Congress created the OFPP it envisioned a small office of highly qualified experts, supplemented when necessary by the efforts of executive agency personnel. Their principal focus would be to seek savings and efficiencies through consolidation, simplification, and central direction of procurement policies and regulations, which had then become unwieldy and outdated. Since 1974 Congress has adjusted the authority of the OFPP Administrator to initiate directives and regulations, but it has attempted to maintain the thrust of OFPP's efforts to initiate procurement reform.

The OFPP Act contained fourteen sections, later amended to add provisions concerning procurement notice requirements, requirements for research into innovative procurement methods, and other reforms. The Office of Competition Advocate and provisions concerning rights in technical data were introduced in 1984, and rules for travel expenses of contractors were added in 1986. The Uniform Procurement System, the Federal Acquisition Regulatory Council, the Cost Accounting Standards Board, and the Advocate for Commercial Products were added by the 1988 Amendments, as was section 27, which set out extensive rules and procedures covering procurement integrity.

This subchapter addresses those sections of the OFPP Act bearing directly upon the authority of the Administrator; upon the policy, directive, and rulemaking functions of OFPP; and upon the operation of the Federal Acquisition Regulatory Council. Other portions of the report address those provisions of the Act which bear more directly on the functions discussed in those chapters, such as the Cost Accounting Standards Board and the Advocate for Commercial Products.

In its review of the provisions related to the duties and authority of the Administrator, the Panel concluded that OFPP has succeeded in serving the acquisition needs of DOD and that, overall, its rulemaking system has functioned well. The only changes recommended are to amend the Act's small purchase threshold and its definition of technical data, both of which are to conform its provisions with other recommendations made by the Panel.



## **6.10.1. 41 U.S.C. § 401**

### **Declaration of policy**

#### **6.10.1.1. Summary of the Law**

This initial section of the Office of Federal Procurement Policy (OFPP) Act articulates the policy of the United States to promote economy, efficiency, and effectiveness in the procurement of property and services in executive branch procurement by:

- promoting full and open competition;
- establishing policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost;
- promoting the development of simplified uniform procurement processes;
- promoting the participation of small business concerns;
- supporting the continuing development of a competent, professional work force;
- eliminating fraud and waste in the procurement process;
- eliminating redundant administrative requirements placed on contractor and Federal procurement officials;
- promoting fair dealings and equitable relationships with the private sector;
- ensuring that payment is made in a timely manner and only for value received;
- requiring, to the extent practicable, the use of commercial products to meet the Government's needs;
- requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract;
- ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements; and

- promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required.

#### **6.10.1.2. Background of the Law**

The Office of Federal Procurement Policy Act was the culmination of a Federal procurement reform movement of the late 1960s and early 1970s. Public concern about the effectiveness and integrity in the Federal procurement system ultimately led to an extensive examination of that system by the Commission on Government Procurement established by Congress in November 1969. The Commission's findings and recommendations became the foundation for the Act's provisions. The central finding of the Commission was characterized by the Congress with the observation that "no one was in charge of a function which involves the expenditure of more than one-fourth of the budget."<sup>1</sup> Specifically, the Commission found flaws in the coordination of policies between executive branch agencies, a vacuum in policy leadership, and an outmoded and fragmented statutory base.<sup>2</sup> To remedy the problems perceived to be caused by a lack of centralized authority, the Commission's major recommendation was to establish the OFPP.<sup>3</sup>

This section and section 402, the declaration of congressional policy, express the guiding principles of the OFPP and a "conceptual framework for the conduct of Federal Procurement."<sup>4</sup> These sections remain almost unchanged from the original OFPP Act, except for the addition of three objectives to section 401. In 1983, the concept of promoting full and open competition was added; and the 1988 amendment added an objective to promote the use of commercial products "to the maximum extent practicable."<sup>5</sup> The 1988 amendment also added the objective of promoting procurement policies to accommodate emergencies and wartime needs.<sup>6</sup>

#### **6.10.1.3. Law in Practice**

This is not an executory provision of the Act but, like section 402, establishes the general policies and goals which should be carried out by the Administrator of OFPP. No comments have been received concerning this section.

#### **6.10.1.4. Recommendation and Justification**

##### **Retain**

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<sup>1</sup>S. Rep. No. 692, 93th Cong., 2nd. Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4589, 4596.

<sup>2</sup>THE REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Vol. I, at 8 (1972).

<sup>3</sup>*Id.*

<sup>4</sup>S. REP. NO. 692, 93th Cong., 2nd. Sess., *reprinted in* 1974 U.S.C.C.A.N. 4589, 4598.

<sup>5</sup>Pub. L. No. 96-83, § 2, 93 Stat. 648 (1983), Pub. L. No. 100-697, § 2, 102 Stat. 4055 (1988).

<sup>6</sup>Pub. L. No. 100-697, § 2, 102 Stat. 4055 (1988).

This statute sets forth the broad policies and goals of Federal executive branch procurement and is absolutely necessary in order to provide the OFPP Administrator and other executive agency heads with common Government-wide objectives.

#### **6.10.1.5. Relationship to Objectives**

This section states only the broad policy objectives to be achieved by executive agency procurement and leaves detailed implementation to regulation. It therefore promotes an important goal of the Panel.

## **6.10.2. 41 U.S.C. § 403**

### **Definitions**

#### **6.10.2.1. Summary of the Law**

This section lays out the significant terms used in the Office of Federal Procurement Policy (OFPP) Act including the terms: "executive agency," "procurement," "competitive procedures," "full and open competition," "responsible source," "major system," "item," "small purchase threshold," and "technical data."

#### **6.10.2.2. Background of the Law**

This section was part of the original OFPP Act and has been supplemented by the various amendments to that Act.<sup>1</sup>

#### **6.10.2.3. Law in Practice**

The Panel's review indicated that all of the definitions listed in this section were currently appropriate with the exception of the "small purchase threshold." The recommendation of the Panel as described in detail in Chapter 4 is that the term "simplified acquisition threshold" be substituted for "small purchase threshold".

#### **6.10.2.4. Recommendations and Justification**

##### **I**

**Amend Section 4(11) to substitute the term "simplified acquisition threshold" for "small purchase threshold" and to set the threshold at \$100,000 in lieu of the current threshold of \$25,000; provided that the new threshold remain subject to adjustment every five years beginning in 1995.**

##### **II**

**Amend Section 4(8) to change the definition of "technical data" to include computer data bases and manuals and other publications supporting computer programs.**

This provision sets forth basic definitions that apply to executive branch procurement and thus is essential to provide the Administrator and other executive agency heads with common Government-wide meaning of significant acquisition terms used throughout the Act. For the

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<sup>1</sup>The Office of Federal Procurement Policy Act, Pub. L. No. 93-400, § 4, 88 Stat. 797 (1974).

reasons set forth in the analysis contained in Chapter 4 of this report, the Panel recommends that this section be amended to conform to the new definition which it recommends be substituted for the small purchase threshold. The simplified acquisition threshold will be defined as \$100,000.

Further, for the reasons set forth in the analysis of technical data contained in Chapter 5 of this report, the Panel recommends amending the Act's definition of technical data to conform with the related recommendations made in that chapter.

#### **6.10.2.5. Relationship to Objectives**

This section sets forth common definitions to be applied throughout the OFPP Act and promotes a Government-wide understanding of those significant terms.

#### **6.10.2.6. Proposed Statute**

(8) the term "technical data" means recorded information of a scientific or technical nature. It does not include computer programs but does include manuals, instructional materials and technical data formatted as a computer data base. ~~reordered information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency.~~ Such term does not include computer software or financial, administrative, cost or pricing or management data or other information incidental to contract administration;

\* \* \*

(11) the term "simplified acquisition ~~small purchase~~ threshold" means \$100,000 ~~\$25,000~~, adjusted on October 1 of each year divisible by 5 to the amount equal to \$100,000 ~~\$25,000~~ in constant fiscal year 1990 dollars (rounded to the nearest \$1,000).

### 6.10.3. 41 U.S.C. § 405

#### Authority and functions of the Administrator

##### 6.10.3.1. Summary of the Law

This statutory provision sets out the role of the Administrator of the Office of Federal Procurement Policy (OFPP) in carrying out the policies and functions outlined in the OFPP Act. That role is to provide overall direction of procurement policy and leadership in the development of procurement systems in the executive agencies. The Administrator may prescribe Government-wide policies in carrying out the functions outlined in the Act with due regard for the programs of the executive agencies. The statutory provision also provides that the Act's policies be implemented in "a single Government-wide procurement regulation," the Federal Acquisition Regulation, which was to be followed in the procurement of property (other than real property), services and construction, repair, and maintenance. In instances where DOD, NASA, and GSA cannot agree on regulations, forms, and procedures, the Administrator shall, within statutory guidelines, prescribe Government-wide regulations, forms, and procedures for procurement of the above items. The law also sets out the functions of the Administrator and ways of carrying out those functions. This includes direction of the computer-based Federal Procurement Data System and the Federal Acquisition Institute. This provision also gives the Administrator a veto power, with the concurrence of the Director of the Office of Management and Budget (OMB), over any Government-wide procurement regulation issued by an executive agency, and limits the powers of the Administrator to those expressly assigned by statutory provision.

##### 6.10.3.2. Background of the Law

This provision was part of the original Office of Federal Procurement Policy Act<sup>1</sup> which, in section 6, called for centralization of authority in the OFPP Administrator. It was Congress' response to the Procurement Commission's recommendation to fill "the need for someone to be in charge."<sup>2</sup> The Administrator would have discretion to prescribe policies and regulations to the extent the Administrator felt necessary<sup>3</sup>, and this authority would be bridled by the requirement that he not authorize supply or procurement support to Federal grant holders or act contrary to state laws in providing Federal assistance to states.<sup>4</sup> Congress intended that OFPP's rulemaking authority concern the procurement aspects of regulations and wanted OFPP "to leave the operational, administrative, and technical phases to the procuring agencies as far as they d[id] not conflict with the goal of uniformity and consistency."<sup>5</sup> Congress gave OFPP extensive power to prescribe regulations which included cognizance over the procurement aspects of regulations of the Labor Department, the Small Business Administration, and the Environmental Protection

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<sup>1</sup>Pub. L. No. 93-400, § 6, 88 Stat. 797 (1974).

<sup>2</sup>S. REP. NO. 692 (1974), 93 Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4589, 4596.

<sup>3</sup>*Id.* at 4599.

<sup>4</sup>Pub. L. No. 93-400, § 6(b).

<sup>5</sup>S. REP. NO. 692, 93 Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4589, 4600.

Agency.<sup>6</sup> It was sometimes difficult, however, for OFPP to determine the boundaries between procurement policy and agency operational and technical policy. One incident has specifically served to define OFPP's limitations with regard to its rulemaking authority in technical or operational areas. On that occasion the Air Force challenged one of the Secretary of Labor's determinations that certain statutory labor standards were applicable to a certain class of contracts.<sup>7</sup> The OFPP Administrator held that he had the final authority in all procurement-related matters including the coverage of contract labor standards. The Secretary of Labor contested this determination based on his understanding that OFPP's authority was limited to regulating how the procurement process implements Labor's socioeconomic decisions. In settlement of this controversy, the Attorney General ruled, in a 1979 opinion, that OFPP's regulatory authority did not extend to substantive determinations of certain labor statutes.<sup>8</sup>

As a result of Congress' perception that OFPP had gone beyond its authority on this and other occasions<sup>9</sup> and its perception that OFPP was spending far too much time on trivial matters instead of on broader procurement reform policy, the 1979 Reauthorization Act eliminated OFPP's power to promulgate procurement regulations and gave additional authority to OMB to rescind agency regulations which the Administrator determined to be inconsistent with the OFPP Act's procurement policy.<sup>10</sup> In 1983, however, Congress decided it needed to restore OFPP's power to prescribe regulations, procedures, and forms based, in part, upon a General Accounting Office conclusion that without strong OFPP leadership, the Federal Acquisition Regulation (FAR) system could crumble under the "proliferation of supplemental agency regulations."<sup>11</sup> Congress caveated that restoration of authority with language in section 405(b) that it was only to be used when DOD, GSA, and NASA failed to agree or issue Government-wide regulations, procedures, or forms in a timely manner.<sup>12</sup> Section 405 was also amended in 1983 to provide for the implementation of Government-wide procurement policy in the single system of Government-wide procurement regulations, designated as the Federal Acquisition Regulation in the 1988 amendments.

In response to continuing agency concerns questioning whether it was Congress' intent that OFPP should wait for DOD, NASA, and GSA to initiate policy or regulatory changes or take the initiative on its own, the 1988 Amendments further clarified the authority of the Administrator to initiate, as well as to direct policy, prescribe regulations, forms, and procedures.<sup>13</sup> The

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<sup>6</sup>*Id.* at 4599

<sup>7</sup>H.R. REP. NO. 178, 96th Cong., 1st Sess., reprinted in 1979 U.S.C.C.A.N. 1492, 1496.

<sup>8</sup>43 Op. Atty. Gen. No. 14 (1979)

<sup>9</sup>Congress was also critical of OFPP regulations which empowered the Council on Wage and Price Stability to make contractors who would not comply with voluntary wage and price guidelines ineligible for Government contracts. H. R. REP. NO. 78, 96th Cong., 1st Sess., reprinted in the 1979 U.S.C.C.A.N. 1492, 1498.

<sup>10</sup>*Id.* at 1496-98.

<sup>11</sup>S. REP. NO. 424, p. 11, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 5687, 5697.

<sup>12</sup>Pub. L. No. 98-191, § 6(b) (1983). The 1983 amendments which restored the Administrator's regulatory power codified a response that Senator Cohen made to a question as to whether the Administrator could act unilaterally to issue regulations affecting DOD without consulting DOD. The response was that the Administrator's authority should be used whenever he "determines that DOD, NASA and GSA are unable to agree or fail to issue Government-wide regulations in a timely manner." Determining what constituted a "timely manner" would be left up to the Administrator.

<sup>13</sup>Pub. L. No. 100-697, § 3(a), 102 Stat. 4055 (1988).

remaining consideration regarding the Administrator's authority concerned his role in light of the 1983 creation of the position of the Under Secretary of Defense for Acquisition and how they would work together. It is clear from S. Rep. No.100-424 that, in giving the Administrator authority to initiate as well as direct procurement policy, it was Congress' intent that the Administrator should be "an active leader of Government-wide procurement reform and an effective manager of the FAR system," while not relieving the procuring agencies of their responsibility to make and implement improvements in the procurement process.<sup>14</sup>

Other reforms initiated in the various amendments to the OFPP Act created and implemented the computer based Federal Procurement Data system and centralized the Federal Acquisition Institute in the General Services Administration.<sup>15</sup>

#### **6.10.3.3. Law in Practice**

In providing that the policies and regulations prescribed by the Administrator "shall be followed by executive agencies," Congress intended that those policies and regulations have the same force and effect as statutes for which any violation would be subject to judicial challenge and review<sup>16</sup> and, although OFPP regulations may not be binding on a court, they would be persuasive evidence of the meaning of a statutory provision implemented through OFPP regulations.<sup>17</sup>

No comments or suggestions were received concerning this statutory provision and the Panel does not recommend any revisions.

#### **6.10.3.4. Recommendation and Justification**

##### **Retain**

This statutory provision should be retained as it sets out the functions and duties of the OFPP Administrator and provides a proper balance between the role of OFPP, DOD, and other executive agencies in the formation of procurement policy.

#### **6.10.3.5. Relationship to Objectives**

This statutory provision states the broad policy objectives and the fundamental requirements to be achieved by the OFPP Administrator without being unduly burdensome through overly detailed legislation.

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<sup>14</sup>*Id.* at 5698.

<sup>15</sup>Pub. L. No. 100-697, § 3, 102 Stat. 4055 (1988)

<sup>16</sup>S. REP. NO. 692 (1974), 93 Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N 4589, 4600.

<sup>17</sup>*Esprit Corporation, Inc. v. U.S.*, 6 Cl. Ct. 546, 32 Cont. Cas. Fed (CCH) P73, 069 (1984).



#### **6.10.4. 41 U.S.C. § 405a**

### **Uniform Federal procurement regulations and procedures**

#### **6.10.4.1. Summary of the Law**

This section authorizes the Administrator of the Office of Federal Procurement Policy (OFPP) to issue a single, simplified, uniform Federal procurement regulation and to establish procedures for ensuring that all Federal agencies comply with its provisions. Under this section, the OFPP Administrator will, after consulting with the Small Business Administration, analyze the impact on small business concerns resulting from revised procurement regulations and incorporate simplified procedures for small business concerns into revised procurement regulations.

#### **6.10.4.2. Background of the Law**

This section was passed in the Small Business Investment Act of 1978, and there appears to be no detailed legislative history for the provision.<sup>1</sup>

#### **6.10.4.3. Law in Practice**

No comments were received concerning this statute, and the Panel is proposing no amendments to this section.

#### **6.10.4.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it ensures that small business concerns will be a part of the formulation of procurement policy.

#### **6.10.4.5. Relationship to Objectives**

This section provides for the implementation of broad policy objectives and fundamental requirements to be achieved through regulations and procedures rather than detailed legislation.

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<sup>1</sup>Pub. L. No. 95-507, Title II, Ch. 3, § 222, 92 Stat. 1771 (1978).

## **6.10.5. 41 U.S.C. § 405b**

### **Consulting services**

#### **6.10.5.1. Summary of the Law**

This section requires the Office of Federal Procurement Policy (OFPP) to issue a policy under the Office of Procurement Policy Act concerning conflict of interest standards for consultant services. The statute further requires the OFPP to issue procedures for implementing that policy, including those concerning registration, certification, and enforcement. The regulations apply to consulting services for: (1) advisory assistance, (2) services related to support of bid and proposal preparation and submission for Federal contracts, and (3) other services related to Federal contracts which may be specified in regulations under the Act to the extent necessary to deal with conflicts of interests that could be harmful to the interests of the United States.

#### **6.10.5.2. Background of the Law**

This section became law under the 1989 Defense Appropriations Act<sup>1</sup> as a result of the Pryor-Levin Consultant Amendment (S. 11549) in the wake of the "Ill Wind" investigations. That amendment grew out of concern and from testimony of the Deputy DOD Inspector General (DODIG) that DOD did not know whether its consultants were convicted felons, worked for other DOD contractors, or represented foreign governments.<sup>2</sup>

#### **6.10.5.3. Law in Practice**

This section is implemented by OFPP Policy Letter 89-1, Conflict of Interest Policies Applicable to Consultants (1989), which requires contracting officers to take appropriate steps to identify and evaluate potential conflicts of interest that could be prejudicial to the interests of the United States. This section directs agencies to obtain from prime contractors certified information describing the nature and extent of any conflicts of interest concerning proposed awards, requiring that marketing consultants be identified. More specifically, in contracts over \$200,000, the statute requires any marketing consultant to execute a certificate that he has provided no unfair competitive advantage with respect to his services or that any competitive advantage has been disclosed to the prime contractor. In contracts over \$25,000, it requires contractors providing advisory and assistance services to execute a certificate that no actual or potential conflict of interest or unfair competitive advantage exists with respect to his services, or that any conflict of interest or competitive advantage has been disclosed to the prime contractor. The FAR implementation in Subpart 9.5 is substantially the same as that contained in the Policy Letter. No comments were received in reference to this statute.

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<sup>1</sup>Pub. L. No. 100-463, Title VIII § 8141, 102 Stat. 2270-47.

<sup>2</sup>134 CONG. REC., S. 11547-11548 (daily ed. Aug. 11, 1988.)(statement of Sen. Pryor).

#### **6.10.5.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it satisfies a mandated requirement for conflict of interest standards applicable to consultant services. This need was recognized by Congress in the post-"Ill Wind" environment. This broad approach to requiring conflict of interest standards for consultants is not unduly burdensome.

#### **6.10.5.5. Relationship to Objectives**

This section promotes financial and ethical integrity of consultants by mandating the issuance of regulations and not through detailed statutes which might be unduly burdensome.

## **6.10.6. 41 U.S.C. § 406**

### **Administrative powers**

#### **6.10.6.1. Summary of the Law**

This section grants certain administrative powers to the Office of Federal Procurement Policy (OFPP) Administrator by requiring executive agencies to furnish OFPP with services, personnel, facilities, and access to records.

#### **6.10.6.2. Background of the Law**

When the OFPP was established in 1974, Congress intended that the office operate with a relatively small staff and rely on executive agency personnel to help perform its function. Section 406 gave the Administrator of OFPP power to supplement the OFPP staff with resources from other executive agencies.<sup>1</sup> The Governmental Affairs Committee of the Senate considered giving the Administration subpoena power, but felt OFPP had sufficient authority under the Act to execute its duties.<sup>2</sup> This section has remained unaltered since the introduction of the Act in 1974.

#### **6.10.6.3. Law in Practice**

No comments were received concerning this section, and the Panel recommends no amendments to this section.

#### **6.10.6.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it gives the Administrator of OFPP the authority to use the resources of the executive agencies, as needed.

#### **6.10.6.5. Relationship to Objectives**

This section sets out the powers of the Administrator of OFPP in broad objectives and fundamental requirements, reserving implementing methodology to regulations.

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<sup>1</sup>S. REP. NO.692, 93d Cong., 2d Sess., reprinted in U.S.C.C.A.N.4589, 4603.

<sup>2</sup>*Id.*

## **6.10.7. 41 U.S.C. § 407**

### **Responsiveness to Congress**

#### **6.10.7.1. Summary of the Law**

This section provides that the Office of Federal Procurement Policy (OFPP) shall remain responsive to Congress by submitting annual reports on its major activities. In addition, OFPP is required to submit major policy matters to Congressional Committees 30 days prior to the effective date of any policy or regulation prescribed under section 405.

#### **6.10.7.2. Background of the Law**

This section was part of the original OFPP Act,<sup>1</sup> which was amended in 1979<sup>2</sup> and 1983.<sup>3</sup> The 1983 Amendments deleted the requirement for the OFPP Administrator to submit plans for a new uniform procurement system consistent with the plans that had been delivered to Congress in February, 1982.

#### **6.10.7.3. Law in Practice**

No comments were received concerning this statute, and the Panel recommends no amendments to this section.

#### **6.10.7.4. Recommendation and Justification**

##### **Retain**

This statute should be retained because it provides for full and open communication with Congress.

#### **6.10.7.5. Relationship to Objectives**

This section provides Congress information concerning the major activities of the OFPP.

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<sup>1</sup>Office of Federal Procurement Policy Act, Pub. L. No. 93-400, § 8, 88 Stat. 798 (1974).

<sup>2</sup>Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, § 5, 93 Stat. 651 (1979).

<sup>3</sup>Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. No. 98-191, § 8(a), 97 Stat. 1331(1983).

## **6.10.8. 41 U.S.C. § 408**

### **Effect on existing laws**

#### **6.10.8.1. Summary of the Law**

This section states Congress' intention that the Office of Federal Procurement Policy (OFPP) have control over Government-wide integration and issuance of procurement policy, and states that any other procurement authority is subject to that conferred in 41 U.S.C. § 405.

#### **6.10.8.2. Background of the Law**

This section was part of the original OFPP Act.<sup>1</sup> From the history of the 1974 statute, the initial intent of Congress was that the authority to prescribe policy was "basic to the intent to make OFPP the controlling force for the Government-wide integration and issuance of procurement policy" and that it viewed executive agency authority as subject to that of OFPP.<sup>2</sup>

#### **6.10.8.3. Law in Practice**

No comments were received concerning this statute, and the Panel recommends no amendments to this section.

#### **6.10.8.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it supports the concept of centralized authority to issue policy and regulations which Congress gave to OFPP and reaffirmed in the 1983 amendments to the Act.

#### **6.10.8.5. Relationship to Objectives**

This section provides executive agencies, acting in accordance with other statutes, with notice of the limitations under the OFPP Act on their authority to publish policies, procedures, and regulations.

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<sup>1</sup>Office of Federal Procurement Policy Act, Pub. L. No. 93-400 § 8, 88 Stat. 799 (1974).

<sup>2</sup>S. REP. NO. 692, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4589, 4605.

## **6.10.9. 41 U.S.C. § 409**

### **Effect on existing regulations**

#### **6.10.9.1. Summary of the Law**

This section provides that policies, regulations, or forms in effect prior to the Office of Federal Procurement Policy (OFPP) Act of 1983 remain in effect until repealed or otherwise amended.

#### **6.10.9.2. Background of the Law**

This section was originally enacted in 1974 when the first OFPP Act was passed.<sup>1</sup> It was amended in 1979 and 1983 to accommodate changes under the Federal Procurement Regulation until the Federal Acquisition Regulation went into effect.<sup>2</sup>

#### **6.10.9.3. Law in Practice**

There were no comments received concerning this section, and the Panel proposes no amendments to this section.

#### **6.10.9.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it provides the basis for an orderly transition from one set of procurement policies and regulations to another. Notwithstanding that the transition is complete, continuation of this provision lends a continuity of interpretation and certainty to issues arising for resolution under the former rules.

#### **6.10.9.5. Relationship to Objectives**

This section is in keeping with the objective that acquisition laws should identify broad policy objectives and the fundamental requirements to be achieved, leaving detailed implementing methodology to acquisition regulations.

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<sup>1</sup>Pub. L. No. 93-400, § 10, 88 Stat. 799 (1974).

<sup>2</sup>Pub. L. No. 96-83, § 6, 93 Stat. 651 (1983).

## **6.10.10. 41 U.S.C. § 410**

### **Authorization of Appropriations**

#### **6.10.10.1. Summary of the Law**

This law authorizes the FY84 appropriation and succeeding appropriations for the Office of Federal Procurement Policy (OFPP).

#### **6.10.10.2. Background of the Law**

This law provides authorization for appropriation of funds for OFPP. The original section, in 1974, placed a limit on OFPP appropriations at \$2 million.<sup>1</sup> Funds for OFPP were authorized for five years, and Congress intended that subsequent authorization proposals be referred to the Government Operations Committee which would pass appropriations in accordance with the goal of promoting the economy, efficiency, and effectiveness of Government procurement.<sup>2</sup> As it presently stands, this statute provides a permanent authorization for OFPP appropriations.<sup>3</sup>

#### **6.10.10.3. Law in Practice**

No comments were received concerning this section.

#### **6.10.10.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this statute be retained as it is the foundation authorizing future appropriations for OFPP.

#### **6.10.10.5. Relationship to Objectives**

This section provides for the continued authorization of appropriations to carry out the policies and regulations of the OFPP.

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<sup>1</sup>Pub. L. No. 93-400, § 11, 88 Stat. 799 (1974).

<sup>2</sup>S. REP. NO. 692, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N., 4589, 4606.

<sup>3</sup>Pub. L. No. 100-6793(b), 102 Stat. 4056 (1988).



## **6.10.11. 41 U.S.C. § 411**

### **Delegation of authority by Administrator**

#### **6.10.11.1. Summary of the Law**

This section describes the power of the Administrator of the Office of Federal Procurement Policy (OFPP) to delegate his authority to personnel within his office and within other executive agencies.

#### **6.10.11.2. Background of the Law**

This section was originally part of the first Office of Federal Procurement Policy Act<sup>1</sup> and was subsequently incorporated in successive amendments.<sup>2</sup> The 1979 amendment deleted references to the prohibition on the Administrator's delegation of authorities to conform to that amendment's overall limitation on the Administrator's powers. When the 1983 amendment restored the Administrator's powers to issue directives and regulations, it restored the ban on delegating the "authority to provide overall direction . . . and to prescribe policies and regulations to carry out such policy."<sup>3</sup>

#### **6.10.11.3. Law in Practice**

No comments were received concerning this section and the Panel proposes no changes to this section.

#### **6.10.11.4. Recommendation and Justification**

##### **Retain**

The Panel recommends retention of this section as a necessary requirement in order to carry out the policy of the Act.

#### **6.10.11.5. Relationship to Objectives**

This section provides for the effective and efficient implementation of OFPP policies and procedures.

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<sup>1</sup>Pub. L. No. 93-400, § 12, 88 Stat. 799 (1974)

<sup>2</sup>Pub. L. No. 96-83, § 8, 97 Stat. 652 (1979) and Pub. L. No. 98-191, § 8, 97 Stat. 1331 (1983).

<sup>3</sup>*Id.* at § 8(c).

## **6.10.12. 41 U.S.C. § 412**

### **Access by Comptroller General to information; rulemaking procedure**

#### **6.10.12.1. Summary of the Law**

This section provides that the General Accounting Office will have access to the records of Office of Federal Procurement Policy (OFPP) and, more significantly, provides public access and input to OFPP policies and regulations through notice of public meetings. At least 10 days notice of formal meetings will be given to the public.

#### **6.10.12.2. Background of the Law**

This section was part of the OFPP Act which was enacted in 1974.<sup>1</sup> It was contained in subsequent versions of the OFPP Act.

This section requires the Administrator, with a notice of 10 days, to open to the public formal scheduled meetings to promulgate procurement policies and regulations, and gives the administrator authority to determine which regulations and policies are subject to this requirement.<sup>2</sup> Congress intended that the public notice requirement apply to "highly sensitive or significant issuances of the OFPP," keeping in mind its overall intent to give the "maximum practical public visibility to rulemaking activities."<sup>3</sup>

#### **6.10.12.3. Law in Practice**

FAR 1.503 provides that public meetings may be appropriate when a decision to revise FAR coverage is "likely to benefit from significant additional views and discussions." No comments were received concerning this section.

#### **6.10.12.4. Recommendation and Justification**

##### **Retain**

This section should be retained because it gives to the public and to Congress access to significant policy and regulatory decisions concerning the procurement functions of the executive agencies. It also gives the public an opportunity to express their views on major policy and regulatory implementation.

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<sup>1</sup>Pub. L. No. 93-400, § 14, 88 Stat. 800 (1974).

<sup>2</sup>S. REP. NO. 692, 93rd Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4589, 4606.

<sup>3</sup>*Id.*

#### **6.10.12.5. Relationship to Objectives**

This section gives the Comptroller General needed access to books and records of the OFPP and ensures the public full and open access to formal OFPP meetings held for the purpose of developing procurement policies and regulations.

## **6.10.13. 41 U.S.C. § 414**

### **Executive agency responsibilities**

#### **6.10.13.1. Summary of the Law**

This section mandates executive agency participation in the Office of Federal Procurement Policy (OFPP) procurement reform efforts, including an increase in the use of full and open competition. It also provides for clear lines of authority, accountability, and responsibility for procurement decision-making within the executive agency by placing the procurement function at a sufficiently high level to provide direct access to its leadership. The section also provides for comparative equality between organizational counterparts by ensuring the appointment of a procurement executive who is responsible for the management and direction of the agency's procurement system and the development of a career management program.

#### **6.10.13.2. Background of the Law**

Executive Order No. 12352, issued in March, 1982, outlined four procurement reform goals to: (1) increase competition; (2) simplify the procurement process; (3) develop a professional work force with latitude to use business judgment and initiative; and (4) establish a system in each agency to manage procurement. These goals subsequently became the nucleus of the OFPP Act amendment initiatives to increase competition and to establish the senior procurement executive program. The OFPP Amendments of 1983 were also passed to remedy perceived slow and half-hearted implementation of OFPP policies and directives.<sup>1</sup>

#### **6.10.13.3. Law in Practice**

No comments have been received concerning this section and the Panel has no proposals for amending this section.

#### **6.10.13.4. Recommendation and Justification**

##### **Retain**

This statute codified several of the procurement reform initiatives which have streamlined and made today's executive agency more responsive to competition.

#### **6.10.13.5. Relationship to Objectives**

This statute has encouraged full and open access to the procurement system through mandating that executive agencies should promote use of full and open competition and a clear line of responsibility for procurement decision-making.

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<sup>1</sup>Pub. L. No. 98-191, § 16, 97 Stat. 1331 (1983).

**6.10.14. 41 U.S.C. § 415**

**Studies and reports**

**6.10.14.1. Summary of the Law**

This section required the Office of Federal Procurement Policy (OFPP) Administrator to issue reports in 1984 relating to competition in subcontracts.

**6.10.14.2. Background of the Law**

This section was enacted as a 1983 Amendment to the Office of Procurement Policy Act.<sup>1</sup> The section required one-time studies concerning source selection methods, dollar values, and other factors concerning subcontracting.

**6.10.14.3. Law in Practice**

No comments were received concerning this section.

**6.10.14.4. Recommendation and Justification**

**Delete**

This section required one-time reports with a 1984 deadline. The statute has outlived its usefulness and should be deleted from Title 41.

**6.10.14.5. Relationship to Objectives**

Deletion of this provision satisfies the Panel's objective of streamlining the acquisition laws.

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<sup>1</sup>Pub. L. No. 98-191, § 7, 97 Stat. 1330(1983).

## **6.10.15. 41 U.S.C. § 418b**

### **Publication of proposed regulations**

#### **6.10.15.1. Summary of the Law**

This section provides an opportunity for the public to comment on proposed procurement policy regulations, procedures, or forms having a significant effect beyond internal operating procedures, or a significant cost or administrative impact on contractors or offerors. The section requires that the implementation of issuances not be effective until 30 days after publication for public comment. The section also provides that the requirement may be waived based upon urgent and compelling circumstances.

#### **6.10.15.2. Background of the Law**

This section was introduced by an amendment to the Office of Federal Procurement Policy (OFPP) Act in 1984.<sup>1</sup> The purpose of this amendment was to allow an opportunity for potential problems with proposed procurement regulations to surface through public comment.

#### **6.10.15.3. Law in Practice**

This statute is implemented at FAR 1.501, which provides the public a minimum of 30 days, and normally at least 60 days, to comment on a proposed policy or procedure. FAR 1.502 allows consideration to be given to unsolicited recommendations for revisions which have been submitted in writing. A specific discussion of procedures concerning the issuance of agency regulations in accordance with this section is contained in FAR 1.301-1.304. No comments were received concerning this statute.

#### **6.10.15.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that this section be retained. This provision, known as the "notice requirement," provides an opportunity for the public to comment on proposed regulations and does not unduly burden the process of generating procurement regulations.

#### **6.10.15.5. Relationship to Objectives**

This section ensures full and open public access to the procurement system through notice of, and opportunity to comment on, proposed procurement regulations.

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<sup>1</sup>Pub. L. No. 98-400, § 22 (1984), Pub. L. No. 98-577, § 302(a), 98 Stat. 3076 (1984).

## Federal Acquisition Regulatory Council

### 6.10.16.1. Summary of the Law

This section established the Federal Acquisition Regulatory (FAR) Council, comprised of the Administrator of OFPP and representatives from DOD, NASA, and GSA, to assist in the direction and coordination of Government-wide procurement policy and regulatory activities. This section also provides for three executive agencies (DOD, NASA, and GSA) to jointly issue and maintain the FAR. Specifically, the Council will "manage, coordinate, control, and monitor" the maintenance of, and changes in, the FAR. It designates categories of individuals who may be picked to sit on the Council. Regulations issued by executive agencies are required to be limited to those essential to implement Government-wide directives within the agency or those required to satisfy specific and unique needs of the agency. The law also requires the Office of Federal Procurement Policy (OFPP), upon request of a person, to review procurement agency regulations for consistency with the FAR. This section also gives the OFPP Administrator authority to rescind executive agency regulations that are inconsistent with the FAR.

### 6.10.16.2. Background of the Law

Section 421 was added to the OFPP Act by the 1988 amendments to the Act.<sup>1</sup> The purpose of the Council is to assist in directing and coordinating the FAR. It provides a "structural mechanism" to allow the members to work together. The thrust of the congressional designation of membership is to place responsibility for regulatory policy at the "highest practicable level."<sup>2</sup> In limiting agency discretion to issue regulations, Congress' intent was to allow the Administrator, acting in concert with the other Council members, to address the problem of proliferating agency supplemental procurement regulation.<sup>3</sup>

### 6.10.16.3. Law in Practice

FAR 1.102 implements section 421 and provides, in accordance with the statute, for the tripartite management of the FAR. In practice, however, much of the effort in maintaining the FAR is accomplished jointly by the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations (DAR) Council, which are not statutory but are provided for in FAR 1.201-1. The DAR Council also maintains the Defense Acquisition Regulations System (DFARS) in accordance with DFARS 201.201-1(a). DOD Directive 5000.35 governs the composition and operation of the DAR Council. FAR 1.201-1 establishes a FAR Secretariat in GSA for administering the FAR.

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<sup>1</sup>Pub. L. No. 100-679, § 4, 102, Stat. 4056.

<sup>2</sup>S. REP. NO. 424, 100th Cong., 2d Sess. 14 (1988).

<sup>3</sup>*Id.*

Some have questioned dividing the authority and responsibility of DOD, GSA, and NASA between two councils (i.e., the CAAC and the DAR Council) and suggest efficiencies might be achieved through a single council system. Others suggest that the two council system functions well in identifying and resolving differences in agency needs and viewpoints and should not be changed; that DOD and the civilian agencies have legitimate differences in facing different types of procurement; and that the public interest is not served by imposing an artificial uniformity on inherently dissimilar systems. Consequently, the Panel does not recommend the addition of a provision in the law to provide for a single operating council or any other changes with respect to issuing, maintaining, or overseeing acquisition regulations.

One commenter suggested naming the OFPP Administrator as the chairperson of the FAR Council. The Panel believes, however, that because of the broad authority of the Administrator this is not necessary.

#### **6.10.16.4. Recommendation and Justification**

##### **Retain**

This section should be retained as it furthers the orderly promulgation of procurement regulations in a fair and even-handed manner.

#### **6.10.16.5. Relationship to Objectives**

This section furthers the goal of providing for Government-wide consistency in procurement policies and regulations, except where there are unique agency needs.



## **6.11. Other Related Statutes**

### **6.11.0. Introduction**

This subchapter contains a variety of provisions that relate generally to standards of conduct required of public officials and Government contractors. It contains three recommendations to change existing statutes.

The first recommendation is to repeal the Byrd Amendment, 31 U.S.C. § 1352, which prohibits those who seek or receive Federal contracts from using appropriated funds to pay any person to lobby executive agencies or Congress in connection with the award of contracts. The Byrd Amendment has proven to be costly to implement, appears to have had no identifiable impact on lobbying, and from the information described in the accompanying analysis, appears to contribute little to either public knowledge or protection. Other authorities already provide adequate legal protection against lobbying with appropriated funds, and the Panel urges that DOD be relieved of the unproductive record keeping requirements imposed by this provision.

The Panel also recommends that 10 U.S.C. § 2409a be repealed immediately rather than be allowed to expire in 1994. That statute protects employees of defense contractors from retaliation for communicating with Government officials on improper or illegal activities. Section 2409a does not apply to contracts under \$500,000 or contracts in which the price is based solely upon established catalogue or market prices of commercial items. Section 2409 provides the DOD Inspector General with greater flexibility, and the procedures under section 2409a are unnecessarily cumbersome. Section 2409 is suspended while section 2409a is in effect and this has created an unfortunate gap in whistle blower coverage. As a result, no whistle blower coverage exists for contracts falling within the exceptions to section 2409a or for any contracts awarded prior to that date. For these reasons the Panel recommends immediate repeal of section 2409a.

Finally, the Panel recommends the repeal of 10 U.S.C. § 2408, which bars a person convicted of fraud or any felony from working on a defense contract or first tier subcontract for five years. Compliance with the provision has proven to require extensive record keeping that has yet to be fully reliable. It must, in addition, parallel the similar consolidated list maintained by GSA of suspended and debarred contractors. The Panel believes the primary objective of this law can be achieved through reliance on established suspension and debarment procedures without the administrative burdens imposed by this section.

The remainder of the statutes in this section are either recommended to be retained or, in one case, the Panel recommended no action because the statute did not primarily concern the acquisition process.

**6.11.1. 18 U.S.C. § 431**  
**Contracts by a Member of Congress**

**18 U.S.C. § 432**  
**Officer or employee contracting with Member of Congress**

**41 U.S.C. § 22**  
**Interest of Member of Congress**

**6.11.1.1. Summary of the Law**

Section 18 U.S.C. § 431 assesses a fine of not more than \$3,000 for any Member of Congress, Delegate, or Resident Commissioner who obtains for himself, or through an agent, a contract or agreement with the United States or any of its agencies. This section also requires that any contracts made in violation of this provision be voided and any monies paid the Member of Congress be repaid.

Section 18 U.S.C. § 432 assesses a fine of not more than \$3,000 for any officer or employee of the Government who enters into a contract with a Member of Congress, Delegate, or Resident Commissioner.

Section 41 U.S.C. § 22 requires that every contract of the United States contain an express condition that no member or delegate of Congress have a share in a Government contract or derive any benefit in such a contract. There are exceptions for contracts involving farm loans and other similar instruments.

**6.11.1.2. Background of the Law**

Section 431 is based on chapter 321 § 114 of the Act of March 4, 1909, 35 Stat. 1109, the former section 204. Section 432 is based on chapter 321 § 115 of the Act of March 4, 1909, 35 Stat. 1109, the former section 205. Both statutes appeared in the present form in the 1948 codification of the criminal statutes. The purpose of the statutes was to prevent temptations which might arise if Members of Congress could contract with Government agencies.<sup>1</sup>

Section 22 of Title 41 is based upon an 1808 statute, the Act of April 21, 1808, chapter 48, § 3, 2 Stat. 484. It took its present form in R.S. § 3741, February 27, 1877, chapter 69, 19 Stat. 249.

**6.11.1.3. Law in Practice**

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<sup>1</sup>*United States v. Dietrich*, 126 F. 671 (C.C. Neb. 1904).

These statutes are implemented in the procurement process as a result of 41 U.S.C. § 22. The contract clause in FAR 52.222-4 implements the mandate of 41 U.S.C. § 22. At least one court has held that failure to place the clause in a contract does not render it invalid if there is no evidence showing that a member of Congress has an interest in the contract.<sup>2</sup>

There were no comments received concerning these statutes.

#### **6.11.1.4. Recommendation and Justification**

##### **Retain**

The Panel recommends that these statutes be retained to maintain the appropriate balance between the public interest and the private interests of the members of Congress. These statutes have served an important function for many years and should be retained.

There is a detailed discussion of panel recommendations, at 4.1, to exempt certain actions from 41 U.S.C. § 22 as part of a simplified acquisition threshold.

#### **6.11.1.5. Relationship to Objectives**

This statute promotes the ethical integrity of defense procurement without being unduly burdensome.

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<sup>2</sup>*United States v. Certain Land Situate in St. Charles County, Mo.*, 46 F. Supp. 921 (E.D.Mo.), reversed on other grounds, 324 U.S. 49, 89 L. Ed. 744, 65 S. Ct. 442 (1945).

## **6.11.2. 18 U.S.C. § 641**

### **Public money, property or records**

#### **6.11.2.1. Summary of the Law**

This statute makes it a crime to embezzle, steal, purloin, knowingly convert, sell, or dispose of without authority a record, voucher, money, property being made under Government contract, or other thing of value belonging to the United States or any of its agencies or departments. It is also a crime under this statute to receive, conceal, or retain with the intent to convert Government property knowing that the property has been stolen or converted. The penalty for commission of the offense is a fine of not more than \$10,000 or imprisonment for not more than 10 years or both if the value of the stolen or converted property exceeds \$100, and a fine of \$1,000 or imprisonment of not more than one year if the property value does not exceed that sum.

#### **6.11.2.2. Background of the Law**

This statutory provision is based upon two Civil War era statutes which were later consolidated with two other 19th century statutes in the Act of March 4, 1909, chapter 321 § 35, 35 Stat. 1096-8. It is, in effect, a consolidation of former sections 82, 87, 100, and 101 of Title 18.<sup>1</sup> The purpose of the current consolidated statute was "to collect from scattered sources crimes so kindred as to belong in one category."<sup>2</sup> The statute appeared in its present form in the 1948 codification of the criminal statutes.

#### **6.11.2.3. Law in Practice**

This statute is frequently used in procurement-related prosecutions. Most recently, it supported a number of convictions in "Operation Ill Wind" and has been used to prosecute recent similar cases involving the misappropriation of sensitive Government procurement planning information.<sup>3</sup> No comments were received concerning this statute.

#### **6.11.2.4. Recommendation and Justification**

##### **No Action**

The Panel makes no recommendation concerning this statute. Although it is used to enforce criminal penalties against those who commit procurement fraud, it is a statute of general

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<sup>1</sup>R.S. 5438 and 5439, Act of March 2, 1863, ch. 67, 12 Stat. 696, 698 and the Act of March 3, 1875, §§ 1 and 2, ch 144, 18 Stat 479, respectively.

<sup>2</sup>*Morissette v. United States*, 342 U.S. 246, 96 L. Ed. 288, 72 S. Ct. 240(1952).

<sup>3</sup>*United States v. Zettl*, 835 F. 2d 1959 (4th Cir. 1987), *cert. denied*, 494 U.S. 1080, 108 L. Ed. 2nd 940, 110 S. Ct 1809 (1990).

application and not of primary relevance to the Panel's objectives to streamline the procedures governing defense acquisition.

**6.11.2.5. Relationship to Objectives**

This section promotes the ethical integrity of defense procurement without being unduly burdensome to the procurement process.

### 6.11.3. 31 U.S.C. § 1352

#### **Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions**

##### 6.11.3.1. Summary of the Law

The "Byrd Amendment," 31 U.S.C. § 1352, prohibits recipients and requesters of Federal contracts, grants, loans, or cooperative agreements from using appropriated funds to pay any person to influence or to attempt to influence executive or legislative decision-making in connection with the awarding of any Federal contract, grant, loan, or cooperative agreement. The act also requires requesters or recipients of Federal contracts, grants, loans, or cooperative agreements to report to the relevant agency certain lobbying activities paid for with non-appropriated funds. Further, agencies are required to report to the Congress semi-annually a compilation of such information. Fines for violation of the act's prohibitions and reporting requirements range from \$10,000 to \$100,000. The act requires the Office of Management and Budget (OMB) to issue uniform regulations.

The law applies to nonprofit entities, and state and local governments, as well as prime contractors and subcontractors.

##### 6.11.3.2. Background of the Law

At present, four principal disclosure laws govern lobbying in the Federal Government: the 1938 Foreign Agents Registration Act (governing foreign lobbying)<sup>1</sup>, the 1946 Federal Regulation of Lobbying Act (governing legislative lobbying),<sup>2</sup> two provisions of the Housing and Urban Development (HUD) Reform Act (applicable to lobbying the Department of Housing and Urban Development and the Farmers' Home Administration),<sup>3</sup> and the "Byrd Amendment" to the FY 1990 Department of the Interior Appropriations Act<sup>4</sup> (which governs lobbying the executive and legislative branches).

The Byrd Amendment and HUD disclosure provisions were enacted in response to disclosures in 1989 that senior HUD officials had awarded large discretionary grants to developers who had retained well-connected and favored consultants as lobbyists. The Byrd Amendment and HUD disclosure laws were intended to ensure the integrity of the process by which Government makes decisions on contracts, grants, loans, and cooperative agreements, and to restrain the exorbitant fees reportedly paid to some consultants and firms that sell their ability to gain access to decision makers. Congress intended the law to require full disclosure of lobbying activities financed with appropriated funds and to prevent even the appearance of

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<sup>1</sup>22 U.S.C. § 611-621.

<sup>2</sup>2 U.S.C. §§ 261-270.

<sup>3</sup>42 U.S.C. § 35376 and 42 U.S.C. § 1490p.

<sup>4</sup>Department of the Interior and Related Agencies Act for FY 1990, § 319, Pub. L. No. 101-121 Title III § 319, 102 Stat. 750(1990), *codified at* 31 U.S.C. § 1352.

conflicts. It was viewed as part of a comprehensive and consistent legislative framework prohibiting the use of appropriated funds to influence congressional and executive department decision-making.

### 6.11.3.3. Law in Practice

As required by the statute, OMB issued guidance on the new statute in June, 1990. The regulations, found in FAR Subpart 3.8, define key terms, set forth the prohibitions of the act and policy guidance for certifications and disclosure requirements, exemptions process, processing suspected violations, solicitation and contract clauses, and civil penalties. Both the act and the regulations prohibit expenditures of appropriated funds for lobbying, and both require requesters and recipients of Federal contracts, grants, loans, or cooperative agreements to certify that no prohibited payments have been or will be made. Such certifications are required on Federal awards that exceed \$100,000 (\$150,000 for loans). Contractors are also required to disclose lobbying activities paid for with non-appropriated funds that would have been prohibited if paid for with appropriated funds.

The Byrd Amendment and HUD disclosure provisions cover lobbying on contracts, grants and loans, but not lobbying on executive branch actions such as licenses, policy-making, and regulations. As a consequence, it has been noted that some types of lobbying may require multiple disclosures under the various laws, while others may require no disclosure at all.<sup>5</sup> The Byrd Amendment, furthermore, applies only to conduct by outside lobbyists but not to activities performed by a firm's regular employees. It also applies only to efforts to influence specific awards of Federal assistance, but not to lobbying on agency programs or budgets. Lobbying on an awarded defense contract would require formal disclosure, therefore, but lobbying to obtain continued funding for a defense program might not.

A report by the DOD Inspector General, covering the period January, 1990, through March, 1991, found that only 10 lobbying disclosure forms were forwarded by DOD contractors to DOD for inclusion in DOD's semiannual report to Congress.<sup>6</sup> Contractor records generally lacked sufficient detail to determine whether the firms fully complied with the Act's disclosure requirement, or whether any prohibited activities occurred.<sup>7</sup> The IG Report recommended that OMB issue clarifying guidance, indicating that the shortcomings found in the course of the IG review were more the result of confusion and uncertainty about the application of the regulation than of unwillingness to cooperate.

In a statement presented to a subcommittee of the Senate Committee on Governmental Affairs, Senator Levin noted that under applicable FAR cost principles, six major defense contractors reported incurring total lobbying costs in excess of \$5 million in 1990; yet reports filed by their lobbyists for the same period, under the Lobbying Registration Act, accounted for

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<sup>5</sup>S. REP. NO.354, 102d Cong., 2d Sess.,15 (1992).

<sup>6</sup>FINAL REPORT ON THE REVIEW OF LOBBYING ACTIVITIES, DEPARTMENT OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, REPORT NO. 91-122, Sep. 25, 1991, at i. (Hereafter cited as IG Report).

<sup>7</sup>*Id.* at 8.

only \$500,000, and the reports filed under the Byrd Amendment only one firm reported \$3,500.<sup>8</sup> There is considerable evidence that such extreme reporting disparities are proper reflections of the patchwork character of laws and their differing reporting requirements on the same lobbying activities. Senator Levin described the Byrd Amendment as a "phantom law" which results in no meaningful disclosure of lobbying activities.<sup>9</sup>

The Act and the regulations are complex and impose significant record-keeping and other reporting burdens on Government agencies and private industry. The act has been criticized as being costly to implement, confusing to comply with, and of limited value. DOD, for example, has estimated that the certification requirement is included in approximately 35,000 actions valued at about \$60 billion each year.<sup>10</sup> It is not clear that the act has had any significant impact on lobbying.

#### **6.11.3.4. Recommendation and Justification**

##### **Repeal**

The Byrd Amendment is costly to implement and appears to have had little identifiable impact on lobbying. The Panel is aware that the 102d Congress has recently reviewed the scope and effectiveness of the various lobbying provisions and that the 103d Congress can be expected to consider this topic further. Comments received by the Panel regarding the applicability of the Byrd Amendment to defense acquisitions uniformly suggest that it imposes a paperwork burden that does not contribute to the better management of defense programs.<sup>11</sup> The FAR cost principles implementing the requirements of 10 U.S.C. § 2324(e)(1)(B) make the cost of legislative lobbying unallowable, and in addition make unallowable the cost of seeking to influence the executive branch on any regulatory or contract matter. In the Panel's view, those protections against lobbying with appropriated funds satisfy the predominant concern in this area. The additional reporting requirements of the Byrd Amendment contribute little to either public knowledge or protection, and the Panel recommends that they be repealed.

#### **6.11.3.5. Relationship to Objectives**

Repeal of the Byrd Amendment would reduce costs and streamline the acquisition process by eliminating a record keeping burden on Government and industry.

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<sup>8</sup>Statement of Senator Carl Levin on Lobbying and the Byrd Amendment before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, September 25, 1991, at 113.

<sup>9</sup>*Id.* at 116.

<sup>10</sup>Statement of Pete A. Bryan on Lobbying and the Byrd Amendment before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate (Sep. 25, 1991).

<sup>11</sup>Memorandum from Debra van Opstal, Deputy Director, Science and Technology Program, Center for Strategic and International Studies (June 29, 1992); memorandum to Harvey Wilcox from Pete A. Bryan, Deputy Director, Contract Policy and Administration, DOD (June 24, 1992).



#### **6.11.4. 10 U.S.C. § 2408**

### **Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors**

#### **6.11.4.1. Summary of the Law**

The section prohibits an individual who has been convicted of fraud or any felony in connection with a DOD contract from working on a defense contract or first tier subcontract, or serving as director for a defense contractor or first tier subcontractor, for a period of five years. Knowing violation of the restriction subjects a defense contractor or subcontractor to criminal penalties up to \$500,000.

Section 815 of the National Defense Authorization Act for Fiscal Year 1993<sup>1</sup> recently amended 10 U.S.C. § 2408 to require that the Attorney General establish a single point of contact from which defense contractors and subcontractors could obtain information concerning whether prospective employees had been convicted of a defense-related felony.

#### **6.11.4.2. Background of the Law**

This section was originally contained in the Defense Authorization Act for Fiscal Year 1987.<sup>2</sup> The Defense Authorization Act of 1989<sup>3</sup> increased the minimum period of disqualification from one to five years and expanded the list of disqualified activities.

#### **6.11.4.3. Law in Practice**

DFARS section 203.571 implements 10 U.S.C. § 2408 and requires the inclusion of the clause at DFARS section 252.203-7001 in all solicitations and contracts other than those using small purchase procedures.

With the cooperation of the Department of Justice, DOD compiles a list of those debarments resulting from convictions for defense procurement-related felonies and forwards that information to the General Services Administration (GSA). In 1992, GAO found that this list was not sufficiently comprehensive to aid in enforcement of section 2408 and, therefore, recommended that the Attorney General or the Secretary of Defense publish a monthly list of those convicted of a defense contract related felony whether or not they had been debarred.<sup>4</sup>

The Panel believes that the purpose of the suspension and debarment process is to determine the persons with whom DOD should not deal, and that process provides appropriate

<sup>1</sup>Pub. L. No. 102-487, 106 Stat. 2315-1454 (1992).

<sup>2</sup>Pub. L. No. 99-661, 100 Stat. 3941-42 (1986).

<sup>3</sup>Pub. L. No. 100-456, 102 Stat. 2023 (1988).

<sup>4</sup>MORE DATA NEEDED ON INDIVIDUALS CONVICTED OF PROCUREMENT-RELATED CRIMES, GAO/NSIAD 92-35 (1992).

oversight and sanctions to prevent such persons from being employed by defense contractors. The Panel does not support maintaining lists in addition to the GSA centralized list, and believes that the objectives of section 2408 can better be achieved through reliance on the debarment process without the attendant record-keeping that has proven to be cumbersome and less than fully reliable despite considerable administrative effort over several years.

#### **6.11.4.4. Recommendation and Justification**

##### **Repeal**

The Panel recommends repeal of this provision. The Panel believes the prohibition is overly broad and that agency suspension and debarment procedures can better achieve the objectives of the section.

#### **6.11.4.5. Relationship to Objectives**

Repeal of this section will streamline the body of DOD acquisition laws while promoting the ethical integrity of the Government procurement process.

## **6.11.5. 10 U.S.C. § 2409 - 10 U.S.C. § 2409a**

### **Protection of "Whistle Blowers"**

#### **6.11.5.1. Summary of the Law**

10 U.S.C. § 2409 protects employees of defense contractors against reprisals for disclosing substantial violations of law. It also requires the Inspector General of the Department of Defense (DODIG) to investigate and report to Congress on allegations of reprisals.

10 U.S.C. § 2409a protects employees of defense contractors from retaliation for communicating with Government officials about improper or illegal activities. The statute requires DOD to establish procedures to investigate complaints of reprisal. The provision applies to DOD contracts over \$500,000 but excludes contracts in which the price is based solely on established catalog or market prices of commercial items sold in substantial quantities to the general public.

#### **6.11.5.2. Background of the Law**

10 U.S.C. § 2409 was contained in the Defense Authorization Act for Fiscal Year 1987.<sup>1</sup> 10 U.S.C. § 2409a was contained in the Defense Authorization Act for Fiscal Year 1991<sup>2</sup> and was enacted to give whistle blowers a greater remedy than that provided for in section 2409. Section 2409a allows the Secretary of Defense to apply for an enforcement order in the U.S. District Court for the district in which the violation occurred. Pub. L. No. 102-25 suspended 10 U.S.C. § 2409 while 10 U.S.C. § 2409a is in effect. Unless extended, 10 U.S.C. § 2409a will expire on November 5, 1994.

#### **6.11.5.3. Law in Practice**

Remedies for reprisals against employees of defense contractors created in either section are in addition to any remedies that the employee might have under applicable state law. The DODIG has responsibility to investigate reports of reprisals.

#### **6.11.5.4. Recommendations and Justification**

**Retain § 2409**  
**Repeal § 2409a**

The Panel recommends repeal of 10 U.S.C. § 2409a now rather than allowing it to expire on November 5, 1994.

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<sup>1</sup>Pub. L. No. 99-662, 100 Stat. 3941-42 (1986).

<sup>2</sup>Pub. L. No. 101-510, 104 Stat. 1616 (1990).

10 U.S.C. § 2409 is in many respects broader in coverage than 10 U.S.C. § 2409a. Section 2409a does not apply to contracts under \$500,000 or contracts in which the price is based solely upon established catalog or market prices of commercial items. These exclusions have no relation to the purpose of the provision and, in the Panel's view, are illogical. Section 2409 also provides the DODIG with greater flexibility. The procedures under section 2409a are unnecessarily cumbersome.

Section 2409 was suspended while section 2409a is in effect.<sup>3</sup> This has created an unfortunate gap in whistle blower coverage. Section 2409a only applies to contracts awarded after October 7, 1991. As a result, no whistle blower coverage exists for contracts falling within the exceptions to section 2409a or for any contracts awarded prior to that date.

#### **6.11.5.5. Relationship to Objectives**

Repeal of section 2409a will streamline the body of DOD acquisition laws and promote a more effective protection for whistle blowers, thus promoting the integrity of the acquisition process.

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<sup>3</sup>Act of April 6, 1991, Pub. L. No. 101-510, Title VIII, Subtitle D § 837(b), 104 Stat. 1616.

## 6.11.6. 18 U.S.C. § 874

### **Kickbacks from public works employees**

#### **6.11.6.1. Summary of the Law**

This statute prohibits anyone from inducing any person employed in construction or repair of a public work or building, or so employed as a result of work financed in whole or part by loans or grants from the United States, to give up any part of the compensation to which he is entitled, and establishes a fine of not more than \$5,000 or imprisonment for not more than five years or both.

#### **6.11.6.2. Background of the Law**

This section is based on a 1934 statute which was formerly codified as 40 U.S.C. § 276b and has not changed substantially since then.<sup>1</sup>

#### **6.11.6.3. Law in Practice**

This statute has been interpreted to be a protection of Federal wage standards on Federal and federally subsidized public works and construction projects.<sup>2</sup> It not only penalizes anyone who uses intimidation or threats to obtain a kickback because of their ability to hire or fire workers, but also punishes anyone seeking kickbacks who may be merely in a position to influence a hiring or firing decision.<sup>3</sup>

#### **6.11.6.4. Recommendation and Justification**

##### **Retain**

This statute should be retained as its primary purpose is to protect public works employees and construction workers from being subject to intimidation or threats of dismissal as a result of refusing to give kickbacks to contractors. This statute goes beyond the Anti-Kickback Act proscription against offering kickbacks as contained in 41 U.S.C. § 53 in that its impact is to protect the worker from threats and other intimidation.

#### **6.11.6.5. Relationship to Objectives**

This statute promotes the ethical integrity of defense procurement without being unduly burdensome.

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<sup>1</sup>Act June 13, 1934, ch. 483, § 1, 48, Stat. 948 (1934).

<sup>2</sup>*Slater v. U.S.*, 562 F. 2d 58 (1st Cir., 1976).

<sup>3</sup>See *United States v. Price*, 224 F. 2d 604 (6th Cir. 1955), *cert. den.* 350 U.S. 876, 100 L. Ed. 774, 76 S. Ct. 121 (1955).

## **6.11.7. 41 U.S.C. §§ 51 - 58**

### **Anti-Kickback Act<sup>1</sup>**

#### **6.11.7.1. Summary of the Law**

The Anti-Kickback Act of 1986 prohibits any person from providing or soliciting a kickback, attempting these acts, or including the amount of any kickback in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.<sup>2</sup> The criminal penalty for anyone who knowingly and willfully commits these offenses is imprisonment for not more than 10 years or a fine in accordance with Title 18, or both.<sup>3</sup>

The statute provides for a civil penalty of twice the amount of the kickback and not more than \$10,000 for each act in which a person knowingly provides or solicits a kickback.<sup>4</sup> The statute also provides the United States with a right of action in the amount of the kickback against the employer or prime contractor whose employee, subcontractor, or subcontractor employee commits a kickback offense, for six years after commission of the offense or six years after the United States first knew or should reasonably have known that the offense had occurred.<sup>5</sup>

Also under the statute, a contracting officer may offset the amount of any kickback against any money owed by the United States under the contract related to the kickback.<sup>6</sup> Prime contractors are also required to have kickback prevention and detection programs and are obligated to promptly report suspected incidents and cooperate in any Federal investigations of possible violations.<sup>7</sup> Evidence that a person has given information to the Government shall be favorable evidence of responsibility in the case of a suspension or debarment proceeding.<sup>8</sup> The General Accounting Office (GAO) and any agency inspector general shall have access to, inspect the facility of, or audit the books and records of any prime or subcontractor for the purpose of determining whether a violation has been committed on any agency prime contract.<sup>9</sup>

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<sup>1</sup>This statute is different from the Copeland Anti-Kickback Act, 40 U.S.C. § 276c or the Federal Kickback Act, 18 U.S.C. § 874, formerly 40 U.S.C. § 276(b), discussed elsewhere in this report. The Copeland Act requires the Secretary of Labor, among other things, to issue regulations requiring contractor to furnish a weekly statement concerning wages paid each employee during the previous week. The statute also provides that penalties under the False Statements Act, 18 U.S.C. § 1001 shall apply to any such statement. The Federal Kickback Act discussed infra prohibits anyone from inducing a subcontractor or material man on a public works project financed by the Federal Government to give up any part of his compensation or face criminal penalties.

<sup>2</sup>41 U.S.C. § 53.

<sup>3</sup>41 U.S.C. § 54.

<sup>4</sup>41 U.S.C. § 55.

<sup>5</sup>41 U.S.C. § 55.

<sup>6</sup>41 U.S.C. § 56.

<sup>7</sup>41 U.S.C. § 57.

<sup>8</sup>41 U.S.C. § 57.

<sup>9</sup>41 U.S.C. § 58.

### **6.11.7.2. Background of the Law**

The forerunner of the 1986 Anti-Kickback Act was enacted in 1946 in the aftermath of World War II.<sup>10</sup> Based upon the findings of a 1943 GAO audit of cost-plus-fixed-fee contracts which revealed kickbacks, and the GAO recommendation that legislation be developed to combat that practice, the Senate Special Committee to Investigate the National Defense Program initiated a full-scale examination of the problem. The Committee discovered that gifts and gratuities of money, war bonds, and entertainment had been given to purchasing agents of certain prime contractors for inducing orders or as rewards for previously given orders.<sup>11</sup> In 1960, the Act was amended to apply to all negotiated contracts.<sup>12</sup> The 1986 Act, also known as the Anti-Kickback Enforcement Act, made substantial changes in the original statute. First, the 1986 amendment prohibited accepting kickbacks whereas the 1946 Act prohibited only their payment. The revised statute also included a provision to prohibit attempted kickbacks. The statute, as most recently amended, covers all contracts, rather than just negotiated contracts, and covers kickbacks intended to induce any favorable treatment in contracting, not just inducements for the award of subcontracts or orders. Criminal penalties were also increased from maximum imprisonment of 2 to 10 years for anyone who "knowingly" and, as a result of that amendment, "willfully" violates the statute. The maximum fine was increased from \$10,000 to \$250,000 for individuals and \$1 million for entities other than individuals. The 1986 amendment also created a cause of action for the United States in a civil suit against anyone violating the statute. Finally, the 1986 amendment placed new requirements on contractors in the detection and prevention of kickbacks.

### **6.11.7.3. Law in Practice**

This Act is implemented at FAR 3.502-1 and -3. Section 3.502-3 requires that the contract clause 52.203-7, "Anti-Kickback Procedures," be inserted in all solicitations. The clause, which is also required to be incorporated in all subcontracts, outlines the provisions of the Act, and requires that the contractor promptly report suspected kickback occurrences and cooperate fully with Federal agency investigations of suspected kickbacks. The clause also provides that the contracting officer may offset kickbacks against monies owed by the Government and directs that the prime contractor withhold monies owed due to kickbacks from a subcontractor.

### **6.11.7.4. Recommendation and Justification**

#### **Retain**

Retention of this statute is recommended as it serves as the foundation for Government action, both criminal and civil, against anyone accepting a kickback and anyone providing a kickback, other than in a public works or construction projects. Kickbacks in public works and construction projects are addressed by 18 U.S.C. § 874.

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<sup>10</sup>Act of Mar. 8, 1946, ch. 80, 60 Stat. 37.

<sup>11</sup>H.R. REP. NO. 212, 79th Cong., 2d Sess. (1946).

<sup>12</sup>Act of Sep. 2, 1960, Pub. L. No. 86-695, 74 Stat. 740.

The Panel makes specific recommendations at 4.1 and 8.3, related to the act and its application to commercial items or a simplified acquisition threshold.

**6.11.7.5. Relationship to Objectives**

This statute promotes the ethical integrity of defense procurement without being unduly burdensome.



## 6.11.8. 5 U.S.C. Appendix 5 §§ 401 - 408

### Office of Government Ethics

#### 6.11.8.1. Summary of the Law

These provisions established the Office of Government Ethics (OGE) and made its director responsible for developing, in consultation with the Attorney General and the Office of Personnel Management, rules and regulations concerning conflicts of interest and ethics in the executive branch.<sup>1</sup> OGE is also responsible for monitoring and investigating compliance with the financial disclosure requirements by executive branch officials; for reviewing certain financial statements for possible conflict of interest law violations; for monitoring and investigating individual and agency compliance with additional financial reporting and internal review requirements; for interpreting rules and regulations governing conflict of interest and ethical problems and filing of financial statements; for consulting with Federal agencies concerning conflict of interest problems in individual cases; and for establishing a formal advisory opinion service.<sup>2</sup>

#### 6.11.8.2. Background of the Law

Prior to the establishment of OGE, standards of ethical conduct and financial disclosure requirements were established by a 1965 executive order, Exec. Order No. 11222, and Civil Service Commission implementing rules and regulations.<sup>3</sup> A 1976 General Accounting Office (GAO) study found several problems: that interpretation and implementation of standards of conduct regulations was inadequate; procedures to ensure collection, review and control of financial disclosure statements were lacking; and resolution of conflicts of interest was ineffective and untimely.<sup>4</sup> One of the primary findings of the GAO was that with no power to monitor compliance, investigate, or order remedial action, the Civil Service Commission lacked the "centralized supervisory authority" to enforce its implementation of Exec. Order No. 11222.<sup>5</sup> Accordingly, the Comptroller General recommended that an OGE be established.<sup>6</sup> The following year President Carter called upon Congress to implement the GAO's recommendation.<sup>7</sup> Congress did so in legislation which, in addition to correcting the deficiencies pointed out by GAO, authorized OGE to provide advisory opinions to agencies.<sup>8</sup>

The Ethics in Government Act Amendments which reauthorized OGE in 1988, gave OGE broader authority to recommend that agencies investigate and take disciplinary or corrective

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<sup>1</sup>5 U.S.C. App. 5 § 401.

<sup>2</sup>*Id.*

<sup>3</sup>S. REP. NO. 170, 95th Cong., 2nd Sess. 28 (1978), *reprinted in* 1962 U.S.C.C.A.N., 4217, 4244.

<sup>4</sup>*Id.* at 4246.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 4247.

action to remedy a violation.<sup>9</sup> It also gave OGE the power to direct corrective action in the absence of appropriate agency action.<sup>10</sup>

### **6.11.8.3. Law in Practice**

Pursuing one of the 1989 recommendations of his Commission on Federal Ethics Law Reform, the President directed OGE to draft and promulgate uniform standards of conduct regulations for agencies within the executive branch. Published on August 7, 1992, OGE's Standards of Ethical Conduct for Employees of the Executive Branch<sup>11</sup> will take effect on February 3, 1993, and will impose the single executive branch-wide standard for ethics rules that the Commission recommended.

The President's Ethics Commission also noted that one of the functions of OGE was its advisory opinion service. Under a 1980 Memorandum of Understanding with the Department of Justice, an opinion on a significant matter of first impression or a matter otherwise touching upon criminal law violations must be coordinated with the Department of Justice.<sup>12</sup> The memorandum also provides that any person relying in good faith upon a formal advisory opinion of OGE shall not be subject to prosecution.<sup>13</sup> The Commission also noted that opinions regarding the informal resolution of agency cases may also confer a bar on prosecution.<sup>14</sup> Its collection of formal and informal opinions is published and provides a "common law" for the executive branch ethics program.<sup>15</sup>

No comments were received concerning this statutory provision, and the Panel is aware of no problems which should be remedied through a statutory change.

### **6.11.8.4. Recommendation and Justification**

#### **Retain**

The Panel recommends that 5 U.S.C. App. 5 §§ 401-408 be retained. The legislation establishing the OGE brought about strong centralized management and Government-wide uniformity of ethical standards throughout the executive branch, which clearly promotes Federal acquisition practices.

### **6.11.8.5. Relationship to Objectives**

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<sup>9</sup>Pub. L. No. 100-598, 102 Stat. 3031.

<sup>10</sup>*Id.*

<sup>11</sup>5 C.F.R. 2653.

<sup>12</sup>TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 92 (1989).

<sup>12</sup>*Id.* at 80.

<sup>13</sup>*Id.* at 92.

<sup>14</sup>*Id.* at 93.

<sup>15</sup>*Id.*

This statute as it exists promotes the continued ethical integrity of defense procurement programs.

## 6.11.9. 5 U.S.C. Appendix 6 §§ 101 - 111

### Financial Disclosure Requirements of Federal Personnel

#### 6.11.9.1. Summary of the Law

This statute sets out the detailed financial disclosure requirements for executive, legislative, and judicial branch officers and employees, including nominees for positions which require Senate confirmation, and special Government employees serving more than 60 days within a calendar year.<sup>1</sup> The Attorney General may file a civil action in the appropriate Federal district court against any individual who knowingly and willfully fails to file or report any required information or who files a false report. The penalty for violation is a fine of not more than \$5,000.<sup>2</sup> The statute requires that the financial disclosure reports of higher-level officials be made available to the public with the exception of those filed by persons in the intelligence agencies.<sup>3</sup> The use of the reports for commercial purposes or for any solicitation is prohibited.<sup>4</sup> The designated agency ethics official or Secretary is to provide for review of each disclosure report within 60 days after filing. If after review it is determined that the report submitted is not in compliance with applicable laws and regulations, the submitter shall be given an opportunity for personal consultation and notified of appropriate alternatives for resolving any conflict of interest, including divestiture, restitution, establishment of a blind trust, request for exemption, reassignment, or resignation.<sup>5</sup>

#### 6.11.9.2. Background of the Law

There has been concern since the late 1940s that Federal Government employees should have financial disclosure regulations to guide their conduct regarding outside financial interests.<sup>6</sup> In 1946, Senator Wayne Morse introduced a resolution which would have required Senators to file annual financial statements.<sup>7</sup> With the support of President Truman, he continued his efforts with the introduction of legislation to cover all Federal employees who earned over \$10,000.<sup>8</sup> That effort failed,<sup>9</sup> but it was a concept later pursued by Senator William Fulbright, Senator Paul Douglas, and President Kennedy.<sup>10</sup> Due to concern over the financial dealings of one of its members, Congress adopted rules requiring financial reporting in 1967.<sup>11</sup> By that date the executive branch had established a requirement for confidential financial disclosure as a result of

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<sup>1</sup> 5 U.S.C. App. 6 § 101.

<sup>2</sup> 5 U.S.C. App. 6 § 104.

<sup>3</sup> 5 U.S.C. App. 6 § 105(a).

<sup>4</sup> 5 U.S.C. App. 6 § 105(c)(1).

<sup>5</sup> 5 U.S.C. App. 6 § 106(b) and (c).

<sup>6</sup> S. REP. NO. 170, 95th Cong., 2nd Sess. 28 (1978), *reprinted in* 1962 U.S.C.C.A.N., 4217, 4245-6.

<sup>7</sup> *Id.* at 1438.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4239.

<sup>11</sup> *Id.*

Executive Order No. 11222, executed by President Johnson, and the judicial branch later established reporting through the U.S. Judicial Conference resolutions of 1969.<sup>12</sup>

Unevenness among the congressional, judicial, and executive branch disclosure rules prompted efforts throughout the mid-1970s to enact financial disclosure legislation for the three branches of Government. In 1976, a General Accounting Office report entitled *Action Needed to Make the Executive Branch Financial Disclosure System Effective* criticized the existing reporting system, finding the following discrepancies: the failure of the executive departments to tailor regulations to individual agency and employee responsibilities; ineffective procedures to ensure collection, review, and control of financial disclosure statements; ineffective and untimely resolution of conflicts of interest issues; and lack of a centralized supervisory authority.<sup>13</sup> That report helped to catalyze the enactment of new financial reporting requirements in the Ethics in Government Act of 1978, which included a separate title covering financial reporting for each of the three branches of Government. This separate treatment of the branches continued until the passage of the Ethics Reform Act of 1989, which introduced uniformity to the requirements for the three branches.<sup>14</sup>

### 6.11.9.3. Law in Practice

In 1989, the President's Commission on Federal Ethics Law Reform referred to financial disclosure as the "linchpin of the ethical enforcement system."<sup>15</sup> The Commission recommended that the system be continued, finding that "10 years of experience with the Ethics in Government Act requirements have demonstrated the value of public financial disclosure to the maintenance of public confidence of Government officials."<sup>16</sup> The Commission felt, however, that there should be more flexibility in the disclosure requirements than those laid out in the Ethics in Government Act,<sup>17</sup> and that there should be uniformly strong review processes in all three branches.<sup>18</sup> In addition, it recommended that the reporting thresholds be raised to adjust for inflation.<sup>19</sup>

The extensive amendments made by Congress in 1989 to address these and other concerns have been in effect only a short period of time. No comments were received concerning this statute, and the Panel is aware of no problems which should be remedied through statutory change.

### 6.11.9.4. Recommendation and Justification

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<sup>12</sup>*Id.* at 1439-40.

<sup>13</sup>*Id.*

<sup>14</sup>Pub. L. No. 101-194 (1989)

<sup>15</sup>TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM 5 (1989).

<sup>16</sup>*Id.* at 80.

<sup>17</sup>*Id.* at 81.

<sup>18</sup>*Id.* at 83.

<sup>19</sup>*Id.* at 81.

## **Retain**

The Panel recommends that 5 U.S.C. App. 6 §§ 101-111 be retained as it is the foundation for Federal requirements for financial disclosure by Government officials.

### **6.11.9.5. Relationship to Objectives**

This statute, as it exists, promotes the continued ethical integrity of defense procurement programs.

## **6.11.10. 10 U.S.C. § 2393**

### **Prohibition against doing business with certain offerors or contractors**

#### **6.11.10.1. Summary of the Law**

This section prohibits the Secretary of a military department from soliciting an offer from, awarding a contract to, extending an existing contract with, or approving the award of a subcontract to an offeror or contractor known by the Secretary to have been debarred or suspended by another Federal agency unless the debarment or suspension has been terminated or the debarment or suspension period has expired. If the Secretary determines there is a compelling reason to solicit an offer from, award a contract to, extend a contract with, or approve a subcontract with such an entity, the Secretary shall send notice of the determination to the Administrator of the General Services Administration, who shall maintain the notice for public inspection. The statute requires the Secretary of Defense to issue regulations requiring that each DOD contractor have its subcontractors disclose, at the time of award of the subcontract (if above the small purchase threshold), whether or not it has been suspended or debarred by the Federal Government.

#### **6.11.10.2. Background of the Law**

This section was added to Title 10 in 1981 by the 1982 Defense Authorization Act.<sup>1</sup> Prior to passage of that Act, the Senate Subcommittee on Oversight of Government Management recommended in July of 1981, based in part on the findings of an interagency task force, that new debarment and suspension regulations be issued which would have Government-wide effect.<sup>2</sup>

The section was amended in 1987 when subsection (b) was added to require subcontractors to provide notice to their prime contractor of whether they had been suspended or debarred.<sup>3</sup>

#### **6.11.10.3. Law in Practice**

DFARS 209.405 satisfies the direction of the section to require disclosures by subcontractors as to whether they have been debarred.

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<sup>1</sup>Pub. L. No. 97-86, Title IX, § 914(a), 95 Stat. 1124 (1981).

<sup>2</sup>Senate Subcommittee on Oversight of Government Management of the Committee of Government Affairs, 97 Cong., 1st Sess., Reform of Government-Wide Debarment and Suspension Procedures, at 18-19 (1981).

<sup>3</sup>Pub. L. No. 100-180 Div. A., Title XXI, § 1231(17), 101 Stat. 1161 (1987).

#### **6.11.10.4. Recommendations and Justification**

##### **Retain**

Although the practice of suspension and debarment in DOD precedes this statute, section 2393 addresses DOD debarment and suspension of contractors who have been debarred or suspended by other Federal agencies and promotes a coherent approach among DOD and other segments of the Government concerning debarred and suspended contractors.

Recommendations to exempt certain of these restrictions for commercial items is discussed at 8.3.

#### **6.11.10.5. Relationship to Objectives**

This statute promotes the ethical integrity of defense procurement without being unduly burdensome.



**Chapter 7**  
**Defense Trade and Cooperation**

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**STREAMLINING**  
**DEFENSE**  
**ACQUISITION LAWS**

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**Report**  
**of the**  
**Acquisition Law Advisory Panel**

**to the**  
**United States Congress**



**January**  
**1993**

7. DEFENSE TRADE AND COOPERATION .....	1
7.0 Introduction.....	1
7.1. Purchases of Foreign Goods by the Department of Defense.....	13
7.1.0. Introduction .....	13
7.1.1. 41 U.S.C. §§ 10a through 10d; miscellaneous Public Laws .....	25
7.1.2. 19 U.S.C. §§ 2501 through 2581.....	37
7.1.3. 19 U.S.C. §§ 2701 through 2706.....	41
7.1.4. 10 U.S.C. § 2506 renumbered as § 2533.....	43
7.1.5. 10 U.S.C. § 2507 renumbered as § 2534.....	47
7.1.6. 10 U.S.C. § 4542 .....	59
7.1.7. 10 U.S.C. § 7309 .....	65
7.1.8. 10 U.S.C. § 2631 and 46 U.S.C. App. § 1241 .....	69
7.1.9. 10 U.S.C. § 2327 .....	71
7.2. INTERNATIONAL AND COOPERATIVE AGREEMENTS .....	73
7.2.0. Introduction .....	73
7.2.1. 10 U.S.C. § 2504 renumbered as § 2531.....	81
7.2.2. 10 U.S.C. § 2505 renumbered as § 2532.....	85
7.2.3. 10 U.S.C. § 2350a.....	89
7.2.4. 10 U.S.C. § 2350b.....	99
7.2.5. 10 U.S.C. § 2350i .....	107
7.2.6. 10 U.S.C. § 2350c.....	109
7.2.7. 10 U.S.C. § 2350d .....	113
7.2.8. 10 U.S.C. § 2350e.....	117
7.2.9. 10 U.S.C. § 2350h.....	121
7.2.10 .10 U.S.C. § 7344 .....	123
7.2.11 .50 U.S.C. App. §§ 2061 through 2170 .....	125
7.3. Acquisition, Cross-Servicing Agreements, and Standardization .....	133
7.3.0. Introduction .....	133
7.3.1. 10 U.S.C. §§ 2341 through 2350.....	139
7.3.2. 10 U.S.C. § 2350f.....	147
7.3.3. 10 U.S.C. § 2350g .....	151
7.3.4. 10 U.S.C. § 2457 .....	155
7.3.5. 22 U.S.C. § 2794(7).....	161
7.4. Proposed Defense Trade and Cooperation Code .....	165

## **7. DEFENSE TRADE AND COOPERATION**

### **7.0 Introduction**

With the end of the Cold War, the integration of international and domestic economic security is emerging as a key issue to be considered as the U.S. restructures its defense establishment. Because of the need to focus on the economic aspects of American security, defense acquisition faces the twin challenges of reducing procurement expenditures while preserving a viable industrial and technology base. As discussed in Chapters 1 and 8 of this Report, reduction of defense expenditures and maintenance of the defense technology and industrial base will require greater use of commercial and nondevelopmental defense items, some of which will of necessity come from abroad. As further discussed in subchapter 7.2., collaborative sharing of research and development costs through international cooperative programs has long been a method for reducing U.S. research and development expenditures but will require the U.S. to acquire from its foreign partners. More recently, as addressed in subchapter 7.3., allied burdensharing is being emphasized by Congress as a way to cut the costs of international commitments of the United States. All of these developments suggest that in the future foreign-made defense items will of necessity be used in greater quantities by DOD. At the same time, national security will dictate that concern for foreign control or ownership of key U.S. industrial capacity be considered.

On the other hand, a robust industrial base is required to promote American technological competitiveness. Our declared National Security Strategy emphasizes the importance of domestic "surge capacity" in responding to a wide variety of crisis mobilization scenarios -- not unlike Operation Desert Shield. One way to promote the U.S. defense technology and industrial base in times of declining defense expenditures is to export defense items to our allies. These same industrial base problems are also faced by many of our allies around the world, particularly those in NATO, each of whom will presumably want to use exports to protect their industrial bases.

The countervailing concerns sketched above show that domestic source restrictions on DOD acquisitions cannot be considered in a vacuum, apart from laws, treaties, and regulations governing the sale of U.S. defense items abroad, the acquisition of companies by foreign entities, and the operation of international defense cooperation. Accordingly, the Panel decided that all of these concerns should be addressed in a comprehensive way in a new chapter within Title 10. This section of the Report discusses the structure of that new chapter.

One way to deal with the common pressures of reducing defense spending while promoting critical industrial base sectors is to broaden the pattern of international armaments cooperation. As succinctly stated by the Secretary of Defense in his 1992 Annual Report to the President and the Congress:

The Department of Defense considers international defense industrial cooperation to be a significant element of the U.S. acquisition process. By taking advantage of the growing

technological capabilities of our allies, we can make more efficient use of scarce defense resources.<sup>1</sup>

However, there are formidable obstacles to enhanced international defense trade and cooperation. Many are rooted in some of the most fundamental economic choices made by any state, beginning with the all-important questions of what to produce domestically and what to obtain by trade with foreign countries. In the past, domestic restrictions reflect both pragmatic industrial base concerns and varying degrees of both self-interest and applied patriotism. These concerns can be seen in the passage of legislation such as the Buy American Act, as well as the source restrictions and product preferences which have become a regular feature of recent defense annual appropriations and authorizations acts.

A further issue is the extent of industrial self-reliance needed to insure any nation's survival, either in wartime or in situations such as a blockade, embargo, or other logistical interruption. The United States, for example, has historically been unwilling to transfer to overseas suppliers its capacities for the forging and casting of large-bore cannon. More recently, American policy-makers have worried that our reliance on advanced weaponry might lead to a dangerous dependence on the foreign-produced microchips needed to produce these technologically advanced systems.

Although many western democracies emphasize the somewhat contradictory need to cut overall defense spending even while conserving national armaments industries, there is a growing recognition that defense production reflects the dynamics of an increasingly global marketplace. Military hardware is clearly affected by the same interdependence which leads to the production of a "domestic" automobile with a third or more of its parts and major components typically obtained from offshore suppliers. In addition to microchips, typical items obtained from foreign sources by U.S. defense manufacturers include electrical components, chemicals, fasteners, specialty metals, and various alloys. The fact that some or all of these items must be obtained through waivers of existing laws or regulations only underlines the tension between reality and current statutory policy.

Multinational corporations as well as regional consolidations (such as Europe in 1992) are also the harbingers of fundamental change in the global economy. To prosper -- or even to survive -- domestic concerns are increasingly pressed to compete in the international marketplace, often against foreign Government-owned competitors. Particularly for defense industries, that international marketplace not only demands efficiency but partnerships. These relationships can result equally from individual relationships concluded between international buyers and sellers or from international agreements arrived at between Governments. What is fundamental, however, is that these opportunities reflect the results of competition on a level playing field in defense trade -- that is, to weigh the ever-present preference for "Buy American" with the emergent need to be able to "Sell American."

In analyzing the legislative changes needed to help provide that level playing field in defense trade and cooperation, the Panel has concluded that:

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<sup>1</sup>Dick Cheney, Secretary of Defense, Annual Report to the President and the Congress, February 1992, at p. 17.

- Department of Defense international defense acquisition policies should be consistent, on a reciprocal basis, with the defense acquisition and trade policies of United States allies.
- Department of Defense international defense acquisition policies on international and cooperative agreements should be consistent with the maintenance of strong domestic technology, industrial, and mobilization bases.
- Department of Defense international defense acquisition policies should be consistent with international operational agreements, allied logistics support and standardization, and export sales of defense items to foreign countries.

### 7.0.1. Background

After World War II, the requirement for international institutions to deal with monetary and trade issues led to the "Bretton Woods" accords,<sup>2</sup> and the establishment of such institutions as the International Monetary Fund (IMF),<sup>3</sup> the World Bank,<sup>4</sup> and the General Agreement on Tariffs and Trade (GATT).<sup>5</sup> These institutions have endured for almost a half century. The GATT has successfully regulated international trade in spite of the Cold War and its implications for East-West security. A key element in its success has been the delicate balance preserved between free trade and protectionism.

Under the general rubric of national security, government procurement was historically reserved from the purview of such agreements as the GATT.<sup>6</sup> National security and government procurement were inextricably linked and therefore excluded from international trade regulation. Since government procurement typically accounts for a substantial portion of the gross domestic product, its effect on a national trade balance can be significant; and of course, defense acquisition is an important segment of the general government procurement sector. Aware that procurement held such significance, the GATT multilateral trade negotiations ultimately produced the Agreement on Government Procurement contemporaneously with addressing the elimination of non-tariff barriers to trade.<sup>7</sup>

<sup>2</sup>Named after the agreements reached between the United States, the United Kingdom, and their World War II allies at Bretton Woods, New Hampshire, in July 1944.

<sup>3</sup>The IMF is not a bank but a membership association of countries which pay a subscription and agree to abide by a mutually advantageous code of conduct concerning international economic and monetary policy.

<sup>4</sup>The World Bank is a publicly owned financial intermediary which borrows commercially by selling bonds and lends to finance investment in developing countries.

<sup>5</sup>The GATT is an agreement among signatory countries whose general principles are: (a) trade without discrimination (most-favored-nation concept); (b) protection through tariffs (tariff schedules to minimize trade distortions); (c) a stable basis for trade (the generalized-system-of-preferences (GSP)); (d) promotion of fair competition (elimination of non-tariff barriers, subsidies, and dumping); (e) a general prohibition on quantitative and qualitative restrictions on imports (elimination of quotas except for balance-of-payments difficulties); and (f) an acceptable waiver procedure with provision for emergency actions (the "safeguard" rule).

<sup>6</sup>General Agreement on Tariffs and Trade, Article XXI.

<sup>7</sup>Tokyo Round of Multilateral Trade Negotiations (MTN), 1973 - 1979.

In the United States, the Trade Agreements Act of 1979 implemented the Agreement on Government Procurement.<sup>8</sup> For the first time, above a threshold agreed among the signatories to the Agreement,<sup>9</sup> Government agency procurement was covered by the principles of reciprocal free trade.<sup>10</sup> Not only was DOD included in agency coverage but specific classes and items of defense goods were included as well.<sup>11</sup>

Even with the advent of regional trade and economic blocs, such as the European Community (EC)<sup>12</sup> and the recently concluded North American Free Trade Agreement (NAFTA),<sup>13</sup> coverage of government procurement has been included within the articles of agreement. In the former, government procurement within the EC member countries is regulated through various Directives,<sup>14</sup> whereas in the latter, the government procurement regime is an integral part of the accord modeled after the U.S./Canada Free Trade Agreement provisions.<sup>15</sup>

Efforts at addressing international government procurement within the United Nations framework led to the promulgation of a draft model procurement law for guidance to developing countries.<sup>16</sup> The articles of the draft law on procurement generally address processes for general tendering and two-stage tendering, prequalification, solicitation, tender and tender securities, evaluation and comparison of tenders, contract acceptance, procurement by other means, request-for-proposals, request-for-quotations, competitive negotiation, single source procurement, and procurement review.

With the emergence of each of these agreements on government procurement, accompanied by draft general codes for developing countries' implementation, the level of international cooperation appears to be improving. One sector remains elusive in the drive toward a level playing field, however, and that is international defense trade and cooperation.

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<sup>8</sup>19 U.S.C. § 2511 *et seq.*

<sup>9</sup>Originally established at 150,000 Special Drawing Rights (SDRs) and subsequently lowered to 130,000 SDRs (approximately \$141,000 U.S.).

<sup>10</sup>For agencies and goods covered, see Annexes to the Agreement.

<sup>11</sup>DFARS, Subpart 225.4.

<sup>12</sup>Treaty of Rome, March 25, 1957.

<sup>13</sup>Concluded December 17, 1992; provides for a threshold of \$50,000 for Federal Government entities/\$250,000 for Government enterprises and addresses among other subjects: national treatment and non-discrimination; rules of origin; denial of benefits; prohibition of offsets; technical specifications; tendering procedures; qualification of suppliers; bid challenge; provision of information; technical cooperation; joint programs for small business; and definitions.

<sup>14</sup>*E.g.* Works Directive; Supplies Directive; Utilities Directive; and draft Services Directive; above various thresholds, the Directive Articles are generally premised on: (1) open, restricted, and negotiated procedures in contract formation; (2) common rules in the technical field; (3) common rules on advertising and participation; and (4) criteria for qualitative selection and the award of contracts.

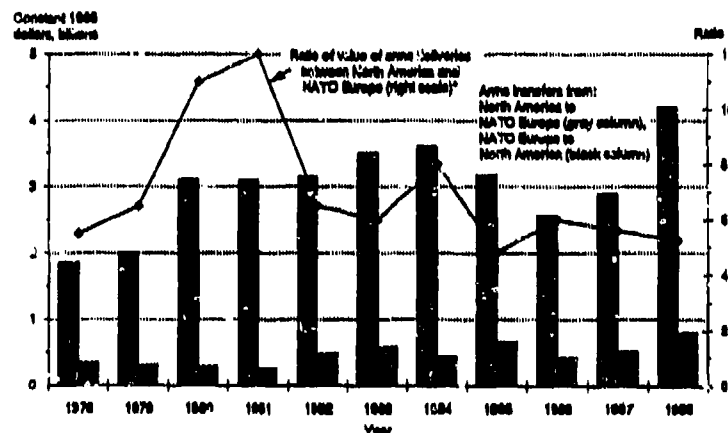
<sup>15</sup>In force since 1988, Part Three of the Agreement provides broadened Government procurement coverage, above a \$25,000 threshold, for GATT-eligible products with improved transparency and bid challenge procedures.

<sup>16</sup>See U.N. Commission on International Trade Law (UNCITRAL), A/CN.9/WG.V/WP.30, 9 May 1991.

## 7.0.2. Defense Trade and Cooperation

Other than the right of individual and collective self-defense assured under the United Nations Charter,<sup>17</sup> defense and security issues have generally been outside the scope of international economic and trade-related agreements.<sup>18</sup> European and North American defense and security issues were placed within the ambit of such institutions as the North Atlantic Treaty Organization (NATO),<sup>19</sup> the Western European Union (WEU),<sup>20</sup> and more recently the Conference on Security and Co-Operation in Europe (CSCE).<sup>21</sup>

During the period that international agreement on free trade in government procurement has been negotiated, the United States has been initiating discussion of an allied regime on defense trade and cooperation. Beginning in the 1970s with acquisition and logistic support projects within NATO,<sup>22</sup> the United States pursued defense procurement-related arrangements with its allies. On the basic premise of a "two-way street," principles of rationalization, standardization, and interoperability (RSI) with our NATO allies in defense acquisition were specifically enacted by statute in the United States.<sup>23</sup> The Office of Technology Assessment, in Figure 7A. below, depicts the value of reciprocal transatlantic defense trade during the years 1978-88.<sup>24</sup>



\* Example: In 1978, value of arms delivered from North America to NATO Europe was 6 times greater than from NATO Europe to U.S.  
**Figure 7A. - Transatlantic Defense Trade, by Value and Ratio, 1978-88**  
 Source: Office of Technology Assessment, from data in the U.S. Arms Control and Disarmament Agency, *World Military Expenditures and Arms Transfers, 1989* (Washington, DC: U.S. Government Printing Office, 1990)

<sup>17</sup>See Charter of the United Nations, Article 7.

<sup>18</sup>See, for example, NAFTA Article 1018: "Exceptions - 1. Nothing in this Chapter shall be construed to prevent a Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defense purposes."

<sup>19</sup>The North Atlantic Treaty, April 4, 1949.

<sup>20</sup>Brussels Treaty, March 17, 1948. (Following the collapse of the European Defense Community in 1954, the WEU was a political outgrowth of the Brussels Treaty Organization intended originally to integrate West Germany into the western defense structure).

<sup>21</sup>Conference on Security and Co-Operation in Europe: Final Act, August 1, 1975 (Helsinki).

<sup>22</sup>NATO Mutual Support Act of 1979, 10 U.S.C. § 2341 *et seq.*

<sup>23</sup>10 U.S.C. § 2457.

<sup>24</sup>U.S. Congress Office of Technology Assessment, Global Arms Trade, Commerce in Advanced Military Technology and Weapons, June 1991, at 49.

An integral component of the transatlantic defense trade included statutory authority in the U.S. for agreements on cooperative projects with NATO member countries, other major allies, and friendly foreign countries.<sup>25</sup> Then, through the negotiation of reciprocal bilateral procurement agreements with our allies in the 1980s,<sup>26</sup> the U.S. advanced not only international defense cooperation in research, development, production, and logistics support, but also promoted the concept of a more transparent system of international defense acquisition.<sup>27</sup>

International defense trade is always balanced against concerns of national sovereignty and security, as embodied in the procurement arena by the maintenance of an indigenous defense industrial base. In the U.S. particularly, preservation of the defense industrial base has been established by the Congress through legislative mandate.<sup>28</sup> Through agreements between the U.S. and Canada, a *de facto* North American defense industrial base has gradually arisen.<sup>29</sup> Indeed, recent legislation has codified the relationship by defining the national technology and industrial base as including the U.S. and Canada,<sup>30</sup> while defining a domestic source, for industrial preparedness purposes, as including production capability either in the U.S. or Canada.<sup>31</sup>

In Europe, concerns over the defense industrial base led to the establishment of the Independent European Programme Group (IEPG).<sup>32</sup> The Group has, for example, formed a cooperative research and development program called European Cooperation for the Long term in Defense (Euclid). Perhaps viewed as a regional counter-weight during healthy and competitive global economic times, the goal is a laudable one. But in a time of economic downturn, coupled with an overall lessening of global security tensions, the effect of continuing to insist on an indigenous defense industrial base must be offset by the reality that such policies can be devastating to national economies.

From the U.S. perspective, the Defense Policy Advisory Committee for Trade Policy Matters (DPACT)<sup>33</sup> has perceived European procurement practice, related to efforts such as Euclid, as a barrier to cooperative research and development with the United States. In addition, DPACT has provided specific recommendations on U.S. defense export policy, financial

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<sup>25</sup>Chapter 138, Title 10, subchapter II: *Cooperative Agreements*.

<sup>26</sup>Director of Defense Procurement, Reciprocal Procurement Agreements, DOD 1992 (formerly DFARS Appendix-T).

<sup>27</sup>See section 7.2.0.1., *NATO Code of Conduct in Defense Trade*, *infra*.

<sup>28</sup>Currently Chapter 148, Title 10.

<sup>29</sup>Defense Development and Defense Production Sharing Arrangements (DD/DPSA), DOD Directive 2035.1; Industrial Preparedness Program, DFARS 225.870-2(b), DOD Directive 4005.3-M; inclusion of Canada for production planning purposes, DFARS 225.870-1.

<sup>30</sup>Defense Authorization Act of 1993, Pub. L. No. 102-484, §4203(a), 106 Stat. 2442.

<sup>31</sup>Defense Production Act Amendments of 1992, Pub. L. No. 102-558, 106 Stat. 4198.

<sup>32</sup>Comprised of the European members of NATO, the IEPG was formed to address harmonization of operational requirements, competition, open purchasing arrangements, cross-border defense trade, *juste retour*, technology transfer, and cooperation in research, development and technology. [Note: The IEPG was recently subsumed by the WEU organization, see note 19, *supra*.]

<sup>33</sup>Established by the Secretary of Defense and the United States Trade Representative pursuant to the authority delegated under Exec. Order No. 11846 of March 27, 1975, as an advisory committee established under section 1103 of the Trade Agreements Act of 1979.



competitiveness, research and development contracting, Government-industry relations, communication of planning information, and commercial products and value based acquisition. With these recommendations in mind, DPACT succinctly stated that:

Defense trade will take on added importance as U.S. defense budgets decline. Exports to friendly countries, consistent with U.S. national security and foreign policy objectives, help keep production lines open, lower costs to DOD and provide built-in surge capacity. Such exports also provide added security on a regional basis to complement U.S. commitments at a very low cost to the U.S.<sup>34</sup>

DPACT recently recommended, as well, that efforts in the Uruguay Round of multilateral trade negotiations to expand GATT coverage, to add new public sector coverage, and to include coverage for services, be vigorously pursued by the U.S. negotiators.<sup>35</sup> The recent breakthrough on agricultural subsidies has given added impetus to a successful conclusion of the Uruguay Round.

### **7.0.3. The International Defense Acquisition Challenge**

Despite the progress that has been achieved in the past few decades, much remains to be accomplished in the practice of international defense acquisition and trade. The Panel accumulated a considerable number of studies suggesting that coordination between defense trade and cooperation and the preservation of a viable national defense technology and industrial base is less than effective. As one study recently found:

In response to these changing demands, governments are cutting their defense spending, either canceling defense programs altogether or stretching them out and reducing the final purchases. The combination of lower production runs and increasingly challenging technological specifications inflates the final price tag of many programs, making them more vulnerable to cancellation. And industry is increasingly financially exposed at the front end of the development process.

Out of necessity, European companies continue to concentrate on exports, while U.S. companies have raised their share of global defense exports considerably over the last decade. This surge paralleled a growth in global defense expenditure, however, which cannot be taken for granted in the future. The global market has recently been a victim of overcapacity. Even the expected export boom following the Gulf War may be curtailed by international political initiatives on arms control and export

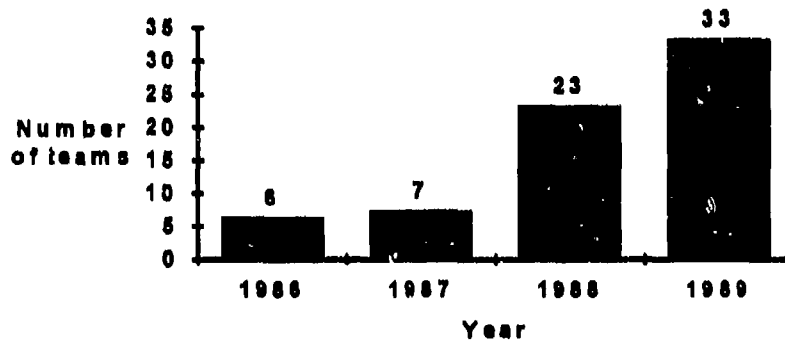
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<sup>34</sup>*Id.* at pg. 1.

<sup>35</sup>DPACT, Year-End Review 1991, Feb. 28, 1992.

controls. Major importers are also seeking to develop indigenous capabilities that cut into the long-term viability of direct exports.<sup>36</sup>

In reducing the international defense acquisition market, significant international collaboration among industry will be inevitable. To illustrate the trend, according to the Office of Technology Assessment, Figure 7B. below charts recent defense acquisition teaming between U.S. and European industry:<sup>37</sup>



**Figure 7B. U.S.-European Defense Industrial Cooperative Agreements**

SOURCE: LCOL. Willie H. Cole, LCOL. Richard C. Hoehberg, and CDR Alfred E. Therrien, *Europe 1992: Catalyst for Change in Defense Acquisition: Report of the DSAC 1989-90 Military Research Fellows* (Washington, DC: Defense Systems Management College, 1990), pg. 45.

#### 7.0.4. General Recommendations

Three broad principles in international defense acquisition emerged from the Panel's Goals and Objectives and the various statutory analyses conducted in the area of defense trade and cooperation.

**Department of Defense international defense acquisition policies should be consistent, on a reciprocal basis, with the defense acquisition and trade policies of United States allies.**

Uniformity in requirements, coverage, general applicability, visibility, and transparency of the international defense acquisition system must be achieved on a reciprocal basis as reciprocity is the cornerstone of international law and policy. An example would be the recent initiative toward a NATO Code of Conduct in Defense Trade. With the downturn in global defense spending, the defense acquisition and trade policies of our allies must be consistent with U.S. policy if the alliances are to achieve the required economies of scale while preserving our collective defense industrial capabilities so vital to the maintenance of our mobilization and surge capacities. Elsewhere the Panel has recommended steps to permit better integration of defense and commercial requirements and sources. Military-commercial integration by itself, however,

<sup>36</sup>The Center for Strategic and International Studies, The Atlantic Partnership. An Industrial Perspective on Transatlantic Defense Cooperation, at pgs. 4-5 (May 1991).

<sup>37</sup>Note 24, *supra*, at pg. 25.

will not be a panacea for resolving all defense technology and industrial base problems.<sup>38</sup> Additionally, certain technologies may be so critical that it is essential to national security for such products to be developed and acquired only from United States sources. The Secretary should have the authority to restrict acquisitions to United States sources and control the foreign ownership of key defense industry sectors to ensure this country's continuing military strength. In the future, defense acquisition and trade policy will become two sides of the same coin.

**Department of Defense international defense acquisition policies on international and cooperative agreements should be consistent with the maintenance of strong domestic technology, industrial, and mobilization bases.**

As defense budgets shrink over the next decade, it will become increasingly difficult to maintain an adequate technology and industrial base with sufficient surge capacity for times of war. As with the successful joint military approach conceived by the Goldwater-Nichols Department of Defense Reorganization Act of 1986 and first tested in Operation Desert Storm,<sup>39</sup> DOD international defense acquisition policies on international and cooperative agreements should be consistent with the maintenance of a strong mobilization base. In the Defense Authorization Act of 1993, the Congress has enacted major new initiatives to foster and encourage the revitalization of a national defense technology and industrial base.<sup>40</sup> These initiatives were envisioned by the Panel to become fully coordinated with the implementation of this new Chapter on Defense Trade and Cooperation.

**Department of Defense international defense acquisition policies should be consistent with international operational agreements, allied logistics support and standardization, and export sales of defense items to foreign countries.**

Items acquired by DOD must often be the same as -- or function with -- articles acquired by our allies on the basis of rationalization, standardization, and interoperability. DOD should have additional statutory authority, for example, to encourage the purchase of NATO-standard items, which may or may not be available from U.S. sources, as well as to encourage increased allied burdensharing. Likewise where NATO-standard items are or could be available from U.S. sources, DOD needs authority to encourage their export, thus enhancing the competitiveness of our national defense technology and industrial base. DOD, unlike civilian agencies, develops unique products, systems, and components which are sold abroad under interagency scrutiny, sometimes with departmental security assistance. As the domestic requirement for new weapons

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<sup>38</sup>Cf. The Defense Authorization Act of 1993, Pub. L. No. 102-484, §4226(e), 106 Stat. 2442; which established a Military-Civilian Integration and Technology Transfer Advisory Board composed of individuals experienced and accomplished in "defense or civilian technology development, business development, international trade, or finance" to formulate policy in the integration of military and civilian capabilities within the national technology and defense industrial base.

<sup>39</sup>See Rep. Les Aspin, Chairman, and Rep. William Dickinson, Ranking Republican, House Armed Services Committee, Defense For A New Era, Lessons of the Persian Gulf War, March 30, 1992, at pgs. 41-2.

<sup>40</sup>The Defense Conversion, Reinvestment, and Transition Assistance Act of 1992, Pub. L. No. 102-484, §§ 4001-4272, 106 Stat. 2442.

systems decreases, there may be an increasing opportunity to participate in defense cooperation projects. Selling U.S. defense products abroad not only permits the economic production of such products, while lowering the unit cost of items for U.S. forces, but will also enhance the national defense technology and industrial base. Similarly we can expect that our allies will be looking to foreign exports to solve their own industrial base problems. Since many foreign countries have policies inimical to competition, the Panel concluded that the Secretary should have the authority to coordinate defense cooperation with the buying and selling of products and services in order to negotiate effectively appropriate international agreements.

For these reasons, defense acquisition and trade policy will become more closely aligned in their import to DOD, as similarly the terms national and economic security have recently been recommended to become aligned in the national policy of the United States.<sup>41</sup>

#### 7.0.5. Overview of Chapter Recommendations

In addressing international acquisition law, the Panel set up an International Defense Acquisition Law Focus Group to aid in its deliberations.<sup>42</sup> Following extensive review of current practice and commentary on DOD issues and problems in international defense acquisition, the Focus Group prepared and presented a strawman draft consolidated chapter on defense trade and cooperation for the Panel's review. In brief, the Focus Group's Draft Chapter suggested consolidating the disparate statutes, from a collection of various titles in the U.S. Code, into a single new chapter in Title 10, including subsuming those sections of Title 22 dealing with Military Assistance and Foreign Military Sales.<sup>43</sup> The new chapter also includes those provisions presently contained in Chapter 138 of Title 10, addressing Cooperative Agreements with NATO Allies and Other Countries. The Focus Group suggested the creation of a Defense Trade and Cooperation Office within DOD to carry out defense trade and cooperation functions through a reorganized and renamed Defense Trade Assistance Agency.

Although the Panel recommends that a new Chapter in Title 10 on Defense Trade and Cooperation be established, time and resources did not permit consolidation into the draft presented here of those provisions in Title 22 concerning Military Assistance and Foreign Military Sales.<sup>44</sup> Given the importance of cooperative projects, foreign military sales, and technology

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<sup>41</sup>See Carnegie Endowment for International Peace, Institute for International Economics, Memorandum to The President-Elect, Subject Harnessing Process to Purpose, Washington, DC, 1992. See also appended reports: Carnegie National Commission on America and the New World, Changing our Ways: America and the New World, July 1992; and Competitiveness Policy Council, Building a Competitive America: The First Annual Report to the President and Congress, March 1992.

<sup>42</sup>Composed of a cross-section of the international defense acquisition law community: (1) Alfred G. Volkman, Director of Foreign Contracting, Department of Defense; (2) Joel L. Johnson, Vice President, International Aerospace Industries Association of America, Inc.; (3) Susan Alesi, Esq., Special Assistant, Office of Federal Procurement Policy; and (4) W. E. Mounts, Esq., Coordinator, Acquisition Law Panel Task Force Contract Counsel.

<sup>43</sup>Title 22, Chapter 32, subchapter II, *Military Assistance and Sales*, and Chapter 39, *Arms Export Control*.

<sup>44</sup>The Panel did address two specific sections of Title 22, §§ 2761(e) and 2794(7) in the Final Report.

transfer in times of globally constrained resources, the Panel hopes that further work will be done by others to complete the consolidation started by the Panel.<sup>45</sup>

The new chapter on defense trade and cooperation recommended by the Panel is divided into three subchapters -- policy on foreign purchases by DOD; international and cooperative agreements; and acquisition, cross-servicing agreements; and standardization -- each dealing with one of the Panel's primary recommendations. Set out below under each primary recommendation is an overview of each consolidated subchapter (showing the source of each section and recommended action) in a chapter to be entitled "Defense Trade and Cooperation."

## I

**Department of Defense international defense acquisition policies should be consistent, on a reciprocal basis, with the defense acquisition and trade policies of United States allies.**

### SUBCHAPTER I. PURCHASE OF FOREIGN GOODS BY THE DEPARTMENT OF DEFENSE

- § 2x10 *Definitions*. [New; consolidated subchapter definitions]
- § 2x11 *Policy on purchases of foreign goods*. [Amend 10 U.S.C. §§ 2506/2533]
- § 2x12 *Items restricted to American sources*. [Amend 10 U.S.C. §§ 2507/2534; merge amended 10 U.S.C. § 4542; merge 10 U.S.C. § 7309; apply 41 U.S.C. § 10b-1]
- § 2x13 *Application of the Trade Agreements Act*. [Apply 19 U.S.C. § 2501 *et seq.*]
- § 2x14 *Preference for American goods*. [Apply 41 U.S.C. § 10a]
- § 2x15 *Determination of unreasonable cost*. [Apply 41 U.S.C. § 10a-d]

[Repeal 10 U.S.C. § 2327, *Contracts: consideration of national security objectives*; no action 10 U.S.C. §§ 2631/46 U.S.C. App. 1241, *Cargo Preference Acts*].

## II

**Department of Defense international defense acquisition policies on international and cooperative agreements should be consistent with maintaining strong domestic technology, industrial, and mobilization bases.**

### SUBCHAPTER II. INTERNATIONAL AND COOPERATIVE AGREEMENTS

- § 2x20 *Definitions*. [Consolidated subchapter definitions]
- § 2x21 *Defense memoranda of understanding and related agreements*. [Amend 10 U.S.C. § 2504; merge 10 U.S.C. § 2350i]
- § 2x22 *Offset policy; notification*. [Retain 10 U.S.C. § 2505]
- § 2x31 *Cooperative projects: allied countries*. [Amend and consolidate 10 U.S.C. §§ 2350a and 2350b]

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<sup>45</sup>The Panel notes efforts begun in this area by The Atlantic Partnership, Study Proposal 1992-1993, Center for Strategic and International Studies, Washington, D.C.

- § 2x32 *Cooperative military airlift agreements: allied countries.* [Retain 10 U.S.C. § 2350c]
- § 2x33 *Cooperative logistic support agreements: NATO countries.* [Amend 10 U.S.C. § 2350d]
- § 2x34 *NATO AWACS project: authority of Secretary of Defense.* [Retain 10 U.S.C. § 2350e]

[Repeal 10 U.S.C. § 2350h, *Memorandums of Agreement: Department of Defense ombudsman for foreign signatories*; repeal 10 U.S.C. § 7344, *Suspension of construction in case of treaty*; no action 10 U.S.C. § 2061 through 2170, *Defense Production Act*].

### III

**Department of Defense international defense acquisition policies should be consistent with international operational agreements, allied logistics support and standardization, and export sales of defense items to foreign countries.**

#### SUBCHAPTER III. ACQUISITION, CROSS-SERVICING AGREEMENTS, AND STANDARDIZATION

- § 2x50 *Definitions.* [Consolidated subchapter definitions]
- § 2x51 *Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States.* [Retain 10 U.S.C. § 2341]
- § 2x52 *Cross-servicing agreements.* [Amend 10 U.S.C. § 2342]
- § 2x53 *Law applicable to acquisition and cross-servicing agreements.* [Amend 10 U.S.C. § 2343]
- § 2x54 *Methods of payment for acquisitions and transfers by the U.S.* [Retain 10 U.S.C. § 2344]
- § 2x55 *Liquidation of accrued credits and liabilities.* [Retain 10 U.S.C. § 2345]
- § 2x56 *Crediting of receipts* [Retain 10 U.S.C. § 2346]
- § 2x57 *Limitation on amounts that may be obligated or accrued by the United States.* [Amend 10 U.S.C. § 2347]
- § 2x58 *Inventories of supplies not to be increased.* [Retain 10 U.S.C. § 2348]
- § 2x59 *Procurement of communications support and related supplies and services.* [Amend 10 U.S.C. § 2350f]
- § 2x60 *Authority to accept use of direct payment, real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements.* [Amend 10 U.S.C. § 2350g]
- § 2x70 *Standardization of equipment with North Atlantic Treaty Organization members.* [Retain 10 U.S.C. § 2457]

[Repeal 22 U.S.C. § 2761(e), *Charges; reduction or waiver*; No action 22 U.S.C. § 2794(7), *Definitions; defense articles and defense services.*]1

## 7.1. Purchases of Foreign Goods by the Department of Defense

### 7.1.0. Introduction

Historically, the United States has given a preference to U.S. goods and services.<sup>1</sup> For many years, the statutory source of this preference has been the Buy American Act.<sup>2</sup> As implemented by Executive Orders<sup>3</sup> and the DOD balance of payments policy,<sup>4</sup> foreign source goods are excluded unless the price of equivalent U.S. goods exceeds the foreign price by 50% or more.<sup>5</sup> Today, however, the Buy American Act is frequently less relevant to defense acquisition because of:

- the proliferation of special purpose legislation applicable only to DOD which further restricts the acquisition of foreign source items for specific classes of products (e.g., busses, hand measuring tools);<sup>6</sup>
- memoranda of understanding and related international agreements between DOD and various nations which modify or eliminate Buy American restrictions;<sup>7</sup>
- the Trade Agreements Act of 1979,<sup>8</sup> and the Caribbean Basin Economic Recovery Act;<sup>9</sup> and
- implementation of other policies intended to protect the defense technology, industrial, and mobilization base.<sup>10</sup>

In addition, the application of the Buy American Act to specific goods and classes of goods can be arbitrary, unfathomable, and inconsistent with the purposes for which the Buy American Act was enacted.<sup>11</sup> Moreover, the rule-of-origin definition of a U.S. source product in

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<sup>1</sup>Buy American restrictions have been traced back to 1844. See Gantt & Speck, Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order, 7 J. Pub. Law 378, 379 (1958).

<sup>2</sup>41 U.S.C. §§ 10a-10d.

<sup>3</sup>Current practice under the Buy American Act stems from the issuance of Exec. Order No. 10582 on December 17, 1957. That Executive Order has since been amended by Exec. Order Nos. 11051 (1962), 12148 (1979), and 12608 (1987).

<sup>4</sup>See generally DFARS subpart 25.3.

<sup>5</sup>FAR 25.105 and DFARS 225.105(1).

<sup>6</sup>E.g., 10 U.S.C. § 2507.

<sup>7</sup>See generally DFARS subpart 25.8. Countries with treaties or MOU's (21) include Belgium, Canada, Denmark, Egypt, Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom. In addition, Australia, Sweden, and Switzerland enjoy special exemption from the Buy American Act and the balance of payments program. DFARS 225.872-1; and DOD Volume, Reciprocal Procurement Agreements, OUSDA/DDP-1992.

<sup>8</sup>19 U.S.C. §§ 2501 *et seq.*

<sup>9</sup>19 U.S.C. §§ 2701 *et seq.*

<sup>10</sup>DFARS subparts 208.72 and 225.71.

<sup>11</sup>See generally 2 Nash & Cibinic Report, No. 7, ¶ 39 (July 1988), commenting on *Orlite Engineering Co.*, B-229615, 88-1 CPD ¶ 300.

the Buy American Act (as implemented by Executive Order) is different from the definition in the Trade Agreements Act.<sup>12</sup>

#### 7.1.0.1. Product Preferences and Domestic Source Restrictions

Today, there is no coherent and consistent statutory approach to product preferences and source restrictions on defense acquisition. Chapter 148 of Title 10 currently contains some statutory guidance.<sup>13</sup> However, review of the DFARS Part 225 shows that a contracting officer, to determine applicable source restrictions, must look to at least the following disparate sources of law:

- Chapter 148, Title 10;
- The Trade Agreements Act, Title 19;
- The Buy American Act, Title 41;
- Military assistance and foreign military sales, Title 22;
- Various annual authorization and appropriations acts;
- International treaties; and
- Memoranda of understanding and related international agreements.

In addition, Congress has frequently added, but rarely subtracted, restrictions through the authorization and appropriation process, often with exceptions and conditions that are product unique and totally uncoordinated with similar exceptions in other statutes. As a result, a contracting officer must know not only the restrictions applicable to products like the product to be acquired, but must also determine whether a restriction is applicable to the specific appropriation to be used to fund the specific acquisition.

The Panel recommends that source restrictions applicable to DOD acquisition be restated in a comprehensive way. As the Secretary of Defense has found, the language of current source restrictions<sup>14</sup>

. . . is often confusing, causing administrative problems and difficulties in implementation. The wording of the restrictions does not follow a common format and rarely defines the product or industry precisely. Each restriction has distinct requirements,

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<sup>12</sup>Under the Buy American Act and Exec. Order No. 10582, an article is considered a foreign end product if it is not produced in the United States, or if it is produced in the United States and 50 percent or more of the cost of its components originate from foreign sources. The Trade Agreements Act uses a "substantial transformation" method to determine country of origin. Under this approach, articles are considered the product of a particular country regardless of the cost of foreign components so long as those components are substantially transformed within that country into a new and different article of commerce with a name, character, or use distinct from that article form which it was transformed. *See generally* Office of Federal Procurement Policy, Report to Congress: Buy American Act—A Study of Alternatives to the Rule of Origin (December 1990).

<sup>13</sup>Chapter 148 was substantially modified by the Defense Authorization Act of 1993; with those sections concerning international agreements, offsets, and source restrictions were renumbered as §§ 2531-2534.

<sup>14</sup>Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989), at pg. 6.



exemptions, and waiver provisions and can be amended, extended, or terminated from year to year. . . . Many restrictions are rigid, being strong prohibitions against procuring from any foreign sources, with only limited exemptions or waiver provisions. In some cases, . . . restrictions are not waived for North Atlantic Treaty Organization (NATO) and other qualifying countries.

In addition, to the extent that the provisions permit waivers and exemptions, there is great disparity in the circumstances and procedures permitting waivers of a statutory prohibition on foreign sources.<sup>15</sup> Finally and most importantly, the Secretary has found that current restrictions do little to further the U.S. industrial base, but do much harm in delaying procurement actions, precluding DOD access to important new technologies, and generally raising the price DOD must pay for the goods and services it buys.<sup>16</sup>

The Panel further recommends that the restatement apply specifically to DOD and be placed in a new subchapter, itself part of a new, more general chapter in Title 10 on Defense Trade and Cooperation. A restatement applicable only to DOD is justified because the considerations applicable to source restrictions for defense products and services are unique from those applicable to most (perhaps all) civilian agencies.

#### **7.1.0.2. Restrictions on Foreign Contracting, Ownership, Control, and Influence**

The restrictions on foreign contracting, ownership, control, and influence are multidimensional. For example, in 10 U.S.C. § 2327, DOD may not contract with foreign entities owned or controlled by a foreign Government which supports international terrorism.<sup>17</sup> The restriction is implemented by FAR<sup>18</sup> and DFARS<sup>19</sup> regulations.

Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 (as enacted, 50 U.S.C. App. 2170 (Exon-Florio Amendment)) entitles the President, in the interests of national security, to block or restructure a proposed merger, acquisition, or takeover of a U.S. company by a foreign entity.<sup>20</sup> The statute is premised on a procedure of voluntary notification in mergers, acquisitions, or takeovers involving prospective foreign ownership. Following passage of Exon-Florio, there have been several studies conducted by the General Accounting Office (GAO)

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<sup>15</sup>*Id.*

<sup>16</sup>*Id.*, at pg. 7.

<sup>17</sup>For ownership or control of contractors or subcontractors by citizens or national of foreign countries with respect to construction services, see 10 U.S.C. § 10b-1.

<sup>18</sup>FAR Parts 209, 225, and 252.

<sup>19</sup>DFARS 209.104-1(g) and 225.000-71.

<sup>20</sup>See 31 C.F.R. Part 800; The Presidential review process entails: (1) the conduct of a confidential investigation by the Committee on Foreign Investment in the United States (CFIUS) [established by Exec. Order No. 11858]; (2) appropriate action by the President "to suspend or prohibit any acquisition, merger, or takeover;" (3) supported by findings based on "credible evidence" that "the foreign interest exercising control might take action that threatens to impair the national security" and that no other provision of law can adequately address the situation; and (4) after considering various enumerated factors relating to domestic industrial production.

concerning Federal data collection on foreign investment in the U.S.,<sup>21</sup> and the extent of foreign participation in the Strategic Defense Initiative Program.<sup>22</sup>

Testimony in 1990 concerning the implementation of Exon-Florio, however, revealed:<sup>23</sup>

... At the present time, notifications are coming in to CFIUS at the rate of 350 a year. Some 350 filings annually would represent, we estimate, around 50 percent of annual acquisitions valued at more than \$1 million. This is a fairly large proportion, though perhaps not inappropriately so in view of the interplay and dynamics of technology, the economy and defense.

To date, CFIUS has gone to the investigation stage seven times. In two of those cases, notification was withdrawn with CFIUS permission and one investigation is in progress. Four cases have reached the President's desk for decision. In only one of those cases has the President exercised his statutory authority to prohibit a foreign acquisition . . . .<sup>24</sup>

Related GAO testimony at the time, from the defense industrial security perspective,<sup>25</sup> highlighted procedural weaknesses in the practice of granting Special Security Agreements (SSAs).<sup>26</sup> These agreements were initiated in 1984 to permit U.S. firms that are foreign owned, controlled, or influenced (FOCI) to continue to work on classified defense contracts.<sup>27</sup> Under DOD policy, SSAs are limited to contracts whose classification level does not exceed the Secret level, provided the FOCI emanates from a country with which the U.S. has a bilateral industrial security arrangement.

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<sup>21</sup>General Accounting Office, Foreign Investment, Federal Data Collection on Foreign Investment in the United States, GAO/NSIAD-90-25BR, October 1989.

<sup>22</sup>General Accounting Office, Strategic Defense Initiative Program, Extent of Foreign Participation, GAO/NSIAD 90-2, February 1990.

<sup>23</sup>Testimony of the Honorable Charles H. Dallara, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, U.S. Senate, March 13, 1990.

<sup>24</sup>Divestment order of the China National Aero-Technology Import and Export Company's (CATIC) acquisition of MAMCO Manufacturing, Inc. (MAMCO), a U.S. company - February 1990.

<sup>25</sup>See Exec. Order No. 10865, 32 C.F.R. Part 155, and DOD Directive 5200 2-R.

<sup>26</sup>Statement for the Record, National Security and International Affairs Division, GAO, for the Committee on the Armed Services, House of Representatives, March 21, 1990. The procedural weaknesses noted included: (1) interim security arrangements prior to a formal SSA were deficient in that new contracts were awarded during the period and the period itself was extending up to a year or more; (2) incomplete or inadequate supporting justifications, pursuant to the Services implementing regulations, citing need for a product or service that is mission-critical, cannot be obtained in sufficient quantity from U.S.-owned sources, and involved a unique product or technology; (3) inadequate determinations that the risks of FOCI can be negated or reduced to an acceptable level; and (4) that DOD policies requiring outside directors of the FOCI firm to be DOD watchdogs were inadequately documented in practice.

<sup>27</sup>*Id.*, at pg. 1, it was noted that "In practice, under an SSA, the foreign firm is permitted to retain a minority position on the U.S. firm's board of directors."

Most recently, however, a major CFIUS investigation resulted in the withdrawal of a proposed sale of a U.S. firm to a foreign Government-owned firm. The proposed sale of the missiles division of the LTV Aerospace and Defense Company to the Thomson-CSF firm, which is 58% owned by the French Government, would have involved access to highly classified or "proscribed information."<sup>28</sup> The specter of a potentially blocked sale raised much international concern that was assuaged only by the voluntary withdrawal by Thomson-CSF from the proposed purchase.

Based on the LTV-Thomson scenario, and on the studies and testimony discussed above, the Defense Authorization Act of 1993 enacted new provisions to address this type of foreign investment.<sup>29</sup> Two of the provisions focus on entities controlled by foreign Governments and specifically prohibit: (1) the purchase, by an entity controlled by a foreign Government, of certain U.S. defense contractors that perform DOD or Department of Energy (DOE) national security contracts requiring access to proscribed information; and (2) the award of certain DOD/DOE national security contracts to an entity controlled by a foreign Government. The third provision directs DOD/DOE to develop a database helpful to CFIUS under section 721 of the Defense Production Act.

In comments to the Panel, the Navy expressed support for the new provisions because they strengthened the overall Exon-Florio regime and will provide CFIUS a more structured framework. The remaining deficiency in the process was cited as:

. . . the definition of a "control" transaction in Exon-Florio remains flawed (from a DOD perspective) since it permits far too many [true corporate] "control" transactions to proceed forward without scrutiny.<sup>30</sup>

While taking no position on the matter, the Panel hopes that further study will be done by others more experienced in matters concerning foreign contracting, ownership, control, and influence to develop a comprehensive regime that ensures coordination of policy on foreign control over U.S. defense contractors with defense trade and cooperation, since the multinational buying and selling of key defense industries can trump the best laid plans to create a reciprocal defense trading regime.

### **7.1.0.3. Overview of Subchapter Recommendations**

The remainder of this subchapter (Chapter 7.1.1. and following) discuss each codified section of law which relates to domestic source restrictions applicable to DOD procurement contracts, and gives the Panel's recommendations on both amendment and recodification. A draft

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<sup>28</sup>Characterized by the DOD Acting General Counsel in Congressional testimony as "sensitive enough to generally prohibit foreign nationals and representatives of the foreign interest from having access to it". See S. Rep. No. 3114 at pg. 234.

<sup>29</sup>Pub. L. No. 102-484, §§ 835-8, 106 Stat. 2442.

<sup>30</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 11 October 1992.

of the proposed subchapter on domestic source restrictions within the proposed Chapter on Defense Trade and Cooperation -- which sets out the law as amended and recodified -- can be found in subchapter 7.4. below. In addition, a discussion of product restrictions prevalent in defense appropriation and authorization acts over the past decade can be found in Appendix C of this Report. To the extent that such provisions have been codified, they are discussed below; the Panel has recommended that none of these provisions be retained except to the extent they have been codified. This section of the Report concludes with a section-by-section discussion of the proposed new subchapter, which highlights the source of each proposed section and summarizes amendments that have been made to existing laws.

#### **7.1.0.4. Section-by-Section Discussion**

##### **Section 2x10. Definitions**

This section prescribes a uniform set of definitions for use in describing source restrictions. The definitions in this section are taken from 10 U.S.C. § 2506 and 41 U.S.C. § 10c, with modifications. The most important modification is the definition of "American Goods." In the proposed subchapter, "American goods" are defined as:

- an end product that is wholly mined, produced, or manufactured in the United States; or
- an end product that is manufactured in the United States which includes components mined, produced, or manufactured outside the United States if such end product is substantially transformed within the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

This definition is taken from the Buy American Act, but has been modified to introduce the concept of substantial transformation, which is the test for country of origin found in the Trade Agreements Act.<sup>31</sup>

The Panel believes that the substantial transformation test is a more rational test to apply than the components test used under the Buy American Act -- at the very least, substantial transformation is capable of being verified without audit -- and for that reason alone, will streamline and unify the acquisition considerations applicable to foreign source products. Given the substantial "gaming" that is permitted by the current components test<sup>32</sup> and the extensive

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<sup>31</sup>19 U.S.C. § 2518(b): "Rule of Origin.—An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed."

<sup>32</sup>Under the Buy American Act and implementing Executive Orders, an end item is domestic if it meets the following three tests: (1) the process of manufacturing the end product must occur in the United States; (2) over 50% of the cost of components must be incurred for components manufactured in the United States; and (3) to constitute a domestic component, the process of manufacturing of the component must occur in the United States

DOD exemptions to the Buy American Act,<sup>33</sup> there is no reason to believe that abandonment of the components test will lower the average United States labor content of articles purchased by DOD. In addition, the substantial transformation test can probably be met by U.S. source commercial items (as defined in proposed 10 U.S.C. § 2302) whereas the component test has required significant changes in manufacturing or subcontracting methods, and thereby creates a potential barrier to civil-military integration.

A second important definition is that of "covered contract." The subchapter defines this term as:

a contract for property, other than real property and commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2, the total value of which exceeds the simplified acquisition threshold set out at 10 U.S.C. § 2302(4).<sup>34</sup>

In recommending a separate statute on commercial items, the Panel considered the effect of the integration of commercial items with defense trade and cooperation. The recommendation of the Panel was to subject the defense acquisition of commercial items to defense trade provisions, for to do otherwise would defeat the exercise of balancing defense trade and cooperation with the need to preserve a national defense technology and industrial base. Similarly, the treatment afforded the acquisition of commercial items in the recommended separate statute is cross-referenced in this Chapter. The function of this definition is intended to exempt simplified acquisition, commercial items, and commercial components from domestic product preferences and source restrictions.

### **Section 2x11. Policy on Purchases of Foreign Goods**

This section is taken from 10 U.S.C. § 2506, which states the factors to be considered in determining whether to purchase foreign source items. The current provisions of section 2506 are incomplete because national security, technology, industrial, and mobilization base considerations are left out. In addition, section 2506 fails to account for treaties and other international agreements. Paragraphs (a)(7), (a)(8), and (a)(9) have been added by the Panel to address these omissions. Comment from the Section of Public Contract Law of the American Bar Association indicated that:

The Section supports the Panel's proposed language in sections 2x11 and 2x12 of the draft text. We encourage the elimination of

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but the component's components can come from anywhere. Thus, if 95% of the labor in components is United States labor, but the item is assembled in Mexico, the item does not qualify as a domestic end item under the Act. On the other hand, if the end item is manufactured in the United States from components assembled in the United States from 100% foreign sub-components, then the item qualifies as domestic. As these examples show, the amount of United States labor in a conforming end item may actually be less than in some non conforming end items. *See generally* 2 Nash & Cibinic Report, note 11, *supra*.

<sup>33</sup>Note 14, *supra*.

<sup>34</sup>The reference is to 10 U.S.C. § 2302, as modified by the Panel, and to new section 2xx2. *See* Chapters 1, 4, and 8 of this Report.

unnecessary buy-national requirements provided that the Secretary of Defense retains the authority to limit procurement of specific goods or services to domestic sources if he determines it would be in the national interest to do so.<sup>35</sup>

After considering the Buy American Act, domestic source restrictions, and product preferences, the Panel recognized the need for coordination with the defense technology and industrial base in its recommended paragraph (a)(7). The Panel also notes that the present day reality of a defense technology and industrial base involves a North American defense industrial base. As stated in the Defense Authorization Act of 1993, the national defense technology and industrial base is now defined as encompassing the United States and Canada.<sup>36</sup> For too long, DOD has wrestled with establishing a policy on the purchase of Canadian products as foreign goods, while concurrently seeking to preserve and enhance the North American defense industrial base. Hopefully, the proposed language will assist in rationalizing the policy toward Canadian goods.

Equally important in the international acquisition policy arena is the recommended addition of paragraph (a)(8). This paragraph requires DOD to coordinate, not only with obligations contained in international treaties and agreements, but also with the acquisition activities of our major allies, and reinforces the efforts currently underway to make international defense trade more visible, transparent, and reciprocal.<sup>37</sup> The Panel believes that linking the two policies in (a)(7) and (a)(8) within section 2x11 will enable DOD to jointly address the inter-relationship between defense trade and the national defense technology and industrial base as an international defense acquisition issue.

The addition of paragraph (a)(9) requires the Secretary of Defense to address national security concerns in purchasing foreign goods. With the addition of this subparagraph, the Panel recommends repeal of 10 U.S.C. § 2327 as duplicative and unnecessarily restrictive in focusing only on considerations of ownership by countries supporting terrorist activities.<sup>38</sup> Again, broad new provisions enacted by the Defense Authorization Act of 1993 mandate a national security reporting threshold of \$500,000 in the award of defense contracts to foreign owned and controlled companies, as well as prohibitions on the purchase of certain U.S. defense contractors by, or the award of national security contracts to, entities controlled by a foreign Government.<sup>39</sup> Section (a)(9) is intended to provide DOD with the broad authority to protect national security through source restrictions including those based on foreign control of U.S. sources (as well as purchases from foreign sources).

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<sup>35</sup>Letter from Karen Hastie Williams, Chair-Elect, on behalf of the ABA Section of Public Contract Law, to William E. Mounts, Defense Systems Management College, dated November 12, 1992.

<sup>36</sup>Pub. L. No. 102-484, § 4203(a), 106 Stat. 2442.

<sup>37</sup>See the discussion at section 7.2.0.1., *NATO Code of Conduct in Defense Trade*.

<sup>38</sup>See also note 30, *supra*.

<sup>39</sup>Pub. L. No. 102-484, §§ 835-8, 106 Stat. 2442.

The amended section also contains a new subsection (b) which replaces the existing reference to the Buy American Act with a reference to the new subchapter. The amended definition in subsection (c) is recommended for consolidation in new section 2x10, *Definitions*.

### **Section 2x12. Items Restricted to American Sources**

The Buy American Act has not been an impenetrable barrier to the acquisition of foreign source items since the Eisenhower Administration. There are, however, numerous absolute or nearly absolute prohibitions on the purchase of specific items from foreign sources. Some, but by no means all, of the absolute prohibitions are found in the current version of 10 U.S.C. § 2507. However, the important authority of the Secretary of Defense to restrict purchases to domestic sources to protect the defense technology and industrial base and further national security is nowhere expressly stated in the United States Code, but is found only by inference from exceptions to other than competitive procedures found in 10 U.S.C. §§ 2304(c)(3), (4), and (6).

The Panel recommends that the authority of the Secretary to restrict procurements to domestic sources be expressly granted by statute, and language enacting that regulation is found in subsection 2x12(a). In addition, the prohibition on the purchase of goods from countries that are in violation of the Agreement on Government Procurement, or which otherwise discriminate against U.S. products, currently found in 41 U.S.C. § 10b-1, is incorporated into subsection 2x12(b) with two exceptions: (1) commercial items and components are permitted to be acquired from any source; and (2) the restrictions in section 10b-1 are not applicable to contracts made under simplified acquisition procedures.<sup>40</sup> The Panel believes that these exceptions facilitate the acquisition of commercial products and ancillary commercial services while removing regulatory hurdles from -- and hence reduce the cost of -- the award of smaller contracts. The commercial item exception can be redressed in the overall GATT trade dispute settlement regime in any case; and as for the exception for simplified acquisition procedures, the Panel recommended \$100,000 threshold is still below the present GATT threshold of general applicability.

Finally, other than the recommended deletion of the expired restriction on carbonyl iron powders found in subsection (f), provisions for absolute restrictions currently found in 10 U.S.C. § 2507 were retained as subsections in section 2x12. In section 2x12, the existing statutory restriction on the transfer of large-caliber cannon technology presently found in 10 U.S.C. § 4542 and the restriction on construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309 were consolidated with the current statutory restrictions of 10 U.S.C. § 2507(a) through (e). The Panel recommended that the many other restrictions contained in annual authorization and appropriation acts, be repealed. As succinctly stated in the 1989 Secretary of Defense Report to Congress on the impact of domestic source restrictions:

... there are currently underway or in development many programs initiated by the Congress, DOD, the Services, other executive branch agencies, and U.S. industry to bolster the competitiveness of the U.S. industrial base. Now is the time to integrate and rationalize such initiatives into an overall strategy, rather than

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<sup>40</sup>See discussion at Chapters 4 and 8.

proliferate new initiatives and continue old ones that have outlived their usefulness or proven counterproductive.

For all of these reasons, we therefore recommend a careful phasing out of most ad hoc buy American restrictions that have been enacted in annual DOD appropriations and authorization acts.<sup>41</sup>

Subsection 2x12(h) contains the Stratton Amendment, found in 10 U.S.C. § 4542, which prohibits the transfer of technical data packages for large-caliber cannon to foreign countries. As there are exceptions to the transfer prohibition, where coproduction or cooperative project agreements are in place, comment from the U.S. Army indicated that the provision was recommended for retention.<sup>42</sup> Other than amending the provision to be consistent with section 2x31 on cooperative project agreements, the provision was retained and consolidated in this section. Subsection 2x12(i) retains and consolidates the present restriction on the construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309.

Other than these two restrictions and those found in 10 U.S.C. § 2507, the Panel recommends that reliance for establishing domestic source restrictions and product preferences to protect the national defense technology and industrial base should reside, instead, within the primary authority of the Secretary of Defense.

#### **Section 2x13. Application of the Trade Agreements Act of 1979**

Subsection (a) of this section clarifies the relationship of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501 *et seq.*, to both the absolute restrictions stated in section 2x12, and to the Buy American Act, as that Act is restated for purposes of Title 10 in section 2x14.

Subsection (b) resolves a problem with spare parts acquisition under current law. The Trade Agreements Act permits the purchase of manufactured goods from designated countries which are made from components which may be foreign both to the country of origin and the United States. For example, a Japanese company may build a computer printer in Japan using components from Taiwan. Under the Act, the Japanese printer can be purchased as though it were a domestic item. However, spare parts for the printer, when bought separately from Taiwan, do not qualify for exemption from the Trade Agreements Act and may not qualify for regulatory exemption from the Buy American Act. The Council of Defense and Space Industry Associations commented on this problem as follows:

To impose "Buy American" requirements on the acquisition of spare parts when the original system was exempted from such requirements (whatever the reason) makes no economic sense and subjects the supplier to senseless hardship. Although DFARS

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<sup>41</sup>Note 14, *supra*.

<sup>42</sup>Memorandum from Larry D. Anderson, LTC, JAGC, Legal Officer, U.S. Army Materiel Command, to William E. Mounis, DSMC CM-AL, dated 21 September 1992.



225.102(b)(iii)(B) contains a spare parts exception to "Buy American [Act]" for DOD procurements, the exception should be included in the statute in order to extend it to all federal procurements and to preserve this exception from regulatory changes. Also, to further Congress' current initiatives to remove barriers to the integration of the commercial and defense industrial bases, the exception should cover spare parts for commercial items.<sup>43</sup>

The Panel notes that there is currently no statutory or regulatory coverage exempting spare parts purchases from the Trade Agreements Act, although there must be such coverage if DOD's needs for spare and replacement parts are to be met. Given the proposed amendment of the Buy American Act to incorporate a substantial transformation test, the Panel believes there is no further need to treat spare parts for commercial items as a separate class, since spares for such items can be purchased under the spare parts exemptions provided by the Panel in sections 2x13 and 2x14.

#### **Section 2x14. Preference for American Goods**

This section implements the Buy American Act within Title 10. Since the term "American good" is defined in section 2x10, the language of 41 U.S.C. §§ 10a and 10b can be greatly simplified. Paragraphs 2x14(a)(1) and (a)(2) implement current exemptions from the provisions of the Buy American Act. The exemption set out in paragraph 2x14(a)(3) is a spare and replacement parts exemption similar to that found in subsection 2x13(b).

The proposed section also repeals the debarment provisions found in 41 U.S.C. § 10b(b) which provides for blacklisting Government contractors violating Buy American restrictions. These provisions, while seemingly absolute, have been interpreted to apply only where there is a knowing and willful violation of the Buy American Act.<sup>44</sup> Since regulatory suspension and debarment procedures are also triggered by a knowing and willful breach of contract, or a false representation,<sup>45</sup> there is no need to retain a stand-alone, statutory procedure.

#### **Section 2x15. Determination of Unreasonable Cost**

This section implements in statute the "unreasonable cost" concepts currently found in Executive Orders implementing the Buy American Act and in the FAR. The Panel has created a section setting forth these standards so that, for any future statutory source restrictions, this section can be used in place of ad hoc prohibitions or descriptions of unreasonable price.

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<sup>43</sup>Letter from the Council of Defense and Space Industry Associations, to Donald M. Freedman, Executive Secretary, DoD Advisory Panel, dated August 11, 1992.

<sup>44</sup>See *Administrator, Veterans Administration*, 36 Comp. Gen. 718 (1957) (debarment requires "bad faith" use of foreign materials); *Secretary of the Army*, 39 Comp. Gen. 599 (1960) (debarment requires knowing violation of Act); *Harold P. Danz*, 42 Comp. Gen. 401 (1963) (debarment appropriate only where there is "some degree of culpability . . . , and not in cases of bona fide misunderstanding or inadvertence").

<sup>45</sup>FAR 9.406-2, 9.407-2.

**Repeal 10 U.S.C. § 2327. Contracts: Consideration of National Security Objectives**

The Panel has established a requirement for considering national security in its recommended new paragraph 2x11(a)(9), discussed above, which provides that national security objectives be considered in the award of DOD contracts for the purchase of foreign goods. The Panel recommends that new paragraph 2x11(a)(9), as supplemented by the provisions of the Defense Authorization Act of 1993 previously discussed, makes section 2327 redundant.

## **7.1.1. 41 U.S.C. §§ 10a through 10d; miscellaneous Public Laws**

### **Buy American Act Domestic Source Restrictions Domestic Product Preferences**

#### **7.1.1.1. Summary of the Law**

Sections 10a to 10d of Title 41 (The Buy American Act of 1933) implement a policy preference for goods produced or manufactured in the United States by affecting access of foreign made goods to the U.S. Government procurement market. The Act requires that domestic end products be procured for public use except where: (a) inconsistent with the public interest; (b) the cost is unreasonable; (c) they are procured for use outside the United States; or (d) they are not commercially available in the required quantity or quality within the United States.<sup>1</sup> The Act specifically applies to supplies and materials used in contracts for public works.<sup>2</sup>

To qualify as a domestic end product, under Executive Order, an unmanufactured product must have been mined or produced in the United States; or in the case of a manufactured product, the cost of its qualifying country and U.S. components must exceed 50 percent of the cost of all its components.<sup>3</sup> By adding a price differential to foreign product offers, the Act's provisions do not exclude such goods from the U.S. Government procurement market; but rather, only affect the evaluation of such goods in comparison to domestic end products.<sup>4</sup>

Over the years, various Defense Authorization and Appropriation Acts have placed "buy American" restrictions in Government procurement of specific products, effectively precluding some foreign sources.<sup>5</sup> Under delegated authority from the President, DOD imposes similar restrictions on certain items of defense equipment for mobilization purposes and to bolster the defense industrial base. As Canada participates with the United States in a North American Defense Industrial Preparedness Program, those restrictions are not applicable to Canada.<sup>6</sup>

#### **7.1.1.2. Background of the Law**

The Buy American Act was enacted during a period of economic depression and isolationism and was preceded by the Smoot-Hawley Tariff Act of 1930, which raised tariffs to the highest rates in U.S. history. The socioeconomic objective behind both statutes was a desire to increase domestic employment and to raise the incomes of U.S. manufacturers by encouraging

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<sup>1</sup>41 U.S.C. § 10a.

<sup>2</sup>41 U.S.C. § 10b.

<sup>3</sup>Exec. Order No. 10582 (Dec. 17, 1954 as amended); DFARS 225.000-70 and 252.225-7001.

<sup>4</sup>FAR 25.303; DFARS subpart 225.1.

<sup>5</sup>DFARS subpart 225.70; and note 20 *infra*.

<sup>6</sup>DFARS subpart 225.71.

the use of domestic goods.<sup>7</sup> Other than an amendment exempting certain functions under the Foreign Assistance Act of 1961,<sup>8</sup> the Buy American Act has remained the standard-bearer for domestic preference legislation.

In the 1960s, however, under the aegis of "Buy American," DOD further strengthened domestic source preferences by placing a 50 percent balance of payments price differential on foreign goods.<sup>9</sup> Although established as an interim measure to stem the outflow of gold from the United States, the initiative has since provided the genesis for the DOD Balance of Payments Program.<sup>10</sup> Originally intended to apply only to those products procured by the United States for use outside the country, the price differential has since expanded to include the procurement of all foreign goods which result in dollars being expended abroad.

With the enactment of the Trade Agreements Act of 1979 (TAA), the President was permitted to waive Buy American Act provisions for certain designated countries based on adherence to the General Agreement on Tariffs and Trade (GATT) Agreement on Government Procurement.<sup>11</sup> The Agreement permits signatory countries to compete for U.S. Government procurement of eligible products without regard to Buy American Act provisions above a specified dollar threshold as set by the United States Trade Representative (USTR). Eligible products,<sup>12</sup> as well as Government agencies within each country covered by the TAA,<sup>13</sup> are set forth in Annexes to the TAA. Purchases under small business and socially disadvantaged business preference programs are exempt from TAA application.

The Buy American Act of 1988, part of the Omnibus Trade and Competitiveness Act of 1988,<sup>14</sup> now restricts the use of Presidential waiver authority in the procurement of goods or services of foreign origin under the TAA, specifically where: (a) a designated country is not in good standing under the Agreement; (b) a designated country maintains a significant and persistent pattern or practice of discrimination against U.S. products resulting in identifiable harm to U.S. businesses; or (c) procuring the services of any contractor or subcontractor from countries identified under (a) and (b).<sup>15</sup>

### 7.1.1.3. Law in Practice

The Buy American Act provides for a price differential of either 6 or 12 percent to be applied to foreign source products. In contrast, DOD places a price differential of 50 percent on

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<sup>7</sup>Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989), at E-4.

<sup>8</sup>22 U.S.C. § 2393 note; Exec. Order No. 11223 (May 12, 1965 as amended).

<sup>9</sup>Memorandum from Secretary of Defense Robert S. McNamara to the Secretaries of the Military Departments "Supplies and Services for Use Outside the United States" (July 16, 1962).

<sup>10</sup>Stamps, Robert, The Department of Defense Balance of Payments Program: A Brief History and Critique, at 535.

<sup>11</sup>19 U.S.C. § 2503.

<sup>12</sup>DFARS 225.403-70.

<sup>13</sup>FAR 25.406.

<sup>14</sup>Pub. L. No. 100-418, 102 Stat. 1545.

<sup>15</sup>41 U.S.C. § 10b-1.

such goods.<sup>16</sup> Years of practice under the Buy American Act has resulted in repeated requests for authorized waivers to the price differential. For example, blanket waivers of Buy American are in place under reciprocal procurement memoranda of understanding designed to promote the concept of cooperation in NATO and allied defense procurement.<sup>17</sup> Although the Buy American Act excludes from its application the procurement of products for use outside the United States, DOD's Balance of Payments Program applies a price differential to all procurement of foreign supplies and services resulting in dollar expenditures outside the United States. As reported to Congress by the Secretary of Defense:

In order to maintain consistency in the application of its Balance of Payments program differential, DOD applies the Act differently by covering all purchases, even those for use outside the United States, rarely using the statutory exemption for such procurement. Thus, while implementation of the Buy American Act does not necessarily result in an outright prohibition on acquisition of foreign products, foreign sources (especially in non-designated countries) are often placed at a major competitive disadvantage, both at the prime contract level and as suppliers of components.<sup>18</sup>

Since the advent of the TAA, DOD's implementation of the Act has placed some domestically manufactured products at a competitive disadvantage under TAA rules of origin in the qualification of a product as a domestic end product. The TAA test is one of "substantial transformation," versus the Buy American Act's test of "50 percent of component cost," creating the anomaly of a U.S. domestic manufactured product being competitively disadvantaged under the latter application.<sup>19</sup>

The practice of legislating domestic source restrictions on Government procurement of designated products through annual Defense Authorization and Appropriations Acts, under the auspices of the Buy American Act, has over the years encompassed many different sectors and classes of products, such as: transportation by ocean vessels and by air carriers; food, clothing, fabrics, specialty metals, and hand or measuring tools; construction of major components of the hull and superstructure of naval vessels, and repair and maintenance of naval vessels; circuit breakers for naval vessels; multipassenger motor vehicles (buses) and administrative motor vehicles; R&D contracting; aircraft ejection seats and night vision devices; transfer of large-caliber cannon production technology; coal or coke; floating storage of petroleum; 120mm mortars and ammunition; Strategic Defense Initiative contracts; valves and machine tools, anchor and mooring chain; certain chemical weapons antidote; supercomputers; sonobuoys; ball bearings and roller bearings; and PAN carbon fibers. Furthermore, under authority of the National Security Act of

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<sup>16</sup>FAR 25-105(a).

<sup>17</sup>10 U.S.C. § 2457.

<sup>18</sup>Note 7, *supra*.

<sup>19</sup>Office of Federal Procurement Policy, Buy American Act: A Study of Alternatives to the Rule of Origin, Report to Congress (Dec. 1990).

1947<sup>20</sup> and the Defense Production Act of 1950,<sup>21</sup> the Secretary of Defense and the Services have placed similar restrictions on other sectors and classes of products.<sup>22</sup>

In response to a request in the 1989 Defense Authorization Act for a report on the impact of statutory Buy American restrictions affecting defense procurement, the Secretary of Defense formulated specific Buy American Act recommendations including: (a) abolish most Congressionally mandated restrictions; (b) avoid future use of Buy American restrictions; and (c) rely on the authority of the Office of Secretary of Defense.<sup>23</sup> However, as well as renewing previous Buy American source restrictions, legislation enacted since the DOD Report has continued the practice of placing new Buy American source restrictions on government procurement.<sup>24</sup>

#### 7.1.1.4. Recommendations and Justification

As stated above, the Panel's primary recommendation is that statutory domestic source restrictions applicable to DOD acquisition be reduced and restated in a more comprehensive way. To the extent that the provisions permit waiver and exemptions, there is great disparity in the circumstances permitting such waivers and the procedures for waiving a statutory prohibition on foreign sources.<sup>25</sup> Finally, the Secretary has found that the current restrictions do little to further the U.S. industrial base, but do much harm in delaying procurement actions, precluding DOD access to important new technologies, and generally raising the price DOD must pay for the goods and services it buys.<sup>26</sup> The Panel further recommends that the restatement apply specifically to DOD and be in a new subchapter of Title 10 as part of a more general chapter on Defense Trade and Cooperation. A subchapter applicable only to DOD is justified because the considerations applicable to source restrictions for defense products and services are different from those applicable to most (perhaps all) civilian agencies.

The text of the Panel's primary recommendation can be found in subchapter 7.4, which distributes portions of the Buy American Act into proposed sections 2x10 through 2x15, which also adds defense technology and industrial base and national security issues into the establishment of domestic source restrictions. If this consolidation were not done, then the following changes would need to be made to the Buy American Act itself:

**Amend section 10a and subsection 10b(a) by striking the phrase "substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States," and inserting the phrase "or substantially**

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<sup>20</sup>50 U.S.C. § 404.

<sup>21</sup>50 U.S.C. App. 2061 *et seq.*

<sup>22</sup>DFARS Part 208.

<sup>23</sup>Note 12, *supra*, at 12-3.

<sup>24</sup>See Pub. L. No. 102-702, section 8027A, concerning contractor participation in the secondary Arab boycott of Israel; and the 1993 Defense Authorization Act, section 813, concerning procurement limitations on fuel cells.

<sup>25</sup>Note 7, *supra*.

<sup>26</sup>*Id.*, at pgs. 7-10.

**transformed" between the word "manufactured" and the phrase "in the United States."**

This change is necessary to conform the Buy American Act rule of origin determination to that in the TAA. Under the authority of the TAA and within its threshold, the United States designates those countries which provide reciprocity to U.S. producers in accordance with the requirements of the TAA, and for which domestic preference of the Buy American Act is waived. The TAA rule of origin requires a test of "substantial transformation" to determine the eligibility of foreign qualifying products. However, because the TAA does not modify the definition of "domestic end product" as contained in the Buy American Act, commercial products which are manufactured in the United States are being placed at a competitive disadvantage to certain foreign source products.<sup>27</sup>

The proposed amendment echoes the intent of the Office of Federal Procurement Policy's "Buy American Act Amendment of 1992" and Report by eliminating the application of the Buy American Act "50 percent component cost" rule in defining a domestic end product.

**Amend section 10b by deleting subsection (b); striking the phrase "blacklisting contractors violating requirements" in the section heading; and deleting subsection heading (a).**

The Panel recommends repeal of the debarment provisions found in subsection 10b(b). These provisions, while seemingly absolute, have been interpreted to apply only where there is a knowing and willful violation of the Buy American Act.<sup>28</sup> Since regulatory suspension and debarment procedures are also triggered by a knowing and willful breach of contract, or a false representation,<sup>29</sup> there is no need for a statutory procedure.<sup>30</sup>

**Amend section 10c by adding subsection "(d) The term 'substantially transformed' has the meaning given such term by section 2518(4)(B) of Title 19."**

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<sup>27</sup>Office of Federal Procurement Policy, Statement in Explanation of The Buy American Act Amendment of 1992 (Proposed).

<sup>28</sup>See *Administrator, Veterans Administration*, 36 Comp. Gen. 718 (1957) (debarment requires "bad faith" use of foreign materials); *Secretary of the Army*, 39 Comp. Gen. 599 (1960) (debarment requires knowing violation of Act); *Harold P. Danz*, 42 Comp. Gen. 401 (1963) (debarment appropriate only where there is "some degree of culpability . . . , and not in cases of bona fide misunderstanding or inadvertence").

<sup>29</sup>FAR 9.406-2, 9.407-2.

<sup>30</sup>Note also the recently enacted 10 U.S.C. § 2410f, Debarment of persons convicted of fraudulent use of 'Made in America' labels, providing that:(a) If the Secretary of Defense determines that a person has been convicted of intentionally affixing a label bearing a 'Made in America' inscription to any product sold in or shipped to the United States that is not made in America, the Secretary shall determine, not later than 90 days after determining that the person has been so convicted, whether the person should be debarred from contracting with the Department of Defense. If the Secretary determines that the person should not be debarred, the Secretary shall submit to Congress a report on such determination not later than 30 days after the determination is made. (b) For purposes of this section, the term 'debar' has the meaning given that term by section 2393(c) of this title.

[Pub. L. No. 102-484, §834, 106 Stat. 2442.]

This amendment completes the first amendment stated above by adding a cross reference to the definition of "substantially transformed" in the TAA.

**Retain the following Congressionally mandated domestic source restrictions:**

- **Repair and Maintenance of Naval Vessels [Pub. L. No. 101-511, § 8043].**
- **Sonobuoys [Pub. L. No. 102-484, § 833].**

Consistent with Chapter 7.1.5, below, the consolidated subchapter on source restrictions codifies a number of provision which currently appear only in public laws.<sup>31</sup> The Panel recommended retention of the above restrictions because they were created or amended by Congress in the Defense Authorization Act for FY93 and appear to strike a balance among cost considerations, preservation of the defense industrial base, and the maintenance of operational flexibility.

**Repeal the following Congressionally mandated domestic source restrictions and product preferences:**

- **Jewel Bearings [Pub. L. No. 90-469 and 101-511, § 8121];**
- **Food, Clothing, Fabrics, Specialty Metals, and Hand or Measuring Tools [Pub. L. No. 97-377, § 723];**
- **Night Vision Devices [Pub. L. No. 101-511, § 8054];**
- **Floating Storage of Petroleum [Pub. L. No. 101-511, § 8020];**
- **Anchor and Mooring Chain [Pub. L. No. 100-202, § 8125, 101-165, § 9051, and 101-511, § 8041];**
- **PAN Carbon Fibers [Pub. L. No. 101-511, § 8048].**

Consistent with Chapter 7.1.5, below, the Panel recommended repeal of the above domestic source restrictions and product preferences enacted in annual authorization and appropriation acts as necessary to reinforce the United States' commitment to unrestrained global trade; unless Congress specifically enacts such restrictions or preferences in support of the national defense technology and industrial base by amending new section 2x12, *Items Restricted to American Sources*, in the recommended new chapter on Defense Trade and Cooperation in Title 10.

#### **Additional Streamlining Amendments**

**In subparagraph 10b-1(g)(2)(A) strike the phrase "after conducting one or more public hearings at which interested parties may present comments. Sections 556 and 557 of title 5,**

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<sup>31</sup>The Panel has not codified the recent restriction on purchases of ball bearings and roller bearings contained in Pub. L. No. 102-484, § 832, 106 Stat. 2442. This provision is already in the DFARS and expires at the end of FY95.



**United States Code, shall not apply to the conduct of any such hearing."**

**In subparagraph 10b-1(g)(2)(B), after the words "and rules that" strike the phrase ", to the extent the Administrator considers appropriate and consistent with the applicability of such policy guidance to all services (other than construction services), is" and replace with the word "are."**

**Strike subparagraph 10b-1(g)(2)(C) in its entirety.**

**Strike subsection 10b-2(b) in its entirety, renumbering subsection (c) to "(b)."**

The above streamlining amendments reflect the deletion of statutory references to mandated Office of Federal Procurement Policy and Secretary of Defense Reports already completed and delivered, or due for delivery at the conclusion of this Panel's Report, to Congress.

#### **7.1.1.5. Relationship to Objectives**

Amendment of 41 U.S.C. §§ 10a through 10d, as recommended, would establish a balance between an efficient process, full and open access to the procurement system in international defense trade, while contemporaneously ensuring that the development and preservation of the national defense technology and industrial base is not inhibited.

#### **7.1.1.6. Proposed Statutes**

##### **Section 10a. American Materials Required For Public Use**

Notwithstanding any other provision of law, and unless the head of the Federal agency concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured or substantially transformed in the United States ~~substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,~~ shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or of the articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they were manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

**Section 10b. Contracts for public works; specification for use of American materials; ~~blacklisting contractors violating requirements~~**

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work of the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured or substantially transformed in the United States ~~substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States~~ except as provided in section 10a of this title: *Provided, however,* that if the head of the Federal agency making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as that particular article, material, or supply, and a public record made of the findings which justified the exception.

~~(b) If the head of a Federal Agency which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public his findings, including therein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public.~~

**Sec. 10b-1. Prohibited procurement practices**

(a) Federal contracts for goods or services of foreign origin

A Federal agency shall not award any contract-- (1) for the procurement of an article, material, or supply mined, produced, or manufactured-- (A) in a signatory country that is considered to be a signatory not in good standing of the Agreement pursuant to section 2515(f)(3)(A) of title 19; or (B) in a foreign country whose government maintains, in government procurement, a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses, as identified by the President pursuant to section 2515(g)(1)(A) of Title 19; or (2) for the procurement of a service of any contractor or subcontractor that is a citizen or national of a foreign country identified by the President pursuant to section 2515(f)(3)(A) or 2515(g)(1)(A) of Title 19, or is owned or controlled directly or indirectly by citizens or nationals of such a foreign country.

(b) Exceptions to prohibition

The prohibition on procurement in subsection (a) of this section is subject to sections 2515(h) and 2515(j) of Title 19 and shall not apply—(1) with respect to services, articles, procured and used

outside the United States and its territories; (2) notwithstanding section 2515(g) of Title 19, to an eligible product of a country which is a signatory country unless that country is considered to be a signatory not in good standing pursuant to section 2515(f)(3)(A) of Title 19; or (3) notwithstanding section 2515(g) of Title 19, to a country that is a least developed country (as that term is defined in section 2518(6) of Title 19).

**(c) Authority of President or Federal agency heads to authorize contracts**

Notwithstanding subsection (a) of this section, the President or the head of a Federal agency may authorize the award of a contract or class of contracts if the President or the head of the Federal agency-- (1) determines that such action is necessary-- (A) in the public interest; (B) to avoid the restriction of competition in a manner which would limit the procurement in question to, or would establish a preference for, the services, articles, materials, or supplies of a single manufacturer or supplier; or (C) because there would be or are an insufficient number of potential or actual bidders to assure procurement of services, articles, materials, or supplies of requisite quality at competitive prices; and (2) notifies the Committee on Governmental Affairs of the Senate, as well as other appropriate Senate committees, and the appropriate committees of the House of Representatives, of such determination-- (A) not less than 30 days prior to the date of the award of the contract or the date of authorization of the award of a class of contracts; or (B) if the agency's need for the service, article, material, or supply is of such urgency that the United States would be seriously injured by delaying the award or authorization, not more than 90 days after the date of such award or authorization.

**(d) Limitation on authority of Federal agency heads to authorize contracts**

The authority of the head of a Federal agency under subsection (c) of this section shall not apply to contracts subject to memorandums of understanding entered into by the DOD (or any military department) and a representative of a foreign country (or agency or instrumentality thereof). In the case of any such contracts, any determinations and notice required by subsection (c) of this section shall be made by-- (1) the President, or (2) if delegated, by the Secretary of Defense or the Secretary of the Army, Navy, or Air Force, subject to review and policy guidance by the organization established under section 1872(a) of Title 19.

**(e) Non-delegability of agency heads' authority**

The authority of the head of a Federal agency under subsection (c) or (d) of this section may not be delegated.

**(f) Other authorities to bar procurement from nondesignated countries not affected**

Nothing in this section shall restrict the application of the prohibition under section 2512(a)(1) of Title 19.

**(g) Ownership or control of contractors or subcontractors by citizens or nationals of foreign countries**

(1) For purposes of this section with respect to construction services, a contractor or subcontractor is owned or controlled directly or indirectly by citizens or nationals of a foreign country if-- (A) 50 percent or more of the voting stock of the contractor or subcontractor is owned by one or more citizens or nationals of the foreign country; (B) the title to 50 percent or more of the stock of the contractor or subcontractor is held subject to trust or fiduciary obligations in favor of one or more citizens or nationals of the foreign country; (C) 50 percent or more of the voting stock of the contractor or subcontractor is vested in or exercisable on behalf of one or more citizens or nationals of the foreign country; (D) the case of a corporation-- (i) the number of its directors necessary to constitute a quorum are citizens or nationals of the foreign country; or (ii) the corporation is organized under the laws of the foreign country or any subdivision, territory, or possession thereof; or (E) in the case of a contractor or subcontractor who is a participant in a joint venture or a member of a partnership, any participant of the joint venture or partner meets any of the criteria in subparagraphs (A) through (D) of this paragraph.

~~(2)(A) For purposes of this section, except as provided in paragraph (1), a determination of whether a contractor or subcontractor is a citizen or national of a foreign country or is owned or controlled directly or indirectly by citizens or nationals of a foreign country shall be made in accordance with policy guidance prescribed by the Administrator for Federal Procurement Policy after conducting one or more public hearings at which interested parties may present comments. Sections 556 and 557 of title 5, United States Code, shall not apply to the conduct of any such hearing. (B) The Administrator shall include in the policy guidance prescribed under subparagraph (A) definitions, procedures, standards, and rules that, to the extent the Administrator considers appropriate and consistent with the applicability of such policy guidance to all services (other than construction services), is are the same as or similar to the definitions, procedures, standards, and rules that the Administrator has developed and issued for the administration of section 109 of the Treasury, Postal Service, and General Government Appropriations Act, 1988 (101 Stat. 1329-434). (C) The policy guidance required by subparagraph (A) shall be prescribed not later than 180 days after the date of enactment of this subsection. (3)(A) The Administrator for Federal Procurement Policy shall conduct an assessment of the current rules under this Act for making determinations of country of origin and alternatives to such rules. Such assessment shall identify and evaluate (i) reasonable alternatives to such rules of origin, including one or more alternative rules that require a determination on the basis of total cost, and (ii) the specific cost factors that should be included in determining total cost. (B) In conducting the analysis, the Administrator shall consult and seek comment from representatives of United States labor and business, other interested United States persons, and other Federal agencies. The Administrator shall hold public hearings for the purpose of obtaining such comment, and a transcript of such hearings shall be appended to the report required by subparagraph (C). (C) A report on the results of the analysis shall be submitted to the appropriate committees of the House of Representatives and to the Committee on Governmental Affairs and other appropriate committees of the Senate not later than 18 months after the date of enactment of this subsection. Such report shall include proposed policy guidance or any recommended legislative changes on the factors to be used in making determinations of country of origin.~~

(h) Definitions

As used in this section-- (1) the term "Agreement" means the Agreement on Government Procurement as defined in section 2518(1) of Title 19; (2) the term "signatory" means a party to the Agreement; and (3) the term "eligible product" has the meaning given such term by section 2518(4) of title 19.

### **Sec. 10b-2. Limitation on authority to waive Buy American Act requirement**

(a) Determination by the Secretary of Defense.--(1) If the Secretary of Defense, after consultation with the United States Trade Representative, determines that a foreign country which is party to an agreement described in paragraph (2) has violated the terms of the agreement by discriminating against certain types of products produced in the United States that are covered by the agreement, the Secretary of Defense shall rescind the Secretary's blanket waiver of the Buy American Act with respect to such types of products produced in that foreign country. (2) An agreement referred to in paragraph (1) is any reciprocal defense procurement memorandum of understanding between the United States and a foreign country pursuant to which the Secretary of Defense has prospectively waived the Buy American Act for certain products in that country. ~~(b) Report to Congress.--The Secretary of Defense shall submit to Congress a report on the amount of Department of Defense purchases from foreign entities in fiscal years 1992 and 1993. Such report shall separately indicate the dollar value of items for which the Buy American Act was waived pursuant to any agreement described in subsection (a)(2), the Trade Agreement Act of 1979 (19 U.S.C. 2501 et seq.), or any international agreement to which the United States is a party.~~ (c) (b) Buy American Act Defined.--For purposes of this section, the term "Buy American Act" means Title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved March 3, 1933 (41 U.S.C. § 10a et seq.).

### **Section 10c.**

Definition of terms used in sections 10a to 10c

When used in sections 10a to 10c of this title--

(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms "public use," "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands;

(c) The term "Federal agency" has the meaning given such term by section 472 of Title 40, which includes the Departments of the Army, Navy, and Air Force;

(d) The term "substantially transformed" has the meaning given such term by section 2518(4)(B) of Title 19.

## 7.1.2. 19 U.S.C. §§ 2501 through 2581

### Trade Agreements Act of 1979

#### 7.1.2.1. Summary of the Law

Section 2501 *et seq.* of Title 19, the Trade Agreements Act of 1979 (hereinafter TAA), implemented the results of the Tokyo Round of Multilateral Trade Negotiations.<sup>1</sup> Title III of the TAA codified into U.S. law the Agreement on Government Procurement concluded under auspices of the General Agreement on Tariffs and Trade (GATT).<sup>2</sup> Over a certain threshold established by the Government Procurement Agreement, the President is permitted to waive the application of the Buy American Act preference system<sup>3</sup> against particular products of designated countries.<sup>4</sup> Designated countries would be those signatory countries to the Agreement or those which provide reciprocal procurement benefits to the United States.<sup>5</sup>

Other provisions include waiver of discriminatory requirements with respect to purchases under the Agreement on Civil Aircraft,<sup>6</sup> the authority to expand coverage under the Agreement as a result of subsequent multilateral negotiation,<sup>7</sup> the requirement for monitoring and enforcement under the Agreement,<sup>8</sup> the requirement (since expired) to conduct labor surplus area studies,<sup>9</sup> treatment of Members of Congress acting as official advisors,<sup>10</sup> and a definitions section.<sup>11</sup>

Title IV of the TAA provides the statutory framework for implementing the GATT Agreement on Technical Barriers to Trade.<sup>12</sup> Many of the implementing statutes mirror customary U.S. standards activities already in practice; however, future standards-related

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<sup>1</sup>19 U.S.C. § 2501. Short title; 19 U.S.C. § 2502. Congressional statement of purposes; 19 U.S.C. § 2503. Approval of trade agreements; and 19 U.S.C. § 2504. Relationship of trade agreements to United States law.

<sup>2</sup>Subchapter I - Government Procurement.

<sup>3</sup>19 U.S.C. § 10a *et seq.*

<sup>4</sup>19 U.S.C. § 2511, General authority to modify discriminatory purchasing requirements.

<sup>5</sup>19 U.S.C. § 2512, Authority to encourage reciprocal competitive procurement practices.

<sup>6</sup>19 U.S.C. § 2513, Waiver of discriminatory purchasing requirements with respect to purchases of civil aircraft.

<sup>7</sup>19 U.S.C. § 2514, Expansion of the coverage of the Agreement.

<sup>8</sup>19 U.S.C. § 2515, Monitoring and enforcement.

<sup>9</sup>19 U.S.C. § 2516, Labor surplus area studies.

<sup>10</sup>19 U.S.C. § 2517, Authority of information to Members of Congress designated as official advisors.

<sup>11</sup>19 U.S.C. § 2518, Definitions.

<sup>12</sup>Subchapter II - Technical Barriers To Trade (Standards): 19 U.S.C. § 2531. Certain standards-related activities; 19 U.S.C. § 2532. Federal standards-related activities; 19 U.S.C. § 2533. State and private standards-related activities; 19 U.S.C. § 2541. Functions of Trade Representative; 19 U.S.C. § 2543. Representation of United States interests before international standards organizations; 19 U.S.C. 2544. Standards information center; 19 U.S.C. § 2545. Contracts and grants; 19 U.S.C. § 2547. Consultations with representatives of domestic interests; 19 U.S.C. § 2551. Right of action; 19 U.S.C. § 2553. Action after receipt of representations; 19 U.S.C. § 2554. Procedure after finding by international forum; 19 U.S.C. § 2561. Findings of reciprocity required in administrative proceedings; 19 U.S.C. 2571. Definitions; 19 U.S.C. § 2572. Exemptions; 19 U.S.C. § 2573. Reports to Congress on operation of agreement; and 19 U.S.C. § 2581. Auction of import licenses.

activities are permissible unless they create unnecessary obstacles to the international trade of the United States.<sup>13</sup>

### 7.1.2.2. Background of the Law

As a result of the Tokyo Round of multilateral negotiations to reduce trade barriers, the TAA opened U.S. Government procurement opportunities to nations who are signatories to the GATT Government Procurement Agreement. The principal objective of the Tokyo Round trade negotiation was the elimination, reduction, and harmonization of certain non-tariff barriers. The results of the Tokyo Round were enacted into U.S. law by the Trade Agreements Act of 1979.<sup>14</sup>

With respect to the Agreement on Government Procurement, statutory implementation was accomplished by Executive Order.<sup>15</sup> The provisions were amended by the Buy American Act of 1988 (BAA) which was a part of the Omnibus Trade and Competitiveness Act of 1988,<sup>16</sup> and modified the TAA authority to waive discriminatory practices by requiring the President to report annually to Congress on the extent to which foreign countries, whose products are acquired through U.S. Government procurement, maintain a significant and persistent pattern or practice of discrimination against U.S. products resulting in identifiable harm to U.S. businesses.<sup>17</sup> Under Title VII of the BAA Act, GATT dispute settlement procedures are then initiated against signatory countries so identified; and where discriminatory practices are not corrected within one-year, sanctions are imposed by revoking Buy American Act waivers previously afforded.

Provisions of the United States-Canada Free Trade Agreement and the United States-Israel Free Trade Area modify the definition of "eligible products" by lowering the threshold of applicability to \$25,000 and \$50,000, respectively.<sup>18</sup> The recently concluded North American Free Trade Agreement (NAFTA) will, if ratified by Congress, adopt a \$50,000 threshold.<sup>19</sup>

### 7.1.2.3. Law in Practice

The Trade Agreements Act of 1979 is implemented in FAR subpart 25.4 and DFARS subpart 225.4, with covered TAA end products specifically enumerated.<sup>20</sup>

The original intent of lowering nontariff barriers through the TAA has generally been achieved; however the overall value of expected coverage under the Government Procurement Code has not met expectations.<sup>21</sup> It was originally estimated that the TAA would result in over \$20 billion in foreign sales opportunity coverage, yet reality has indicated such coverage has not

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<sup>13</sup>19 U.S.C. § 2531-3, *supra*.

<sup>14</sup>19 U.S.C. §2511 *et seq.*

<sup>15</sup>Exec. Order No. 12260, Dec. 31, 1980, 46 F.R. 1653.

<sup>16</sup>Pub. L. No. 100-418, §§7004, 7005(e), 102 Stat. 1545, 1553.

<sup>17</sup>19 U.S.C. § 2515(d).

<sup>18</sup>10 U.S.C. § 2518.

<sup>19</sup>See section 7.0.1., *supra*, note 13.

<sup>20</sup>DFARS 225.403-70.

<sup>21</sup>General Accounting Office, The International Agreement on Government Procurement: An Assessment of Its Commercial Value and U.S. Government Implementation (NSIAD-84-117), July 16, 1984.

been attained.<sup>22</sup> In recent Congressional testimony, an estimate has that currently only 7% of total world commerce is now covered by the provisions of the GATT Agreement.<sup>23</sup>

Efforts to correct these anomalies were proposed during the current Uruguay Round of multilateral negotiations and include expanding the agency and product coverage of the Agreement as well as lowering the threshold of coverage. However, in the interim, the Buy American Act of 1988 now restricts the use of Presidential waiver authority in the procurement of goods or services of foreign origin under the TAA, specifically where: (a) a designated country is not in good standing under the Agreement; (b) a designated country maintains a significant and persistent pattern or practice of discrimination against U.S. products resulting in identifiable harm to U.S. businesses; or (c) procuring the services of any contractor or subcontractor from countries identified under (a) and (b).<sup>24</sup>

As previously discussed, Title VII of the Act permits actions under the GATT Procurement Agreement dispute settlement provisions for foreign discrimination in government procurement. Such actions have been limited mainly by two factors: (a) that the U.S. Government has not had the expertise or adequate resources to obtain needed information on foreign procurement practices; and (b) that despite guarantees of confidentiality, U.S. companies do not complain out of fear of retaliation from foreign Governments.<sup>25</sup> Two discriminators have been identified under current Title VII review -- Norway, for discrimination in Code-covered procurement; and the European Community, for discrimination in non-Code-covered procurement.<sup>26</sup> Under the review, other countries whose Government procurement markets were of particular concern, and which warranted further provision of information by the United States Trade Representative concerning non-Code-coverage, included Australia, China, and Japan.

#### **7.1.2.4. Recommendations and Justification**

### **I**

#### **Retain Subchapter I - Government Procurement, sections 2511 through 2518; except for deletion of section 2516.**

Retention of subchapter I, Government Procurement, is recommended as it continues adequately to serve a valid defense acquisition purpose. As Title III of the TAA codified into U.S. law the Agreement on Government Procurement concluded under auspices of the GATT, any recommendations for statutory change would constitute a unilateral action on the part of the United States in contravention of the GATT regime. Anticipated changes in acquisition practice under the TAA, such as expanding coverage of agencies and products under the Agreement as

<sup>22</sup>In 1981 only \$4 billion coverage was documented, *supra*, note 8.

<sup>23</sup>Testimony of Pat Choate, Managing Director, Manufacturing Policy Project, on The State of the Economy and America's Global Competitive Position, before the Committee on Banking, Housing and Urban Affairs, United States Senate, July 23, 1992.

<sup>24</sup>41 U.S.C. § 10b-1.

<sup>25</sup>General Accounting Office, Executive Branch Identification of Discrimination in Foreign Government Procurement (T-NSIAD-90-35), May 1, 1990.

<sup>26</sup>Office of the United States Trade Representative, Title VII Report to Congress, Apr. 29, 1992.



well as lowering the threshold of coverage, will of necessity be dependent upon the outcome of the Uruguay Round multilateral trade negotiations.

Deletion of section 2516, Labor Surplus Area Studies, is warranted because the mandated one-time reporting requirement was submitted on July 1, 1981.

## II

**No action on sections 2501 through 2504; and subchapter II - Technical Barriers To Trade (Standards), sections 2531 through 2573.**

Although acquisition related, Titles I and IV of the TAA provided, respectively, the introductory statutory framework and the statutory implementation of the GATT Agreement on Technical Barriers to Trade (Standards) in subchapter II. The determination that these sections were predominately trade-law related, and not within the primary defense acquisition purview of the Panel's statutory mandate, resulted in the no action recommendation.

## III

**Section 2581 was determined not acquisition related.**

Section 2581, Auction of Import Licenses, is a trade-related statute having no direct relation to defense acquisition.

### **7.1.2.5. Relationship to Objectives**

Retention of subchapter I, Government Procurement, establishes a balance between an efficient process and full and open access to the procurement system in international defense trade. Although no Panel action was taken on subchapter II, Technical Barriers to Trade (Standards), the goal to reduce such acquisition-related barriers was based more in trade-law and not within the primary purview of the Panel's statutory mandate.

### **7.1.3. 19 U.S.C. §§ 2701 through 2706**

#### **Caribbean Basin Economic Recovery Act**

##### **7.1.3.1. Summary of the Law**

In conjunction with the Governments of Canada, Mexico, and Venezuela, the United States developed the Caribbean Basin Initiative program as a collaborative means to address the public and private sector economic crisis in the Caribbean. The linchpin of the program, under Title II of the Act,<sup>1</sup> granted the countries of the Caribbean Basin preferential trade access to the markets of the United States. Other measures in the Act, however, included investment incentives and financial assistance to the region.<sup>2</sup>

The Caribbean Basin Economic Recovery Act authorizes the President to proclaim duty-free treatment for all eligible articles from any beneficiary country.<sup>3</sup> Countries eligible for designation as beneficiary countries are enumerated in the statute, excepting communist countries and those countries which have seized ownership or control of property, or which repudiate contracts or intellectual property rights, owned by a U.S. citizen or corporation.<sup>4</sup> Eligible products include the growth, product, or manufacture of designated beneficiary countries under regulations prescribed by the Secretary of the Treasury,<sup>5</sup> generally excepting those textile and apparel articles, footwear, prepared tuna, petroleum products, watches and parts, sugar and beef products dealt with under the Harmonized Tariff Schedule of the United States.<sup>6</sup> With an effective date of August 5, 1983,<sup>7</sup> the balance of the Caribbean Basin Economic Recovery Act provided for annual reports or studies from the International Trade Commission<sup>8</sup> and the Secretary of Labor.<sup>9</sup>

##### **7.1.3.2. Background of the Law**

The United States developed this program in 1982 as a multilateral action program for the Caribbean Basin region which had been seriously affected as a region by the escalating cost of imported oil and declining prices for the major export goods. Venezuela and Mexico had already contributed significantly to the region through mechanisms such as a joint oil facility. Additionally, Canada had provided major foreign assistance to the region and already permitted duty-free entry on over ninety-eight percent of its imports from the Caribbean Basin.

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<sup>1</sup>Pub. L. No. 98-67, 97 Stat. 384.

<sup>2</sup>*Id.*, see also H. Rept. 2769, §§ 201-3.

<sup>3</sup>19 U.S.C. § 2701.

<sup>4</sup>19 U.S.C. § 2702.

<sup>5</sup>19 U.S.C. § 2703.

<sup>6</sup>*Id.*, §§ (b) and (c).

<sup>7</sup>19 U.S.C. § 2706.

<sup>8</sup>19 U.S.C. § 2704.

<sup>9</sup>19 U.S.C. § 2705.

The centerpiece of the U.S. program was the offer of one-way free trade, under Title II of the Act, providing most-favorable and long term access to the domestic marketplace. While duty-free access provided significant potential stimulus for the Caribbean region, it alone constituted only three-tenths of one percent of total duty-free imports into the U.S. market. At the time, all imports from the Caribbean Basin constituted less than 4 percent of total U.S. imports and the United States enjoyed an overall trade surplus of almost \$3 billion, excluding petroleum and related products.

The legislative history of the Act indicated, as well, that passage of the Caribbean Basin Economic Recovery Act was meant to address U.S. export potential to the region:

Stability and economic development of the region, including through freer long term access to the U.S. market, are essential to maintenance and expansion of these U.S. export markets.<sup>10</sup>

Other than numerous amendments modifying provisions of the Harmonized Tariff Schedule of the United States to accommodate the determination of "eligible articles" under the Caribbean Basin initiative and miscellaneous amendments to conform with provisions of the Internal Revenue Code, the Act has remained essentially as enacted. The Act was recently reaffirmed in Congressional findings of August 20, 1990.<sup>11</sup>

#### **7.1.3.3. Law in Practice**

The Caribbean Basin Economic Recovery Act is implemented in defense acquisition generally the same as products acquired under provisions of the Trade Agreements Act.<sup>12</sup> Those Caribbean Basin end products specifically excepted under the statutory regime are highlighted, as well, in the enumeration of covered products.<sup>13</sup>

#### **7.1.3.4. Recommendations and Justification**

**No action on sections 2701 through 2706.**

Although the Caribbean Basin Economic Recovery Act applies to the procurement of defense goods, the Panel determined that a no action recommendation was warranted as these sections were predominately trade-law related and not within the primary defense acquisition purview of the Panel's statutory mandate.

#### **7.1.3.5. Relationship to Objectives**

Action on this statute would not specifically promote the objectives of the Panel.

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<sup>10</sup>H. Rept. 98-266 at 3.

<sup>11</sup>Pub. L. No. 101-382, §202, 104 Stat. 655.

<sup>12</sup>DFARS Subpart 225.4.

<sup>13</sup>DFARS 225.403-70.

## **7.1.4. 10 U.S.C. § 2506 renumbered as § 2533<sup>1</sup>**

### **Limitation on use of funds; procurement of goods which are other than American goods**

#### **7.1.4.1. Summary of the Law**

Through the mechanism of limiting the use of appropriated funding, Congress made Buy American provisions specifically applicable to DOD by enacting this provision in the industrial base chapter of Title 10. Although not a strict limitation, the section provides that DOD appropriations may not be used to procure goods other than American unless consideration is given to bids from labor surplus areas and from small business or other domestic firms, any balance of payment impact, and shipping or other added costs.

#### **7.1.4.2. Background of the Law**

This section was originally enacted by the DOD Authorization Act for 1975<sup>2</sup> and added as section 2501 of Title 10 by the Codification of Military Laws Act of 1988.<sup>3</sup> The statute was renumbered to section 2506 as part of the extensive provisions on defense industrial base enacted by the DOD Authorization Act of 1989.<sup>4</sup> The section was renumbered as section 2533 by the Defense Authorization Act of 1993 and placed in the completely revised Chapter 148, renamed as "National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion."<sup>5</sup>

#### **7.1.4.3. Law in Practice**

Within DOD, this section is implemented by Part 225 of the Defense Federal Acquisition Regulation Supplement.<sup>6</sup>

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<sup>1</sup>Pub. L. No. 102-484, §§4201-4272, 106 Stat. 2442.

<sup>2</sup>Pub. L. No. 93-365, § 707.

<sup>3</sup>Pub. L. No. 100-370, 102 Stat. 855.

<sup>4</sup>Pub. L. No. 100-456, 102 Stat. 2014.

<sup>5</sup>Note 1, *supra*.

<sup>6</sup>DFARS Subparts 225.1 through 225.3.

#### 7.1.4.4. Recommendations and Justification

##### I

**Amend section 2506 by striking the heading "Limitation on use of funds: procurement of goods which are other than American goods" and inserting in lieu thereof , "Policy on Purchases of Foreign Goods."**

**Amend subsection (a) by striking the reference to subsection (c); and amend by adding new paragraphs (a)(7), (a)(8), and (a)(9).**

The Panel recommends a new heading to section 2506 in order to focus on the intent of the provision which summarizes the policy on purchases of foreign goods by DOD. The new provision states the factors to be considered in determining whether to purchase foreign source items for DOD in light of current international regimes involving defense trade. The current statute is incomplete in leaving out industrial base, mobilization base, and national security considerations. In addition, the current statute fails to account for treaties and other international agreements. New paragraphs (a)(7), (a)(8), and (a)(9) have been added to fill these omissions.

##### II

**Amend subsection (b) by striking the reference to the Buy American Act; amend the definition in subsection (c) by striking the balance of paragraph (2) after the words "United States" and inserting in lieu thereof "if such end product is substantially transformed within the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed" and consolidate the amended definition into new section 2x10.**

The amended section also contains an amendment to subsection (b), replacing the existing inaccurate reference to the Buy American Act with a reference to the new subchapter. The amended definition in subsection (c) is recommended for consolidation in new section 2x10, *Definitions*.

Renumber as section 2x11 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with purchases of foreign goods by the DOD and the inter-relationship of these purchases on the defense industrial base, move to subchapter I, *Purchases of Foreign Goods By the Department of Defense*.

#### 7.1.4.5. Relationship to Objectives

Amendment of this statute clearly establishes a balance between an efficient process and the preservation of the national defense technology and industrial base, while ensuring the full and open access to the procurement system intrinsic to international defense trade and cooperation.

#### 7.1.4.6. Proposed Statute

**§ 2x11. ~~[2506/1533]. Limitation on use of funds; procurement of goods which are other than American goods~~ *Policy on Purchases of Foreign Goods***

(a) Funds appropriated to the Department of Defense may not be obligated under a covered contract for procurement of goods which are other than American goods ~~(as defined in subsection (e))~~ unless adequate consideration is given to the following:

(1) The bids or proposals of firms located in labor surplus areas in the United States (as designated by the Department of Labor) which have offered to furnish American goods.

(2) The bids or proposals of small business firms in the United States which have offered to furnish American goods.

(3) The bids or proposals of all other firms in the United States which have offered to furnish American goods.

(4) The United States balance of payments.

(5) The cost of shipping goods which are other than American goods.

(6) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.

(7) The need to protect the national defense technology and industrial base and the United States mobilization base.

(8) Coordination of acquisition activities of the Department of Defense with obligations contained in international treaties and with the acquisition activities of major United States allies.

(9) National security interests of the United States.

(b) Consideration of the matters referred to in paragraphs (1) through ~~(6)~~ (9) of subsection (a) shall be given ~~under regulations of the Secretary of Defense and subject to the determinations and exceptions contained in title III of the Act of March 3, 1933 (41 U.S.C. 10a, 10b), popularly known as the "Buy American Act", in the manner set out in this Subchapter.~~

## 7.1.5. 10 U.S.C. § 2507 renumbered as § 2534<sup>1</sup>

### Miscellaneous procurement limitations

#### 7.1.5.1. Summary of the Law

Prior to its recent amendment, section 2507 provided that: (a) only domestically-produced buses may be purchased for the armed forces; (b) DOD appropriations may not be used to buy chemical weapons antidotes in automatic injectors critical to DOD industrial preparedness unless the injectors are manufactured in the United States by firms in the industrial preparedness program; (c) no DOD funds may be used to buy manual typewriters with components manufactured in a Warsaw Pact country absent most-favored-nation status; (d) through 1996, DOD funds may not be used to buy specified valves and machines tools unless made in the United States or Canada; (e) through 1992, only domestically produced carbonyl iron powders may be used by DOD; and (f) naval air circuit breakers must be domestically produced.

#### 7.1.5.2. Background of the Law

The domestic restriction on the purchase of buses was originally enacted by the Defense Authorization Act for 1969.<sup>2</sup> The limitation was contained in the House version of the bill noting that in Vietnam, the Army and Air Force were then using almost exclusively foreign produced buses.<sup>3</sup> The committee stated that since activities in that area would likely continue for some time, DOD should ensure that preference be given to U.S. items whenever possible.

The chemical weapons antidote limitation was originally enacted by the Defense Authorization Act for 1988 and 1989.<sup>4</sup> The language was first introduced as part of the *en bloc* amendments to the House version of the bill; and was enacted to ensure a domestic producer of chemical weapons antidote under the industrial preparedness program.

The Warsaw Pact manual typewriter limitation was first enacted by the Defense Authorization Act of 1984.<sup>5</sup> The most-favored-nation exception was added by a floor amendment to the Senate version of the Defense Authorization Act for 1988.<sup>6</sup> Introduced by Senators Dixon and Simon, the limitation was intended to enable DOD to accept bids for less expensive but higher quality Polish-manufactured manual typewriters.<sup>7</sup> The restriction on Warsaw Pact typewriters was repealed by the Defense Authorization Act of 1993.<sup>8</sup>

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<sup>1</sup>Section 2507 was amended and renumbered by Pub. L. No. 102-484, §§ 4201-4272, 106 Stat. 2442.

<sup>2</sup>Pub. L. No. 90-500, § 404.

<sup>3</sup>H. Conf. Rept. 1869.

<sup>4</sup>Pub. L. No. 100-180, 101 Stat. 1043.

<sup>5</sup>Pub. L. No. 97-295, 96 Stat. 1294.

<sup>6</sup>Pub. L. No. 100-180, 101 Stat. 1134.

<sup>7</sup>See Cong. Record, Sep. 17, 1987, at S. 12253.

<sup>8</sup>Pub. L. No. 102-484, § 831, 106 Stat. 2442.

The valve and machine tool restrictions, as well as the naval vessel air circuit breaker limitation, were added by the Defense Authorization Act for 1988.<sup>9</sup> In the case of valves, the restrictions pertained only to those used in piping for naval surface ships and submarines. However, in both valves and machine tools the restriction applied only to those manufactured in the United States or Canada.

The carbonyl iron powder limitation was added by the Defense Authorization Act for 1991.<sup>10</sup> The House Report noted, that outside of the Soviet Union, only two facilities produced this iron -- one in Germany and one at Redstone Arsenal in Huntsville, Alabama. The domestic restriction provision was intended to preserve the sole U.S. source at Huntsville.<sup>11</sup> The Defense Authorization Act for FY1992 and FY1993 amended the limitation by placing an expiration date for the limitation for January 1, 1993.<sup>12</sup>

The section was renumbered as section 2534 by the Defense Authorization Act of 1993 and placed in the completely revised Chapter 148, renamed "National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion."<sup>13</sup> The Act also amended section 2507 by adding two new restrictions that (a) DOD, for the next three years, purchase only domestically manufactured ball bearings or roller bearings,<sup>14</sup> and (b) DOD not procure sonobuoys from foreign countries that discriminate in their procurement against U.S. sonobuoy manufacturers.<sup>15</sup>

### 7.1.5.3. Law in Practice

The restrictions are implemented in DFARS subpart 225.7. The practice of legislating domestic source restrictions on government procurement of designated products through annual Defense Authorization and Appropriations Acts, under the auspices of the Buy American Act and this provision of Title 10, has over the years encompassed many different sectors and classes of products; such as: transportation by ocean vessels and by air carriers; food, clothing, fabrics, specialty metals, and hand or measuring tools; construction of major components of the hull and superstructure of naval vessels, and repair and maintenance of naval vessels; multipassenger motor vehicles (buses) and administrative motor vehicles; R&D contracting; aircraft ejection seats and night vision devices; transfer of large-caliber cannon production technology; coal or coke; floating storage of petroleum; 120mm mortars and ammunition; Strategic Defense Initiative contracts; valves and machine tools, anchor and mooring chain; certain chemical weapons antidote; supercomputers; ball bearings, roller bearings and PAN carbon fibers. Furthermore, under authority of the National Security Act of 1947<sup>16</sup> and the Defense Production Act of

<sup>9</sup>Pub. L. No. 100-180, 101 Stat. 1042.

<sup>10</sup>Pub. L. No. 101-510, 104 Stat. 1614.

<sup>11</sup>H. Rept. 101-685 at pgs. 311-12.

<sup>12</sup>Pub. L. No. 102-190, §835, 105 Stat. 1448.

<sup>13</sup>Note 1, *supra*.

<sup>14</sup>Pub. L. No. 102-484, § 832, 106 Stat. 2442.

<sup>15</sup>*Id.*, §833.

<sup>16</sup>50 U.S.C. § 404.



1950,<sup>17</sup> the Secretary of Defense and the Services have placed similar restrictions on other sectors and classes of products.<sup>18</sup>

In response to a request in the 1989 Defense Authorization Act<sup>19</sup> for a report on the impact of statutory Buy American restrictions affecting defense procurement, the Secretary of Defense formulated specific recommendations including: (a) abolish most Congressionally mandated restrictions; (b) avoid future use of Buy American restrictions; and (c) rely on the authority of the Office of Secretary of Defense.<sup>20</sup> However, as well as renewing previous Buy American source restrictions, legislation enacted since the DOD Report has continued the practice of providing new domestic source restrictions on government procurement.<sup>21</sup>

#### **7.1.5.4. Recommendations and Justification**

The Panel recommends that section 2507 be incorporated into its revised consolidated subchapter as section 2x12. In doing so, the Panel makes the following amendments to section 2507:

**Amend section 2507 by striking the heading "Miscellaneous procurement limitations" and inserting in lieu thereof, "Items restricted to American sources."**

**Amend section 2507 by deleting subsection (f).**

**Amend section 2507 by redesignating subsections (a) through (e) as subsections (c) through (g); and by adding new subsections (h) and (i).**

The Panel recommends that the authority of the Secretary to restrict procurements to domestic sources be expressly granted by statute, and language implementing that regulation is found in section 2x12(a). In addition, the prohibitions on the purchase of goods from countries that are in violation of the Agreement on Government Procurement, or which otherwise discriminate against United States products, currently found in 41 U.S.C. § 10b-1, are incorporated into section 2x12(b) with two exceptions: (1) commercial items and components are permitted to be acquired from any source; and (2) the restrictions in section 10b-1 are not applicable to contracts made under simplified acquisition procedures. The Panel believes that these exceptions from the international government procurement regime are helpful to facilitate the acquisition of commercial products and services while removing regulatory hurdles from -- and hence reduce the cost of -- the award of smaller contracts. The commercial item exception can be redressed in the overall GATT trade dispute settlement regime, in any case; and as for the

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<sup>17</sup>50 U.S.C. App. § 2061 *et seq.*

<sup>18</sup>DFARS Part 208.

<sup>19</sup>Pub. L. No. 100-456, 102 Stat. 2014.

<sup>20</sup>Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989), at pgs. 12-13.

<sup>21</sup>E.g. Pub. L. No. 102-484, §§ 831 through 833.

exception for simplified acquisition procedures, the Panel recommended \$100,000 threshold is still below the present GATT threshold of general applicability.

Finally, other than the recommended deletion of the expired restriction on carbonyl iron powders found in subsection (f), provisions for absolute restrictions currently found in 10 U.S.C. § 2507 were retained along with those annual authorization and appropriation act restrictions framed as amendments to new section 2x12. In section 2x12, the existing statutory restriction on the transfer of large-caliber cannon technology presently found in 10 U.S.C. § 4542 and the restriction on construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309 were consolidated with the current statutory restrictions of 10 U.S.C. § 2507(a) through (e). The Panel recommended that the many other restrictions contained in annual authorization and appropriation acts be repealed. Instead of restrictions provided in annual authorization and appropriation acts, the Panel recommends that primary reliance for domestic source restrictions to protect the defense industrial base should be placed within the authority of the Secretary of Defense.

The only source restrictions consolidated in this section were the Panel's recommended subsections (h) and (i). Subsection (h) contains the Stratton Amendment prohibition, found in 10 U.S.C. § 4542, on the transfer by arsenals to foreign countries of technical data packages for large-caliber cannon. As there are exceptions to the transfer prohibition, where coproduction or cooperative project agreements are in place, comment from the U.S. Army indicated that the provision was recommended for retention.<sup>22</sup> Other than amending the provision to be consistent with section 2x31 on cooperative project agreements, the provision was retained and consolidated in this section. Subsection (i) retains and consolidates the present restriction on the construction or repair of vessels in foreign shipyards contained in 10 U.S.C. § 7309.

Renumber as section 2x12 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with restrictions to American sources by DOD and the interrelationship of these restrictions to the defense industrial base, move to Subchapter I, *Purchases of Foreign Goods By the Department of Defense*.

#### **7.1.5.5. Relationship to Objectives**

Amendment of this statute clearly establishes a balance between an efficient process, the preservation of the national defense technology, and industrial base, while ensuring full and open access to procurement systems intrinsic to international defense trade and cooperation.

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<sup>22</sup>Memorandum from Larry D. Anderson, LTC, JAGC, Legal Advisor, U.S. Army Materiel Command, to William E. Mounts, DSMC CM-AL, dated 21 September 1992.

#### 7.1.5.6. Proposed Statute

#### §2x12. [2507/2534] Miscellaneous procurement limitations Items Restricted to American Sources

(a) AUTHORITY OF THE SECRETARY.—The Secretary of Defense is hereby authorized to require the Department to acquire only American goods and related American services for specific items as the Secretary may find necessary to protect the United States national defense technology and industrial base, or the United States mobilization base, or to further national security.

(b) RESTRICTIONS ON ACQUISITION OF GOODS FROM COUNTRIES WHICH DISCRIMINATE AGAINST AMERICAN GOODS AND RELATED AMERICAN SERVICES.—Section 10b-1 of Title 41 shall apply to the Department of Defense except that section shall have no application to the acquisition of commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2 or to contracts the value of which is below the simplified acquisition threshold as defined in 10 U.S.C. § 2302(4).

(c) BUSES.--Funds appropriated for use by the armed forces are available to acquire a multipassenger motor vehicle (bus) only if the vehicle is manufactured in the United States. However, the Secretary of Defense may prescribe regulations authorizing the acquisition of a multipassenger motor vehicle (bus) not manufactured in the United States, but only to ensure that compliance with this subsection will not result in an uneconomical procurement action or adversely affect the national interest.

(d) CHEMICAL WEAPONS ANTIDOTE MANUFACTURED OVERSEAS.--Funds appropriated to the Department of Defense may not be used for the procurement of chemical weapons antidote contained in automatic injectors (or for the procurement of the components for such injectors) determined to be critical under the Industrial Preparedness Planning Program of the Department of Defense unless-

(1) such injector or component is manufactured in the United States by a company which is an existing producer under the industrial preparedness program at the time the contract is awarded and which

(A) has received all required regulatory approvals; and

(B) has the plant, equipment, and personnel to perform the contract in existence in the United States at the time the contract is awarded; or

(2) the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, determines that such procurement from a source in addition to a source described in paragraph (1) is critical to the national security.

**(e) VALVES AND MACHINE TOOLS .--**

**(1) Effective through fiscal year 1996, funds appropriated or otherwise made available to the Department of Defense may not be used to enter into a contract for the procurement of items described in paragraph (2) that are not manufactured in the United States or Canada.**

**(2) Items covered by paragraph (1) are the following:**

**(A) Powered and nonpowered valves in Federal Supply Classes 4810 and 4820 used in piping for naval surface ships and submarines.**

**(B) Machine tools in the Federal Supply Classes for metal-working machinery numbered 3405, 3408, 3410 through 3419, 3426, 3433, 3438, 3441 through 3443, 3445, 3446, 3448, 3449, 3460, and 3461.**

**(3) Contracts covered by paragraph (1) include the following:**

**(A) Contracts for the procurement of items described in paragraph (2) for use in any property under the control of the Department of Defense, including government-owned, contractor-operated facilities.**

**(B) Contracts entered into by contractors on behalf of the Department of Defense for the procurement of items described in paragraph (2) for the purposes of providing the items to other contractors as Government-furnished equipment.**

**(4) In any case in which a contract subject to the requirement of paragraph (1) includes the procurement of more than one Federal Supply Class of machine tools or machine tools and accessories described in paragraph (2), each supply class shall be evaluated separately for purposes of determining whether the limitation in this subsection applies.**

**(5) The Secretary of Defense may waive the requirement of paragraph (1) with respect to the procurement of an item if the Secretary determines that any of the following apply with respect to that item:**

**(A) The restriction would cause unreasonable costs or delays to be incurred.**

**(B) United States producers of the item would not be jeopardized by competition from a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.**

**(C) Satisfactory quality items manufactured in the United States or Canada are not available.**

(D) The restriction would impede cooperative programs entered into between the Department of Defense and a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(E) The procurement is for an amount less than \$25,000 and simplified small purchase procedures are being used.

(F) The restriction would result in the existence of only one United States or Canadian source for the item.

~~(F) CARBONYL IRON POWDERS .--~~

~~----- (1) Until January 1, 1993, the Secretary of Defense shall require that only domestically manufactured carbonyl iron powders may be used in a system or item procured by or provided to the Department of Defense.~~

~~----- (2) The Secretary of Defense may waive the restriction required by paragraph (1) if the Secretary certifies that such a restriction is not in the national interest.~~

~~----- (3) In this subsection:~~

~~----- (A) The term "domestically manufactured" means manufactured in a facility located in the United States or Canada.~~

~~----- (B) The term "carbonyl iron powders" means powders or particles produced from the thermal decomposition of iron penta carbonyl.~~

~~(f)(g) AIR CIRCUIT BREAKERS .--~~

(1) The Secretary of Defense may not procure air circuit breakers for naval vessels unless-

(A) the air circuit breakers are produced or manufactured in the United States; and

(B) substantially all of the components of the air circuit breakers are produced or manufactured in the United States.

(2) For purposes of paragraph (1)(B), substantially all of the components of air circuit breakers shall be considered to be produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States.

(3) Paragraph (1) does not prevent the procurement of spares and repair parts needed to support air circuit breakers produced or manufactured outside the United States.

(4) The Secretary of Defense may waive the limitation in paragraph (1) on a case-by-case basis with respect to any procurement if the Secretary determines that carrying out a proposed procurement in accordance with the limitation in that case--

(A) is not in the national security interests of the United States;

(B) will have an adverse effect on a United States company; or

(C) will result in procurement from a United States company that, with respect to the sale of air circuit breakers, fails to comply with applicable Government procurement regulations or the antitrust laws of the United States.

(5) Whenever the Secretary proposes to grant a waiver under paragraph (4), the Secretary shall submit a notice of the proposed waiver, together with a statement of the reasons for the proposed waiver, to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives. The waiver may then be granted only after the end of the 30-day period beginning on the date on which the notice is received by those committees.

~~(g)~~ SONOBUOYS - (1) The Secretary of Defense may not procure a sonobuoy manufactured in a foreign country if United States firms that manufacture sonobuoys are not permitted to compete on an equal basis with foreign manufacturing firms for the sale of sonobuoys in that foreign country.

(2) The Secretary may waive the limitation in paragraph (1) with respect to a particular procurement of sonobuoys if the Secretary determines that such procurement is in the national security interests of the United States.

(3) In this subsection, the term 'United States firm' has the meaning given such term in section ~~2x20(10) 2532(d)(1)~~ of this title.

(h) SEC. 4542. TECHNICAL DATA PACKAGES FOR LARGE-CALIBER CANNON; PROHIBITION ON TRANSFERS TO FOREIGN COUNTRIES; EXCEPTION

~~(1)~~ (a) General rule

Funds appropriated to the Department of Defense may not be used-- ~~(1)~~ (A) to transfer to a foreign country a technical data package for a defense item being manufactured or developed in an arsenal; or ~~(2)~~ (B) to assist a foreign country in producing such a defense item.

(2) ~~(b)~~ Exception

The Secretary of the Army may use funds appropriated to the Department of Defense to transfer a technical data package, or to provide assistance, described in ~~subsection (a) paragraph (1)~~ if-- ~~(1)~~ (A) the transfer or provision of assistance is to a friendly foreign country (as determined by the Secretary of Defense in consultation with the Secretary of State); ~~(2)~~ (B) the

Secretary of the Army determines that such action-- (A) (i) would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and (B) (ii) would not transfer technology (including production techniques) considered unique to the arsenal concerned, except as provided in ~~subsection (e) paragraph (5)~~, and ~~(3) (C)~~ the Secretary of Defense enters into an agreement with the country concerned described in ~~subsection (e) or (d) paragraph (3) or (4)~~.

(3) ~~(e)~~ Coproduction agreements

An agreement under this ~~subsection~~ paragraph shall be in the form of a Government-to-Government Memorandum of Understanding and shall include provisions that-- ~~(1) (A)~~ prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; ~~(2) (B)~~ require that production by the participating foreign country of the defense item to which the technical data package or assistance relates be shared with the arsenal concerned; ~~(3) (C)~~ subject to such exceptions as may be approved under ~~subsection (f) paragraph (6)~~, prohibit transfer by the participating foreign country to a third party or country of-- ~~(A) (i)~~ any defense article, technical data package, technology, or assistance provided by the United States under the agreement; and ~~(B) (ii)~~ any defense article produced by the participating foreign country under the agreement; and ~~(4) (D)~~ require the Secretary of Defense to monitor compliance with the agreement and the participating foreign country to report periodically to the Secretary of Defense concerning the agreement.

(4) ~~(d)~~ Cooperative project agreements

An agreement under this ~~subsection~~ paragraph is a cooperative project agreement under ~~section 2x31 of this chapter 27 of the Arms Export Control Act (22 U.S.C. 2767)~~ which shall include provisions that-- ~~(1) (A)~~ for development phases describe the technical data to be transferred and for the production phase prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; ~~(2) (B)~~ require that at least the United States production of the defense item to which the technical data package or assistance relates be carried out by the arsenal concerned; and ~~(3) (C)~~ require the Secretary of Defense to monitor compliance with the agreement.

(5) ~~(e)~~ Licensing fees and royalties

The limitation in ~~subsection (b)(2)(B) paragraph (2)(B)(ii)~~ shall not apply if the technology (or production technique) transferred is subject to nonexclusive license and payment of any negotiated licensing fee or royalty that reflects the cost of development, implementation, and prove-out of the technology or production technique. Any negotiated license fee or royalty shall be placed in the operating fund of the arsenal concerned for the purpose of capital investment and technology development at that arsenal.

(6) ~~(f)~~ Transfers to third parties

A transfer described in ~~subsection (e)(3) paragraph (3)(C)~~ may be made if-- ~~(1) (A)~~ the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program or a cooperative project in which the United States and the participating foreign country were partners; or ~~(2) (B)~~ the President-- ~~(A) (i)~~ complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. 2753(d)) with respect to such transfer; and ~~(B) (ii)~~ certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large-caliber cannon.

(7) ~~(g)~~ Notice and reports to Congress: ~~(1) (A)~~ The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this subsection. ~~(2) (B)~~ The Secretary shall submit to Congress a semi-annual report on the operation of this section and of agreements entered into under this subsection.

(8) ~~(h)~~ Arsenal defined

In this subsection, the term "arsenal" means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon.

~~(i) SEC. 7309. RESTRICTIONS ON CONSTRUCTION OR REPAIR OF VESSELS IN FOREIGN SHIPYARDS.~~

~~(1) (a)~~ Except as provided in ~~subsection (b) paragraph (2)~~, no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard.

~~(2) (b)~~ The President may authorize exceptions to the prohibition in ~~subsection (a) paragraph (1)~~ when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress.

~~(3)(A)-(e)(1)~~ A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the homeport of which is in the United States may not be overhauled, repaired, or maintained in a shipyard outside the United States.

~~(B) (2) SubParagraph (A) (1)~~ does not apply in the case of voyage repairs.

~~(4) (d)~~ An inflatable boat or rigid inflatable boat, as defined by the Secretary of the Navy, is not a vessel for the purpose of the restriction in ~~subsection (a) paragraph (1)~~.



**(5) (e) In the case of a naval vessel the homeport of which is not in the United States (or a territory of the United States), the Secretary of the Navy may not during the 15-month period preceding the planned reassignment of the vessel to a homeport in the United States (or a territory of the United States) begin any work for the overhaul, repair, or maintenance of the vessel that is scheduled to be for a period of more than six months.**

## 7.1.6. 10 U.S.C. § 4542

### **Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception**

#### 7.1.6.1. Summary of the Law

This statute provides that funds appropriated to DOD may not be used either to (1) transfer to a foreign country a technical data package for a defense item manufactured or developed in an arsenal; or (2) assist a foreign country in producing such a defense item.<sup>1</sup> The Secretary of the Army may, however, use funds appropriated to DOD to transfer a technical data package or to provide assistance if (1) the transfer or provision of assistance is to a friendly foreign country; (2) the Secretary of the Army determines that such action would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and (3) the Secretary of Defense enters into either a coproduction or cooperative project agreement.<sup>2</sup> A coproduction agreement must be in the form of a Government-to-Government Memorandum of Understanding. An agreement under section 4542(d) is considered a cooperative project agreement under section 27 of the Arms Export Control Act.

#### 7.1.6.2. Background of the Law

The provision was originally enacted by the Defense Authorization Act of 1987.<sup>3</sup> The Defense Authorization Act of 1990<sup>4</sup> amended the provision by adding the exception for cooperative project agreements and, rather than limiting transfers only to NATO and major non-NATO allies, by opening transfers up to "friendly foreign countries".

#### 7.1.6.3. Law in Practice

The actual practice of this statute centers around restricting the transfer to foreign Governments of technical data concerning the activities of the U.S. Army Watervliet Arsenal (WVA), the single U.S. Government-owned, Government-operated plant manufacturing large-caliber cannon. As a result of recent modernization projects, the U.S. Army now possesses a state-of-the-art gun tube manufacturing facility capable of meeting both the Army's peacetime requirements and a large portion of its projected wartime requirements.<sup>5</sup> The section is intended to protect this indigenous capability.

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<sup>1</sup>10 U.S.C. § 4542(a).

<sup>2</sup>10 U.S.C. § 4542(b).

<sup>3</sup>Pub. L. No. 99-500; with omissions corrected by Pub. L. No. 99-591, 100 Stat. 3341-107; and Pub. L. No. 99-661, 100 Stat. 3968.

<sup>4</sup>Pub. L. No. 101-189, 103 Stat. 1489.

<sup>5</sup>Secretary of Defense, A Report to the United States Congress On The Impact of Buy American Restrictions Affecting Defense Procurement, Department of Defense (July 1989) at A-95.

The initial impact of the restriction was to restrict the transfer of technical data packages in projects involving cannon or gun technology as between the United States and its allied countries. Even with the additions of exceptions to the prohibition for coproduction and cooperative agreements, however, the provision has still had:

... a number of clearly documented adverse impacts:

- It disturbs our allies, who point out that the supposed exception for friendly foreign countries means little, because of the requirement that any transfer (1) clearly benefit the preservation of the U.S. production base and (2) not involve technology 'considered unique' to WVA.
- While protecting some current U.S. technology, it has also resulted in our being denied access to foreign technology from which we could benefit.
- It has disrupted cooperative armaments efforts, contrary to the will of the Congress and to DOD policy directed at reciprocity and working with allies.

Accommodating it has created administrative burdens and caused the expenditure of considerable effort in attempts to meet commitments and to implement important initiatives while still remaining in compliance with the law. . . .<sup>6</sup>

#### 7.1.6.4. Recommendations and Justification

##### I

Amend Section 4542(d) by striking in the introductory sentence the phrase "27 of the Arms Export Control Act (22 U.S.C. § 2767)" and inserting in lieu thereof "2x31 of this chapter"; and insert the word "shall" after the word "which" and before the amended word "include."

Under provisions of 10 U.S.C. § 2350a and by Executive Order, the Secretary of Defense has been delegated the authority to engage in cooperative research and development projects and reporting requirements under section 27 of the Arms Export Control Act. This amendment statutorily recognizes the existing delegation, as presently reflected in new section 2x31; and, consistent with the proposed Panel consolidation of sections 2350a and 2350b, obviates further need for the referral to section 27 of the Arms Export Control Act.

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<sup>6</sup>*Id.*, at A102-3.

## II

### Consolidate section 4542 as new subsection 2x12(i).

Despite the number of adverse impacts encountered with this section, a comment from the U.S. Army indicated that the provision, with its exceptions where coproduction or cooperative project agreements are in place, was recommended for retention.<sup>7</sup> The Panel concurred and felt that this section was one of the restrictions which would be recommended for consolidation into new section 2x12, *Items Restricted to American Sources*.

Other than amending the provision to be consistent with new section 2x31 on cooperative project agreements, the Panel recommended amending and consolidating section 4542 into new section 2x12, *Items Restricted to American Sources*.

#### 7.1.6.5. Relationship to Objectives

Amendment and consolidation of this statute establishes a balance between an efficient process and preservation of the national defense technology and industrial base, while ensuring full and open access to the procurement system intrinsic to international defense trade and cooperation.

#### 7.1.6.6. Proposed Statute

#### **§2x12. ~~[2507] Miscellaneous procurement limitations~~ Items Restricted to American Sources**

**(a) AUTHORITY OF THE SECRETARY.**—The Secretary of Defense may acquire only American goods and related American services for specific items as the Secretary may find necessary to protect the United States defense technology and industrial base, or the United States mobilization base, or to further national security.

**(b) RESTRICTIONS ON ACQUISITION OF GOODS FROM COUNTRIES WHICH DISCRIMINATE AGAINST AMERICAN GOODS AND RELATED AMERICAN SERVICES.**—Section 10b-1 of Title 41 shall apply to the Department of Defense except that section shall have no application to the acquisition of commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2 or to contracts the value of which is below the simplified acquisition threshold as defined in 10 U.S.C. § 2302(4).

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**(i) ~~SEC. 4542. TECHNICAL DATA PACKAGES FOR LARGE-CALIBER CANNON; PROHIBITION ON TRANSFERS TO FOREIGN COUNTRIES; EXCEPTION~~**

**(1) (a) General rule**

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<sup>7</sup>Memorandum from Larry D. Anderson, LTC, JAGC, Legal Advisor, U.S. Army Materiel Command, to William E. Mounts, DSMC CM-AL, dated 21 September 1992.

Funds appropriated to the Department of Defense may not be used-- (1) (A) to transfer to a foreign country a technical data package for a defense item being manufactured or developed in an arsenal; or (2) (B) to assist a foreign country in producing such a defense item.

(2) (b) Exception

The Secretary of the Army may use funds appropriated to the Department of Defense to transfer a technical data package, or to provide assistance, described in ~~subsection (a) paragraph (1)~~ if-- (1) (A) the transfer or provision of assistance is to a friendly foreign country (as determined by the Secretary of Defense in consultation with the Secretary of State); (2) (B) the Secretary of the Army determines that such action-- (A) (i) would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and (B) (ii) would not transfer technology (including production techniques) considered unique to the arsenal concerned, except as provided in ~~subsection (e) paragraph (5)~~, and (3) (C) the Secretary of Defense enters into an agreement with the country concerned described in ~~subsection (e) or (d) paragraph (3) or (4)~~.

(3) (e) Coproduction agreements

An agreement under this ~~subsection~~ paragraph shall be in the form of a Government-to-Government Memorandum of Understanding and shall include provisions that-- (1) (A) prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; (2) (B) require that production by the participating foreign country of the defense item to which the technical data package or assistance relates be shared with the arsenal concerned; (3) (C) subject to such exceptions as may be approved under ~~subsection (f) paragraph (6)~~, prohibit transfer by the participating foreign country to a third party or country of-- (A) (i) any defense article, technical data package, technology, or assistance provided by the United States under the agreement; and (B) (ii) any defense article produced by the participating foreign country under the agreement; and (4) (D) require the Secretary of Defense to monitor compliance with the agreement and the participating foreign country to report periodically to the Secretary of Defense concerning the agreement.

(4) (d) Cooperative project agreements

An agreement under this ~~subsection~~ paragraph is a cooperative project agreement under section 2x31 of this chapter 27 of the Arms Export Control Act (22 U.S.C. 2767) which shall include provisions that-- (1) (A) for development phases describe the technical data to be transferred and for the production phase prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; (2) (B) require that at least the United States production of the defense item to which the technical data package or assistance relates be carried out by the arsenal concerned; and (3) (C) require the Secretary of Defense to monitor compliance with the agreement.

**(5) (e) Licensing fees and royalties**

The limitation in ~~subsection (b)(2)(B)~~ paragraph (2)(B)(ii) shall not apply if the technology (or production technique) transferred is subject to nonexclusive license and payment of any negotiated licensing fee or royalty that reflects the cost of development, implementation, and prove-out of the technology or production technique. Any negotiated license fee or royalty shall be placed in the operating fund of the arsenal concerned for the purpose of capital investment and technology development at that arsenal.

**(6) (f) Transfers to third parties**

A transfer described in ~~subsection (e)(3)~~ paragraph (3)(C) may be made if-- (1) (A) the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program or a cooperative project in which the United States and the participating foreign country were partners; or (2) (B) the President-- (A) (i) complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. 2753(d)) with respect to such transfer; and (B) (ii) certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large-caliber cannon.

(7) (g) Notice and reports to Congress: (1) (A) The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this subsection. (2) (B) The Secretary shall submit to Congress a semi-annual report on the operation of this section and of agreements entered into under this subsection.

**(8) (h) Arsenal defined**

In this subsection, the term "arsenal" means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon.

## 7.1.7. 10 U.S.C. § 7309

### **Restrictions on construction or repair of vessels in foreign shipyards**

#### 7.1.7.1. Summary of the Law

This section prohibits major construction, repair, overhaul, or maintenance of naval vessels in foreign shipyards if those vessels are home ported in the United States. This statute prohibits U.S. vessels from steaming to foreign shipyards for major repairs or construction; however, it does allow "voyage repairs" so that ships are not required to return to their home port if repairs are needed while at sea. Inflatable boats are not considered vessels under this statute.

#### 7.1.7.2. Background of the Law

This section was originally enacted in 1982 as part of the nation's build-up to a 600 ship Navy.<sup>1</sup> It was amended in 1988 when "Restrictions" and "or repair" were added to its statutory purview.<sup>2</sup> The Defense Authorization Act of 1993 added an annual reporting requirement by the Secretary of Defense,<sup>3</sup> as well as a further limitation on overseas ship repairs for vessels homeported in the U.S.<sup>4</sup>

#### 7.1.7.3. Law in Practice

The purpose of this section is to strike a balance between possible cost savings in foreign shipyards and preservation of the domestic defense industrial base. At the same time it also seeks to maintain operational flexibility by allowing "voyage repairs" and excluding inflatable boats from coverage. Congress vigorously monitors compliance with this law to make sure that only bona fide "voyage repairs" are made in foreign shipyards. The Supportability, Maintenance and Modernization Division, Office of the Deputy Chief of Naval Operations (Logistics) recommends retention of this law to ensure the continued viability of U.S. shipyards. It also supports retention of the exemption for "voyage repairs" so that individual ships and battle groups are not forced to return to their home port for repairs during combat or other naval operations.<sup>5</sup>

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<sup>1</sup>Pub. L. No. 97-252, 96 Stat. 758.

<sup>2</sup>Pub. L. No. 100-456, 102 Stat. 2054.

<sup>3</sup>Pub. L. No. 102-484, § 1015, 106 Stat. 2442.

<sup>4</sup>*Id.*, at § 1012.

<sup>5</sup>Information received from CAPT Trytten, USN, of the Supportability, Maintenance and Modernization Division, Office of the Deputy Chief of Naval Operations (Logistics), verbally to B. Capshaw, Esq., Acquisition Law Task Force, on May 26, and Dec. 7, 1992.

#### 7.1.7.4. Recommendation and Justification

**Consolidate section 7309 into new subsection 2x12(j).**

The Panel recommended this section be retained because it strikes an effective balance among cost considerations, preservation of the defense industrial base, and the maintenance of operational flexibility. The Panel believed that this section was one of the restrictions which would be recommended to be consolidated into new section 2x12, *Items Restricted to American Sources*.<sup>6</sup>

#### 7.1.7.5. Relationship to Objectives

Retention and consolidation of this statute clearly establishes a balance between an efficient process and preservation of the national defense technology and industrial base, while ensuring full and open access to the procurement system intrinsic to international defense trade and cooperation.

#### 7.1.7.6. Proposed Statute

**~~§2x12. [2507]-Miscellaneous procurement limitations~~ Items Restricted to American Sources**

(a) AUTHORITY OF THE SECRETARY.—The Secretary of Defense may acquire only American goods and related American services for specific items as the Secretary may find necessary to protect the United States defense technology and industrial base, or the United States mobilization base, or to further national security.

(b) RESTRICTIONS ON ACQUISITION OF GOODS FROM COUNTRIES WHICH DISCRIMINATE AGAINST AMERICAN GOODS AND RELATED AMERICAN SERVICES.—Section 10b-1 of Title 41 shall apply to the Department of Defense except that section shall have no application to the acquisition of commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2 or to contracts the value of which is below the simplified acquisition threshold as defined in 10 U.S.C. § 2302(4).

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(j) SEC. 7309. RESTRICTIONS ON CONSTRUCTION OR REPAIR OF VESSELS IN FOREIGN SHIPYARDS.

(1) ~~(a)~~ Except as provided in subsection (b) paragraph (2), no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard.

<sup>6</sup>Letter from John J. Stocker, President, Shipbuilders Council of America, to Admiral Vincent, dated December 8, 1992, stated: "With respect to the proposed changes to 10 U.S.C. § 7309, that I understand would retain the essence of the statute, but would consolidate it under an omnibus Defense Trade Chapter, we have serious concerns that such a consolidation may simply be a prelude to the next phase in a continuous trend to ignore or circumvent the statutory requirements of 10 U.S.C. § 7309. . ."



(2) (b) The President may authorize exceptions to the prohibition in ~~subsection (a) paragraph (1)~~ when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress.

(3) ~~(A) (e) (1)~~ A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the homeport of which is in the United States may not be overhauled, repaired, or maintained in a shipyard outside the United States.

(B) ~~(2)~~ Subparagraph (A) ~~(1)~~ does not apply in the case of voyage repairs.

(4) ~~(d)~~ An inflatable boat or rigid inflatable boat, as defined by the Secretary of the Navy, is not a vessel for the purpose of the restriction in ~~subsection (a) paragraph (1)~~.

(5) ~~(e)~~ In the case of a naval vessel the homeport of which is not in the United States (or a territory of the United States), the Secretary of the Navy may not during the 15-month period preceding the planned reassignment of the vessel to a homeport in the United States (or a territory of the United States) begin any work for the overhaul, repair, or maintenance of the vessel that is scheduled to be for a period of more than six months.

## **7.1.8. 10 U.S.C. § 2631 and 46 U.S.C. App. § 1241**

### **Cargo Preference Act of 1904 Cargo Preference Act of 1954**

#### **7.1.8.1. Summary of the Law**

Provisions of 10 U.S.C. § 2631 restrict the ocean transportation of supplies bought for the Services to U.S. vessels provided the freight charges are not excessive or otherwise unreasonable. Although provisions of 46 U.S.C. App. 1241, concerning the transportation of Government personnel and certain cargoes, apply to DOD, the implementation of 10 U.S.C. § 2631 is much stricter, making the application of Title 46 provisions moot.

#### **7.1.8.2. Background of the Law**

The Cargo Preference Act of 1904<sup>1</sup> was revised by the enactment of this section primarily by substituting the word "supplies" for the words "coal, provisions, fodder, or supplies of any description," among other substitutions.<sup>2</sup> Although the Cargo Preference Act of 1954<sup>3</sup> is applicable to DOD as well, the scope of coverage under this section exceeds the 1954 Act's requirements.

#### **7.1.8.3. Law in Practice**

Authority under the Cargo Preference Act of 1904 has been delegated by the President to the Secretary of Defense<sup>4</sup> and is implemented within DOD by regulation.<sup>5</sup> There has been recent controversy over the DOD implementing clause which defines "supplies" and "subcontractor," for purposes of the Cargo Preference Act, as including in the former, not only end items but components as well, and in the latter, at any level below the prime contractor.<sup>6</sup> The DOD definition is based on a Department of Justice Memorandum which argued that the statutory language "bought for the [Services]" was controlling regardless of "the status of title of supplies at intermediate steps in the contracting process . . ." <sup>7</sup> A recent decision by the United States Court of Appeals for the Federal Circuit, however, casts some doubt on the inclusion of components in the DOD definition.<sup>8</sup>

<sup>1</sup>Apr. 28, 1904, ch. 1766, 33 Stat. 518.

<sup>2</sup>Aug. 10, 1956, ch. 1041, 70A Stat. 146.

<sup>3</sup>Aug. 26, 1954, ch. 936, 68 Stat. 832; *see also* 46 U.S.C. App. § 1241 - Transportation in American vessels of Government personnel and certain cargoes

<sup>4</sup>Memorandum of the President of the United States, Aug. 7, 1985, 50 F.R. 36565.

<sup>5</sup>DFARS Subpart 247.5.

<sup>6</sup>DFARS 252.247-7023.

<sup>7</sup>Memorandum of Assistant Attorney General Charles Cooper, Office of Legal Counsel, Department of Justice, Feb. 2, 1988.

<sup>8</sup>*Craft Machine Works, Inc. v. U.S.*, 926 F.2d 1110 (U.S.C.A. Fed. Cir., 1991) - reversed a U.S. Claims Court decision which had held that the contract's Cargo Preference Clause required transportation of completed cranes and components on U.S.-flag vessels.

Comment provided through the American Bar Association, Section of International Law, maintained that:

The application of this clause could require, for example, a prime contractor providing commercial automobiles to DOD to flow-down the CPA Clause to a supplier of radios for the automobiles, who, in turn, would be required to flow-down the Clause to the supplier of the radio components. The contract administration burden, alone, could be significant, outweighing any perceptible benefit to DOD to having the commercial components shipped on U.S. vessels.<sup>9</sup>

#### **7.1.8.4. Recommendation and Justification**

**Create exemptions to 10 U.S.C. § 2631 and 46 U.S.C. App. § 1241 for commercial items and simplified acquisitions.**

These statutes are predominately transportation-related and outside of the primary area of the Panel's interest. On the other hand, as stated to the American Bar Association for presentation to the Panel, if these statutes apply beyond final shipment of products to the Government, then they potentially create a substantial impediment to the acquisition of commercial items, whose components will often be on American soil before a contract is received that would attempt retroactively to restrict their transportation to U.S. vessels. Moreover, the Panel believes that it is unduly burdensome to require the administration of this statute for contracts smaller than the simplified acquisition threshold. Accordingly, the Panel recommends in Chapters 4 and 8 that commercial item and simplified acquisitions be exempt from these acts.

#### **7.1.8.5. Relationship to Objectives**

The Panel believes that this section has a tangential relationship to DOD acquisition, and by providing an exemption for commercial items and simplified acquisition, the conduct of DOD acquisition will be streamlined.

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<sup>9</sup>Letter from Kathleen Troy and Matthew McGrath, Co-Chairs, International Procurement Committee, American Bar Association, Section of International Law, to William E. Mounts, Defense Systems Management College, dated November 16, 1992, enclosing for submission to the Acquisition Law Advisory Panel a letter from Thomas M. Duffy, Corporate Counsel, Fujitsu America, Inc., dated October 20, 1992, concerning comment on the Cargo Preference Act.

## 7.1.9. 10 U.S.C. § 2327

### **Contracts: consideration of national security objectives**

#### **7.1.9.1. Summary of the Law**

This section requires a firm submitting a proposal to disclose any significant interest in the firm owned or controlled, directly or indirectly, by a foreign Government that has provided support for acts of international terrorism. Heads of agencies are precluded from entering into contracts greater than \$100,000 with firms disclosing such ownership or control except when the Secretary of Defense determines such action to be inconsistent with the national security objectives of the United States and subsequently reports that determination to Congress.

#### **7.1.9.2. Background of the Law**

Congress enacted this provision in 1986 because of a conflict between U.S. defense contracting procedures and foreign policy objectives.<sup>1</sup> The actual occurrence giving rise to the statute involved an Italian firm, partially owned by the Libyan Government, ending up as low bidder on a Government defense contract. Award of the contract to the Italian firm, when the Libyan Government was engaged in international terrorist activities against the U.S., was perceived as "inimical to U.S. foreign policy or national security."<sup>2</sup>

#### **7.1.9.3. Law in Practice**

Within DOD, this statutory section is implemented by regulation.<sup>3</sup> Similar provisions were enacted by the Defense Authorization Act of 1993 requiring that: (1) all defense contracts awarded to entities of foreign countries, involving access to a prescribed category of information, be reported to Congress; (2) the purchase of certain U.S. defense contractors by an entity controlled by a foreign Government be prohibited; and (3) the award of certain DOD and Energy Department national security contracts to companies owned by an entity controlled by a foreign Government be similarly prohibited.<sup>4</sup>

#### **7.1.9.4. Recommendations and Justification**

##### **Repeal section 2327.**

The Panel has established an analogous requirement for considering national security in its recommended new section 2x11(a)(9), which provides that national security objectives be considered in the award of DOD contracts for the purchase of foreign goods. The Panel

<sup>1</sup> Added by identical amendments, Pub. L. No. 99-500, 99-591, 99-661, 100 Stat. 1783-164, 3341-164, 3944.

<sup>2</sup> Conf. Rep. 99-661, pg. 270.

<sup>3</sup> DFARS 209.104-1(g) and 225.000-71.

<sup>4</sup> Pub. L. No. 102-484, §§ 835-8, 106 Stat. 2442.

recommends that the new section 2x11(a)(9), as supplemented by the provisions of the Defense Authorization Act of 1993, makes section 2327 redundant.

**7.1.9.5. Relationship to Objectives**

Repeal of this section furthers the Panel objective of streamlining the DOD acquisition laws.

## 7.2. INTERNATIONAL AND COOPERATIVE AGREEMENTS

### 7.2.0. Introduction

The only current procurement authority for the implementation of international and cooperative agreements is the statutory international agreements exception from the requirement, under the Competition in Contracting Act of 1984 (CICA),<sup>1</sup> to utilize other than competitive procedures in the award of U.S. Government contracts.<sup>2</sup> This exception for international agreements is qualified by the recent requirement that before it can be used, an appropriate justification and approval be secured from the competition advocate of the procuring activity concerned.<sup>3</sup>

Title 10 authorities for the implementation of international defense and cooperative agreements are presently contained in Chapters 138<sup>4</sup> and 148.<sup>5</sup> Chapter 138 addresses acquisition, cross-servicing, and cooperative agreements. By DOD Directive, the negotiation and conclusion of these agreements, on behalf of the department or Service concerned, is coordinated and approved between the Under Secretaries of Defense for Acquisition and Policy.<sup>6</sup> Chapter 148, on the other hand, is primarily concerned with the effects of international and cooperative agreements on the U.S. defense industrial base. The Defense Authorization Act of 1993 has completely rewritten this chapter placing responsibility for defense industrial base policies with a new National Defense Technology and Industrial Base Council.<sup>7</sup> The provisions relating to international agreements, offset policy and notification, and domestic source restrictions were, however, retained, renumbered, and placed in a new subchapter entitled "Miscellaneous Technology Base Policies and Programs."<sup>8</sup>

The impact of international cooperation with our allies and defense trade generally has been extensively studied and reported. For example, a recent General Accounting Office report on international procurement agreements pointed up the status of defense trade between the United States and the European allies.<sup>9</sup> Figure 7C., below,

. . . shows the annual U.S. procurements from the thirteen European NATO countries increased from about \$1 billion to approximately \$2.4 billion between the fiscal years 1983 and 1987.

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<sup>1</sup>10 U.S.C. § 2301 *et seq.*

<sup>2</sup>10 U.S.C. § 2304(c)(4).

<sup>3</sup>*Id.*, at (f)(2)(E).

<sup>4</sup>10 U.S.C. §§ 2341 *et seq.*

<sup>5</sup>10 U.S.C. §§ 2504 - 2508; *renumbered* §§ 2531 - 2535, Defense Authorization Act for FY 1993, Pub. L. No. 102-484, §§ 835-838, 106 Stat. 2442.

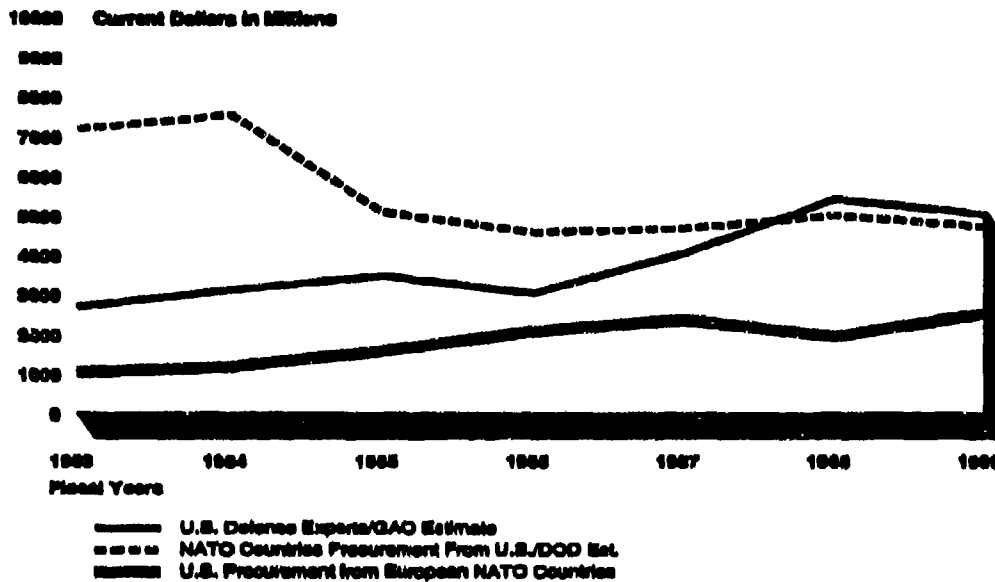
<sup>6</sup>DOD Directive 5530.3, June 11, 1987.

<sup>7</sup>Composed of the Secretary of Defense (Chairman), the Secretary of Commerce, and the Secretary of Energy.

<sup>8</sup>Defense Authorization Act for FY 1993, Pub. L. No. 102-484, §§ 4201 - 4272, 106 Stat. 2442.

<sup>9</sup>General Accounting Office, Report to Congressional Committees, International Procurement, NATO Allies' Implementation of Reciprocal Defense Agreements, GAO/NSIAD-92-126, March 1992

This figure declined to less than \$2 billion in fiscal year 1988 but rose to a new high of \$2.5 billion in fiscal year 1989.<sup>10</sup>



**Fig. 7C. US and European NATO Countries' Defense Trade Procurement Dollar Flows**

NOTE: European NATO countries' procurements reflect defense ministries' purchases.

The Report concluded that DOD had not adequately addressed recent initiatives in international agreements intended to promote fair treatment in international defense acquisition practice. DOD had also failed to assist U.S. contractors seeking defense business opportunities in Europe. The recently proposed NATO Code of Conduct in Defense Trade would address many of these concerns.

#### 7.2.0.1. NATO Code of Conduct in Defense Trade

Preceding the advent of the Trade Agreements Act of 1979, a whole body of defense trade practice evolved in domestic U.S. acquisition practice under bilateral reciprocal defense procurement agreements.<sup>11</sup> In a speech by former U.S. Ambassador to NATO William H. Taft IV,<sup>12</sup> the issue of a multilateral "Defense GATT" type arrangement for international defense trade was first raised and set the stage for serious discussion of the issue in NATO. The call resulted in the formation of a Defense Trade Study Group whose report led to the proposed Code of Conduct for Defense Trade in NATO.<sup>13</sup> The Code is meant to provide a moral and political commitment to improve the conditions of defense trade. The Code contains an Implementation

<sup>10</sup>*Id.*, at pg. 16

<sup>11</sup>The reciprocal procurement agreements generally address the bilateral removal of barriers to competition, the provision of requirements information, quality assurance, auditing, technology transfer, and methods for addressing potential contract disputes.

<sup>12</sup>Ambassador William H. Taft IV, "The Future of Defense and Industrial Cooperation in NATO", Speech, German Strategy Forum and the Institute for Policy Analysis, Bonn, GE, March 15, 1990.

<sup>13</sup>NATO Code of Conduct in Defense Trade (Draft), July 29, 1992.

Plan for reducing and eliminating barriers to defense trade and transfer of technology, while concurrently instituting transparent and non-discriminatory government defense procurement practices.

Other than basic research, the Code will cover research, development, and production, including in-service support and off-the-shelf contracting.<sup>14</sup> Particular defense procurement practices and procedures deemed essential in the Code include: the non-discriminatory treatment of suppliers within the market; qualification of suppliers; publication of and non-discriminatory access to bidding opportunities; bid solicitation; solicitation/tender evaluation criteria; contractor debrief and dispute settlement procedures; contract auditing procedures; quality control and quality assurance practices and procedures; protection of classified information and data; and intra-alliance technology transfer.<sup>15</sup>

#### **7.2.0.2. Effect of International Cooperative Agreements on the Defense Technology and Industrial Base**

As the world gets closer to addressing the need for a "defense GATT" type multilateral agreement, the effect of such an agreement on our national defense technology and industrial base must be addressed. Chapter 148 of Title 10 currently addresses the process for intra-agency review and coordination of international agreements with respect to the impact of such agreements on the U.S. defense technology and industrial base.<sup>16</sup> Mindful of the extensive revision to the statutes governing the industrial base by the Defense Authorization Act of 1993, the Panel's recommendation is that the National Defense Technology and Industrial Base Council consider fully coordinating their activities with the implementation of the new Chapter on Defense Trade and Cooperation.<sup>17</sup>

It is worthy of note here that the national defense technology and industrial base has now been defined by statute as including both the United States and Canada.<sup>18</sup> Panel deliberations pointed up not only the evolution of a North American defense industrial base, but also the special procurement relationship established by the U.S./Canada Free Trade Agreement of 1988, along with the recently concluded North American Free Trade Agreement. With regard to the latter, a recent report of the Office of Technology Assessment on the defense industrial base<sup>19</sup> highlighted the important defense trade relationship between the United States and Canada. As can be seen from Figure 7D., below,<sup>20</sup> the net defense trade balance between the United States and Canada remains a positive one in favor of the United States.

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<sup>14</sup>*Id.*, at ¶ 6, pg. 2.

<sup>15</sup>*Id.*, at ¶¶ 14-24, pgs. 4-7.

<sup>16</sup>10 U.S.C. § 2504, *renumbered* by the Defense Authorization Act for FY 1993 to § 2531, note 5, *supra*.

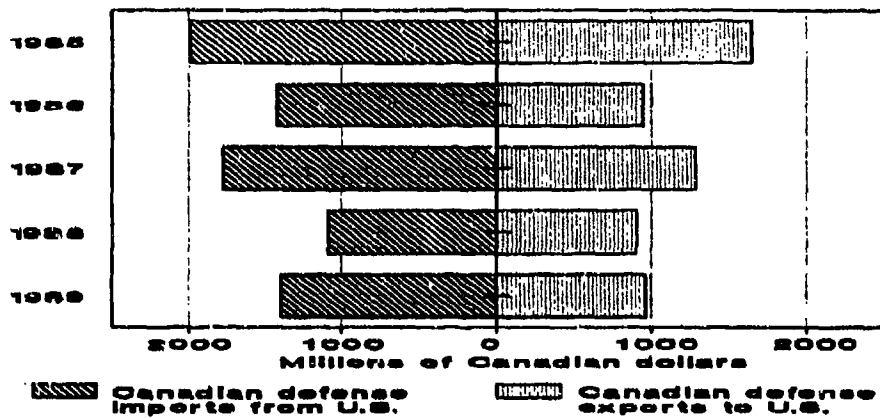
<sup>17</sup>*E.g.*, the Military-Civilian Integration and Technology Transfer Advisory Board provided for in § 4226 of the Defense Authorization Act for FY 1993, note 5, *supra*.

<sup>18</sup>*See* section 7.0.2, *supra*, notes 30 and 31.

<sup>19</sup>Congress of the United States Office of Technology Assessment, Redesigning Defense. Planning the Transition to the Future U.S. Defense Industrial Base, July 1991.

<sup>20</sup>*Id.*, Appendix A, at pg. 111.





**Fig. 7D. Canada-US Defense Trade Under the DD/DPSA Agreement**

SOURCE: James Ferguson, *Canadian Defense Trade and Europe: Methodological Concerns and Empirical Evidence*, Center for Studies in Defense Resources Management, Solicited Research Report #4 (Kingston, Canada: National Defense College, Fall 1990), Table VI.

The special relationship with Canada magnifies the importance of coordinating North American defense technology and industrial base issues with those involving regional and global defense trade and cooperation.

### 7.2.0.3. Overview of Subchapter Recommendations

The Panel has recommended changes to current authorities to increase the flexibility of the Secretary of Defense to enter into cooperative programs. In giving the Secretary authority in this area in the past, the Congress has restricted such flexibility by application of Chapter 137 of Title 10 and of the Arms Export Control Act. In order to better take advantage of cooperative program opportunities, the Secretary of Defense should have the flexibility to better adapt to the acquisition practices, rules, and procedures of our international partners and not have to treat our partners, who contribute a significant portion of a cooperative program costs, as customers pursuant to the sales procedures and rules of the Arms Export Control Act.

A section-by-section summary analysis of subchapter II recommendations follows:

#### Section 2x20. Definitions

In consolidating and reordering the sections concerning international and cooperative agreements, previously resident in disparate chapters of Title 10, various definitions applicable to the subchapter on international and cooperative agreements were consolidated in this section. Consistent with the recommended treatment afforded the various sections by the Panel, the definition of "cooperative research and development project," presently in 10 U.S.C. § 2350a, was deleted. The broader definition of "cooperative project" contained in 10 U.S.C. § 2350i was substituted instead.

Consistent with the consolidation of sections 2350a and 2350b into new section 2x21, the resulting subchapter definition now encompasses cooperative research, development, testing,

evaluation, production, and in-service support, and modifications to existing military equipment to meet U.S. military requirements. As well, the definition of "major ally of the United States" now includes member nations, NATO, and its subsidiary bodies.

A definition for the term "friendly foreign countries" was added. The term was derived from the definition afforded the term in 10 U.S.C. § 4542, which is now consolidated in new section 2x12.

#### **Section 2x21. Defense memoranda of understanding and related international agreements**

This section implements the policies currently found in 10 U.S.C. § 2504 taking into account certain considerations when making and implementing these international agreements, providing for intra-agency review of these agreements, and limiting the entry into such agreements when they would have a significant adverse effect on U.S. industry. The Panel recommended that the term "memorandum of understanding" currently used in section 2504 be expanded to the term "international agreement." The consolidated section 2x21 would thus encompass the Secretary's limitations on entering into such agreements, accompanied by the statutory treatment required of foreign contributions for cooperative projects, as presently contained in 10 U.S.C. § 2350i.

Included within the general framework of authorized international agreements are the reciprocal procurement MOUs that have been negotiated over the years between DOD and twenty-one separate countries. These agreements, previously published as Appendix T to the Defense Federal Acquisition Regulation Supplement, are now collectively maintained in a separate DOD volume.<sup>21</sup>

#### **Section 2x22. Offset policy; notification**

This section remains unchanged from the existing language of 10 U.S.C. § 2505. The Panel recommends retaining the required notification threshold of \$50 million contained in this section despite the recently enacted Defense Production Act Amendments of 1992,<sup>22</sup> which now provide for (1) an annual report on the impact of offsets prepared by the Secretary of Commerce; (2) a notice requirement for U.S. firms entering into a contract for the sale of a weapons system or defense-related item to a foreign country or firm if subject to an offset agreement exceeding \$5 million in value; and (3) consideration of the findings and recommendations in the Secretary of Commerce's annual report during bilateral and multilateral negotiations to minimize the effects of offsets.

#### **Section 2x31. Cooperative projects: allied countries**

The Panel recommendation was to consolidate 10 U.S.C. §§ 2350a and 2350b by creating a new section 2x31 addressing cooperative projects. Retention of the authority given SECDEF under section 2350a, other than the constraint that all U.S. funds be spent in the United States,

<sup>21</sup>Director of Defense Procurement, Reciprocal Procurement Agreements, Department of Defense, 1992.

<sup>22</sup>Pub. L. No. 102-558, 106 Stat. 4198.

combined with the flexibility to waive those provisions of U.S. acquisition law which may impede the successful execution of international cooperative projects, currently extended under section 2350b, provides for a balanced statute which encourages cooperative projects to improve conventional defense capabilities. The consolidation removes the current anomaly in the implementation of sections 2350a and 2350b where cooperative partners contributing equitably to a cooperative project are treated as though they were customers under a foreign military sales case.

Consolidating 10 U.S.C. § 2350b into the new section 2x31 retains the prohibition on the use of military or economic assistance grants or loans for the purpose of satisfying a foreign country's contribution to a cooperative project. The consolidation continues the general applicability of Chapter 137 of Title 10 to cooperative projects, while vesting in the Secretary the ability to waive those provisions necessary to the successful negotiation, conclusion, and execution of cooperative project.

The remaining portion of section 2350b, concerning delegation by the President to the Secretary of Defense of authority to conduct cooperative projects, was deleted in the consolidation by the Panel, as such authority has previously been delegated by Executive Order.<sup>23</sup>

#### **Section 2x32. Cooperative military airlift agreements: allied countries**

This section retains the language of 10 U.S.C. § 2350c; as well as the amendment contained in the Defense Authorization Act of 1993,<sup>24</sup> extending (1) the period for liquidation of accrued credits and liabilities from three months to twelve months consistent with the period provided for in section 2x55, below; and (2) specific country coverage to include agreements with Japan and the Republic of Korea.

#### **Section 2x33. Cooperative logistic support agreements: NATO countries**

This section would amend 10 U.S.C. § 2350d, with respect to Weapons System Partnership Agreements, by deleting subsections (d) and (e) dealing with the applicability of Chapter 137 and the Arms Export Control Act, respectively. These provisions defeated the very purpose for which the statute was originally enacted -- to increase flexibility in contracting under cooperative logistics support agreements with our allies -- and also make the section internally inconsistent, i.e. the authority provided by paragraphs (a), (b), and (c) are abrogated by the restrictions of paragraphs (d) and (e). As well, the applicability of Chapter 137 and the Arms Export Control Act were previously deleted in the recommended treatment afforded cooperative project agreements by the new requirements contained in consolidated sections 2x21 and 2x31, above.

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<sup>23</sup>Exec. Order No. 11958, Jan. 18, 1977, as amended by Exec. Order No. 12118, Feb. 6, 1979; Exec. Order No. 12163, Sept. 29, 1979; Exec. Order No. 12210, Apr. 16, 1980; Exec. Order No. 12321, Sept. 14, 1981; Exec. Order No. 12365, May 24, 1982; Exec. Order No. 12423, May 26, 1983; Exec. Order No. 12560, May 24, 1986.

<sup>24</sup>Pub. L. No. 102-484, § 1311, 106 Stat. 2442.

**Section 2x34. NATO Airborne Warning and Control System (AWACS) program:  
authority of Secretary of Defense**

This section retains the authority of the Secretary to waive specified procurement practices, contained in 10 U.S.C. § 2350e, NATO AWACS Program, through its recently extended expiration date of September 30, 1993.

**Repeal 10 U.S.C. § 2350h. Memorandums of agreement: Department of Defense  
ombudsman for foreign signatories**

As the role of ombudsman constitutes additional duty for the office concerned, discussions with the DOD Director of Foreign Contracting revealed little or no substantive use made of the services of the ombudsman by foreign governments. Other than a perception by the Israeli Government of a lack of DOD attention to the interests of foreign countries, there appears neither an interest by other Governments in establishing a reciprocal function, nor a wide-spread problem requiring a DOD office of ombudsman for foreign signatories. In times of constrained resources, the Panel did not believe it was appropriate to continue to use DOD funds to unilaterally assist foreign officials to aid their national contractors to compete with U.S. contractors.

## 7.2.1. 10 U.S.C. § 2504 renumbered as § 2531<sup>1</sup>

### Defense memoranda of understanding and related agreements

#### 7.2.1.1. Summary of the Law

This section provides that, in the negotiation or implementation of any memorandum of understanding between the Secretary of Defense, on behalf of the United States, and any foreign countries related to defense research, development, or production, the Secretary of Defense must consider the effect of the agreement on the U.S. defense industrial base and solicit comments from the Secretary of Commerce regarding the commercial effects of such an agreement. The Secretary of Commerce may seek interagency review and recommend to the President the renegotiation of existing agreements if there is a belief that the agreement might adversely effect the international competitiveness of U.S. industry. Such agreements may not be entered into if the President determines that the agreement has unacceptable adverse effects on U.S. industry.

#### 7.2.1.2. Background of the Law

This section was originally enacted by the DOD Authorization Act for 1989<sup>2</sup>, and has the same initial legislative history as section 2501. Initially, the section contained language generally requiring consultation with the Secretary of Commerce on such agreements. Subsequent amendment by the DOD Authorization Act for 1990 and 1991<sup>3</sup> specified greater detail in the role of the Secretary of Commerce in international armaments cooperation agreements, requiring that the Secretary of Defense consider the effects of such agreements on the U.S. defense industrial base.

The DOD Authorization Act for 1991<sup>4</sup> extended the application of this section to include reciprocal defense procurement agreements as international agreements which also must be reviewed by the Secretary of Commerce. The section was renumbered by the Defense Authorization Act of 1993 and placed in the completely revised Chapter 148, renamed "National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion."<sup>5</sup>

#### 7.2.1.3. Law in Practice

Within DOD, this section is implemented by Part 225 of the Defense Federal Acquisition Regulation Supplement<sup>6</sup> and DOD Directive 5530.3.<sup>7</sup> The latter requires an extensive and convoluted process for requesting authority to negotiate or conclude international agreements.

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<sup>1</sup>Pub. L. No. 102-484, §§ 4202(a), 106 Stat. 2315, 2659.

<sup>2</sup>Pub. L. No. 100-456, § 824; 102 Stat. 1918, 2019.

<sup>3</sup>Pub. L. No. 101-189, § 815(a); 103 Stat. 1352, 1500.

<sup>4</sup>Pub. L. No. 101-510, § 1453; 104 Stat. 1485, 1694.

<sup>5</sup>Note 1, *supra*.

<sup>6</sup>DFARS Subparts 225.1 through 225.3.

<sup>7</sup>DOD Directive 5530.3, International Agreements, June 11, 1987.

#### 7.2.1.4. Recommendations and Justification

The Panel has recommended retaining section 2504 as section 2x21 of its proposed statute. As consolidated, the following changes have been made to section 2504:

##### I

Amend section 2504 by replacing "memorandum of understanding" with the phrase "agreement" throughout.

Amend section 2504 throughout by inserting the adjective "international" before the word "agreement."

The Panel recommends that the term "international agreement" replace the term "memorandum of understanding" in section 2504 as the latter is merely a type of international agreement; for included within the general framework of authorized MOUs are the reciprocal procurement MOUs that have been negotiated over the years between DOD and twenty-one separate countries. These agreements previously published as Appendix T to the Defense Acquisition Regulation Supplement are now collectively maintained in a separate DOD volume.<sup>8</sup> It would seem that Congress intended to cover the broader scope of international agreements if the intra-agency review function is to have its full effect.<sup>9</sup> Continued use of the term "memorandum of understanding," therefore, generates confusion as to the coverage intended by the statute.

##### II

Amend section 2504 throughout, in the phrase "research, development, or production", by striking the word "or" and by adding the term ", or logistic support" after the word "production."

For purposes of new subchapter II, *International and Cooperative Agreements*, the term "cooperative project" is now defined in section 2x20. The recommended amendment achieves consistency with section 2x20, because not only does the term as now defined include in-service support, but also included would be new section 2x33<sup>10</sup> which specifically addresses *Cooperative Logistic Support Agreements*.

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<sup>8</sup>Director of Defense Procurement, *Reciprocal Procurement Agreements*, Department of Defense, 1992.

<sup>9</sup>However, international agreements does not include agreements such as Letters of Offer and Acceptance (LOAs) entered into during cases established under foreign military sales (FMS) practice, DOD Directive 5530.3, June 11, 1987. Note: Letters from John A. Richards, Deputy Assistant Secretary for Industrial Resource Administration, Department of Commerce, Bureau of Export Administration, dated August 27, and November 9, 1992 requested that LOAs be included within the definition of international agreements.

<sup>10</sup>Currently 10 U.S.C. § 2350d.

### 7.2.1.5. Relationship to Objectives

Amendment of this statute helps to establish a balance between an efficient process, the preservation of the national defense technology and industrial base, while ensuring full and open access to procurement systems intrinsic to international defense trade and cooperation.

### 7.2.1.6. Proposed Statute

#### §2x21. [2504/2531]. Defense memoranda of understanding and related international agreements

(a) CONSIDERATIONS IN MAKING AND IMPLEMENTING ~~MOUS AND RELATED INTERNATIONAL AGREEMENTS.~~--In the negotiation, renegotiation, and implementation of any existing or proposed international agreement, including a memorandum of understanding, ~~or any existing or proposed agreement related to a memorandum of understanding~~, between the Secretary of Defense, acting on behalf of the United States, and one or more foreign countries (or any instrumentality of a foreign country) relating to research, development, ~~or production, or logistics support~~ of defense equipment, or to the reciprocal procurement of defense items, the Secretary of Defense shall--

(1) consider the effects of such existing or proposed ~~memorandum of understanding or related international agreement~~ international agreement on the national defense technology and industrial base of the United States; and

(2) regularly solicit and consider comments and recommendations from the Secretary of Commerce with respect to the commercial implications of such ~~memorandum of understanding or related international agreement~~ international agreement and the potential effects of such ~~memorandum of understanding or related international agreement~~ international agreement on the international competitive position of United States industry.

(b) INTER-AGENCY REVIEW OF EFFECTS ON UNITED STATES INDUSTRY.--Whenever the Secretary of Commerce has reason to believe that an existing or proposed ~~memorandum of understanding or related international agreement~~ international agreement has, or threatens to have, a significant adverse effect on the international competitive position of United States industry, the Secretary may request an inter-agency review of the ~~memorandum of understanding or related international agreement~~ international agreement. If, as a result of the review, the Secretary determines that the commercial interests of the United States are not being served or would not be served by adhering to the terms of such existing ~~memorandum or related international agreement~~ international agreement or agreeing to such proposed ~~memorandum or related international agreement~~ international agreement, as the case may be, the Secretary shall recommend to the President the renegotiation of the existing ~~memorandum or related international agreement~~ international agreement or any modification to the proposed ~~memorandum of understanding or related international agreement~~ international agreement that he considers necessary to ensure an appropriate balance of interests.

(c) LIMITATION ON ENTERING INTO ~~MOUs AND RELATED~~ INTERNATIONAL AGREEMENTS.--~~An memorandum of understanding or related international~~ agreement referred to in subsection (a) may not be entered into or implemented if the President, taking into consideration the results of the interagency review, determines that such ~~memorandum of understanding or related international~~ agreement has or is likely to have a significant adverse effect on United States industry that outweighs the benefits of entering into or implementing such ~~memorandum of international~~ agreement.



## **7.2.2. 10 U.S.C. § 2505 renumbered as § 2532<sup>1</sup>**

### **Offset policy; notification**

#### **7.2.2.1. Summary of the Law**

This section provides that the President shall establish a comprehensive policy regarding defense-related offset agreements in contracts for the sale of U.S. defense items. The policy must address technology transfer issues, and issues regarding the implementation and effect of such agreements on the defense industrial base.<sup>2</sup>

Specifically, the section prohibits memoranda of understanding that would transfer U.S. defense technology pursuant to an offset where the implementation of such an agreement would adversely affect the U.S. defense industrial base and result in a substantial domestic financial loss. An exception is provided where such agreements would strengthen U.S. national security.<sup>3</sup>

The section further provides that a U.S. firm may protest to the Secretary of Defense a required technology transfer on the grounds that it would adversely affect the U.S. defense industrial base and result in significant financial loss. Finally, the section requires notification to the Secretary of Defense of proposed international sales with offset arrangements exceeding \$50,000,000; and provides definitions of "United States firm" and "foreign firm."

#### **7.2.2.2. Background of the Law**

This section was originally enacted by the DOD Authorization Act for 1989<sup>4</sup> as part of extensive provisions relating to the defense industrial base. The Senate version of that bill originally assigned these responsibilities jointly to the Secretaries of Defense, Commerce, State, and Treasury, and the U.S. Trade Representative.<sup>5</sup> In conference, the House receded with an amendment assigning them to the President, after consultation with the enumerated officials.<sup>6</sup> The conferees noted that the reporting requirements were not intended to duplicate, but rather incorporate, information already provided by other reporting requirements, such as those contained in the Defense Production Act.<sup>7</sup>

<sup>1</sup>Pub. L. No. 102-484, § 4202(a), 106 Stat. 2315, 2659.

<sup>2</sup>10 U.S.C. § 2505(a).

<sup>3</sup>10 U.S.C. § 2505(b). *See also* DFARS 225-7307, Implementation of offset arrangements negotiated pursuant to foreign military sales agreements.

<sup>4</sup>Pub. L. No. 100-456, 102 Stat. 2014.

<sup>5</sup>S. Rep. No. 100-326, 100th Congress, 2nd Sess. 106.

<sup>6</sup>H. Rept. 100-989, 100th Congress, 2nd Sess. 430.

<sup>7</sup>50 U.S.C. App. § 2099: *as amended* by the Defense Production Act Amendments of 1992, Pub. L. No. 102-558, 106 Stat. 4198, which now provide for (1) an annual report on the impact of offsets prepared by the Secretary of Commerce; (2) a notice requirement for U.S. firms entering into a contract for the sale of a weapons system or defense-related item to a foreign country or firm if subject to an offset agreement exceeding \$5 million in value; and (3) consideration of the findings and recommendations of the annual report during bilateral and multilateral negotiations to minimize the effects of offsets.

The section was renumbered by the Defense Authorization Act of 1993 and placed in the completely revised Chapter 148, renamed "National Defense Technology and Industrial Base, Defense Reinvestment, and Defense Conversion."<sup>8</sup>

### **7.2.2.3. Law in Practice**

Pursuant to the reporting provisions of the statute, as implemented by Executive Order, the responsibility for submission of annual reports on the impact of offsets has been delegated to the Director of the Office of Management and Budget.<sup>9</sup> Although only two such reports had been submitted by 1990, deficiencies at the time included a failure to address technology transfer and the effect of offsets on specific subsectors of the domestic economy.<sup>10</sup>

The 1991 Report does not correct these deficiencies; however, the Report does indicate that progress toward minimizing the effects of offsets was being made internationally.<sup>11</sup> The report noted that, within DOD, the issue of offsets was being pursued in the negotiation and re-negotiation of cooperative agreements and bilateral reciprocal procurement memoranda of understanding. Also noted was the North Atlantic Treaty Organization's Working Group on Defense Trade whose efforts have resulted in a draft NATO Code of Conduct in Defense Trade calling for the elimination of offsets.

### **7.2.2.4. Recommendations and Justification**

#### **Retain section 2505.**

The Panel recommended that section 2505 be retained as sections 2x20 (definitions) and 2x22 of the Panel's consolidated chapter on defense trade and cooperation, as it continues to adequately serve a valid defense acquisition purpose by requiring an analysis by the Secretary of Defense of the impact of offsets on the defense industrial base.

### **7.2.2.5. Relationship to Objectives**

Retention of this statute helps to establish a balance between an efficient process and the preservation of the national defense technology and industrial base, while ensuring full and open access to procurement systems intrinsic to international defense trade and cooperation.

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<sup>8</sup>Note 1, *supra*.

<sup>9</sup>Exec. Order No. 12661; *see also* note 5, *supra*.

<sup>10</sup>General Accounting Office, Military Exports, Implementation of Recent Offset Legislation, NSIAD-91-13, Dec., 1990.

<sup>11</sup>Office of Management and Budget, Negotiations Concerning Offsets in Military Exports, June 21, 1991.

## **7.2.2.6. Proposed Statute**

### **§ 2x22. [2505/2532]. Offset policy; notification**

(a) **ESTABLISHMENT OF OFFSET POLICY.**--The President shall establish, consistent with the requirements of this section, a comprehensive policy with respect to contractual offset arrangements in connection with the purchase of defense equipment or supplies which addresses the following:

(1) Transfer of technology in connection with offset arrangements.

(2) Application of offset arrangements, including cases in which United States funds are used to finance the purchase by a foreign government.

(3) Effects of offset arrangements on specific subsectors of the industrial base of the United States and for preventing or ameliorating any serious adverse effects on such subsectors.

(b) **TECHNOLOGY TRANSFER.**--(1) No official of the United States may enter into a memorandum of understanding or other agreement with a foreign government that would require the transfer of United States defense technology to a foreign country or a foreign firm in connection with a contract that is subject to an offset arrangement if the implementation of such memorandum or agreement would significantly and adversely affect the defense industrial base of the United States and would result in a substantial financial loss to a United States firm.

(2) Paragraph (1) shall not apply in the case of a memorandum of understanding or agreement described in paragraph (1) if the Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, determines that a transfer of United States defense technology pursuant to such understanding or agreement will result in strengthening the national security of the United States and so certifies to Congress.

(3) If a United States firm is required under the terms of a memorandum of understanding, or other agreement entered into by the United States with a foreign country, to transfer defense technology to a foreign country, the United States firm may protest the determination to the Secretary of Defense on the grounds that the transfer of such technology would adversely affect the defense industrial base of the United States and would result in substantial financial loss to the protesting firm. The Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, shall make the final determination of the validity of the protesting firm's claim.

(c) **NOTIFICATION REGARDING OFFSETS.**--If at any time a United States firm enters into a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm and such contract is subject to an offset arrangement exceeding \$50,000,000 in value, such firm shall notify the Secretary of Defense of the proposed sale. Notification shall be made under this subsection in accordance with regulations prescribed by the Secretary of Defense in consultation with the Secretary of Commerce.

### **7.2.3. 10 U.S.C. § 2350a**

#### **Cooperative research and development projects: allied countries**

##### **7.2.3.1. Summary of the Law**

The Secretary of Defense is permitted to enter into memoranda of agreement or other international agreements with major allied countries of the United States for conducting research and development projects involving defense equipment and munitions as long as the cost arrangements of the project are equitably shared. In such cooperative projects, U.S. funds may not be used to procure foreign equipment or services nor may the allied contribution be derived from U.S. military or economic assistance grants, loans, or other funding. The statute also provides authority for side-by-side testing of allied and U.S. conventional defense equipment, munitions, and technologies by the Deputy Director, Defense Research and Engineering (Test and Evaluation) in satisfaction of U.S. military requirements thereby encouraging our major allies to establish reciprocal programs.

In order to ensure that opportunities for cooperative research and development are adequately considered at an early stage in the acquisition process, the statute requires DOD to prepare an arms cooperation opportunities document (previously referred to as CODS; now a part of the integrated program summary report) for project review by the Defense Acquisition Board. The Undersecretary of Defense (Acquisition) ensures that the arms cooperation document is an integral part of the project's Mission Needs Statement.

Provision is made for both the Secretaries of Defense and State to jointly submit designation, and the criteria for designation, of major non-NATO allies for purposes of entering into cooperative research and development programs.

##### **7.2.3.2. Background of the Law**

Although originally established as the NATO Cooperative Research and Development Program,<sup>1</sup> this statutory section was added to Chapter 138 of Title 10 by section 931 (a)(2) of the Defense Authorization Act of 1990-1991.<sup>2</sup> It consolidated two previously existing statutes concerning, respectively, NATO and non-NATO cooperative programs and the two previous program elements entitled "Foreign Weapons Evaluation" and "NATO Cooperative Development Testing." Section 1053 of the Defense Authorization Act of 1992-1993 subsequently amended the statute by inserting language to provide for cooperative and side-by-side testing projects with other friendly foreign countries as well as major allies of the United States.<sup>3</sup> Section 843 of the Defense Authorization Act of 1993 amended subsection (c) by adding authority for the equitable sharing of the costs of claims.<sup>4</sup>

<sup>1</sup>Pub. L. No. 99-145, 99 Stat. 741.

<sup>2</sup>Pub. L. No. 101-189, § 931(a)(2), 103 Stat. 1352, 1531.

<sup>3</sup>Pub. L. No. 102-190, § 1053, 105 Stat. 1290, 1471.

<sup>4</sup>Pub. L. No. 102-484, § 843, 106 Stat. 2315, 2468.

The objective of this statute was to encourage cooperative research and development projects for conventional defense capabilities among both NATO and non-NATO allies, and subsequently expanded to include friendly foreign countries.<sup>5</sup> In addition to NATO allies, such friendly foreign countries presently include Australia, Egypt, Israel, Japan, and the Republic of Korea.<sup>6</sup> The rationale was that through such cooperative projects duplication of effort would be avoided, resulting in lower unit costs through an equitable sharing of the research and development. Where cooperative research and development projects were accompanied by larger joint production quantities, the supporting rationale was that each participant's overall defense budget would be enhanced.

### **7.2.3.3. Law in Practice**

This section is implemented by DOD Directive<sup>7</sup> and DFARS subpart 225.8.

For many years DOD and the Services relied upon statutory research and development authorities of the Secretary of Defense<sup>8</sup> and the military departments<sup>9</sup> along with the constitutional powers of the President to enter into cooperative R&D agreements with other Governments. Section 2350a(a) clearly provides authority that DOD formerly inferred from these authorities; however, use of this authority is subject to certain restrictions which have not applied to the previously inferred authority.

Cooperative research and development is an important segment of the defense acquisition process. The criteria DOD utilizes in approving cooperative research and development projects include: (a) improve current U.S. defense posture and capabilities; (b) secure follow-on support from within the Service or Agency; (c) demonstrate equity in funding with the allied participant(s) in a memorandum of understanding; and (d) address satisfactorily technology transfer and defense industrial base considerations to ensure sufficient benefits accrue to the U.S. defense industrial and technology base.<sup>10</sup>

While section 2350a specifically authorizes cooperative research and development projects that improve conventional defense capabilities, there are restrictions on the procurement of equipment and services under this authority which are not contained in section 2350b. In order to assure substantial participation in these projects, the restrictions are that funds made available for any authorized project may not be used to procure equipment or services from any foreign Government, research organization, or other foreign entity and that military or economic assistance grants, loans, or other funds may not constitute the allies' contribution to the project.

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<sup>5</sup>Popularly referred to as the "Nunn-Roth-Warner Amendment"; implemented at DFARS 225.871.

<sup>6</sup>Report to Congress: The International Cooperative Research and Development Program, Office of the Deputy Under Secretary of Defense (International Programs), Pentagon, Washington, DC, 1992.

<sup>7</sup>DOD Directive 3100.3, Cooperation with Allies in Research and Development of Defense Equipment.

<sup>8</sup>10 U.S.C. § 2358.

<sup>9</sup>10 U.S.C. §§ 4503, 7203, and 9503.

<sup>10</sup>Note 6, *supra*, at pgs. 5-6.

A consolidation of the two statutes must, of necessity, address the retention of these restrictions.<sup>11</sup>

#### **7.2.3.4. Recommendations and Justification**

### **I**

**Amend section 2350a throughout by striking the phrases "research and development" and "R&D" after the word "cooperative" and before the word "project;" and by striking subclause (h)(i)(1).**

By Executive Order, and under provision of section 2350b,<sup>12</sup> the Secretary of Defense has been delegated the authority to engage in joint production projects under section 27 of the Arms Export Control Act. This amendment would statutorily recognize the existing delegation and, consistent with the proposed Panel consolidation of sections 2350a and 2350b, as recommended below, obviate further need for the duplicative referrals to section 27 of the Arms Export Control Act.

For purposes of new subchapter II, *International and Cooperative Agreements*, the term "cooperative project" is now defined in section 2x20 using the definition presently contained in 10 U.S.C. § 2350i(e). The Panel recommended striking subparagraph (h)(i)(1) of section 2350a as redundant.

### **II**

**Amend subsection (d) by striking in the heading the phrase "Restrictions on procurement of " and inserting in lieu thereof the phrase "Acquisition of defense"; and by striking paragraph (1).**

Although the United States has entered into numerous cooperative R&D projects with its allies under both the inherent authority cited above and section 27 of the Arms Export Control Act, the process has not been an easy one. To a greater degree than its allies, the United States must operate under a number of restrictions [e.g. Arms Export Control Act, the Competition in Contracting Act, the "Buy U.S." provision of section 2350a(d), among others] that make reaching agreement with our allies difficult. The United States must insist that such restrictions be incorporated into any agreement and are complied with, while our partners point out that they are sovereign nations providing an equitable share of the cost of the project. As such, our allies often object to our restrictions and, in fact, insist on such offsetting principles as work share corresponding to cost share -- meaning work in their countries corresponding to their funding contribution. In the past DOD has overcome such obstacles by applying pressure to our partners

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<sup>11</sup>Memorandum from Larry D. Anderson, LTC, JAGC, Legal Officer, U.S. Army Materiel Command, to William E. Mounts, DSMC CM-AI, dated 1 September 1992.

<sup>12</sup>See analysis for 10 U.S.C. § 2350b, section 7.2.4. of this Chapter.

and insisting that the prime contractor be charged with dividing the work by applying evaluation criteria to score how well the competing prime contractors complied with this requirement.

In those cases funded under section 2350a and its predecessor provisions, the United States must ensure that all funding goes to U.S. sources and in-house effort. This reduces U.S. flexibility in negotiating international R&D projects, especially in those situations where the U.S. equitable share may be greater than those of our allied partners. In the past, as well, when the U.S. enjoyed a dominant role, pressure could be applied to our allies to get them to accept our restrictions. In the future, however, this is most likely not going to be the case, and to the extent that greater use is to be made of cooperative projects, the U.S. requires the flexibility to accommodate the valid concerns and requirements of our partners. Accordingly, the Panel recommends the repeal of paragraph 2350a(d)(1).

### III

#### **Consolidate sections 2350a and 2350b as new section 2x31**

The Panel recommends the consolidation of sections 2350a with section 2350b, as new section 2x31, *Cooperative Projects: Allied Countries*. This consolidation would provide complete authority and flexibility to the Secretary of Defense to conduct cooperative projects in Title 10 without the need for reference to section 27 of the Arms Export Control Act. The authority to conduct cooperative production projects is added to the authority to conduct cooperative research and development projects, now in section 2350a, combined with the flexibility to waive those provisions of U.S. law which may impede the successful execution of international cooperative projects, as well as other authorities now in section 2350b.

Conducting cooperative programs solely under the auspices of section 27 of the Arms Export Control Act ties such projects to that Act and its procedures and sales philosophies, with the unfortunate result that our partners who jointly fund a cooperative project are often placed in the position of customers rather than partners. Cooperative project authority outside the Arms Export Control Act will allow DOD to execute cooperative projects outside the foreign military sales structure.

While the Panel cannot point to an instance where a cooperative project could not be concluded because of current restrictions and foreign military sales procedures, there are numerous instances where our major allies have complained bitterly about the application of U.S. rules and foreign military sales procedures to jointly funded cooperative projects.<sup>13</sup> To the extent that DOD is to emphasize cooperative projects in the future, and to the extent that the United States may no longer be able to impose its requirements as the dominant partner, DOD should be given greater flexibility to accommodate the requirements of our partners.

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<sup>13</sup> Anecdotal reference related by Anthony Gamboa, Panel member, concerning his personal experiences during international cooperative project negotiations on the Multiple Launch Rocket System (MLRS), between France, Germany, the United Kingdom, and the United States, and on Autonomous Guided Munitions, between several NATO member nations, and the experience of the Army in negotiating the Future Tank Main Armament Agreement with France, Germany, and the United Kingdom.

#### IV

### **Consolidate definitions contained in clause 2350a(i) into new section 2x20.**

In an effort to streamline and consolidate international defense acquisition statutes into a new Chapter 1XX, *Defense Trade and Cooperation*, all definitions relative to subchapter II, *International and Cooperative Agreements*, have been relocated to an introductory new section 2x20, *Definitions*.

#### **7.2.3.5. Relationship to Objectives**

Amendment and consolidation of these sections would establish a balance between an efficient process with full and open access to the procurement system in international defense cooperative projects.

#### **7.2.3.6. Proposed Statute**

~~§2x31 Sec. 2350a, 2350b.~~ **Cooperative research and development projects: allied countries**

##### **(a) Authority to engage in cooperative R&D projects**

The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more major allies of the United States for the purpose of conducting cooperative ~~research and development~~ projects on defense equipment and munitions.

##### **(b) Requirement that projects improve conventional defense capabilities**

(1) The Secretary of Defense may not enter into a memorandum of understanding (or other formal agreement) to conduct a cooperative ~~research and development~~ project under this section unless the Secretary determines that the proposed project will improve, through the application of emerging technology, the conventional defense capabilities of NATO or the common conventional defense capabilities of the United States and its major non-NATO allies.

(2) The authority of the Secretary to make a determination under paragraph (1) may only be delegated to the Deputy Secretary of Defense or the Under Secretary of Defense for Acquisition.

##### **(c) Cost sharing**

Each cooperative ~~research and development~~ project entered into under this section shall require sharing of the costs of the project (including the costs of claims) between the participants on an equitable basis.



(d) ~~Restrictions on procurement of~~ Acquisition of defense equipment and services

~~(1) In order to assure substantial participation on the part of the major allies of the United States in cooperative research and development projects, funds made available for such projects may not be used to procure equipment or services from any foreign government, foreign research organization, or other foreign entity.~~

(1)(2) A major ally of the United States may not use any military or economic assistance grant, loan, or other funds provided by the United States for the purpose of making that ally's contribution to a cooperative ~~research and development~~ program entered into with the United States under this section.

(2)(A) Except as provided in ~~subsection (e) subparagraph (C)~~, chapter 137 of this title shall apply to ~~such contracts (referred to in paragraph (1)) entered into~~ contracts for the acquisition of defense equipment and services by the Secretary of Defense. Except to the extent waived under ~~subsection (e) subparagraph (C) of this subsection~~ or some other provision of law, all other provisions of law relating to procurement, if otherwise applicable, shall apply to such contracts entered into by the Secretary of Defense.

~~(B) (b)~~ When contracting or incurring obligations ~~under section 27(d) of the Arms Export Control Act~~ for cooperative projects, the Secretary of Defense may require subcontracts to be awarded to particular subcontractors in furtherance of the cooperative project.

~~(C) (e)~~ (1) Subject to paragraph (2), when entering into contracts or incurring obligations ~~under section 27(d) of the Arms Export Control Act~~ outside the United States, the Secretary of Defense may waive with respect to any such contract or subcontract the application of any provision of law, other than a provision of the Arms Export Control Act or section 2304 of this title, that specifically--

(i) ~~(A)~~ prescribe procedures to be followed in the formation of contracts;

(ii) ~~(B)~~ prescribe terms and conditions to be included in contracts;

(iii) ~~(C)~~ prescribe requirements for or preferences to be given to goods grown, produced, or manufactured in the United States or in United States Government-owned facilities or for services to be performed in the United States; or

(iv) ~~(D)~~ prescribe requirements regulating the performance of contracts.

(2) A waiver may not be made under paragraph (1) unless the Secretary determines that the waiver is necessary to ensure that the cooperative project will significantly further standardization, rationalization, and interoperability.

(3) The authority of the Secretary to make waivers under this subsection may be delegated only to the Deputy Secretary of Defense or the Acquisition Executive designated for the Office of the Secretary of Defense.

~~(D)(e)~~(1) In carrying out a cooperative project under ~~section 27 of the Arms Export Control Act~~, the Secretary of Defense may agree that a participant (other than the United States) may make a contract for requirements of the United States under the project if the Secretary determines that such a contract will significantly further standardization, rationalization, and interoperability. Except to the extent waived under this section or under any other provision of law, the Secretary shall ensure that such contract will be made on a competitive basis and that United States sources will not be precluded from competing under the contract.

(2) If a participant (other than the United States) in a cooperative project makes a contract on behalf of such project to meet the requirements of the United States, the contract may permit the contracting party to follow its own procedures relating to contracting.

~~(e)(f)~~ In carrying out a cooperative project, the Secretary of Defense may also agree to the disposal of property that is jointly acquired by the members of the project without regard to any laws of the United States applicable to the disposal of property owned by the United States. Disposal of such property may include a transfer of the interest of the United States in such property to one of the other governments participating in the cooperative agreement or the sale of such property. Payment for the transfer or sale of any interest of the United States in any such property shall be made in accordance with the terms of the cooperative agreement.

~~(f)(g)~~ Nothing in this section shall be construed as authorizing--

(1) the Secretary of Defense to waive any of the financial management responsibilities administered by the Secretary of the Treasury; or

(2) to waive the cargo preference laws of the United States, including section 2631 of this title and section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. App. 1241(b)).

~~(g)(e)~~ Cooperative opportunities document

(1)(A) In order to ensure that opportunities to conduct cooperative ~~research and development~~ projects are considered at an early point during the formal development review process of the DOD in connection with any planned project of the Department, the Under Secretary of Defense for Acquisition shall prepare an arms cooperation opportunities document with respect to that project for review by the Defense Acquisition Board at formal meetings of the Board.

(B) The Under Secretary shall also prepare an arms cooperation opportunities document for review of each new project for which a document known as a Mission Need Statement is prepared.

(2) An arms cooperation opportunities document referred to in paragraph (1) shall include the following:

(A) A statement indicating whether or not a project similar to the one under consideration by the Department of Defense is in development or production by one or more of the major allies of the United States.

(B) If a project similar to the one under consideration by the Department of Defense is in development or production by one or more major allies of the United States, an assessment by the Under Secretary of Defense for Acquisition as to whether that project could satisfy, or could be modified in scope so as to satisfy, the military requirements of the project of the United States under consideration by the Department of Defense.

(C) An assessment of the advantages and disadvantages with regard to program timing, developmental and life cycle costs, technology sharing, and Rationalization, Standardization, and Interoperability (RSI) of seeking to structure a cooperative development program with one or more major allies of the United States.

(D) The recommendation of the Under Secretary as to whether the Department of Defense should explore the feasibility and desirability of a cooperative development program with one or more major allies of the United States.

**(h)(~~F~~) Reports to Congress**

(1) Not later than March 1 of each year, the Under Secretary of Defense for Acquisition shall submit to the Speaker of the House of Representatives and the Committees on Armed Services and Appropriations of the Senate a report on cooperative ~~research and development~~ projects under this section. Each such report shall include--

(A) a description of the status, funding, and schedule of existing projects carried out under this section for which memoranda of understanding (or other formal agreements) have been entered into; and

(B) a description of the purpose, funding, and schedule of any new projects proposed to be carried out under this section (including those projects for which memoranda of understanding (or other formal agreements) have not yet been entered into) for which funds have been included in the budget submitted to Congress pursuant to section 1105 of Title 31 for the fiscal year following the fiscal year in which the report is submitted.

(2) The Secretary of Defense and the Secretary of State, whenever they consider such action to be warranted, shall jointly submit to the Committees on Armed Services and Foreign Relations of the Senate and to the Committees on Armed Services and Foreign Affairs of the House of Representatives a report--

(A) enumerating those countries to be added to or deleted from the existing designation of countries designated as major non-NATO allies for purposes of this section; and

(B) specifying the criteria used in determining the eligibility of a country to be designated as a major non-NATO ally for purposes of this section.

~~(3)(A)(d)(1)~~ (1) The Secretary of Defense shall notify the Congress each time he requires that a prime contract be awarded to a particular prime contractor or that a subcontract be awarded to a particular subcontractor to comply with a cooperative agreement. The Secretary shall include in each such notice the reason for exercising his authority to designate a particular contractor or subcontractor, as the case may be.

~~(B)(2)~~ (2) The Secretary shall also notify the Congress each time he exercises a waiver under subsection (c) and shall include in such notice the particular provision or provisions of law that were waived.

~~(i)(g)~~ Side-by-side testing

(1) It is the sense of Congress--

(A) that the Secretary of Defense should test conventional defense equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries to determine the ability of such equipment, munitions, and technologies to satisfy United States military requirements or to correct operational deficiencies; and

(B) that while the testing of nondevelopmental items and items in the late state of the development process are preferred, the testing of equipment, munitions, and technologies may be conducted to determine procurement alternatives.

(2) The Secretary of Defense may acquire equipment, munitions, and technologies of the type described in paragraph (1) for the purpose of conducting the testing described in that paragraph.

(3) The Deputy Director, Defense Research and Engineering (Test and Evaluation) shall notify the Speaker of the House of Representatives and the Committees on Armed Services and on Appropriations of the Senate of the Deputy Director's intent to obligate funds made available to carry out this subsection not less than 30 days before such funds are obligated.

(4) The Secretary of Defense shall submit to Congress each year, not later than March 1, a report containing information on--

(A) the equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries that were evaluated under this subsection during the previous fiscal year;

(B) the obligation of any funds under this subsection during the previous fiscal year; and

(C) the equipment, munitions, and technologies that were tested under this subsection and procured during the previous fiscal year.

~~(j)(h)~~ Secretary to encourage similar programs

The Secretary of Defense shall encourage major allies of the United States to establish programs similar to the one provided for in this section.

~~(i) Definitions--In this section:~~

~~(1) The term "cooperative research and development project" means a project involving joint participation by the United States and one or more major allies of the United States under a memorandum of understanding (or other formal agreement) to carry out a joint research and development program--~~

~~(A) to develop new conventional defense equipment and munitions; or~~

~~(B) to modify existing military equipment to meet United States military requirements.~~

[Consolidate into new section 2x20.]

(2) The term "major ally of the United States" means--

(A) a member nation of the North Atlantic Treaty Organization (other than the United States); or

(B) a major non-NATO ally.

(3) The term "major non-NATO ally" means a country (other than a member nation of the North Atlantic Treaty Organization) that is designated as a major non-NATO ally for purposes of this section by the Secretary of Defense with the concurrence of the Secretary of State.

## **7.2.4. 10 U.S.C. § 2350b**

### **Cooperative projects under Arms Export Control Act: acquisition of defense equipment**

#### **7.2.4.1. Summary of the Law**

As delegated by the President<sup>1</sup>, the Secretary of Defense (SECDEF) is authorized to administer cooperative projects carried out under the auspices of the Arms Export Control Act.<sup>2</sup> The authority to administer contracts and obligations incurred in such projects is to be generally covered by Chapter 137 of Title 10 except where SECDEF, in furtherance of rationalization, standardization, and interoperability (RSI), specifically waives: (a) procedures to be followed in the formation of contracts; (b) terms and conditions to be included in contracts; (c) requirements for domestic source restrictions or product/services preferences; or (d) requirements for regulating the performance of contracts.

SECDEF is further permitted to allow a participant in a cooperative project to contract for U.S. requirements if a determination is made that the contract will significantly further RSI. However, if such a contract is contemplated, it must be made on a competitive basis and U.S. sources are not to be precluded from competing under the contract unless a waiver has been granted by SECDEF. As an alternative, the participant is also permitted to follow its own procedures relating to contracting. Provision in the statute is made for the disposal of property which is jointly acquired under the project, including transfer or sale of the U.S. interest to the other participants, without regard to U.S. laws normally applicable to the disposal of U.S. property.

The only limitations imposed on SECDEF's procurement waiver authority in cooperative projects are: (1) those financial management responsibilities administered by the Secretary of the Treasury; and (2) the cargo preference laws of the United States.

#### **7.2.4.2. Background of the Law**

The original section was added to Chapter 138 of Title 10 as the "NATO cooperative projects" provision by section 1102(b)(1) of the Defense Authorization Act of 1986.<sup>3</sup> Then sections 1103(b)(1) and (2)(A) of the Defense Procurement Improvement Act of 1986<sup>4</sup> amended the provisions of section 27 of the Arms Export Control Act to extend authority for NATO cooperative projects to projects with other friendly countries, and was originally codified as the "Non-NATO cooperative projects" provision limited in scope to Australia, Israel, Japan, and the

<sup>1</sup>Exec. Order No. 11958, Jan. 18, 1977, *as amended* by Exec. Order No. 12118, Feb. 6, 1979; Exec. Order No. 12163, Sept. 29, 1979; Exec. Order No. 12210, Apr. 16, 1980; Exec. Order No. 12321, Sept. 14, 1981; Exec. Order No. 12365, May 24, 1982; Exec. Order No. 12423, May 26, 1983; Exec. Order No. 12560, May 24, 1986.

<sup>2</sup>22 U.S.C. § 2767(d).

<sup>3</sup>Pub. L. No. 99-145, 99 Stat. 710.

<sup>4</sup>Pub. L. No. 99-661, 100 Stat. 3963, 3993.

Republic of Korea. Subsequent amendment by section 931 of the Defense Authorization Act of 1990-1991<sup>5</sup> merged two existing program element provisions into a single section of Title 10,<sup>6</sup> while renumbering this section as 2350b, and adapting the section heading to its current title.

#### **7.2.4.3. Law in Practice**

Implementation of cooperative agreements by the SECDEF under DFARS Subpart 225.8 and provisions of section 27 of the Arms Export Control Act specifically permit: (a) the use of cooperative participant requirements that subcontracts be awarded to particular subcontractors; (b) agreement that disposal of jointly acquired property be accomplished without regard to standard U.S. property disposal laws; and (c) waiver of the applicability of certain acquisition laws during the conduct of the cooperative project. In the latter regard, specific authority is granted to waive procedures in the formation of contracts, contract terms and conditions, domestic source restrictions, domestic product preferences, and requirements regulating the performance of contracts.<sup>7</sup> A comment from the U.S. Navy requested that the waiver authority under section 2350b should be extended to cooperative projects conducted under the authority of section 2350a.<sup>8</sup>

As well, section 2350b specifically authorizes cooperative research and development projects, while delegated the SECDEF authority under section 27 of the Arms Export Control Act recognizes the additional grant to enter into joint production projects. It has always been a legislative anomaly that the SECDEF was directly authorized to conduct cooperative research and development projects under provisions of section 2350a; but for the SECDEF to engage in joint production projects, resort had to be made to delegated 2350b authority derived from section 27 of the Arms Export Control Act.

#### **7.2.4.4. Recommendations and Justification**

##### **I**

**Amend section 2350b by striking paragraph (a)(1) and paragraph (d)(3); and in paragraph (a)(2), by striking the phrase "such contracts (referred to in paragraph (1)) entered into" and inserting in lieu thereof the phrase "contracts for the acquisition of defense;" and by redesignating paragraph (a)(2) as paragraph (2); and by striking throughout the phrase "under section 27(d) of the Arms Export Control Act."**

By Executive Order, the Secretary of Defense has been delegated the authority to engage in cooperative research and development projects and fulfill the reporting requirements under

<sup>5</sup>Pub. L. No. 101-189, 103 Stat. 1352, 1531.

<sup>6</sup>10 U.S.C. § 2350a.

<sup>7</sup>10 U.S.C. § 2350b(c)(1).

<sup>8</sup>Memorandum for the Executive Secretary, DOD Advisory Panel on Streamlining and Codifying Law, from Victoria M. Herman, Assistant Counsel, Navy International Programs Office, dated 17 September 1992.

section 27 of the Arms Export Control Act. This amendment would statutorily recognize the existing delegation; and, consistent with the proposed Panel consolidation of sections 2350a and 2350b recommended below, obviate further need for the duplicative referral to section 27(d) of the Arms Export Control Act.

## II

### **Consolidate sections 2350a and 2350b as new section 2x31.**

The Panel recommends the consolidation of sections 2350a with section 2350b, as new section 2x31, *Cooperative Projects: Allied Countries*. This consolidation would provide complete authority and flexibility to the Secretary of Defense to conduct cooperative projects in Title 10 without the need for reference to section 27 of the Arms Export Control Act. The authority to conduct cooperative production projects is added to the authority to conduct cooperative research and development projects, now in section 2350a, combined with the flexibility to waive those provisions of U.S. law which may impede the successful execution of international cooperative projects, as well as other authorities now in section 2350b.

Conducting cooperative programs solely under the auspices of section 27 of the Arms Export Control Act ties such projects to that Act and its procedures and sales philosophies, with the unfortunate result that our partners who jointly fund a cooperative project are often placed in the position of customers rather than partners. Cooperative project authority outside the Arms Export Control Act will allow DOD to execute cooperative projects outside the foreign military sales structure.

While the Panel cannot point to an instance where a cooperative project could not be concluded because of current restrictions and foreign military sales procedures, there are numerous instances where our major allies have complained bitterly about the application of U.S. rules and foreign military sales procedures to jointly funded cooperative projects.<sup>9</sup> To the extent that DOD is to emphasize cooperative projects in the future, and to the extent that the United States may no longer be able to impose its requirements as the dominant partner, DOD must be given greater flexibility to accommodate the requirements of our partners.

#### **7.2.4.5. Relationship to Objectives**

Amendment and consolidation of this statute would establish a balance between an efficient process with full and open access to the procurement system in international defense cooperative projects.

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<sup>9</sup>Note 13, *supra*, section 7.2.3. of this Report.



#### 7.2.4.6. Proposed Statute

#### ~~§2351~~ ~~Sec. 2350a./2350b.~~ Cooperative research and development projects: allied countries

##### (a) Authority to engage in cooperative R&D projects

The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more major allies of the United States for the purpose of conducting cooperative research and development projects on defense equipment and munitions.

##### (b) Requirement that projects improve conventional defense capabilities

(1) The Secretary of Defense may not enter into a memorandum of understanding (or other formal agreement) to conduct a cooperative research and development project under this section unless the Secretary determines that the proposed project will improve, through the application of emerging technology, the conventional defense capabilities of NATO or the common conventional defense capabilities of the United States and its major non-NATO allies.

(2) The authority of the Secretary to make a determination under paragraph (1) may only be delegated to the Deputy Secretary of Defense or the Under Secretary of Defense for Acquisition.

##### (c) Cost sharing

Each cooperative research and development project entered into under this section shall require sharing of the costs of the project (including the costs of claims) between the participants on an equitable basis.

##### (d) ~~Restrictions on procurement of~~ Acquisition of defense equipment and services

~~(1) In order to assure substantial participation on the part of the major allies of the United States in cooperative research and development projects, funds made available for such projects may not be used to procure equipment or services from any foreign government, foreign research organization, or other foreign entity.~~

(1)(2) A major ally of the United States may not use any military or economic assistance grant, loan, or other funds provided by the United States for the purpose of making that ally's contribution to a cooperative research and development program entered into with the United States under this section.

(2)(A) Except as provided in subsection (e) subparagraph (C), chapter 137 of this title shall apply to ~~such contracts (referred to in paragraph (1)) entered into~~ contracts for the acquisition of defense equipment and services by the Secretary of Defense. Except to the extent waived under ~~subsection (e) subparagraph (C) of this subsection~~ or some other provision of law,

all other provisions of law relating to procurement, if otherwise applicable, shall apply to such contracts entered into by the Secretary of Defense.

~~(B)~~ ~~(b)~~ When contracting or incurring obligations ~~under section 27(d) of the Arms Export Control Act~~ for cooperative projects, the Secretary of Defense may require subcontracts to be awarded to particular subcontractors in furtherance of the cooperative project.

~~(C)~~ ~~(c)~~ (1) Subject to paragraph (2), when entering into contracts or incurring obligations ~~under section 27(d) of the Arms Export Control Act~~ outside the United States, the Secretary of Defense may waive with respect to any such contract or subcontract the application of any provision of law, other than a provision of the Arms Export Control Act or section 2304 of this title, that specifically--

(i) ~~(A)~~ prescribe procedures to be followed in the formation of contracts;

(ii) ~~(B)~~ prescribe terms and conditions to be included in contracts;

(iii) ~~(C)~~ prescribe requirements for or preferences to be given to goods grown, produced, or manufactured in the United States or in United States Government-owned facilities or for services to be performed in the United States; or

(iv) ~~(D)~~ prescribe requirements regulating the performance of contracts.

(2) A waiver may not be made under paragraph (1) unless the Secretary determines that the waiver is necessary to ensure that the cooperative project will significantly further standardization, rationalization, and interoperability.

(3) The authority of the Secretary to make waivers under this subsection may be delegated only to the Deputy Secretary of Defense or the Acquisition Executive designated for the Office of the Secretary of Defense.

~~(D)~~~~(e)~~(1) In carrying out a cooperative project ~~under section 27 of the Arms Export Control Act~~, the Secretary of Defense may agree that a participant (other than the United States) may make a contract for requirements of the United States under the project if the Secretary determines that such a contract will significantly further standardization, rationalization, and interoperability. Except to the extent waived under this section or under any other provision of law, the Secretary shall ensure that such contract will be made on a competitive basis and that United States sources will not be precluded from competing under the contract.

(2) If a participant (other than the United States) in a cooperative project makes a contract on behalf of such project to meet the requirements of the United States, the contract may permit the contracting party to follow its own procedures relating to contracting.

~~(e)~~~~(f)~~ In carrying out a cooperative project, the Secretary of Defense may also agree to the disposal of property that is jointly acquired by the members of the project without regard to any

laws of the United States applicable to the disposal of property owned by the United States. Disposal of such property may include a transfer of the interest of the United States in such property to one of the other governments participating in the cooperative agreement or the sale of such property. Payment for the transfer or sale of any interest of the United States in any such property shall be made in accordance with the terms of the cooperative agreement.

~~(f)~~(e) Nothing in this section shall be construed as authorizing--

(1) the Secretary of Defense to waive any of the financial management responsibilities administered by the Secretary of the Treasury; or

(2) to waive the cargo preference laws of the United States, including section 2631 of this title and section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. App. 1241(b)).

~~(g)~~(e) Cooperative opportunities document

(1)(A) In order to ensure that opportunities to conduct cooperative ~~research and development~~ projects are considered at an early point during the formal development review process of the Department of Defense in connection with any planned project of the Department, the Under Secretary of Defense for Acquisition shall prepare an arms cooperation opportunities document with respect to that project for review by the Defense Acquisition Board at formal meetings of the Board.

(B) The Under Secretary shall also prepare an arms cooperation opportunities document for review of each new project for which a document known as a Mission Need Statement is prepared.

(2) An arms cooperation opportunities document referred to in paragraph (1) shall include the following:

(A) A statement indicating whether or not a project similar to the one under consideration by the Department of Defense is in development or production by one or more of the major allies of the United States.

(B) If a project similar to the one under consideration by the Department of Defense is in development or production by one or more major allies of the United States, an assessment by the Under Secretary of Defense for Acquisition as to whether that project could satisfy, or could be modified in scope so as to satisfy, the military requirements of the project of the United States under consideration by the Department of Defense.

(C) An assessment of the advantages and disadvantages with regard to program timing, developmental and life cycle costs, technology sharing, and Rationalization, Standardization, and Interoperability (RSI) of seeking to structure a cooperative development program with one or more major allies of the United States.

(D) The recommendation of the Under Secretary as to whether the Department of Defense should explore the feasibility and desirability of a cooperative development program with one or more major allies of the United States.

~~(h)(f)~~ Reports to Congress

(1) Not later than March 1 of each year, the Under Secretary of Defense for Acquisition shall submit to the Speaker of the House of Representatives and the Committees on Armed Services and Appropriations of the Senate a report on cooperative ~~research and development~~ projects under this section. Each such report shall include--

(A) a description of the status, funding, and schedule of existing projects carried out under this section for which memoranda of understanding (or other formal agreements) have been entered into; and

(B) a description of the purpose, funding, and schedule of any new projects proposed to be carried out under this section (including those projects for which memoranda of understanding (or other formal agreements) have not yet been entered into) for which funds have been included in the budget submitted to Congress pursuant to section 1105 of Title 31 for the fiscal year following the fiscal year in which the report is submitted.

(2) The Secretary of Defense and the Secretary of State, whenever they consider such action to be warranted, shall jointly submit to the Committees on Armed Services and Foreign Relations of the Senate and to the Committees on Armed Services and Foreign Affairs of the House of Representatives a report--

(A) enumerating those countries to be added to or deleted from the existing designation of countries designated as major non-NATO allies for purposes of this section; and

(B) specifying the criteria used in determining the eligibility of a country to be designated as a major non-NATO ally for purposes of this section.

~~(3)(A)(4)(1)~~ The Secretary of Defense shall notify the Congress each time he requires that a prime contract be awarded to a particular prime contractor or that a subcontract to be awarded to a particular subcontractor to comply with a cooperative agreement. The Secretary shall include in each such notice the reason for exercising his authority to designate a particular contractor or subcontractor, as the case may be.

~~(B)(2)~~ The Secretary shall also notify the Congress each time he exercises a waiver under subsection (c) and shall include in such notice the particular provision or provisions of law that were waived.

~~(i)(g)~~ Side-by-side testing

(1) It is the sense of Congress --

(A) that the Secretary of Defense should test conventional defense equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries to determine the ability of such equipment, munitions, and technologies to satisfy United States military requirements or to correct operational deficiencies; and

(B) that while the testing of nondevelopmental items and items in the late state of the development process are preferred, the testing of equipment, munitions, and technologies may be conducted to determine procurement alternatives.

(2) The Secretary of Defense may acquire equipment, munitions, and technologies of the type described in paragraph (1) for the purpose of conducting the testing described in that paragraph.

(3) The Deputy Director, Defense Research and Engineering (Test and Evaluation) shall notify the Speaker of the House of Representatives and the Committees on Armed Services and on Appropriations of the Senate of the Deputy Director's intent to obligate funds made available to carry out this subsection not less than 30 days before such funds are obligated.

(4) The Secretary of Defense shall submit to Congress each year, not later than March 1, a report containing information on--

(A) the equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries that were evaluated under this subsection during the previous fiscal year;

(B) the obligation of any funds under this subsection during the previous fiscal year; and

(C) the equipment, munitions, and technologies that were tested under this subsection and procured during the previous fiscal year.

~~(j)~~ Secretary to encourage similar programs

The Secretary of Defense shall encourage major allies of the United States to establish programs similar to the one provided for in this section.

## **7.2.5. 10 U.S.C. § 2350i**

### **Foreign contributions for cooperative projects**

#### **7.2.5.1. Summary of the Law**

In cooperative projects where the United States participates on a cost-sharing basis, foreign country or NATO project contributions may be credited to appropriations available to the appropriate military department as determined by the Secretary of Defense. The use to which these credits may be applied by the appropriate military departments, including refunds to the other participants in the cooperative project, is expressly set forth in the statute.

#### **7.2.5.2. Background of the Law**

The provision was added to Chapter 138 of Title 10 as a part of the Defense Appropriations Act of 1992-1993.<sup>1</sup> The authority granted under this section facilitates the efficient conduct of cooperative projects. The cognizant official may now credit the contribution of the foreign partner(s) to the proper U.S. appropriation and these funds can then be obligated and expended in execution of the cooperative project.

#### **7.2.5.3. Law in Practice**

Prior to passage of this very recent provision, the practice within DOD was to credit contributions from foreign participants in a cooperative project to the U.S. Treasury under miscellaneous receipts provisions; alternatively, DOD sought special enabling legislation to reprogram such receipts.<sup>2</sup> Former practice also required the use of inventive procurements, such as establishing trust accounts in the name of the U.S. contracting officer, to allow for the use of a foreign Government's contribution. By providing authority to directly credit foreign cost-sharing contributions to the respective military department sponsor, the current statute enhances fiscal control over cooperative projects within DOD.

#### **7.2.5.4. Recommendations and Justification**

##### **I**

#### **Retain and consolidate section 2350i in new section 2x21.**

By retaining and consolidating the amended provision as paragraph (c) of new section 2x21, *Defense Memoranda of Understanding and Related International Agreements*, the statutory authority contained in this provision will continue to facilitate the deposit of foreign government contributions in cooperative projects to the applicable DOD appropriation account.

<sup>1</sup>Pub. L. No. 102-190, §1047, 105 Stat. 1290, 1467.

<sup>2</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 12 September 1992.

**II**  
**Consolidate definitions contained in subsection 2350i(c) into  
new section 2x20**

In an effort to streamline and consolidate international defense acquisition statutes into a new Chapter 1XX, *Defense Trade and Cooperation*, all definitions relative to subchapter II, *International and Cooperative Agreements*, have been relocated to an introductory new section 2x20, *Definitions*.

**7.2.5.5. Relationship to Objectives**

Retention and consolidation of this statute streamlines the conduct of international cooperative projects while promoting and encouraging financial integrity with sound and efficient procurement practices.

**7.2.5.6. Proposed Statute**

**§ 2x21(d) ~~Sec. 2350i~~ Foreign contributions for cooperative projects**

(1) ~~(a)~~ **Crediting of Contributions.**--Whenever the United States participates in a cooperative project with a friendly foreign country or the North Atlantic Treaty Organization (NATO) on a cost-sharing basis, any contribution received by the United States from that foreign country or NATO to meet its share of the costs of the project may be credited to appropriations available to an appropriate military department or another appropriate organization within the DOD, as determined by the Secretary of Defense.

(2) ~~(b)~~ **Use of Amounts Credited.**--The amount of a contribution credited pursuant to subsection (a) to an appropriation account in connection with a cooperative project referred to in that subsection shall be available only for payment of the share of the project expenses allocated to the foreign country or NATO making the contribution. Payments for which such amount is available include the following:

(a) ~~(1)~~ **Payments to contractors and other suppliers (including the Department of Defense and other participants acting as suppliers) for necessary articles and services.**

(b) ~~(2)~~ **Payments for any damages and costs resulting from the performance or cancellation of any contract or other obligation.**

(c) ~~(3)~~ **Payments or reimbursements of other program expenses, including program office overhead and administrative costs.**

(d) ~~(4)~~ **Refunds to other participants.**

## 7.2.6. 10 U.S.C. § 2350c

### Cooperative military airlift agreements: allied countries

#### 7.2.6.1. Summary of the Law

If funds have been appropriated, and after consultation with the Secretary of State (SECSTATE), the Secretary of Defense (SECDEF) may enter into cooperative airlift agreements with any allied government in return for the reciprocal transportation of personnel and cargo of the military forces of the United States on military aircraft of the allied country. The cooperative military airlift agreement must, under the agreement: provide for liquidating the accrued credits and liabilities every three months; secure the same rate of transportation reimbursement for each party; and ensure that transportation costs of defense articles purchased by an allied country under the Arms Export Control Act or by direct commercial sale, are reimbursed at a rate equal to the full cost of transportation. Peacetime restrictions on cooperative military airlift agreements include consideration of the military airlift capacity of both the sending and receiving countries.

In addition to subchapter I, *Acquisition and Cross-Servicing Agreements*, Chapter 138, Title 10, SECDEF may enter into military airlift agreements only under authority of this section. The term allied countries is defined in this section to include members of NATO, Australia, New Zealand, and any other country designated by SECDEF with the concurrence of SECSTATE. Cooperative military airlift agreements with NATO subsidiary bodies, however, are not required to be reciprocal.

#### 7.2.6.2. Background of the Law

This provision was added to Chapter 138 of Title 10 by section 1125(a) of the Defense Authorization Act of 1983<sup>1</sup> and has had several subsequent conforming amendments since its enactment.<sup>2</sup> However, section 1311 of Title 44 of the Defense Authorization Act of 1993<sup>3</sup> amended the provision to address liquidation of credits by direct payment and expansion of country coverage under the statute bringing it into conformity with the similar liquidation provisions contained in 10 U.S.C. § 2345.

#### 7.2.6.3. Law in Practice

The statute is implemented by the U.S. Transportation Command (USTRANSCOM), a unified command; and, other than its limited statutory country coverage, appears to have successfully fulfilled its legislative intent. The statute is the primary authority for engaging in cooperative military airlift in support of global U.S. operational requirements. USTRANSCOM,

<sup>1</sup>Pub. L. No. 97-252, § 1125(a), 96 Stat. 718, 757.

<sup>2</sup>Pub. L. No. 99-145, § 1304(b), 99 Stat. 742; Pub. L. No. 100-26, § 7(k)(2), 101 Stat. 284; Pub. L. No. 101-189, § 931 (b)(2), 103 Stat. 1352, 1534-35.

<sup>3</sup>Pub. L. No. 102-484, § 1311, 106 Stat. 2315, 2547.



through its Air Mobility Command component, enters into cooperative military airlift agreements with eligible countries to facilitate the reciprocal use of airlift assets on a space-available basis.

#### **7.2.6.4. Recommendation and Justification**

##### **Retain Section 2350c.**

As this section continues to serve a valid purpose and was only recently amended by Title 13 of the Defense Authorization Act of 1993, the Panel recommends retention.

Re-number as section 2x32 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with cooperative military airlift agreements, move to subchapter II, *Defense Trade and Cooperative Agreements*.

#### **7.2.6.5. Relationship to Objectives**

Retention of section 2350c, as amended by the Defense Authorization Act of 1993, promotes and encourages sound and efficient procurement practices.

#### **7.2.6.6. Proposed Statute**

##### **§ 2x32 Sec. ~~2350c~~. Cooperative military airlift agreements: allied countries**

(a) Subject to the availability of appropriations, and after consultation with the Secretary of State, the Secretary of Defense may enter into cooperative military airlift agreements with the government of any allied country for the transportation of the personnel and cargo of the military forces of that country on aircraft operated by or for the military forces of the United States in return for the reciprocal transportation of the personnel and cargo of the military forces of the United States on aircraft operated by or for the military forces of that allied country. Any such agreement shall include the following terms:

(1) The rate of reimbursement for transportation provided shall be the same for each party and shall be not less than the rate charged to military forces of the United States, as determined by the Secretary of Defense under section 2208(h) of this title.

(2) Credits and liabilities accrued as a result of providing or receiving transportation shall be liquidated not less often than once every 3 months by direct payment to the country that has provided the greater amount of transportation as agreed upon by the parties. Liquidation shall be either by direct payment to the country that has provided the greater amount of transportation or by the providing of in-kind transportation services to that country. The liquidation shall occur on a regular basis, but not less often than once every 12 months.

(3) During peacetime, the only military airlift capacity that may be used to provide transportation is that capacity that (A) is not needed to meet the transportation requirements of

the military forces of the country providing the transportation, and (B) was not created solely to accommodate the requirements of the military forces of the country receiving the transportation.

(4) Defense articles purchased by an allied country from the United States under the Arms Export Control Act (22 U.S.C. § 2751 et seq.) or from a commercial source under the export controls of the Arms Export Control Act may not be transported (for the purpose of delivery incident to the purchase of the defense articles) to the purchasing allied country on aircraft operated by or for the military forces of the United States except at a rate of reimbursement that is equal to the full cost of transportation of the defense articles, as required by section 21(a)(3) of the Arms Export Control Act (22 U.S.C. § 2761(a)(3)).

(b) Subject to the availability of appropriations, and after consultation with the Secretary of State, the Secretary of Defense may enter into nonreciprocal military airlift agreements with North Atlantic Treaty Organization subsidiary bodies for the transportation of the personnel and cargo of such subsidiary bodies on aircraft operated by or for the military forces of the United States. Any such agreement shall be subject to such terms as the Secretary of Defense considers appropriate.

(c) Any amount received by the United States as a result of an agreement entered into under this section shall be credited to applicable appropriations, accounts, and funds of the Department of Defense.

(d) Notwithstanding subchapter III I, the Secretary of Defense may enter into military airlift agreements with allied countries only under the authority of this section.

## Cooperative logistic support agreements: NATO countries

### 7.2.7.1. Summary of the Law

Within NATO, the Secretary of Defense may enter into Weapons System Partnership Agreements with one or more Governments participating in NATO Maintenance and Supply Organization (NAMSO). The agreement may provide for the transfer of logistics support, supplies, and services by the United States to NAMSO, or the acquisition of these items from NAMSO. Joint management and administrative expenses under such an agreement must be shared equitably.

The provisions of Chapter 137 of Title 10 apply to the acquisition of logistic support under a Weapon System Partnership Agreement. As well, the Arms Export Control Act applies to any transfer of defense articles or services under such an agreement. The Secretary of Defense's authority under this section is in addition to the authorities contained in subchapter I of Title 10, Chapter 138.

### 7.2.7.2. Background of the Law

This provision was originally established pursuant to section 1102 of the Defense Authorization Act of 1987.<sup>1</sup> Subsequent amendments of the section by sections 931(c) and 938(c) of the Defense Authorization Act of 1990-1991<sup>2</sup> added, for clarification purposes, the application of Chapter 137 to a Weapons System Partnership Agreements, in addition to the requisite Arms Export Control Act determinations in transfers of defense articles and services. Section 843 of the Defense Authorization Act of 1993 amended subsection (c) by adding authority for the equitable sharing of the costs of claims.<sup>3</sup>

### 7.2.7.3. Law in Practice

In practice, the statute provides authority for the Secretary of Defense to enter into Weapon System Partnership Agreements with NATO countries in furtherance of rationality, standardization, and interoperability (RSI) and is implemented by DOD Directive.<sup>4</sup> While RSI is the predominant goal of NATO cooperative logistic support agreements, many European companies have established a production or logistic support base from the U.S. technology data packages destined for NATO logistics planning. While that may enhance the NATO industrial mobilization base, the Department of Commerce was concerned that not enough attention was directed toward ensuring that reciprocal international competitiveness be maintained as well. Their comments specifically reflected that,

<sup>1</sup>Pub. L. No. 99-661, § 1102, 100 Stat. 3816, 3961.

<sup>2</sup>Pub. L. No. 101-189, § 931(c) and § 938(c), 103 Stat. 1352, 1534, 1539.

<sup>3</sup>Pub. L. No. 102-484, § 843, 106 Stat. 2442.

<sup>4</sup>DOD Directive 2000.8 (February 12, 1981).

. . . as future procurements of new weapon systems decline, upgrades and modifications will become more important and competitive than before. Many of the U.S. developed systems that are future candidates for upgrade are now in production by NATO/European consortiums. These consortiums may develop the capability to compete with U.S. firms on these upgrades worldwide as a result of cooperative logistics agreements.<sup>5</sup>

#### **7.2.7.4. Recommendations and Justification**

### **I**

#### **Amend section 2350d by striking subsections (d) and (e).**

NAMSO is a NATO body established to provide logistics support for the forces of member nations. Nations desiring to avail themselves of logistics support for their weapons systems must execute a Weapons System Partnership Agreement under NATO procedures. Prior to enactment of this statutory procedure, the United States was unable to participate in these agreements because the authority for pre-funding required by NAMSO was unavailable and because of the strictures present in the application of Chapter 137 and the Arms Export Control Act to purchases from NAMSO. Accordingly, the original authority to enter into Weapons System Partnership Agreements made no reference to the applicability of Chapter 137 and the Arms Export Control Act; and under this framework, the United States could successfully enter these agreements. The addition of subsections (d) and (e) for clarification purposes was counter-productive because the paragraphs serve to defeat the very purpose for which the statute was originally enacted. They also make the section internally inconsistent, because the authorities provided by subsections (a), (b), and (c) are abrogated by the restrictions of subsections (d) and (e). The Panel therefore recommends that subsections (d) and (e) be deleted.

Re-number as section 2x33 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with cooperative logistic support agreements, move to subchapter II, *International and Cooperative Agreements*.

### **II**

#### **Consolidate definitions contained in subsection 2350d(c) into new section 2x20.**

In an effort to streamline and consolidate international defense acquisition statutes into a new Chapter 1XX, *Defense Trade and Cooperation*, all definitions relative to subchapter II, *International and Cooperative Agreements*, have been relocated to an introductory new section 2x20, *Definitions*.

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<sup>5</sup>Letter from John A. Richards, Deputy Assistant Secretary for Industrial Resource Administration, Department of Commerce, Bureau of Export Administration, dated August 27, 1992

### **7.2.7.5. Relationship to Objectives**

Amendment of this statute would establish a balance between an efficient process and full and open access to the procurement system in international defense cooperative logistic support agreements.

### **7.2.7.6. Proposed Statute**

#### **§ 2x33 ~~Sec. 2350d.~~ Cooperative logistic support agreements: NATO countries**

##### **(a) General authority**

(1) The Secretary of Defense may enter into bilateral or multilateral agreements known as Weapon System Partnership Agreements with one or more governments of other member countries of NATO participating in the operation of the NATO Maintenance and Supply Organization. Any such agreement shall be for the purpose of providing cooperative logistics support for the armed forces of the countries which are parties to the agreement. Any such agreement--

(A) shall be entered into pursuant to the terms of the charter of the NATO Maintenance and Supply Organization; and

(B) shall provide for the common logistic support of a specific weapon system common to the participating countries.

##### **(2) Such an agreement may provide for--**

(A) the transfer of logistics support, supplies, and services by the United States to the NATO Maintenance and Supply Organization; and

(B) the acquisition of logistics support, supplies, and services by the United States from that Organization.

##### **(b) Authority of Secretary**

Under the terms of a Weapon System Partnership Agreement, the Secretary of Defense--

(1) may agree that the NATO Maintenance and Supply Organization may enter into contracts for supply and acquisition of logistics support in Europe for requirements of the United States, to the extent the Secretary determines that the procedures of such Organization governing such supply and acquisition are appropriate; and

(2) may share the costs of set-up charges of facilities for use by the NATO Maintenance and Supply Organization to provide cooperative logistics support and in the costs of establishing a revolving fund for initial acquisition and replenishment of supply stocks to be used by the NATO Maintenance and Supply Organization to provide cooperative logistics support.

(c) Sharing of administrative expenses

Each Weapon System Partnership Agreement shall provide for joint management by the participating countries and for the equitable sharing of the administrative costs and costs of claims incident to the agreement.

~~(d) Application of Chapter 137~~

~~Except as otherwise provided in this section, the provisions of chapter 137 of this title apply to a contract entered into by the Secretary of Defense for the acquisition of logistics support under a Weapon System Partnership Agreement.~~

~~(e) Application of Arms Export Control Act~~

~~Any transfer of defense articles or defense services to a member country of the North Atlantic Treaty Organization or to the NATO Maintenance and Supply Organization for the purposes of a Weapon System Partnership Agreement shall be carried out in accordance with this chapter and the Arms Export Control Act (22 U.S.C. 2751 et seq.).~~

(d)(f) Supplemental authority

The authority of the Secretary of Defense under this section is in addition to the authority of the Secretary under subchapter I and any other provision of law.

## **7.2.8. 10 U.S.C. § 2350e**

### **NATO Airborne Warning and Control system (AWACS) program: authority of Secretary of Defense**

#### **7.2.8.1. Summary of the Law**

In conjunction with the execution of the AWACS Memorandum of Understanding, the Secretary of Defense (SECDEF) may waive reimbursement for the cost of auditing, quality assurance, codification, inspection, contract administration, acceptance testing, certification services, planning, programming, and management services. In addition, SECDEF has the authority to waive any administrative services surcharge otherwise chargeable; and may assume contingent liability for (a) program losses resulting from the gross negligence of any contracting officer of the United States; (b) identifiable taxes, customs duties, and other charges levied within the United States on the program; and (c) the United States' share of the unfunded termination liability. Contract authority under this section is limited to program funds appropriated for a particular fiscal year.

#### **7.2.8.2. Background of the Law**

The AWACS provision was enacted as section 932 of the Defense Authorization Act of 1990/1991<sup>1</sup> and originally was due to expire on September 30, 1991. The section has been subsequently amended to provide for a new expiration of September 30, 1993.<sup>2</sup> The statute was enacted in order to provide requisite authority for the U.S. Air Force, in acting as agent for NATO, to employ U.S. Government acquisition practices.

#### **7.2.8.3. Law in Practice**

By providing the requisite authority for the U.S. Air Force to act in the capacity as executive agent for NATO Airborne Early Warning and Control Programme Management Organization (NAPMO), the statute was a required tenet to the successful execution of the NATO AWACS modernization program. The program began with the award of a contract to upgrade the computer configuration of the NATO E-3 aircraft fleet. An addendum to the AWACS Memorandum of Understanding, as executed between the Parties and providing for the further modernization of the AWACS to enable NATO to maintain commonality with the U.S. fleet of AWACS, necessitates the continued retention of the statutory authority provided the Secretary of Defense by this section.<sup>3</sup>

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<sup>1</sup>Pub. L. No. 101-189, § 932(a)(1), 103 Stat. 1352, 1536-37.

<sup>2</sup>Pub. L. No. 102-190, §1051, 105 Stat. 1290, 1470.

<sup>3</sup>Fax Message from Kannan Ganesan to Judy Morehouse, Boeing Defense & Space Group, dated 9/29/92.

#### **7.2.8.4. Recommendation and Justification**

##### **Retain section 2350e.**

The authority provided the Secretary of Defense by the statute exemplifies the requirement for program specific waiver flexibility fundamental to the successful execution of a multilateral collaborative project and, therefore, the Panel recommends its retention.

Renumber as section 2x34 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with a specific cooperative project agreement, move to subchapter II, Defense Trade and Cooperative Agreements.

#### **7.2.8.5. Relationship to Objectives**

Retention of this statute establishes a balance between an efficient process and full and open access to the procurement system in an international collaborative project.

#### **7.2.8.6. Proposed Statute**

**§ 2x34 Sec. ~~2350e~~. NATO Airborne Warning and Control System (AWACS) program: authority of Secretary of Defense**

##### **(a) Authority Under AWACS program**

The Secretary of Defense, in carrying out an AWACS memorandum of understanding, may do the following:

(1) Waive reimbursement for the cost of the following functions performed by personnel other than personnel employed in the United States Air Force Airborne Warning and Control System (AWACS) program office:

- (A) Auditing.
- (B) Quality assurance.
- (C) Codification.
- (D) Inspection.
- (E) Contract administration.
- (F) Acceptance testing.
- (G) Certification services.
- (H) Planning, programming, and management services.

(2) Waive any surcharge for administrative services otherwise chargeable.

(3) In connection with that Program, assume contingent liability for --



(A) program losses resulting from the gross negligence of any contracting officer of the United States;

(B) identifiable taxes, customs duties, and other charges levied within the United States on the program; and

(C) the United States share of the unfunded termination liability.

**(b) Contract authority limitation**

Authority under this section to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

**(c) Definition**

In this section, the term "AWACS memorandum of understanding" means--

(1) the Multilateral Memorandum of Understanding Between the North Atlantic Treaty Organization (NATO) Ministers of Defense on the NATO E-3A Cooperative Programme, signed by the Secretary of Defense on December 6, 1978;

(2) the Memorandum of Understanding for Operations and Support of the NATO Airborne Early Warning and Control Force, signed by the United States Ambassador to NATO on September 26, 1984;

(3) the Addendum to the Multilateral Memorandum of Understanding Between the North Atlantic Treaty Organization (NATO) Ministers of Defense on the NATO E-3A Cooperative Programme (dated December 6, 1978) relating to the modernization of the NATO Airborne Early Warning and Control (NAEW&C) System, dated December 7, 1990; and

(4) any other follow-on support agreement for the NATO E-3A Cooperative Programme.

**(d) Expiration**

The authority provided by this section expires on September 30, 1993.

## **7.2.9. 10 U.S.C. § 2350h**

### **Memorandums of agreement: Department of Defense ombudsman for foreign signatories**

#### **7.2.9.1. Summary of the Law**

The Secretary of Defense is required to designate an official<sup>1</sup> to act as the DOD ombudsman, on behalf of foreign Governments who are parties to memoranda of agreement with the United States, concerning acquisition issues under the jurisdiction of the Secretary of Defense.

#### **7.2.9.2. Background of the Law**

This provision was added to Chapter 138 of Title 10 by section 1452(a)(1) of the Defense Authorization Act of 1991<sup>2</sup> in order to address periodic and frequent problems involving foreign contractors attempting to perform work for DOD. At the initiative of the Israeli Government, the statute was meant to obviate bureaucratic delays and demands that often had the practical effect of eliminating a foreign contractor from a competition. Since such actions effectively resulted in erecting non-tariff barriers to international defense trade, the ombudsman was intended to help foreign officials in aiding their contractors to meet the procedures and requirements of the U.S. defense contracting system.

#### **7.2.9.3. Law in Practice**

The office of ombudsman for foreign signatories was established for the benefit of foreign countries doing business with the DOD and does not appear to enhance domestic defense acquisition procedures. The statutory designation of an ombudsman, other than unilaterally trouble-shooting the implementation of reciprocal procurement agreements, generally serves no other purpose than a collateral, additional duty. In fact, our allies have not reciprocally appointed similar ombudsmen in their respective countries pursuant to these procurement agreements apparently rationalizing that U.S. industry does not need them.<sup>3</sup> Although U.S. Government acquisition laws and regulations provide an unparalleled freedom of access and information to foreign governments and their industry, many of these same foreign Governments do not reciprocate in kind, thus leaving U.S. industry at a competitive disadvantage internationally.

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<sup>1</sup>Deputy Director, Foreign Contracting, Office of Director of Defense Procurement.

<sup>2</sup>Pub. L. No. 101-510, § 1452(a)(1), 104 Stat. 1485, 1693-94.

<sup>3</sup>Letter from John A. Richards, Deputy Assistant Secretary for Industrial Resource Administration, Department of Commerce, Bureau of Export Administration, dated August 27, 1992

#### **7.2.9.4. Recommendation and Justification**

##### **Repeal section 2350h.**

As the role of ombudsman constitutes additional duty for the office concerned, discussions with the DOD Director of Foreign Contracting revealed little or no substantive use by foreign Governments of the services of the ombudsman. Other than a perception by a foreign government of a lack of DOD attention to the interests of foreign countries, there appears neither an interest by other governments in such a function, nor a wide-spread problem requiring an office of ombudsman for foreign signatories. In times of constrained resources, the Panel did not believe it was appropriate to continue to use DOD funds to unilaterally assist foreign officials to aid their national contractors to compete with U.S. contractors.

#### **7.2.9.5. Relationship to Objectives**

Repeal of this section streamlines the defense acquisition process particularly in times of constrained resources.

## **7.2.10. 10 U.S.C. § 7344**

### **Suspension of construction in case of treaty**

#### **7.2.10.1. Summary of the Law**

This section allows the President to suspend authorized naval aircraft construction in the event of a treaty for the limitation of naval arms.

#### **7.2.10.2. Background of the Law**

This section was originally passed in 1938<sup>1</sup> and codified in 1956. It was passed as a response to the expiration of the Washington Treaty of 1922 and the London Treaty of 1930 limiting naval arms. Congress sought to give the President explicit power to conclude a quick treaty with the rearming nation of Japan.<sup>2</sup>

#### **7.2.10.3. Law in Practice**

According to comment from the Naval Air Systems Command, this section is completely outdated and has never been used.<sup>3</sup>

#### **7.2.10.4. Recommendation and Justification**

##### **Repeal section 7344.**

The Naval Air Systems Command stated that this section is a historical anachronism and should be deleted; and that to their knowledge it has never been cited, used, or referred to, and is of no utility or relevance today.<sup>4</sup> As this section addresses the President's treaty authority which is already provided for in the U.S. Constitution,<sup>5</sup> there would appear to be no need for codification of this power under Title 10. The DOD General Counsel's Office concurred with the comment of the Naval Air Systems Command;<sup>6</sup> and the Panel therefore recommended repeal of this section.

#### **7.2.10.5. Relationship to Objectives**

Repeal of this provision will streamline the body of defense acquisition laws.

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<sup>1</sup>May 17, 1938, ch. 243, § 9, 52 Stat. 403.

<sup>2</sup>S. Rep. No. 1611, 75th Cong., 3d Sess. (1938).

<sup>3</sup>Information received from Lou Sadler, Esq., Office of Counsel, Naval Air Systems Command, verbally to B. Capshaw, Esq., Acquisition Law Task Force, on March 2, 1992.

<sup>4</sup>*Id.*

<sup>5</sup>U.S. Const., art. II, § 2.

<sup>6</sup>Information received from John McNeil, Esq., DOD Office of General Counsel (International), verbally to B. Capshaw, Esq., Acquisition Law Task Force, on March 3, 1992.

## **7.2.11. 50 U.S.C. App. §§ 2061 through 2170**

### **Defense Production Act of 1950**

#### **7.2.11.i. Summary of the Law**

As originally enacted, the Defense Production Act of 1950 (DPA) contained seven titles:

- Title I: Priorities and Allocations
- Title II: Authority to Requisition
- Title III: Expansion of Productive Capacity
- Title IV: Price and Wage Stabilization
- Title V: Settlement of Labor Disputes
- Title VI: Control of Consumer and Real Estate Credit
- Title VII: General Provisions.

Titles IV and V were terminated on April 30, 1953; and Titles II and VI were terminated on June 30 of the same year. The remaining titles still in effect are I, III, and VII.

#### **Title I: Priorities and Allocations**

Title I empowers the President to demand and receive priority handling of U.S. Government purchase orders for defense related products and materials. This requires (1) contracts or orders involving certain defense energy programs be accepted and carried out on a priority status over all other contracts or orders; and (2) allocation of materials and facilities be done in such a way as to promote approved programs.

The Office of Industrial Mobilization within the Department of Commerce has the responsibility for developing, coordinating, and administering a system of priorities to execute the Title I provisions for industrial items. To accomplish this, a Defense Materials System (DMS) and Defense Priorities System (DPS) have been established.

The DMS and DPS are complementary programs designed to expand quickly in the event of a national emergency. DMS is a specialized program limited to four materials (copper, aluminum, steel, and nickel alloys), while DPS is a general priority program relating to a wide variety of undesignated products and materials. Priority ratings are designated either DO or DX. All DO orders have priority over unrated orders. DX rated orders receive the highest priority and take precedence over DO orders and unrated orders.

A company which receives a rated order must adjust its operations to fill that order by its required delivery date. All rated orders must be accepted and criminal penalties may be imposed if a company willfully violates the provisions of the DPA.

### **Title III: Expansion of Productive Capacity and Supply**

This Title empowers the President to expand industrial capacity to meet present and future defense requirements. Specifically this Title provides for:

- (1) guaranteeing private sector loans to expedite production and deliveries or services;
- (2) directing government loans to private business for expansion of capacity, the development technological processes, or the production of essential materials;
- (3) purchasing or committing to purchase metals, minerals, and other materials for government use or resale to encourage exploration, development, and mining of key minerals and metals;
- (4) authorizing installation of additional equipment, facilities, processes, or improvements to plants, factories, and other facilities, both government and commercial.

The President has delegated responsibility to the Department of Interior for programs for all non-fuel minerals which gives that department authority over mines, refineries, and other areas of production.

### **Title VII: General Provisions**

This Title contains several provisions for industrial preparedness under the DPA.

#### Voluntary Agreements:

Under Title VII, the President or his representatives may enter into voluntary agreements with business and industry leaders to expand the nations industrial output. Under this Title any consultations and agreements among contractors are immune from antitrust violations.

#### National Defense Executive Reserve (NDER):

The NDER is composed of individuals with considerable executive experience who undergo special training in order to fill important federal functions in the event of an increased threat to our national security. These executives would be part of emergency agencies with authority to manage defense needs under crisis conditions. Membership in the NDER is limited to 3 year terms and is voluntary.

#### Cost Accounting Standards Board (CAS):

The current CAS board was established as part of the Office of Federal Procurement Policy Act Amendments of 1988.<sup>1</sup> The Board has the authority to promulgate cost accounting standards to be used by all executive agencies, contractors and subcontractors in procurement

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<sup>1</sup>Pub. L. No. 100-679, §5(a), 102 Stat. 4063.

contracts as well as regulations necessary to implement those standards. The Board is also required to make an annual report to Congress and to receive appropriations necessary for its operation.

#### Joint Committee on Defense Production:

Between 1950 and 1977 this committee held hearings and prepared studies on defense preparedness. Based upon its recommendations in the mid-1970s, the Federal Emergency Management Agency was created. However, the Joint Committee was discontinued in 1977.

Sections within the DPA applicable to defense trade and cooperation are 10 U.S.C. § 2099, *Annual Report on Impact of Offsets*, and 10 U.S.C. § 2170, *Authority to Review Certain Mergers, Acquisitions, and Takeovers*, also known as the Exon-Florio Amendment.

#### **7.2.11.2. Background of the Law**

In July of 1950, President Harry S. Truman called upon Congress to enact legislation to handle the economic mobilization problems created by the Korean War. The President recommended that the changes allow for expanded military requirements while also taking care of civilian needs.

Bills were introduced and passed in both the House and Senate. The differences were resolved in conference and the Defense Production Act of 1950 was signed into law on September 8, 1950.<sup>2</sup> As originally enacted, the DPA provided for virtually all mobilization measures taken during the Korean War. The various functions and responsibilities for implementing the DPA were assigned to various government agencies.

The DPA expired on October 20, 1990, however, "DOD was able to obtain needed supplies from contractors on a voluntary basis during Operation Desert Storm notwithstanding the lapse of the DPA."<sup>3</sup> An executive order was signed by the President on January 8, 1991, and gave limited emergency authority to obtain prompt delivery of products to meet DOD needs during the gap between lapse and renewal of the Act.

A short term extension of the DPA was signed into law of August 17, 1991, and expired on September 30, 1991.<sup>4</sup> Another extension ended in March 1992. The DPA was again reinstated and finally signed into law on October 28, 1992; making the DPA retroactive during the time of its lapse.<sup>5</sup> Changes made to the DPA were an effort to bring this Cold War legislation into the post Cold War era. Congressman Tom Carper of Delaware spoke about the changes to the DPA during floor discussion on October 5, 1992.

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<sup>2</sup>50 U.S.C. App. §§ 2061 through 2170.

<sup>3</sup>H. Rept. 208, 102nd Cong., (1st Sess., 1991).

<sup>4</sup>H. Rept. 1028, 102nd Cong., (2nd Sess. 1992).

<sup>5</sup>H. R. Conf. Rept. 1028, 102nd Cong., (2nd Sess., 1992).

First, recognize the need to transition our defense industrial base into a competitive civilian industry by promoting the production of dual-use technologies;

Second, ensure reliable supplies of critical technology items and components;

Third, prohibit anyone who is found to have fraudulently used "made in America" labels on products from getting contracts under the Defense Production Act . . . ;

Fourth, provide for a top-to-bottom review of Federal programs to ensure they are all geared toward the preservation of this Nation's defense industrial base; and

Fifth, require the President to conduct a review of foreign efforts to undermine U.S. technological leadership through coordinated acquisitions of U.S. technology firms or industrial espionage.

In addition, the new DPA requires that all projects receiving DPA assistance be tested for production if the producer so requests, thus strengthening the link between assistance and marketplace performance. It also sets up an information system to perform production analysis and identify potential problems, such as dependence on foreign sources.<sup>6</sup>

Congressman Carper went on to express the view that the re-authorized DPA "is a real step forward in our efforts to shore up U.S. competitiveness in industry and to ensure that our industrial base is capable of providing essential materials to ensure our national security both in peacetime and emergency. The bill has been years in the works, and has improved with age."

Specifically with regard to reporting on the impact of offsets, section 2099 now provides for (1) an annual report on the impact of offsets prepared by the Secretary of Commerce; (2) a notice requirement for U.S. firms entering into a contract for the sale of a weapons system or defense-related item to a foreign country or firm if subject to an offset agreement exceeding \$5 million in value; and (3) consideration of the findings and recommendations of the annual report during bilateral and multilateral negotiations to minimize the effects of offsets.<sup>7</sup>

Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 enacted 50 U.S.C. App. 2170 (Exon-Florio Amendment) which entitles the President, in the interests of national security, to block or restructure a proposed merger, acquisition, or takeover of a U.S. company by a foreign entity.<sup>8</sup> The statute is premised on a procedure of voluntary notification in mergers,

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<sup>6</sup>Congress authorized \$10 million for this information system.

<sup>7</sup>Defense Production Act Amendments of 1992, Pub. L. No. 102-558, 106 Stat. 4198.

<sup>8</sup>31 C.F.R. Part 800; The Presidential review process entails: (1) the conduct of a confidential investigation by the Committee on Foreign Investment in the United States (CFIUS) [established by Exec. Order No. 11858]; (2) appropriate action by the President "to suspend or prohibit any acquisition, merger, or takeover"; (3) supported by



acquisitions, or takeovers involving prospective foreign ownership. Following passage of Exon-Florio, there have been several studies conducted by the General Accounting Office (GAO) concerning federal data collection on foreign investment in the United States,<sup>9</sup> and the extent of foreign participation in the Strategic Defense Initiative Program.<sup>10</sup>

### 7.2.11.3. Law in Practice

Title I, the DPS/DMS program, is widely used in acquisition of items for the use of DOD. The majority of contracts are rated DO, with a much smaller percentage rated DX, the highest status which requires Presidential approval. The priority and allocation system, in addition to its regular use, continues to serve as an "insurance policy" in the event that the outbreak requires expeditious delivery of needed material.

The programs that constitute Title III, which establish domestic production capacity for materials considered essential for national security, are considered a key element of the defense drawdown. The provisions of Title III will be instrumental in restarting needed production capacity or maintaining it in the event of war.

The miscellaneous programs that constitute Title VII operate with varying degrees of effect on DOD. Several, most notably section 111, interact with the other titles. Section 111 gives authority for appropriations to be used for Title III.

Specifically concerning the implementation of Exon-Florio, however, testimony in 1990 revealed:<sup>11</sup>

. . . At the present time, notifications are coming in to CFIUS at the rate of 350 a year. Some 350 filings annually would represent, we estimate, around 50 percent of annual acquisitions valued at more than \$1 million. This is a fairly large proportion, though perhaps not inappropriately so in view of the interplay and dynamics of technology, the economy and defense.

To date, CFIUS has gone to the investigation stage seven times. In two of those cases, notification was withdrawn with CFIUS permission and one investigation is in progress. Four cases have reached the President's desk for decision. In only one of those

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findings based on "credible evidence" that "the foreign interest exercising control might take action that threatens to impair the national security" and that no other provision of law can adequately address the situation; and (4) after considering various enumerated factors relating to domestic industrial production.

<sup>9</sup>General Accounting Office, Foreign Investment, Federal Data Collection on Foreign Investment in the United States GAO/NSIAD-90-25BR, October 1989.

<sup>10</sup>General Accounting Office, Strategic Defense Initiative Program, Extent of Foreign Participation GAO/NSIAD 90-2, February 1990.

<sup>11</sup>Testimony of the Honorable Charles H. Dallars, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the Committee on Energy and Commerce, U.S. Senate, Mar. 13, 1990.

cases has the President exercised his statutory authority to prohibit a foreign acquisition . . . <sup>12</sup>

Related GAO testimony at the time, from the defense industrial security perspective,<sup>13</sup> highlighted procedural weaknesses in the practice of granting Special Security Agreements (SSAs).<sup>14</sup> These agreements were initiated in 1984 to permit U.S. firms that are foreign owned, controlled, or influenced (FOCI) to continue to work on classified defense contracts.<sup>15</sup> Under DOD policy SSAs are limited to contracts whose classification level does not exceed the Secret level, provided the FOCI emanates from a country with which the United States has a bilateral industrial security arrangement.

Most recently, however, a major CFIUS investigation resulted in a proposed sale of a U.S. firm to a foreign Government-owned firm being withdrawn. The proposed sale of the missiles division of the LTV Aerospace and Defense Company to the Thomson-CSF firm, which is 58% owned by the French Government, would have involved access to highly classified or "proscribed information."<sup>16</sup> The specter of a potentially blocked sale raised much international concern that was assuaged only by the voluntary withdrawal by Thomson-CSF from the proposed purchase.

Based on the LTV-Thomson scenario, and on the studies and testimony discussed above, the Defense Authorization Act of 1993 enacted new provisions to address this type of foreign investment in the future.<sup>17</sup> Two of the provisions focus on entities controlled by foreign governments and specifically prohibit: (1) the purchase, by an entity controlled by a foreign government, of certain U.S. defense contractors that perform DOD or Department of Energy (DOE) national security contracts requiring access to proscribed information; and (2) the award of certain DOD/DOE national security contracts to an entity controlled by a foreign Government. The third provision directs DOD/DOE to develop a database helpful to CFIUS under section 721 of the Defense Production Act.

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<sup>12</sup>The one Presidential prohibition was the divestment order issued in the China National Aero-Technology Import and Export Company's (CATIC) acquisition of MAMCO Manufacturing, Inc. (MAMCO), a U.S. company - February 1990.

<sup>13</sup>Exec. Order No. 10865, 32 C.F.R. Part 155, and DOD Directive 5200.2-R.

<sup>14</sup>Statement for the Record, National Security and International Affairs Division, GAO, for the Committee on the Armed Services, House of Representatives, March 21, 1990. The procedural weaknesses noted included: (1) interim security arrangements prior to a formal SSA were deficient in that new contracts were awarded during the period and the period itself was extending up to a year or more; (2) incomplete or inadequate supporting justifications, pursuant to the Services implementing regulations, citing need for a product or service that is mission-critical, cannot be obtained in sufficient quantity from U.S.-owned sources, and involved a unique product or technology; (3) inadequate determinations that the risks of FOCI can be negated or reduced to an acceptable level; and (4) that DOD policies requiring outside directors of the FOCI firm to be DOD watchdogs were inadequately documented in practice.

<sup>15</sup>*Id.*, at pg. 1, it was noted that "In practice, under an SSA, the foreign firm is permitted to retain a minority position on the U.S. firm's board of directors."

<sup>16</sup>Characterized by the DOD Acting General Counsel in Congressional testimony as "sensitive enough to generally prohibit foreign nationals and representatives of the foreign interest from having access to it". S. Rep. No. 3114 at pg. 234.

<sup>17</sup>Pub. L. No. 102-484, §§ 835-838, 106 Stat. 2315, 2461-66.

In comments to the Panel, the Navy expressed support for the new provisions because they strengthened the overall Exon-Florio regime and will provide CFIUS a more structured framework.<sup>18</sup> The remaining deficiency in the process was cited as:

... the definition of a "control" transaction in Exon-Florio remains flawed (from a DOD perspective) since it permits far too many [true corporate] "control" transactions to proceed forward without scrutiny.

#### **7.2.11.4. Recommendation and Justification**

##### **No action on sections 2061 through 2170.**

Although these sections apply to the procurement of defense goods and services, the determination was made that this section was predominately production planning related and, therefore, not within the primary defense acquisition purview of the Panel's statutory mandate. The current DPA program was only signed into law on October 28, 1992. While the reach of the DPA was expanded with this latest authorization, it is still far too early to identify the possible effects, both positive and negative, to the DOD procurement system. Thus, while the DPA is a significant statute, it has very recently received full consideration by the Congress.

#### **7.2.11.5. Relationship to Objectives**

The Panel believes that while this section has a tangential relationship to DOD acquisition, action on this statute would not further the objectives of the Panel.

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<sup>18</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 11 October 1992.

## **7.3. Acquisition, Cross-Servicing Agreements, and Standardization**

### **7.3.0. Introduction**

The genesis for the present subchapter I, *Acquisition and Cross-Servicing Agreements*, of Chapter 138 of Title 10 was the North Atlantic Treaty Organization Mutual Support Act of 1979 (NMSA),<sup>1</sup> enacted to simplify the interchange of logistic support, supplies, and services between the United States, the NATO countries, and NATO subsidiary bodies, thus contributing to the readiness of U.S. and allied armed forces deployed in Europe and adjacent waters.

Prior to the enactment of NMSA, contracting for logistic support and services in Europe had to be implemented using highly formalized procedures involving either government-to-government contract actions or the processing of Foreign Military Sales cases under the Arms Export Control Act. As these Government-to-Government requests for logistic support grew in number, the need for international agreements to control these arrangements, instead of contracts, also increased. In passing NMSA, Congress provided the authority for DOD to enter into these agreements to assuage the sovereignty concerns of our NATO Allies while concurrently meeting the needs of U.S. forces in Europe.

Currently, Chapter 138 of Title 10 places acquisition and cross-servicing agreements in subchapter I; however, the Panel recommended grouping all provisions concerning international agreements related to operational logistics and support together with the provision concerning NATO rationality, standardization, and interoperability (RSI) under a consolidated new subchapter III. While retaining the general acquisition and cross-servicing statutes, the new subchapter brings in provisions concerning the procurement of communications support and services; as well as the authority to accept direct payment, property, supplies, and services in connection with mutual support and occupational agreements, presently located in subchapter II of Title 10.

#### **7.3.0.1. Operational and Burdensharing Agreements**

Recent legislation has addressed increased allied burdensharing of operational and logistics support pursuant to mutual defense agreements and occupational arrangements. In order to accommodate direct payment or burdensharing contributions from foreign countries, and the use of real property, services, and supplies currently permitted by statute, the Panel recommended amendment of 10 U.S.C. § 2350g and relocation to this new subchapter. The amended section would provide needed flexibility to the Secretary of Defense in the administration and execution of mutual defense agreements and occupational arrangements, in addition to the authority to go beyond international courtesies and outside cross-servicing arrangements for needed logistic support, joint or bilateral exercises outside the area of the host-nation country and for increased allied burdensharing.

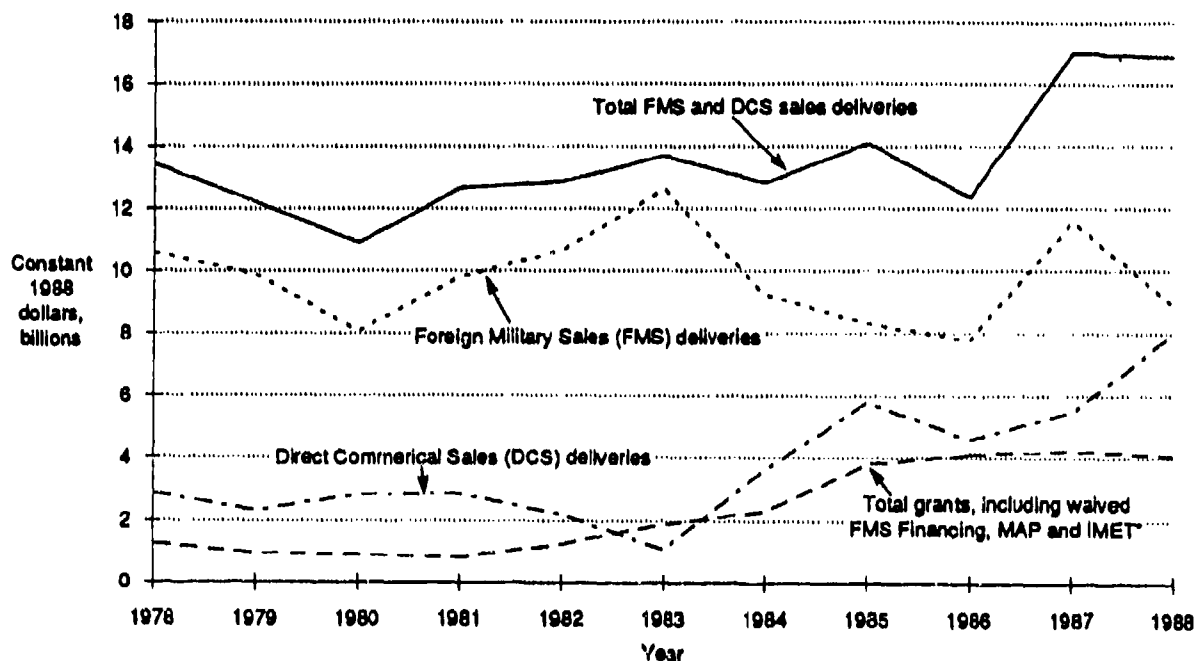
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<sup>1</sup>Pub. L. No. 96-323, § 2(a), 94 Stat. 1016.

The Panel also recommends amending and relocating 10 U.S.C. § 2350f to this subchapter. Since its enactment, there has been confusion with regard to the legality of temporary connections in the course of joint operational exercises or to meet emergent operational requirements. The statute would seem to require an international agreement to make use of this authority; and as Congressional intent does not appear to contemplate an international agreement for every conceivable temporary connection, the Panel recommended amendment of this section to provide for the equivalent exchange of communications support during such contingencies.

### 7.3.0.2. Export Sales of Defense Items

Although the Panel deferred generally on conducting an in-depth analysis of the relationship between international defense acquisition, military assistance, and foreign military sales, the impact of the statistics on the U.S. acquisition process could not be avoided. As recently concluded in a report of the Office of Technology Assessment<sup>2</sup> - "A distinctly economic component has entered U.S. international military sales policies in recent years." That finding is readily apparent when U.S. Government and commercial sales deliveries for the years 1978-88 are depicted, as indicated in Figure 7E. below.<sup>3</sup>



\* Waived FMS Financing credits + Military Assistance Program (MAP) + International Military Education and Training program (IMET)

Fig. 7E. U.S. Government and Commercial Sales Deliveries of U.S. Military Equipment, and U.S. Military Grants, 1978-88

SOURCE: U.S. Department of Defense, Defense Security Assistance Agency, "Fiscal Year Series", September 30, 1989, pg. 2.

The report went on to argue that issues and options facing the U.S. Congress included reform of the arms transfer process, the future of global arms trade, transferring defense

<sup>2</sup>Congress of the United States Office of Technology Assessment, Global Arms Trade, Commerce in Advanced Military Technology and Weapons, June 1991.

<sup>3</sup>*Id.*, at pg. 12.

technology to developing nations, collaboration with Western Europe, and defense industrial collaboration with Japan. Much has been written on the problem of divorcing security assistance and foreign military sales from the foreign policy of the United States.<sup>4</sup> However, as noted elsewhere in this chapter, general trade policy and international defense acquisition are indelibly interrelated.

The Panel did address two sections of Title 22 which pointed up the relationship between general trade policy and international defense acquisition. Initially, in Chapter 5 above, section 22 U.S.C. § 2761(e) on non-recurring recoupment charges was recommended for repeal consistent with current U.S. Government policy. U.S. industry will be better able to be competitive in international defense export sales by no longer being required to recoup non-recurring charges.

Secondly, at the request of the Council of Defense and Space Industry Associations,<sup>5</sup> the Panel considered a proposed amendment to the definition for "defense articles and defense services" presently contained in 22 U.S.C. § 2794(7). The proposal would attempt to resolve the present dilemma with regard to commodity jurisdiction between the various government agencies concerning commercial export. Although the Panel recommended no action on the proposal, the issue of rationalizing exports controls is meritorious and deserving of attention by others more experienced in the matter and directly affected by the present commodity jurisdictional dilemma.

### **7.3.0.3. Overview of Subchapter Recommendations**

The Panel consolidated into a new subchapter those statutory provisions regarding acquisition and cross-servicing agreements with provisions concerning operational and burdensharing agreements, and NATO standardization. The new subchapter provides for uniformity in the treatment of similarly defined classes of agreements related to allied operations, logistics support, and standardization.

A section-by-section summary analysis of the recommendations for subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*, follows:

#### **Section 2x50. Definitions**

In reordering the sections concerning operational international agreements, previously resident in different chapters and subchapters of Title 10, various definitions applicable to the new subchapter were consolidated in this section. Consistent with the recommended treatment afforded new section 2x57, below, the definition for "contingency operation" has been added and appropriately referenced to the definition as presently contained in 10 U.S.C. § 101(47).

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<sup>4</sup>Note 2, *supra*.

<sup>5</sup>Letter from the Council of Defense and Space Industry Associations, to Donald M. Freedman, Executive Secretary, DoD Advisory Panel, dated October 14, 1992

**Section 2x51. Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States**

This section remains unchanged from the existing language of 10 U.S.C. § 2341 as amended by the Defense Authorization Act of 1993.

**Section 2x52. Cross-servicing agreements**

This section amended 10 U.S.C. § 2342 only to delete the requirement for consultation with the Secretary of State as redundant of the omnibus requirement for prior consultation on international agreements mandated by the Case-Zablocki Act.<sup>6</sup>

**Section 2x53. Law applicable to acquisition and cross-servicing agreements**

The Panel recommends elimination of the statutory requirement of 10 U.S.C. § 2343 that mandates the application of domestic procurement procedures to NATO Mutual Support Act (NMSA) activities. Rather than a rigid application of Chapter 137 provisions to NMSA activities, the Panel proposes instead application of the standard of "prudent procurement practices" as presently utilized in the DOD Directive on NMSA.<sup>7</sup>

**Section 2x54. Methods of payment for acquisitions and transfers by the U.S.**

**Section 2x55. Liquidation of accrued credits and liabilities**

**Section 2x56. Crediting of receipts**

These sections remain unchanged from the existing language of 10 U.S.C. §§ 2344, 2345, and 2346.

**Section 2x57. Limitation on amounts that may be obligated or accrued by the United States**

In order to provide for a waiver of the limitations on accrual of reimbursable liabilities, as presently contained in 10 U.S.C. § 2347 (as amended by the Defense Authorization Act of 1993), to accommodate cases involving contingency operations, the Panel recommends an amendment to provide the Secretary of Defense such waiver authority for a maximum of a 180 days.

**Section 2x58. Inventories of supplies not to be increased**

This section remains unchanged from the existing language of 10 U.S.C. § 2348.

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<sup>6</sup>5 U.S.C. § 112b.

<sup>7</sup>DOD Directive 2010.9, Sep. 30, 1988.

**Section 2x59. Procurement of communications support and related supplies and services**

Currently 10 U.S.C. § 2350f resides in subchapter II, *Cooperative Agreements*, of Chapter 138. Since the subject matter of the statute relates to the procurement of communications support, supplies, and services, the Panel recommends that the section more appropriately belongs in new subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

The Panel further recommended amendment of 10 U.S.C. § 2350f by adding a provision for the temporary furnishing or receiving of equivalent communications support and services to meet the requirements of joint operational exercises or to meet emergent operational requirements. As section 2350f was concerned with the procurement of communications and services, it was appropriately relocated to subchapter III as new section 2x59.

**Section 2x60. Authority to accept direct payment or contribution, use of real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements**

As with 10 U.S.C. § 2350f, above, section 2350g presently is contained in subchapter II, *Cooperative Agreements*, of Chapter 138. Since the subject matter of the statute relates to mutual defense agreements and occupational arrangements, the Panel recommends that the section more appropriately belongs in the new subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

In order to accommodate direct payment or contributions from foreign countries and to facilitate increased allied burdensharing, as well as the use of real property, services and supplies currently permitted by statute, the Panel recommended amendment by adding new paragraph (a)(3). The amended section would provide needed flexibility to the Secretary of Defense in the administration and execution of mutual defense agreements and occupational arrangements, as well as authority to go beyond international courtesies and outside cross-servicing arrangements for needed logistic support and increased allied burdensharing.

Furthermore, by adding new subsection (b) as an amendment to section 2350g, the Panel recommended permitting the acceptance of increased allied burdensharing contributions for joint or bilateral exercises outside the present limitation to the area of the host-nation country.

**Section 2x70. Standardization of equipment with North Atlantic Treaty Organization members**

Although the Panel entertained deleting much of the reporting requirements presently contained in this statute, comments received suggested retaining the section as presently structured. With the importance of encouraging NATO rationalization, standardization, and interoperability (RSI) in today's declining global defense economic environment, the Panel recommended retaining new section 2x70 unchanged from the existing language of 10 U.S.C. § 2457.



**Repeal of 22 U.S.C. § 2761(e). Charges; reduction or waiver**

The Panel recommended repeal of the statutory recoupment provisions in the Arms Export Control Act. The President has already revoked all regulatory implementation of various administrative provisions.<sup>8</sup>

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<sup>8</sup>See Chapter 5 of this Report.

### **7.3.1. 10 U.S.C. §§ 2341 through 2350**

## **Acquisition and Cross-Servicing Agreements, Subchapter I, Cooperative Agreements With NATO Allies And Other Countries**

### **7.3.1.1. Summary of the Law**

Chapter 138, subchapter I, "Acquisition and Cross-Servicing Agreements," permits the Secretary of Defense (SECDEF) to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States.<sup>1</sup> The SECDEF may also establish cross-servicing agreements, or the reciprocal provision of logistic support, supplies and services, with any member of NATO, NATO subsidiary body, or certain designated non-NATO countries.<sup>2</sup> Although certain procurement provisions of the United States Code are not applicable to such agreements,<sup>3</sup> the SECDEF must establish reciprocal pricing and reimbursement procedures with provisions,<sup>4</sup> mandating dollar limits on amounts of credits and liabilities and on amounts that would be obligated or accrued by the United States.<sup>5</sup> As a result of these cross-servicing activities, DOD is prohibited from increasing inventories and supplies of U.S. forces in Europe.<sup>6</sup>

### **7.3.1.2. Background of the Law**

The genesis for Chapter 138, subchapter I, was the North Atlantic Treaty Organization Mutual Support Act of 1979 (NMSA)<sup>7</sup> enacted to simplify the interchange of logistic support, supplies, and services between the United States, the NATO countries, and NATO subsidiary bodies, thus contributing to the readiness of U.S. and allied armed forces deployed in Europe and adjacent waters.

Prior to the enactment of NMSA, contracting for logistic support and services in Europe had to be implemented using highly formalized procedures involving either Government-to-Government contract actions or the processing of Foreign Military Sales cases under the Arms Export Control Act. As these Government-to-Government requests for logistic support grew, the need also increased for a general international agreement on logistics rather than relying on contract-by-contract arrangements. In passing NMSA, Congress provided the authority for DOD to enter into these agreements to assuage the sovereignty concerns of our NATO Allies while concurrently meeting the needs of U.S. forces in Europe.

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<sup>1</sup>10 U.S.C. § 2341. Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States.

<sup>2</sup>10 U.S.C. § 2342. Cross-servicing agreements.

<sup>3</sup>10 U.S.C. § 2343. Law applicable to acquisition and cross-servicing agreements.

<sup>4</sup>10 U.S.C. § 2344. Methods of payment for acquisitions and transfers by the United States.

<sup>5</sup>10 U.S.C. § 2345. Liquidation of accrued credits and liabilities; 10 U.S.C. § 2346. Crediting of receipts; 10 U.S.C. § 2347. Limitation on amounts that may be obligated or accrued by the United States.

<sup>6</sup>10 U.S.C. § 2348. Inventories of supplies not to be increased.

<sup>7</sup>Pub. L. No. 96-323, § 2(a), 94 Stat. 1016.

Section 1312 of the Defense Authorization Act of 1993<sup>8</sup> amended the statute by removing the geographical limitation to Europe and adjacent waters.

### 7.3.1.3. Law in Practice

Under the provisions of subchapter I, "Acquisition and Cross-Servicing Agreements," simplification of the interchange of logistic support, supplies, and services was supposed to result in a more flexible use of United States procurement procedures with regard to NATO. DOD was authorized to enter into host nation support agreements and, after consultation with the Department of State, to execute cross-servicing agreements with our allies for the reciprocal provision of logistic support. Commentary on the enactment of NMSA reported that:

In passing NMSA, Congress clearly authorized DOD to create a separate, two-tracked system for acquiring and transferring routine logistic support for European based forces. Congress envisioned that this would be a system parallel to, yet working in tandem with, existing formalized procurement and transfer procedures.<sup>9</sup>

DOD implemented NMSA through DOD Directive 2010.9,<sup>10</sup> which did not fully reflect the authority and flexibility granted by the statute. It consequently drew criticism because it continued to encumber operational logistics by applying the overly restrictive provisions of domestic procurement regulations.<sup>11</sup> Comments from the Services indicated that the burdensome nature of DOD's application of domestic procurement procedures to NMSA activities continues to cause concern, creating unnecessary and burdensome procedures. The U.S. Army highlighted Operation Desert Shield/Operation Desert Storm experiences as reflective of the concerns;<sup>12</sup> and as further reflected in a comment from the U.S. Navy:

Focusing again on the history of the Act discloses that Congress was responding to complaints from NATO Countries (The Netherlands in particular) that our pre-NMSA use of rigid procedures for acquisition (commercial contracts) and sales (FMS) was unwarranted given the routine nature of the transactions. Congress was also responding to the need for field commanders to be able to logistically "forage" or "exchange" to meet emergent

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<sup>8</sup>Pub. L. No. 102-484, § 1312, 106 Stat. 2315, 2547-48.

<sup>9</sup>Pribble, Fred T., Captain, A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1972, 125 Mil. L. Rev. 187 (1989), at 188.

<sup>10</sup>DOD Directive 2010.9, September 30, 1988.

<sup>11</sup>Note 9, *supra*, at 255-6.

<sup>12</sup>Memorandum for DOD Advisory Panel on Streamlining and Codifying Acquisition Law (CM-AL) from Thomas J. Duffy, LTC, JA, Chief, Logistics & Contract Law Team, Army Judge Advocate General, Contract Law Division, dated 15 September 1992 - highlighting the potential problem in deployment and provisioning in the build-up phase of a contingency operation; and Memorandum from Larry D. Anderson, LTC, JAGC, Legal Officer, U.S. Army Materiel Command, to William E. Mounts, DSMC CM-AL, dated 31 August 1992.

- highlighting the difficulty of lease/loan receipt of major end-items of allied equipment (resort to third party leasing procedures under authority of 22 U.S.C. § 2796 were apparently less than effective).

requirements.<sup>13</sup> Given this history, a return to the concept that ACCS [acquisition and cross-servicing] agreements, or their implementing agreements, must meet contracting requirements takes us full circle to the situation in 1979.<sup>14</sup>

#### **7.3.1.4. Recommendations and Justification**

### **I**

**Retain sections 2341,<sup>15</sup> 2344, 2345, 2346, and 2348.**

Retention of these sections of the Subchapter provides the bulwark of authority for meeting the continuing requirement of reciprocal NATO logistics acquisition and cross-servicing agreements for sustained U.S. operational readiness in Europe and elsewhere.

Re-number as sections 2x51, 2x54, 2x55, 2x56, and 2x58, respectively, of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as these sections are concerned with operational logistic support agreements, move to subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

### **II**

**Amend paragraph 2342(a)(1) by striking the phrase "and after consultation with the Secretary of State."**

The requirement for consultation with the Secretary of State is redundant. Prior consultation on international agreements is already mandated by the Case-Zablocki Act.<sup>16</sup>

Re-number as section 2x52 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with operational logistics support agreements, move to subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

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<sup>13</sup>Note 9, *supra*, at 227.

<sup>14</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 29 August 1992.

<sup>15</sup>As amended, see note 8, *supra*.

<sup>16</sup>5 U.S.C. § 112b.

### III

Amend subsection 2343(a) by striking the phrase "chapter 137 of this title and the provisions of this subchapter" after the words "made in accordance with"; and substituting the phrase "prudent procurement practices" in lieu thereof.

Conforming amendments to subsection 2343 (a): strike the references to old sections "2341" and "2342" and insert in lieu thereof, respectively, references to new sections "2x51" and "2x52."

Conforming amendments to subsection 2343(b): strike the phrase , " 2304(a), 2306(a), 2306(b), 2306(e), 2306a, and 2313" and insert in lieu thereof "and chapter 137"; insert the phrase "s 3709, 3735, and" between the words "section" and "3741"; insert the phrase "'5, 13, and" between the words "U.S.C." and "22"; and strike the references to old sections "2341" and "2342" and insert in lieu thereof, respectively, references to new sections "2x51" and "2x52."

Amendment of subsection 2343(a), as recommended, will eliminate the statutory "Chapter 137 clause" which mandates the application of domestic procurement procedures to NMSA activities. Instead, the amendment provides that "prudent procurement practices," as presently set forth in the relevant DOD Directive,<sup>17</sup> be applied to the complete range of NMSA activities authorized under this Subchapter. Originally DOD sought the NMSA authority to have the ability to interchange logistics support with its allies in a quick, simplified manner without hindrance from domestic procurement procedures. Application of Chapter 137 to NMSA activities is counter-productive to this purpose. The provisions of Chapter 137 do not lend themselves to an efficient interchange of logistics support with the forces of other governments and with NATO subsidiary organizations.

The conforming amendments to subsections 2343(a) and (b) provide exceptions to the application of U.S. laws concerning engaging in NMSA-related activities. However, by making Chapter 137 generally non-applicable to NMSA activities, the provisions of 10 U.S.C. § 2314 must be re-introduced to this subchapter. Section 2314 mandates that certain Title 41 provisions, concerning advertisement of solicitations<sup>18</sup> and contract term limitation,<sup>19</sup> do not apply to the DOD, the Services, the Coast Guard, and the National Aeronautics and Space Administration.

Re-number as section 2x53 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with operational logistics support agreements, move to Subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

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<sup>17</sup>Note 10, *supra*, § 6.b.

<sup>18</sup>41 U.S.C. § 5.

<sup>19</sup>41 U.S.C. § 13.

#### IV

**Amend section 2347<sup>20</sup> by adding a new paragraph "(c) When the Secretary of Defense certifies that the armed forces of the United States are, or imminently shall become, involved in a contingency operation, the restrictions set forth in subsections (a) and (b) above are waived for a period not to exceed 180 days."**

**Amend section 2350 by adding the definition "contingency operation has the same meaning provided such term in section 631 of the FY92/93 Defense Authorization Act (P.L. 102-190) (10 U.S.C. § 101(47))."**

The recommended amendments would correct deficiencies in subchapter I which were highlighted by recent experience in Operation Desert Shield/Operation Desert Storm,<sup>21</sup> and would provide statutory coverage for "contingency operations," the definition of which is currently found in 10 U.S.C. § 101(47). As stated in comments received from the U.S. Army:

Since future US involvement in contingency/combat operations may involve cooperative efforts with other nations, to include NATO allies, consideration should be given to including language which would encompass the deployment and build-up phases of any future operation within the waiver found in the statute.<sup>22</sup>

Renumber as sections 2x57 and 2x50, respectively, of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as these sections are concerned with operational logistics support agreements, move to subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

#### **7.3.1.5. Relationship to Objectives**

Amendment and retention of the sections in this subchapter establishes a balance between an efficient process and full and open access to the international logistics procurement process, while not inhibiting the development and preservation of an industrial base.

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<sup>20</sup>As amended; see note 8, *supra*.

<sup>21</sup>Note 12, *supra*.

<sup>22</sup>Memorandum for DOD Advisory Panel on Streamlining and Codifying Acquisition Law (CM-AL), ATTN: William E. Mounts, from Thomas J. Duffy, LTC, JA, Chief, Logistics & Contract Law Team, Army Judge Advocate General, Contract Law Division, dated 15 September 1992, at pg. 2.

### 7.3.1.6. Proposed Statutes

#### **§ 2x52 ~~Sec. 2342~~. Cross-servicing agreements**

(a)(1) Subject to section ~~2343~~ 2x53 of this title and to the availability of appropriations, ~~and after consultation with the Secretary of State,~~ the Secretary of Defense may enter into an agreement described in paragraph (2) with --

(A) the government of a North Atlantic Treaty Organization country;

(B) a subsidiary body of the North Atlantic Treaty Organization; or

(C) the government of a country not a member of the North Atlantic Treaty Organization but which is designated by the Secretary of Defense, subject to the limitations prescribed in subsection (b), as a government with which the Secretary may enter into agreements under this section.

(2) An agreement referred to in paragraph (1) is an agreement under which the United States agrees to provide logistic support, supplies, and services to military forces of a country or subsidiary body referred to in paragraph (1) in return for the reciprocal provisions of logistic support, supplies, and services by such government or subsidiary body to elements of the armed forces.

(b) The Secretary of Defense may not designate a country for an agreement under this section --

(1) unless the Secretary, after consultation with the Secretary of State, determines that the designation of such country for such purpose is in the interest of the national security of the United States; and

(2) in the case of a country which is not a member of the North Atlantic Treaty Organization, notifies the Committees on Armed Services and Foreign Relations of the Senate and the Committees on Armed Services and Foreign Affairs of the House of Representatives at least 30 days before the date on which such country is designated by the Secretary under subsection (a).

(c) The Secretary of Defense may not use the authority of this subchapter to procure from any foreign government as a routine or normal source any goods or services reasonably available from United States commercial sources.

(d) The Secretary shall prescribe regulations to ensure that contracts entered into under this subchapter are free from self-dealing, bribery, and conflict of interests.

**§ 2x53 ~~Sec. 2343.~~ Law applicable to acquisition and cross-servicing agreements**

(a) Except as provided in subsection (b), acquisition of logistic support, supplies, and services under section ~~2341~~ 2x51 of this title and agreements entered into under section ~~2342~~ 2x52 of this title shall be made in accordance with ~~chapter 137 of this title and the provisions of this subchapter~~ prudent procurement practices.

(b) Sections ~~2207, 2304(a), 2306(a), 2306(b), 2306(c), 2306a, and 2313~~ and chapter 137 of this title and sections 3709, 3735, and 3741 of the Revised Statutes (41 U.S.C. § 5, 13, and 22) shall not apply to acquisitions made under the authority of section ~~2341~~ 2x51 of this title or to agreements entered into under section ~~2342~~ 2x52 of this title.

**§ 2x57 ~~Sec. 2347.~~ Limitation on amounts that may be obligated or accrued by the United States**

(a)(1) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable liabilities that the United States may accrue under this subchapter (before the computation of offsetting balances) with other member countries of the North Atlantic Treaty Organization and subsidiary bodies of the North Atlantic Treaty Organization may not exceed \$150,000,000 in any fiscal year, and of such amount not more than \$25,000,000 in liabilities may be accrued for the acquisition of supplies (other than petroleum, oils, and lubricants).

(2) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable liabilities that the United States may accrue under this subchapter (before the computation of offsetting balances) with a country which is not a member of the North Atlantic Treaty Organization, but with which the United States has one or more acquisition or cross-servicing agreements, may not exceed \$10,000,000 in any fiscal year, and of such amount not more than \$2,500,000 in liabilities may be accrued for the acquisition of supplies (other than petroleum, oils, and lubricants). The \$10,000,000 limitation specified in this paragraph is in addition to the limitation specified in paragraph (1).

(b)(1) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable credits that the United States may accrue under this subchapter (before the computation of offsetting balances) with other member countries of the North Atlantic Treaty Organization and subsidiary bodies of the North Atlantic Treaty Organization may not exceed \$100,000,000 in any fiscal year.

(2) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable credits that the United States may accrue under this subchapter (before the computation of offsetting balances) with a country which is not a member of the North Atlantic Treaty Organization, but with which the United States has one or more acquisition and cross-servicing agreements may not exceed \$10,000,000 in any fiscal year. Such limitation specified in this paragraph is in addition to the limitation specified in paragraph (1).



(c) When the Secretary of Defense certifies that the armed forces of the United States are, or imminently shall become, involved in a contingency operation, the restrictions set forth in subsections (a) and (b) above are waived for a period not to exceed 180 days.

**§2x50 ~~Sec. 2350~~. Definitions**

~~In this subchapter:~~

(1) ~~The term~~ "logistic support, supplies, and services" means food, billeting, transportation, petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and port services.

(2) ~~The term~~ "North Atlantic Treaty Organization subsidiary bodies" means--

(A) any organization within the meaning of the term "subsidiary bodies" in article I of the multilateral treaty on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, signed at Ottawa on September 20, 1951 (TIAS 2992; 5 UST 1087); and

(B) any international military headquarters or organization to which the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, signed at Paris on August 28, 1952 (TIAS 2978; 5 UST 870), applies.

(3) ~~The term~~ "military region" means the geographical area of responsibility assigned to the commander of a unified combatant command (excluding Europe and adjacent waters).

(4) "contingency operation" has the same meaning provided such term in section 631 of the FY92/93 Defense Authorization Act (Pub. L. No. 102-190) (10 U.S.C. § 101(47)).

## **7.3.2. 10 U.S.C. § 2350f**

### **Procurement of communications support and related supplies and services**

#### **7.3.2.1. Summary of the Law**

The Secretary of Defense is given the authority to enter into reciprocal agreements with allied countries or international organizations for the provision of communications support and related supplies and services. Any such agreement must not exceed five years duration and the approval of the Secretary of State is required. Liquidation of credits and liabilities under these agreements must be by direct payment of the party concerned at such times as mutually agreed, but no later than thirty days after the term of the agreement; and an annual reconciliation among the parties is required.

#### **7.3.2.2. Background of the Law**

The provision was added to Chapter 138 of Title 10 by section 1005(a) of the Defense Authorization Act of 1985.<sup>1</sup> Amendments to the provision by section 933(a) of the Defense Authorization Act of 1990-1991<sup>2</sup> made certain changes in the applicability and administration of the authority of SECDEF to enter into bilateral agreements with allies or NATO for the equivalent exchange of communications supplies and services.

#### **7.3.2.3. Law in Practice**

The statute gives DOD flexibility in meeting its requirements for global communications support by exchanging excess capacity in U.S. systems for reciprocal access to foreign communications systems. According to a comment from the U.S. Navy, the system is used extensively within DOD to build redundancy and depth into its baseline and tactical networks at a substantial resource savings.<sup>3</sup> This is particularly apparent in agreements concerning the configuration management of DOD owned and leased satellite and telecommunications systems where, under the provisions of this section, common technical, software, and procedural standards and formats for interconnections can be established.<sup>4</sup>

Guidance for the provision of communications equipment and services to foreign users is set forth in a DOD Memorandum requiring an international agreement for the equivalent

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<sup>1</sup>Pub. L. No. 98-525, § 1005(a), 98 Stat. 2492, 2578-79.

<sup>2</sup>Pub. L. No. 101-189, § 933(a)-(d), 103 Stat. 1352, 1537-38.

<sup>3</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated September 8, 1992.

<sup>4</sup>*Id.*, at pg. 2.

exchange of communications support.<sup>5</sup> With the approval of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, however, an exception from this formality is provided "In the case of foreign access that is necessitated by a multilateral or bilateral operational requirement, an agreement may be established which permits an allocation of the full costs of maintaining the interconnection between the United States and foreign users."

#### **7.3.2.4. Recommendations and Justification**

### **I**

#### **Amend subsection 2350f(a) by adding a new paragraph (2).**

Amend subsection (a) of the statute by adding paragraph (2), concerning the temporary furnishing or receiving of equivalent communications support and services to meet the requirements of joint operational exercises or to meet emergent operational requirements, which generally are classified. However, the requirement to provide temporary connection, between the U.S. and foreign users, can best be illustrated by our on-going multilateral international counter-drug operations.

Since the enactment of this statutory provision, however, there has been confusion with regard to the legality of temporary connections in the course of combined exercises or to meet emergent operational requirements. The statute appears to require an international agreement to make use of this authority. As Congressional intent does not appear to contemplate an international agreement for every conceivable temporary connection, the Panel believed that a valid requirement exists for the equivalent exchange of communications support during such contingencies, as reflected in the DOD Memorandum discussed above, and the U.S. Navy comment.<sup>6</sup>

Renumber as section 2x59 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with the procurement of communications support and services, move to subchapter III, *Acquisition, Cross Servicing-Agreements, and Standardization*.

### **II**

#### **Consolidate definitions contained in subsection 2350f(d) into new section 2x50.**

In an effort to streamline and consolidate international defense acquisition statutes into a new Chapter 1XX, *Defense Trade and Cooperation*, all definitions relative to subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*, have been relocated to an introductory new section 2x50, *Definitions*.

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<sup>5</sup>Memorandum for Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Directors of the Defense Agencies, from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence, Feb. 28, 1992.

<sup>6</sup>Note 3, *supra*, at pg. 3.

### 7.3.2.5. Relationship to Objectives

Amendment of the statute as recommended would encourage the exercise of sound judgment on the part of acquisition personnel while concurrently fostering sound and efficient procurement practices in a simple and understandable fashion.

### 7.3.2.6. Proposed Statute

#### **§ 2359 - ~~Sec. 2350f~~. Procurement of communications support and related supplies and services**

(a)(1) As an alternative means of obtaining communications support and related supplies and services, the Secretary of Defense, subject to the approval of the Secretary of State, may enter into a bilateral arrangement with any allied country or allied international organization or may enter into a multilateral arrangement with allied countries and allied international organizations, under which, in return for being provided communications support and related supplies and services, the United States would agree to provide to the allied country or countries or allied international organization or allied international organizations, as the case may be, or may enter into a multilateral arrangement with allied countries and allied international organizations, equivalent value of communications support and related supplies and services. The term of an arrangement entered into under this subsection may not exceed five years.

(2) Nothing in paragraph (1) shall limit the authority of the Secretary of Defense, in the absence of a formal agreement, to temporarily furnish or receive communications support and related supplies from an allied country to meet emergent operational requirements of both countries or incident to an exercise, provided that such periods of interconnection or access, as applicable, do not exceed 90 days and the exchanges can be conducted on conditions of reciprocity. If the interconnection is maintained for joint or multilateral defense purposes, then the costs of maintaining such circuits may be allocated among the various users.

(b)(1) Any arrangement entered into under this section shall require that any accrued credits and liabilities resulting from an unequal exchange of communications support and related supplies and services during the term of such arrangement would be liquidated by direct payment to the party having provided the greater amount of communications support and related supplies and services. Liquidations may be made at such times as the parties in an arrangement may agree upon, but in no case may final liquidation in the case of an arrangement be made later than 30 days after the end of the term for which the arrangement was entered into.

(2) Parties to an arrangement entered into under this section shall annually reconcile accrued credits and liabilities accruing under such agreement. Any liability of the United States resulting from a reconciliation shall be charged against the applicable appropriation available to the DOD (at the time of the reconciliation) for obligation for communications support and related supplies and services.

(3) Payments received by the United States shall be credited to the appropriation from which such communications support and related supplies and services have been provided.

(c) The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives.

### 7.3.3. 10 U.S.C. § 2350g

#### **Authority to accept use of real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements**

##### 7.3.3.1. Summary of the Law

In accordance with mutual defense agreements and occupational arrangements, the Secretary of Defense is authorized to accept real property, or the use thereof, supplies, and services from a foreign country for the support of any element of the U.S. armed forces. The acceptance of services furnished as reciprocal international courtesies or as services customarily made available without charge are included in this authority. The Secretary of Defense requires no specific authorization from Congress to invoke this authority; however general program limitations or prohibitions may not be contravened through the use of this authority. The Secretary must provide Congress a quarterly report on the use of this authority in accepting property or services having an aggregate value exceeding \$1,000,000, with a General Accounting Office audit required annually.

##### 7.3.3.2. Background of the Law

The provision was added as part of the Defense Authorization Act of 1991,<sup>1</sup> as necessary legislation in support of Operation Desert Shield/Desert Storm. The provision has not been subsequently amended. In enacting this provision, it was the sense of Congress that there should be increased burdensharing, with our allies taking the primary responsibility in providing for their own territorial defense, assisted by limited U.S. forces forward deployed for regional and global security.<sup>2</sup> One comment indicated that Congress intended for:

. . . U.S. basing costs to include[d] foreign national costs, civilian employee costs, real estate maintenance, construction, tolls, taxes, rents, utilities and environmental restoration should be provided by the host nation or alliance . . .<sup>3</sup>

Since Operation Desert Shield/Desert Storm, however, allied burdensharing by direct cash contribution has been the focus of the recent enactment of specific provisions to address such burdensharing. The Defense Authorization Act of 1992 and 1993<sup>4</sup> provided authority for the United States to accept cash burdensharing contributions from Japan and the Republic of Korea.

<sup>1</sup>Pub. L. No. 101-510, § 1451(b), 104 Stat. 1485, 1692-93.

<sup>2</sup>*Id.*, § 1455.

<sup>3</sup>Memorandum for DOD Advisory Panel on Streamlining and Codifying Acquisition Law (CM-AL)/Mr. Mounts, from Thomas J. Duffy, LTC, JA, Chief, Logistics & Contract Law Team, Army Judge Advocate General, Contract Law Division, dated November 4, 1992.

<sup>4</sup>Pub. L. No. 102-190, §§ 1045, 105 Stat. 1290, 1465-66.

Similarly, the Defense Authorization Act of 1993<sup>5</sup> has provided authority for cash burdensharing contributions from Kuwait while concurrently directing that host-nation support agreements be revised generally:

Each defense cost-sharing agreement entered into . . . shall provide that the nation agrees to share equitably with the United States, through cash compensation or in-kind contributions . . . the costs to the United States that arise solely from the implementation of the provisions of the bilateral or multilateral defense agreement with that nation.<sup>6</sup>

#### **7.3.3.3. Law in Practice**

In practice, the statute provides the Secretary of Defense authority for actions under mutual defense agreements and occupational arrangements which might otherwise contravene domestic legislation and sensibilities concerning the acceptance, on behalf of the United States, of gratuities from a foreign country. Other authorized acceptance procedures include those services furnished as reciprocal international courtesies, or furnished as services customarily made available by a foreign country. As reflected by the U.S. Navy:

This provision codifies the longstanding principle of 'reciprocal international courtesies' which enables DOD to accept the use of real property or routine services upon conditions or reciprocity. 10 U.S.C. § 7227 is one corollary provision which enables DOD to transfer routine services, section 2350g, as it is supplemented by 10 U.S.C. § 2608(d), puts to rest questions about DOD's authority to accept in-kind contributions for defense uses.<sup>7</sup>

#### **7.3.3.4. Recommendation and Justification**

**Amend section 2350g by adding new paragraph (a)(3) and new subsection (b).**

Under provisions of this section, however, further authority is required to accept direct burdensharing payment or contribution from our allies for the stationing of U.S. forces in foreign countries pursuant to a mutual defense agreement or occupational arrangement. Additionally, similar authority is needed to accommodate special warfare operational agreements entered into pursuant to mutual defense agreements or occupational arrangements.<sup>8</sup> While such provision facilitates force deployment overseas by maximizing the use of host-nation support, authority

<sup>5</sup>Pub. L. No. 102-484, § 1305, 106 Stat. 2315, 2546-47.

<sup>6</sup>Pub. L. No. 102-190, § 1046(3), 105 Stat. 1290, 1466.

<sup>7</sup>Memorandum from Mark E. Rosen, CDR, JAGC, Office of the Navy Judge Advocate General, International Law Division, to Donald Freedman, Executive Secretary, Acquisition Law Panel, dated 12 September 1992.

<sup>8</sup>Memoranda for DOD Advisory Panel on Streamlining and Codifying Acquisition Law (CM-AL)/Mr. Mounts, from Thomas J. Duffy, LTC, JA, Chief, Logistics & Contract Law Team, Army Judge Advocate General, Contract Law Division, dated September 15, 1992 and November 4, 1992.

needs to be broadened to include the acceptance of direct payment, services, and supplies incident to joint or bilateral exercises which may or may not take place operationally within the geographic limits of the host-nation.<sup>9</sup>

In order to accommodate direct payment or burdensharing contributions from foreign countries, as well as the use of real property, services, and supplies currently permitted by statute, the Panel recommends amendment of the statute by adding new paragraph (a)(3). The amended section would provide needed flexibility to SECDEF in the administration and execution of mutual defense agreements and occupational arrangements, as well as authority to go beyond international courtesies and outside cross-servicing arrangements for needed logistic support and increased allied burdensharing. By adding new subsection (b) as an additional amendment to section 2350g, the Panel recommendation also would authorize the acceptance of increased allied burdensharing contributions for joint or bilateral exercises outside the area of the host-nation country.

Re-number as section 2x60 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with operational and mutual defense agreements, move to subchapter III, *Acquisition, Cross-Servicing Agreements, and Standardization*.

#### **7.3.3.5. Relationship to Objectives**

Amendment of this section promotes financial integrity and allied burdensharing; and, while not unduly burdensome in the exercise of sound judgment on the part of acquisition personnel, also encourages sound and efficient procurement practices in a simple, understandable fashion.

#### **7.3.3.6. Proposed Statute**

**§ 2x60--Sec. 2350g. Authority to accept direct payment or contribution, use of real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements**

(a) Authority To Accept.--The Secretary of Defense may accept from a foreign country, for the support of any element of the armed forces in an area of that country--

(1) real property or the use of real property and services and supplies for the United States or for the use of the United States in accordance with a mutual defense agreement or occupational arrangement;

(2) services furnished as reciprocal international courtesies or as services customarily made available without charge; and

(3) direct payment or contribution. Any such direct payment or contribution received by the United States from a foreign country in accordance with a mutual defense agreement or

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<sup>9</sup>Note 7, *supra*.



occupational arrangement accepted in a fiscal year shall be credited to appropriations of the Department of Defense that are available for that fiscal year for the purposes for which the contributions are made. The contributions so credited shall be --

(A) merged with the appropriations to which they are credited; and

(B) available for the same time period as those appropriations.

(b) The limitation upon the authority of the Secretary of Defense to accept direct payment or contribution, the use of real property, services and supplies, from foreign countries in connection with mutual defense agreements or occupational arrangements while in an area of that country, shall not apply in the case of joint or bilateral exercises involving the United States and the providing nation.

~~(b)(c)~~ Quarterly Reports.--(1) Not later than 30 days after the end of each quarter of each fiscal year, the Secretary of Defense shall submit to Congress a report on property, services, and supplies accepted by the Secretary under this section during the preceding quarter. The Secretary shall include in each such report a description of all property, services, and supplies having a value of more than \$1,000,000.

(2) In computing the value of any property, services, and supplies referred to in paragraph (1), the Secretary shall aggregate the value of--

(A) similar items of property, services, and supplies accepted by the Secretary during the quarter concerned; and

(B) components which, if assembled, would comprise all or a substantial part of an item of equipment or a facility.

~~(e)(d)~~ Authority to Use Property, Services, and Supplies.--Property, services, or supplies referred to in subsection (a) may be used by the Secretary of Defense without specific authorization, except that such property, services, and supplies may not be used in connection with any program, project, or activity if the use of such property, services, or supplies would result in the violation of any prohibition or limitation otherwise applicable to that program, project, or activity.

~~(d)(e)~~ Annual Audit by GAO.--The Comptroller General of the United States shall conduct an annual audit of property, services, and supplies accepted by the Secretary of Defense under this section and shall submit a copy of the results of each such audit to Congress.

#### **7.3.4. 10 U.S.C. § 2457**

### **Standardization of equipment with North Atlantic Treaty Organization members**

#### **7.3.4.1. Summary of the Law**

This statute codifies the policy for mandating equipment standardization and joint doctrine with the members of NATO, or at least interoperability with their equipment, for those weapon systems, ammunition, and fuel procured for the use of U.S. armed forces stationed in Europe under the auspices of NATO. Consideration of cost, function, quality, and availability of equipment was added as a requirement in defense procurement procedures, thereby joining the tests of rationalization, standardization, and interoperability (RSI). By relying on licensing and coproduction cooperative agreements, the statute contemplates increased survivability, in time of war, of the NATO armaments production base through dispersal of manufacturing facilities.

To encourage the Governments of Europe to operate in a more unified way, the concept of a "two-way street" between Europe and North America in cooperative defense procurement was introduced. The Secretary of Defense was mandated to prepare an annual NATO Report to Congress (now biennial) providing an assessment and evaluation concerning actual and potential areas for cooperative agreements, including identification of major new systems and research and development in compliance with NATO policy concerning cooperation. The Secretary of Defense (SECDEF) is permitted under the statute to acquire equipment manufactured outside the United States in furtherance of this policy.

#### **7.3.4.2. Background of the Law**

Section 302(c) of the Defense Authorization Act of 1975<sup>1</sup> provided the original discussion of NATO standardization by requiring a semi-annual report from DOD. The Culver-Nunn Amendment, part of the Defense Authorization Act of 1976,<sup>2</sup> added the concepts of cooperative research, development, licensed, and coproduction, support, and logistics to the discussion. When finally enacted by Congress in the Defense Authorization Act of 1983,<sup>3</sup> the statute concurrently authorized SECDEF, pursuant to the cooperative NATO policy, to procure equipment manufactured outside the United States by determining, that for purposes of the "Buy American" Act, the acquisition of equipment manufactured in the United States would be inconsistent with the public interest.

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<sup>1</sup>Pub. L. No. 93-365, §302(c), 88 Stat. 399, 402.

<sup>2</sup>Pub. L. No. 94-361, §§ 802-3, 90 Stat. 923, 930-31.

<sup>3</sup>Pub. L. No. 97-295, § 1(30)(A), 96 Stat. 1294.

#### 7.3.4.3. Law in Practice

NATO standardization is implemented by DOD Directive<sup>4</sup> and in its most recent annual report,<sup>5</sup> DOD recognized that smaller NATO forces in the 1990s would likely lead to more multinational military operations. Standardization of equipment within these organizations will consequently become more important, not only for interoperability but also for logistic support.<sup>6</sup> However, some concerns are evident:

In theory, NATO headquarters should serve as the locus of cooperation to ensure that the forces of member countries are appropriately equipped, including standardization and interoperability of weapons systems, ... has been only marginally successful in obtaining compliance. The chief reason is that the Allies have been reluctant to have an overly effective standardization program, which they fear would be based on generally cheaper and more effective U.S. weapons systems.<sup>7</sup>

#### 7.3.4.4. Recommendation and Justification

##### **Retain section 2457.**

Because the Congressional policy statement in support of RSI and follow-on logistic support within the NATO structure serves a useful purpose, the Panel recommends its retention.

Re-number as section 2x70 of the new Chapter 1XX, *Defense Trade and Cooperation*; and, as this section is concerned with operational and logistic support agreements, move to subchapter III, Acquisition and Cross-Servicing Agreements.

#### 7.3.4.5. Relationship to Objectives

Retention of this statute concerning international logistics and standardization, establishes a balance between an efficient process, full and open access to the procurement process, while not inhibiting the development and preservation of a national defense technology and industrial base.

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<sup>4</sup>DOD Directive 2010.6, Standardization and Interoperability of Weapon Systems and Equipment Within the North Atlantic Treaty Organization.

<sup>5</sup>Department of Defense, Combined Annual Report to Congress on Standardization of Equipment With NATO Members and Cooperative Research and Development Projects With Allied Countries, July 1991.

<sup>6</sup>*Id.*, at 2.

<sup>7</sup>U.S. Congress Office of Technology Assessment, Arming Our Allies: Cooperation and Competition in Defense Technology, May 1990, at 49.

#### **7.3.4.6. Proposed Statute**

##### **§ 2x70 Sec. 2457. Standardization of equipment with North Atlantic Treaty Organization members**

(a) It is the policy of the United States to standardize equipment, including weapons systems, ammunition, and fuel, procured for the use of the armed forces of the United States stationed in Europe under the North Atlantic Treaty or at least to make that equipment interoperable with equipment of other members of the North Atlantic Treaty Organization. To carry out this policy, the Secretary of Defense shall --

(1) assess the costs and possible loss of non-nuclear combat effectiveness of the military forces of the members of the Organization caused by the failure of the members to standardize equipment;

(2) maintain a list of actions to be taken, including an evaluation of the priority and effect of the action, to standardize equipment that may improve the overall non-nuclear defense capability of the Organization or save resources for the Organization; and

(3) initiate and carry out, to the maximum extent feasible, procurement procedures to acquire standardized or interoperable equipment, considering the cost, function, quality, and availability of the equipment.

(b) Progress in realizing the objectives of standardization and interoperability would be enhanced by expanded inter-Allied procurement of arms and equipment within the North Atlantic Treaty Organization. Expanded inter-Allied procurement would be made easier by greater reliance on licensing and coproduction cooperative agreements among the signatories of the North Atlantic Treaty. If constructed to preserve the efficiencies associated with economies of scale, the agreements could minimize potential economic hardship to parties to the agreements and increase the survivability, in time of war, of the North Atlantic Alliance's armaments production base by dispersing manufacturing facilities. In conjunction with other members of the Organization and to the maximum extent feasible, the Secretary shall--

(1) identify areas in which those cooperative agreements may be made with members of the Alliance; and

(2) negotiate those agreements.

(c)(1) It is the sense of Congress that weapons systems being developed wholly or primarily for employment in the North Atlantic Treaty Organization theater should conform to a common Organization requirement in order to proceed toward joint doctrine and planning and to facilitate maximum feasible standardization and interoperability of equipment, and that a common Organization requirement should be understood to include a common definition of the military threat to the members of the Organization.

(2) It is further the sense of Congress that standardization of weapons and equipment within the Organization on the basis of a "two-way street" concept of cooperation in defense procurement between Europe and North America can only work in a realistic sense if the European nations operate on a united and collective basis. Therefore, the governments of Europe are encouraged to accelerate their present efforts to achieve European armaments collaboration among all European members of the Organization.

(d) Before February 1, 1989, and biennially thereafter, the Secretary shall submit a report to Congress that includes --

(1) each specific assessment and evaluation made and the results of each assessment and evaluation, and the results achieved with the members of the North Atlantic Treaty Organization, under subsections (a)(1) and (2) and (b);

(2) procurement action initiated on each new major system not complying with the policy of subsection (a);

(3) procurement action initiated on each new major system that is not standardized or interoperable with equipment of other members of the Organization, including a description of the system chosen and the reason for choosing that system;

(4) the identity of --

(A) each program of research and development for the armed forces of the United States stationed in Europe that supports, conforms, or both, to common Organization requirements of developing weapon systems for use by the Organization, including a common definition of the military threat to the Organization; and

(B) the common requirements of the Organization to which those programs conform or which they support;

(5) action of the Alliance toward common Organization requirements if none exist;

(6) efforts to establish a regular procedure and mechanism in the Organization to determine common military requirements;

(7) a description of each existing and planned program of the DOD that supports the development or procurement of a weapon system or other military equipment originally developed or procured by members of the Organization other than the United States and for which funds have been authorized to be appropriated for the fiscal year in which the report is submitted, including a summary listing of the amount of funds--

(A) appropriated for those programs for the fiscal year in which the report is submitted; and

(B) requested, or proposed to be requested, for those programs for each of the 2 fiscal years following the fiscal year for which the report is submitted; and

(8) a description of each weapon system or other military equipment originally developed or procured in the United States and that is being developed or procured by members of the Organization other than the United States during the fiscal year for which the report is submitted.

(e) If the Secretary decides that procurement of equipment manufactured outside the United States is necessary to carry out the policy of subsection (a), the Secretary may determine under section 2 of title III of the Act of March 3, 1933 (41 U.S.C. § 10a), that acquiring that equipment manufactured in the United States is inconsistent with the public interest.

(f) The Secretary shall submit the results of each assessment and evaluation made under subsection (a)(1) and (2) to the appropriate North Atlantic Treaty Organization body to become an integral part of the overall Organization review of force goals and development of force plans.

### **7.3.5. 22 U.S.C. § 2794(7)**

#### **Definitions; defense articles and defense services**

##### **7.3.5.1. Summary of the Law**

Provisions of Title 22 and the Arms Export Control Act authorize military sales and assistance by the United States of defense articles and services to eligible foreign countries solely for the purposes of internal security, legitimate self-defense, civic action or regional, collective arrangements consistent with the United Nations Charter. Authorized sales can also derive from a United Nations' request to restore international peace and security or to enable less-developed foreign countries, friendly to the United States, to engage in activities helpful to their economic and social development.

Sales under the Arms Export Control Act must also, however: (a) strengthen the security of the United States and promote world peace; (b) restrict the transfer of any defense articles or services to third parties; (c) ensure that the security of the defense articles and services is maintained; and (d) be made only to eligible foreign countries or international organizations.

For purposes of Chapter 39 of the Arms Export and Control Act, the term "defense articles and defense services" means those commercial exports that are subject to 22 U.S.C. § 2778, Control of Arms Exports and Imports, and designated as part of the United States Munitions List.

##### **7.3.5.2. Background of the Law**

The provisions of the Foreign Assistance Act of 1961<sup>1</sup> superseded the military assistance provisions of the Mutual Defense Assistance Act of 1949<sup>2</sup> and the Mutual Security Act of 1951<sup>3</sup> in reaffirming the policy of the United States "to furnish to such countries cooperative military assistance of a kind and in an amount reasonably designed to help them provide for their own security against such aggression and for the security of international organizations of which they may be members."

The Foreign Military Sales Act of 1968<sup>4</sup> consolidated and revised all legislation dealing with military sales, whether for cash or on credit terms, to foreign countries by the United States. In Chapter 3, the Act also established some basic military export controls dealing with aggregate fiscal and geographic regional ceilings. Subsequent amendments in 1970 emphasized international cooperation for the maintenance of peace and security while placing additional restrictions on the military aid and sales programs. The Foreign Military Sales and Assistance Act of 1973 introduced the concepts of international narcotics control and international military education and

<sup>1</sup>Pub. L. No. 87-195, pt. II, 75 Stat. 424.

<sup>2</sup>Pub. L. No. 81-329, 63 Stat. 714.

<sup>3</sup>Pub. L. No. 82-165, 65 Stat. 373.

<sup>4</sup>Pub. L. No. 90-629, 82 Stat. 1320.

training (IMET) and, in conjunction with military assistance to Indochina, established an "armaments, munitions and war material" listing.

The International Security Assistance and Arms Export Control Act of 1976-1977<sup>5</sup> radically changed the landscape of military assistance and sales. The Act achieved the following general objectives: (1) shifting the focus of United States arms sales policy from selling to controlling arms sales and exports; (2) providing Congress and the public with additional information about Government arms sales actions; (3) reducing military grant assistance programs and costs; (4) coupling human rights and anti-discrimination considerations with the furnishing of security assistance; (5) differentiating between defense articles and services.

The International Security Assistance Act of 1978<sup>6</sup> created the economic support fund (ESF) and the international peacekeeping programs account (PKO) and set forth ten arms sales principles to encourage multilateral arms export restraint. The International Security and Development Cooperation Act of 1981<sup>7</sup> addressed nonrecurring research and development costs and Foreign military sales (FMS) administrative charges.

### 7.3.5.3. Law in Practice

Subchapter II of Chapter 32, Military Assistance and Sales, involve both Government-to-Government sales as well as direct commercial sales to foreign purchasers. While the rules and procedures differ for each type of sale, the same U.S. Government statutes and policies are reflected in the regulations governing each type of transaction.<sup>8</sup>

At the end of FY89, the Military Assistance Program (MAP) was formally integrated into the Foreign Military Financing Program. (FMFP). At that time, all funding for MAP grants was terminated and any foreign military sales (FMS) transaction that involved credit of any type was then processed under the FMFP.<sup>9</sup>

With regard to Chapter 39, the Arms Export Control Act, the issue concerning export control and licensing would seem to be resolution of commodity jurisdiction disputes between the Arms Export Control Act and the Export Administration Act.<sup>10</sup>

There are two basic problems associated with commodity jurisdiction. First the statutes and implementing regulations of the Arms Export Control Act (AECA) and the Export Administration Act (EAA) do not provide clear guidance as to which commodities are controlled by one act versus the other. This results in frequent

<sup>5</sup>Pub. L. No. 94-329, 90 Stat. 734.

<sup>6</sup>Pub. L. No. 95-384, 92 Stat. 739.

<sup>7</sup>Pub. L. No. 97-113, 94 Stat. 3132.

<sup>8</sup>DOD 5105.38-M, Security Assistance Management Manual (SAMM), 1988.

<sup>9</sup>Memorandum for Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Law, from Paul C. Smith, COL, JA, Chief, Contract Law Division, Office of the Army Judge Advocate General, dated September 21, 1992.

<sup>10</sup>50 U.S.C. App. 2401 *et seq.*



commodity jurisdiction disputes. Second, the EAA imposes an obligation to coordinate its controls with those under the AECA, but no similar obligation is imposed by the AECA. The practical effect of this asymmetry is that Commerce, which has primary authority in administering the EAA, defers to the decisions of the State Department, which has been designated primary responsibility for administering the AECA. As a consequence, there is a strong bias in favor of placing controversial items on the munitions list.<sup>11</sup>

#### **7.3.5.4. Recommendation and Justification**

##### **No action on section 2794(7).**

The Panel received comment from the Council of Defense and Space Industry Associations highlighting the need for guidance to industry as to what is controlled for export licensing purposes by the State Department under the Munitions Control List,<sup>12</sup> but took no action on section 2794(7). Although the section applies to the procurement of commercial defense goods and services, the determination was made that this section was predominately export control related and, therefore, not within the primary defense acquisition purview of the Panel's statutory mandate.

#### **7.3.5.5. Relationship to Objectives**

The Panel believes that while this section has a tangential relationship to DOD acquisition, action on this statute would not further the objectives of the Panel.

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<sup>11</sup>Response to Congressional Request for Definition of a Defense Article, Attachment to Letter, from the Council of Defense and Space Industry Associations (CODSIA), to Donald M. Freedman, Executive Secretary, DoD Advisory Panel on Streamlining and Codifying Acquisition Law, dated October 14, 1992.

<sup>12</sup>*Id.*, Letter from CODSIA recommended that because the regulations implementing the Munitions Control List and the Export Administration Regulations often overlap and are confusing,, by addressing commodity jurisdiction, a new definition for defense articles and services would hopefully bring consistency to the process of export licensing and control.

## **7.4. Proposed Defense Trade and Cooperation Code**

### **TITLE 10** **CHAPTER 1XX. DEFENSE TRADE AND COOPERATION**

#### ***§2x00. Short Title***

*This chapter shall be known as the Defense Trade and Cooperation Act of 1993.*

#### **SUBCHAPTER I** **PURCHASES OF FOREIGN GOODS BY THE DEPARTMENT OF DEFENSE**

#### ***§2x10. Definitions***

*(a) As used in this subchapter, the following are defined terms—*

*(1) In this section, "American goods" means--*

*(A) an end product that is mined, produced, or manufactured in the United States;*

*or*

*(B) an end product that is manufactured in the United States but which includes components mined, produced, or manufactured outside the United States if such end product is substantially transformed within the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.*

*(2) "goods which are other than American goods" means an end product not meeting the requirements of subsection (a)(1).*

*(3) "unreasonable cost" is defined in 10 U.S.C. § 2x17.*

*(4) "covered contract" means a contract for property, other than real property and commercial items and components as defined in 10 U.S.C. §§ 2302 (5) and 2xx2, the total value of which exceeds the simplified acquisition threshold set out at 10 U.S.C. § 2302(4).*

*(5) "United States", when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;*

*(6) "public use", "public building", and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands.*

**§ 2x11. Policy on Purchases of Foreign Goods**

(a) Funds appropriated to the Department of Defense may not be obligated under a covered contract for procurement of goods which are other than American goods unless adequate consideration is given to the following:

(1) The bids or proposals of firms located in labor surplus areas in the United States (as designated by the Department of Labor) which have offered to furnish American goods.

(2) The bids or proposals of small business firms in the United States which have offered to furnish American goods.

(3) The bids or proposals of all other firms in the United States which have offered to furnish American goods.

(4) The United States balance of payments.

(5) The cost of shipping goods which are other than American goods.

(6) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.

(7) *The need to protect the United States national defense technology and industrial base and mobilization base.*

(8) *Coordination of acquisition activities of the Department with obligations contained in international treaties and with the acquisition activities of major United States allies (as in section 2x20(7) of this chapter).*

(9) *National security interests of the United States.*

(b) Consideration of the matters referred to in paragraphs (1) through (9) of subsection (a) shall be given *in the manner set out in this Subchapter.*

**§ 2x12. Items Restricted to American Sources**

(a) *AUTHORITY OF THE SECRETARY.—The Secretary of Defense is hereby authorized to require the Department to acquire only American goods and related American services for specific items as the Secretary may find necessary to protect the United States national defense technology and industrial base, or the United States mobilization base, or to further national security.*

(b) *RESTRICTIONS ON ACQUISITION OF GOODS FROM COUNTRIES WHICH DISCRIMINATE AGAINST AMERICAN GOODS AND RELATED AMERICAN SERVICES.—Section 10b-1 of Title 41 shall apply to the Department of Defense except that section shall have no application to the acquisition of commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2 or to contracts*

*the value of which is below the simplified acquisition threshold as defined in 10 U.S.C. § 2302(4).*

**(c) BUSES.--**Funds appropriated for use by the armed forces are available to acquire a multipassenger motor vehicle (bus) only if the vehicle is manufactured in the United States. However, the Secretary of Defense may prescribe regulations authorizing the acquisition of a multipassenger motor vehicle (bus) not manufactured in the United States, but only to ensure that compliance with this subsection will not result in an uneconomical procurement action or adversely affect the national interest.

**(d) CHEMICAL WEAPONS ANTIDOTE MANUFACTURED OVERSEAS.--**Funds appropriated to the Department of Defense may not be used for the procurement of chemical weapons antidote contained in automatic injectors (or for the procurement of the components for such injectors) determined to be critical under the Industrial Preparedness Planning Program of the Department of Defense unless-

(1) such injector or component is manufactured in the United States by a company which is an existing producer under the industrial preparedness program at the time the contract is awarded and which

(A) has received all required regulatory approvals; and

(B) has the plant, equipment, and personnel to perform the contract in existence in the United States at the time the contract is awarded; or

(2) the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, determines that such procurement from a source in addition to a source described in paragraph (1) is critical to the national security.

**(e) VALVES AND MACHINE TOOLS .--**

(1) Effective through fiscal year 1996, funds appropriated or otherwise made available to the Department of Defense may not be used to enter into a contract for the procurement of items described in paragraph (2) that are not manufactured in the United States or Canada.

(2) Items covered by paragraph (1) are the following:

(A) Powered and non-powered valves in Federal Supply Classes 4810 and 4820 used in piping for naval surface ships and submarines.

(B) Machine tools in the Federal Supply Classes for metal-working machinery numbered 3405, 3408, 3410 through 3419, 3426, 3433, 3438, 3441 through 3443, 3445, 3446, 3448, 3449, 3460, and 3461.

(3) Contracts covered by paragraph (1) include the following:

(A) Contracts for the procurement of items described in paragraph (2) for use in any property under the control of the Department of Defense, including government-owned, contractor-operated facilities.

(B) Contracts entered into by contractors on behalf of the Department of Defense for the procurement of items described in paragraph (2) for the purposes of providing the items to other contractors as Government-furnished equipment.

(4) In any case in which a contract subject to the requirement of paragraph (1) includes the procurement of more than one Federal Supply Class of machine tools or machine tools and accessories described in paragraph (2), each supply class shall be evaluated separately for purposes of determining whether the limitation in this subsection applies.

(5) The Secretary of Defense may waive the requirement of paragraph (1) with respect to the procurement of an item if the Secretary determines that any of the following apply with respect to that item:

(A) The restriction would cause unreasonable costs or delays to be incurred.

(B) United States producers of the item would not be jeopardized by competition from a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(C) Satisfactory quality items manufactured in the United States or Canada are not available.

(D) The restriction would impede cooperative programs entered into between the Department of Defense and a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(E) The procurement is for an amount less than \$25,000 and simplified small purchase procedures are being used.

(F) The restriction would result in the existence of only one United States or Canadian source for the item.

(f) AIR CIRCUIT BREAKERS .--

(1) The Secretary of Defense may not procure air circuit breakers for naval vessels unless-

(A) the air circuit breakers are produced or manufactured in the United States; and

(B) substantially all of the components of the air circuit breakers are produced or manufactured in the United States.

(2) For purposes of paragraph (1)(B), substantially all of the components of air circuit breakers shall be considered to be produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States.

(3) Paragraph (1) does not prevent the procurement of spares and repair parts needed to support air circuit breakers produced or manufactured outside the United States.

(4) The Secretary of Defense may waive the limitation in paragraph (1) on a case-by-case basis with respect to any procurement if the Secretary determines that carrying out a proposed procurement in accordance with the limitation in that case--

(A) is not in the national security interests of the United States;

(B) will have an adverse effect on a United States company; or

(C) will result in procurement from a United States company that, with respect to the sale of air circuit breakers, fails to comply with applicable Government procurement regulations or the antitrust laws of the United States.

(5) Whenever the Secretary proposes to grant a waiver under paragraph (4), the Secretary shall submit a notice of the proposed waiver, together with a statement of the reasons for the proposed waiver, to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives. The waiver may then be granted only after the end of the 30-day period beginning on the date on which the notice is received by those committees.

(g) SONOBUOYS - (1) The Secretary of Defense may not procure a sonobuoy manufactured in a foreign country if United States firms that manufacture sonobuoys are not permitted to compete on an equal basis with foreign manufacturing firms for the sale of sonobuoys in that foreign country.

(2) The Secretary may waive the limitation in paragraph (1) with respect to a particular procurement of sonobuoys if the Secretary determines that such procurement is in the national security interests of the United States.

(3) In this subsection, the term 'United States firm' has the meaning given such term in section 2x20(10) of this title.

*(h) TECHNICAL DATA PACKAGES FOR LARGE-CALIBER CANNON: PROHIBITION ON TRANSFERS TO FOREIGN COUNTRIES; EXCEPTION*

**(1) General rule**

Funds appropriated to the Department of Defense may not be used-- (A) to transfer to a foreign country a technical data package for a defense item being manufactured or developed in an arsenal; or (B) to assist a foreign country in producing such a defense item.

**(2) Exception**

The Secretary of the Army may use funds appropriated to the Department of Defense to transfer a technical data package, or to provide assistance, described in *paragraph (1)* if-- (A) the transfer or provision of assistance is to a friendly foreign country (as determined by the Secretary of Defense in consultation with the Secretary of State); (B) the Secretary of the Army determines that such action-- (i) would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and (ii) would not transfer technology (including production techniques) considered unique to the arsenal concerned, except as provided in *paragraph (5)*; and (C) the Secretary of Defense enters into an agreement with the country concerned described in *paragraph (3)* or (4).

**(3) Coproduction agreements**

An agreement under this *paragraph* shall be in the form of a Government-to- Government Memorandum of Understanding and shall include provisions that-- (A) prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; (B) require that production by the participating foreign country of the defense item to which the technical data package or assistance relates be shared with the arsenal concerned; (C) subject to such exceptions as may be approved under *paragraph (6)*, prohibit transfer by the participating foreign country to a third party or country of-- (i) any defense article, technical data package, technology, or assistance provided by the United States under the agreement; and (ii) any defense article produced by the participating foreign country under the agreement; and (D) require the Secretary of Defense to monitor compliance with the agreement and the participating foreign country to report periodically to the Secretary of Defense concerning the agreement.

**(4) Cooperative project agreements**

An agreement under this *paragraph* is a cooperative project agreement under section 2x31 of this chapter which shall include provisions that-- (A) for development phases describe the technical data to be transferred and for the production phase prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement; (B) require that at least the United States production of the defense item to which the technical data package or assistance relates be carried out by the arsenal concerned; and (C) require the Secretary of Defense to monitor compliance with the agreement.

**(5) Licensing fees and royalties**

The limitation in *paragraph (2)(B)(ii)* shall not apply if the technology (or production technique) transferred is subject to nonexclusive license and payment of any negotiated licensing fee or royalty that reflects the cost of development, implementation, and prove-out of the technology or production technique. Any negotiated license fee or royalty shall be placed in the operating fund of the arsenal concerned for the purpose of capital investment and technology development at that arsenal.

**(6) Transfers to third parties**

A transfer described in *paragraph (3)(C)* may be made if-- (A) the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program or a cooperative project in which the United States and the participating foreign country were partners; or (B) the President-- (i) complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. 2753(d)) with respect to such transfer; and (ii) certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large-caliber cannon.

**(7) Notice and reports to Congress:** (A) The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this *subsection*. (B) The Secretary shall submit to Congress a semi-annual report on the operation of this *subsection* and of agreements entered into under this section.

**(8) Arsenal defined**

In this *subsection*, the term "arsenal" means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon.

**(i) RESTRICTIONS ON CONSTRUCTION OR REPAIR OF VESSELS IN FOREIGN SHIPYARDS.**

(1) Except as provided in *paragraph (2)*, no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard.

(2) The President may authorize exceptions to the prohibition in *paragraph (1)* when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress.

(3)(A) A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the homeport of which is in the United States may not be overhauled, repaired, or maintained in a shipyard outside the United States.



(B) *Subparagraph (A)* does not apply in the case of voyage repairs.

(4) An inflatable boat or rigid inflatable boat, as defined by the Secretary of the Navy, is not a vessel for the purpose of the restriction in *paragraph (1)*.

(5) In the case of a naval vessel the homeport of which is not in the United States (or a territory of the United States), the Secretary of the Navy may not during the 15-month period preceding the planned reassignment of the vessel to a homeport in the United States (or a territory of the United States) begin any work for the overhaul, repair, or maintenance of the vessel that is scheduled to be for a period of more than six months.

**§2x13. *Application of the Trade Agreements Act.***

(a) *Except as set forth in section 2x11 of this subchapter and in subparagraph (b) of this section, the Trade Agreements Act (19 U.S.C. § 2501 et seq.) shall apply, subject to its terms, to Department of Defense covered contracts.*

(b) *The Trade Agreements Act shall not apply to the acquisition of spare or replacement parts for end products meeting the requirements of the Trade Agreements Act when such acquisitions are restricted to the original source of such end product or to the original manufacturer of the part, or when no domestic or designated country source is available for such parts. The Secretary of Defense shall issue regulations implementing this subsection.*

**§2x14. *Preference for American Goods***

(a) GENERAL.—Except as set out in this Chapter, and unless the Secretary or the Secretaries of the military departments shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only American goods shall be acquired for public use under any covered contract. This section shall not apply—

(1) with respect to articles, materials, or supplies acquired for use outside the United States, or

(2) if American goods of sufficient quality are not reasonably available in commercial quantities,

(3) to the acquisition of spare or replacement parts for an end product meeting the requirements of this subsection when such acquisitions are restricted to the original source of such end product or to the original manufacturer of the part, or when no domestic or designated country source is available for such parts. The Secretary of Defense shall issue regulations implementing this subsection.

(b) **CONTRACTS FOR PUBLIC WORKS; SPECIFICATION FOR USE OF AMERICAN MATERIALS.**—Every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only *American goods*; provided, however, that if the head of the Federal agency making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception. *This section shall not apply if American goods of sufficient quality are not reasonably available in commercial quantities.*

**§2x15. Determination of Unreasonable Cost**

*The cost of American goods is unreasonable as compared to the cost of goods which are other than American goods if the cost of such American goods exceeds the cost of goods which are other than American goods by a percentage to be determined by the Secretary of Defense. The percentage determined under this section shall not be less than the percentage set from time to time by Executive Orders implementing the Buy American Act (41 U.S.C. § 10a - 10d).*

## SUBCHAPTER II

### INTERNATIONAL AND COOPERATIVE AGREEMENTS

#### §2x20. Definitions

(a) *As used in this subchapter, the following are defined terms—*

(1) "allied country" means any of the following:

(A) A country that is a member of the North Atlantic Treaty Organization.

(B) Australia, New Zealand, Japan, and the Republic of Korea.

(C) Any other country designated as an allied country for the purposes of this section by the Secretary of Defense with the concurrence of the Secretary of State.

(2) "cooperative project" means a jointly managed arrangement, described in a written agreement entered into by the participants, that--

(A) is undertaken by the participants in order to improve the conventional defense capabilities of the participants; and

(B) provides for--

(i) one or more participants (other than the United States) to share with the United States the cost of research and development, testing, evaluation, or joint production (including follow-on support) of defense articles;

(ii) the United States and another participant concurrently to produce in the United States and the country of such other participant a defense article jointly developed in a cooperative project described in clause (i); or

(iii) *modifying existing military equipment to meet United States military requirements; or*

(iv) the United States to procure a defense article or a defense service from another participant in the cooperative project.

(3) "defense article" has the meaning given such term in section 47(3) of the Arms Export Control Act (22 U.S.C. § 2794(3)).

(4) "defense service" has the meaning given such term in section 47(4) of the Arms Export Control Act (22 U.S.C. § 2794(4)).

(5) "foreign firm" means a business entity other than a United States firm.

(6) "*friendly foreign country*" means any country designated as a friendly foreign country for purposes of this Subchapter by the Secretary of Defense in consultation with the Secretary of State.

(7) "major ally of the United States" means--

(A) a member nation of the North Atlantic Treaty Organization (other than the United States) and North Atlantic Treaty Organization subsidiary bodies; or

(B) a major non-NATO ally.

(8) "major non-NATO ally" means a country (other than a member nation of the North Atlantic Treaty Organization) that is designated as a major non-NATO ally for purposes of this section by the Secretary of Defense with the concurrence of the Secretary of State.

(9) "North Atlantic Treaty Organization subsidiary bodies" has the meaning given to it by section 2x50 of this title.

(10) "United States firm" means a business entity that performs substantially all of its manufacturing, production, and research and development activities in the United States.

#### **§2x21. Defense international agreements**

(a) CONSIDERATIONS IN MAKING AND IMPLEMENTING *INTERNATIONAL AGREEMENTS*.--In the negotiation, renegotiation, and implementation of any existing or proposed memorandum of understanding, between the Secretary of Defense, acting on behalf of the United States, and one or more foreign countries (or any instrumentality of a foreign country) relating to research, development, or production, or *logistics support* of defense equipment, or to the reciprocal procurement of defense items, the Secretary of Defense shall--

(1) consider the effects of such existing or proposed *international* agreement on the national defense technology and industrial base of the United States; and

(2) regularly solicit and consider comments and recommendations from the Secretary of Commerce with respect to the commercial implications of such *international* agreement and the potential effects of such *international* agreement on the international competitive position of United States industry.

(b) INTER-AGENCY REVIEW OF EFFECTS ON UNITED STATES INDUSTRY.-- Whenever the Secretary of Commerce has reason to believe that an existing or proposed *international* agreement has, or threatens to have, a significant adverse effect on the international competitive position of United States industry, the Secretary may request an inter-agency review of the *international* agreement. If, as a result of the review, the Secretary determines that the commercial interests of the United

States are not being served or would not be served by adhering to the terms of such existing *international* agreement or agreeing to such proposed *international* agreement, as the case may be, the Secretary shall recommend to the President the renegotiation of the existing *international* agreement or any modification to the proposed *international* agreement that he considers necessary to ensure an appropriate balance of interests.

(c) LIMITATION ON ENTERING INTO *INTERNATIONAL* AGREEMENTS.-- *An international* agreement referred to in subsection (a) may not be entered into or implemented if the President, taking into consideration the results of the interagency review, determines that such *international* agreement has or is likely to have a significant adverse effect on United States industry that outweighs the benefits of entering into or implementing such *international* agreement.

(d) FOREIGN CONTRIBUTIONS FOR COOPERATIVE PROJECTS

Crediting of Contributions.-- Whenever the United States participates in a cooperative project with a friendly foreign country or NATO on a cost-sharing basis, any contribution received by the United States from that foreign country or NATO to meet its share of the costs of the project may be credited to appropriations available to an appropriate military department or another appropriate organization within the Department of Defense, as determined by the Secretary of Defense.

Use of Amounts Credited.-- The amount of a contribution credited pursuant to subsection (a) to an appropriation account in connection with a cooperative project referred to in that subsection shall be available only for payment of the share of the project expenses allocated to the foreign country or NATO making the contribution. Payments for which such amount is available include the following:

Payments to contractors and other suppliers (including the Department of Defense and other participants acting as suppliers) for necessary articles and services.

Payments for any damages and costs resulting from the performance or cancellation of any contract or other obligation.

Payments or reimbursements of other program expenses, including program office overhead and administrative costs.

Refunds to other participants.

**§2x22. Offset policy; notification**

(a) ESTABLISHMENT OF OFFSET POLICY.-- The President shall establish, consistent with the requirements of this section, a comprehensive policy with respect to contractual offset arrangements in connection with the purchase of defense equipment or supplies which addresses the following:

(1) Transfer of technology in connection with offset arrangements.

(2) Application of offset arrangements, including cases in which United States funds are used to finance the purchase by a foreign government.

(3) Effects of offset arrangements on specific subsectors of the industrial base of the United States and for preventing or ameliorating any serious adverse effects on such subsectors.

(b) TECHNOLOGY TRANSFER.-- (1) No official of the United States may enter into a memorandum of understanding or other agreement with a foreign government that would require the transfer of United States defense technology to a foreign country or a foreign firm in connection with a contract that is subject to an offset arrangement if the implementation of such memorandum or agreement would significantly and adversely affect the defense industrial base of the United States and would result in a substantial financial loss to a United States firm.

(2) Paragraph (1) shall not apply in the case of a memorandum of understanding or agreement described in paragraph (1) if the Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, determines that a transfer of United States defense technology pursuant to such understanding or agreement will result in strengthening the national security of the United States and so certifies to Congress.

(3) If a United States firm is required under the terms of a memorandum of understanding, or other agreement entered into by the United States with a foreign country, to transfer defense technology to a foreign country, the United States firm may protest the determination to the Secretary of Defense on the grounds that the transfer of such technology would adversely affect the defense industrial base of the United States and would result in substantial financial loss to the protesting firm. The Secretary of Defense, in consultation with the Secretary of Commerce and the Secretary of State, shall make the final determination of the validity of the protesting firm's claim.

(c) NOTIFICATION REGARDING OFFSETS.-- If at any time a United States firm enters into a contract for the sale of a weapon system or defense-related item to a foreign country or foreign firm and such contract is subject to an offset arrangement exceeding \$50,000,000 in value, such firm shall notify the Secretary of Defense of the proposed sale. Notification shall be made under this subsection in accordance with regulations prescribed by the Secretary of Defense in consultation with the Secretary of Commerce.

### **§2x31. Cooperative projects: allied countries**

(a) Authority to engage in cooperative projects

The Secretary of Defense may enter into a memorandum of understanding (or other formal agreement) with one or more major allies of the United States for the purpose of conducting cooperative projects on defense equipment and munitions.

(b) Requirement that projects improve conventional defense capabilities

(1) The Secretary of Defense may not enter into a memorandum of understanding (or other formal agreement) to conduct a cooperative project under this section unless the Secretary determines that the proposed project will improve, through the application of emerging technology, the conventional defense capabilities of NATO or the common conventional defense capabilities of the United States and its major non-NATO allies.

(2) The authority of the Secretary to make a determination under paragraph (1) may only be delegated to the Deputy Secretary of Defense or the Under Secretary of Defense for Acquisition.

(c) Cost sharing

Each cooperative project entered into under this section shall require sharing of the costs of the project (including the costs of claims) between the participants on an equitable basis.

(d) *Acquisition of defense equipment and services*

(1) A major ally of the United States may not use any military or economic assistance grant, loan, or other funds provided by the United States for the purpose of making that ally's contribution to a cooperative ~~research and development~~ program entered into with the United States under this section.

(2)(A) Except as provided in *subparagraph (C)*, chapter 137 of this title shall apply to *contracts for the acquisition of defense equipment and services* by the Secretary of Defense. Except to the extent waived under *subparagraph (C) of this subsection* or some other provision of law, all other provisions of law relating to procurement, if otherwise applicable, shall apply to such contracts entered into by the Secretary of Defense.

(B) When contracting or incurring obligations for cooperative projects, the Secretary of Defense may require subcontracts to be awarded to particular subcontractors in furtherance of the cooperative project.

(C)(1) Subject to paragraph (2), when entering into contracts or incurring obligations outside the United States, the Secretary of Defense may waive with respect to any such contract or subcontract the application of any provision of law, other than a provision of the Arms Export Control Act or section 2304 of this title, that specifically-

- (i) prescribe procedures to be followed in the formation of contracts;
- (ii) prescribe terms and conditions to be included in contracts;

*(iii)* prescribe requirements for or preferences to be given to goods grown, produced, or manufactured in the United States or in United States Government-owned facilities or for services to be performed in the United States; or

*(iv)* prescribe requirements regulating the performance of contracts.

(2) A waiver may not be made under paragraph (1) unless the Secretary determines that the waiver is necessary to ensure that the cooperative project will significantly further standardization, rationalization, and interoperability.

(3) The authority of the Secretary to make waivers under this subsection may be delegated only to the Deputy Secretary of Defense or the Acquisition Executive designated for the Office of the Secretary of Defense.

*(D)*(1) In carrying out a cooperative project, the Secretary of Defense may agree that a participant (other than the United States) may make a contract for requirements of the United States under the project if the Secretary determines that such a contract will significantly further standardization, rationalization, and interoperability. Except to the extent waived under this section or under any other provision of law, the Secretary shall ensure that such contract will be made on a competitive basis and that United States sources will not be precluded from competing under the contract.

(2) If a participant (other than the United States) in a cooperative project makes a contract on behalf of such project to meet the requirements of the United States, the contract may permit the contracting party to follow its own procedures relating to contracting.

*(e)* In carrying out a cooperative project, the Secretary of Defense may also agree to the disposal of property that is jointly acquired by the members of the project without regard to any laws of the United States applicable to the disposal of property owned by the United States. Disposal of such property may include a transfer of the interest of the United States in such property to one of the other governments participating in the cooperative agreement or the sale of such property. Payment for the transfer or sale of any interest of the United States in any such property shall be made in accordance with the terms of the cooperative agreement.

*(f)* Nothing in this section shall be construed as authorizing--

(1) the Secretary of Defense to waive any of the financial management responsibilities administered by the Secretary of the Treasury; or

(2) to waive the cargo preference laws of the United States, including section 2631 of this title and section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. App. 1241(b)).



*(g)* Cooperative opportunities document

(1)(A) In order to ensure that opportunities to conduct cooperative projects are considered at an early point during the formal development review process of the Department of Defense in connection with any planned project of the Department, the Under Secretary of Defense for Acquisition shall prepare an arms cooperation opportunities document with respect to that project for review by the Defense Acquisition Board at formal meetings of the Board.

(B) The Under Secretary shall also prepare an arms cooperation opportunities document for review of each new project for which a document known as a Mission Need Statement is prepared.

(2) An arms cooperation opportunities document referred to in paragraph (1) shall include the following:

(A) A statement indicating whether or not a project similar to the one under consideration by the Department of Defense is in development or production by one or more of the major allies of the United States.

(B) If a project similar to the one under consideration by the Department of Defense is in development or production by one or more major allies of the United States, an assessment by the Under Secretary of Defense for Acquisition as to whether that project could satisfy, or could be modified in scope so as to satisfy, the military requirements of the project of the United States under consideration by the Department of Defense.

(C) An assessment of the advantages and disadvantages with regard to program timing, developmental and life cycle costs, technology sharing, and Rationalization, Standardization, and Interoperability (RSI) of seeking to structure a cooperative development program with one or more major allies of the United States.

(D) The recommendation of the Under Secretary as to whether the Department of Defense should explore the feasibility and desirability of a cooperative development program with one or more major allies of the United States.

*(h)* Reports to Congress

(1) Not later than March 1 of each year, the Under Secretary of Defense for Acquisition shall submit to the Speaker of the House of Representatives and the Committees on Armed Services and Appropriations of the Senate a report on cooperative projects under this section. Each such report shall include--

(A) a description of the status, funding, and schedule of existing projects carried out under this section for which memoranda of understanding (or other formal agreements) have been entered into; and

(B) a description of the purpose, funding, and schedule of any new projects proposed to be carried out under this section (including those projects for which memoranda of understanding (or other formal agreements) have not yet been entered into) for which funds have been included in the budget submitted to Congress pursuant to section 1105 of Title 31 for the fiscal year following the fiscal year in which the report is submitted.

(2) The Secretary of Defense and the Secretary of State, whenever they consider such action to be warranted, shall jointly submit to the Committees on Armed Services and Foreign Relations of the Senate and to the Committees on Armed Services and Foreign Affairs of the House of Representatives a report--

(A) enumerating those countries to be added to or deleted from the existing designation of countries designated as major non-NATO allies for purposes of this section; and

(B) specifying the criteria used in determining the eligibility of a country to be designated as a major non-NATO ally for purposes of this section.

(3)(A) The Secretary of Defense shall notify the Congress each time he requires that a prime contract be awarded to a particular prime contractor or that a subcontract to be awarded to a particular subcontractor to comply with a cooperative agreement. The Secretary shall include in each such notice the reason for exercising his authority to designate a particular contractor or subcontractor, as the case may be.

(B) The Secretary shall also notify the Congress each time he exercises a waiver under subsection (d)(2)(c) and shall include in such notice the particular provision or provisions of law that were waived.

(i) Side-by-side testing

(1) It is the sense of Congress--

(A) that the Secretary of Defense should test conventional defense equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries to determine the ability of such equipment, munitions, and technologies to satisfy United States military requirements or to correct operational deficiencies; and

(B) that while the testing of nondevelopmental items and items in the late state of the development process are preferred, the testing of equipment, munitions, and technologies may be conducted to determine procurement alternatives.

(2) The Secretary of Defense may acquire equipment, munitions, and technologies of the type described in paragraph (1) for the purpose of conducting the testing described in that paragraph.

(3) The Deputy Director, Defense Research and Engineering (Test and Evaluation) shall notify the Speaker of the House of Representatives and the Committees on Armed Services and on Appropriations of the Senate of the Deputy Director's intent to obligate funds made available to carry out this subsection not less than 30 days before such funds are obligated.

(4) The Secretary of Defense shall submit to Congress each year, not later than March 1, a report containing information on--

(A) the equipment, munitions, and technologies manufactured and developed by major allies of the United States and other friendly foreign countries that were evaluated under this subsection during the previous fiscal year;

(B) the obligation of any funds under this subsection during the previous fiscal year; and

(C) the equipment, munitions, and technologies that were tested under this subsection and procured during the previous fiscal year.

(j) Secretary to encourage similar programs

The Secretary of Defense shall encourage major allies of the United States to establish programs similar to the one provided for in this section.

#### **§2x32. Cooperative military airlift agreements: allied countries**

(a) Subject to the availability of appropriations, and after consultation with the Secretary of State, the Secretary of Defense may enter into cooperative military airlift agreements with the government of any allied country for the transportation of the personnel and cargo of the military forces of that country on aircraft operated by or for the military forces of the United States in return for the reciprocal transportation of the personnel and cargo of the military forces of the United States on aircraft operated by or for the military forces of that allied country. Any such agreement shall include the following terms:

(1) The rate of reimbursement for transportation provided shall be the same for each party and shall be not less than the rate charged to military forces of the United States, as determined by the Secretary of Defense under section 2208(h) of this title.

(2) Credits and liabilities accrued as a result of providing or receiving transportation shall be liquidated as agreed upon by the parties. Liquidation shall be either by direct payment to the country that has provided the greater amount of transportation or by the providing of in-kind transportation services to that country. The liquidation shall occur on a regular basis, but not less often than once every 12 months.

(3) During peacetime, the only military airlift capacity that may be used to provide transportation is that capacity that (A) is not needed to meet the transportation requirements of

the military forces of the country providing the transportation, and (B) was not created solely to accommodate the requirements of the military forces of the country receiving the transportation.

(4) Defense articles purchased by an allied country from the United States under the Arms Export Control Act (22 U.S.C. § 2751 et seq.) or from a commercial source under the export controls of the Arms Export Control Act may not be transported (for the purpose of delivery incident to the purchase of the defense articles) to the purchasing allied country on aircraft operated by or for the military forces of the United States except at a rate of reimbursement that is equal to the full cost of transportation of the defense articles, as required by section 21(a)(3) of the Arms Export Control Act (22 U.S.C. § 2761(a)(3)).

(b) Subject to the availability of appropriations, and after consultation with the Secretary of State, the Secretary of Defense may enter into nonreciprocal military airlift agreements with North Atlantic Treaty Organization subsidiary bodies for the transportation of the personnel and cargo of such subsidiary bodies on aircraft operated by or for the military forces of the United States. Any such agreement shall be subject to such terms as the Secretary of Defense considers appropriate.

(c) Any amount received by the United States as a result of an agreement entered into under this section shall be credited to applicable appropriations, accounts, and funds of the Department of Defense.

(d) Notwithstanding subchapter *III*, the Secretary of Defense may enter into military airlift agreements with allied countries only under the authority of this section.

### **§2x33. Cooperative logistic support agreements: NATO countries**

#### **(a) General authority**

(1) The Secretary of Defense may enter into bilateral or multilateral agreements known as Weapon System Partnership Agreements with one or more governments of other member countries of the North Atlantic Treaty Organization (NATO) participating in the operation of the NATO Maintenance and Supply Organization. Any such agreement shall be for the purpose of providing cooperative logistics support for the armed forces of the countries which are parties to the agreement. Any such agreement--

(A) shall be entered into pursuant to the terms of the charter of the NATO Maintenance and Supply Organization; and

(B) shall provide for the common logistic support of a specific weapon system common to the participating countries.

(2) Such an agreement may provide for--

(A) the transfer of logistics support, supplies, and services by the United States to the NATO Maintenance and Supply Organization; and

(B) the acquisition of logistics support, supplies, and services by the United States from that Organization.

(b) Authority of Secretary: Under the terms of a Weapon System Partnership Agreement, the Secretary of Defense --

(1) may agree that the NATO Maintenance and Supply Organization may enter into contracts for supply and acquisition of logistics support in Europe for requirements of the United States, to the extent the Secretary determines that the procedures of such Organization governing such supply and acquisition are appropriate; and

(2) may share the costs of set-up charges of facilities for use by the NATO Maintenance and Supply Organization to provide cooperative logistics support and in the costs of establishing a revolving fund for initial acquisition and replenishment of supply stocks to be used by the NATO Maintenance and Supply Organization to provide cooperative logistics support.

(c) Sharing of administrative expenses

Each Weapon System Partnership Agreement shall provide for joint management by the participating countries and for the equitable sharing of the administrative costs and costs of claims incident to the agreement.

(d) Supplemental authority

The authority of the Secretary of Defense under this section is in addition to the authority of the Secretary under subchapter *III* and any other provision of law.

**§ 2x34 NATO Airborne Warning and Control System (AWACS) program: authority of Secretary of Defense**

(a) Authority Under AWACS program

The Secretary of Defense, in carrying out an AWACS memorandum of understanding, may do the following:

(1) Waive reimbursement for the cost of the following functions performed by personnel other than personnel employed in the United States Air Force Airborne Warning and Control System (AWACS) program office:

- (A) Auditing.
- (B) Quality assurance.
- (C) Codification.

- (D) Inspection.
- (E) Contract administration.
- (F) Acceptance testing.
- (G) Certification services.
- (H) Planning, programming, and management services.

(2) Waive any surcharge for administrative services otherwise chargeable.

(3) In connection with that Program, assume contingent liability for--

(A) program losses resulting from the gross negligence of any contracting officer of the United States;

(B) identifiable taxes, customs duties, and other charges levied within the United States on the program; and

(C) the United States share of the unfunded termination liability.

(b) Contract authority limitation

Authority under this section to enter into contracts shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(c) Definition

In this section, the term "AWACS memorandum of understanding" means--

(1) the Multilateral Memorandum of Understanding Between the North Atlantic Treaty Organization (NATO) Ministers of Defense on the NATO E-3A Cooperative Programme, signed by the Secretary of Defense on December 6, 1978;

(2) the Memorandum of Understanding for Operations and Support of the NATO Airborne Early Warning and Control Force, signed by the United States Ambassador to NATO on September 26, 1984;

(3) the Addendum to the Multilateral Memorandum of Understanding Between the North Atlantic Treaty Organization (NATO) Ministers of Defense on the NATO E-3A Cooperative Programme (dated December 6, 1978) relating to the modernization of the NATO Airborne Early Warning and Control (NAEW&C) System, dated December 7, 1990; and

(4) any other follow-on support agreement for the NATO E-3A Cooperative Programme.

(d) Expiration

The authority provided by this section expires on September 30, 1993.

### SUBCHAPTER III

#### ACQUISITION, CROSS-SERVICING AGREEMENTS, AND STANDARDIZATION

##### *§2x50. Definitions*

*(a) As used in this subchapter, the following are defined terms--*

(1) "allied country" means --

(A) a country that is a member of the North Atlantic Treaty Organization;

(B) Australia, New Zealand, Japan, or the Republic of Korea; or this

(C) any other country designated as an allied country by the Secretary of Defense with the concurrence of the Secretary of State.

(2) "allied international organization" means the North Atlantic Treaty Organization (NATO) or any other international organization designated as an allied international organization by the Secretary of Defense with the concurrence of the Secretary of State.

(3) "*contingency operation*" has the same meaning provided such term in section 631 of the FY92/93 Defense Authorization Act (P.L. 102-190) (10 U.S.C. § 101(47)).

(4) "logistic support, supplies, and services" means food, billeting, transportation, petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, and port services.

(5) "military region" means the geographical area of responsibility assigned to the commander of a unified combatant command (excluding Europe and adjacent waters).

(6) "North Atlantic Treaty Organization subsidiary bodies" means--

(A) any organization within the meaning of the term "subsidiary bodies" in article 1 of the multilateral treaty on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff, signed at Ottawa on September 20, 1951 (TIAS 2992; 5 UST 1087); and

(B) any international military headquarters or organization to which the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, signed at Paris on August 28, 1952 (TIAS 2978; 5 UST 870), applies.

**§2x51. Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States**

Subject to section 2x53 of this title and subject to the availability of appropriations, the Secretary of Defense may--

(1) acquire from the Governments of North Atlantic Treaty Organization countries and from North Atlantic Treaty Organization subsidiary bodies logistic support, supplies, and services for elements of the armed forces deployed in Europe and adjacent waters; and

(2) acquire from any government not a member of the North Atlantic Treaty Organization in which elements of the armed forces are deployed (or are to be deployed) logistic support, supplies, and services for elements of the armed forces deployed (or to be deployed) in such country or in the military region in which such country is located if that country--

(A) has a defense alliance with the United States;

(B) permits the stationing of members of the armed forces in such country or the homeporting of naval vessels of the United States in such country;

(C) has agreed to preposition materiel of the United States in such country; or

(D) serves as the host country to military exercises which include elements of the armed forces or permits other military operations by the armed forces in such country.

**§2x52. Cross-servicing agreements**

(a)(1) Subject to section 2x53 of this title and to the availability of appropriations, the Secretary of Defense may enter into an agreement described in paragraph (2) with--

(A) the government of a North Atlantic Treaty Organization country;

(B) a subsidiary body of the North Atlantic Treaty Organization; or

(C) the government of a country not a member of the North Atlantic Treaty Organization but which is designated by the Secretary of Defense, subject to the limitations prescribed in subsection (b), as a government with which the Secretary may enter into agreements under this section.

(2) An agreement referred to in paragraph (1) is an agreement under which the United States agrees to provide logistic support, supplies, and services to military forces of a country or subsidiary body referred to in paragraph (1) in return for the reciprocal provisions of logistic support, supplies, and services by such government or subsidiary body to elements of the armed forces.



(b) The Secretary of Defense may not designate a country for an agreement under this section--

(1) unless the Secretary, after consultation with the Secretary of State, determines that the designation of such country for such purpose is in the interest of the national security of the United States; and

(2) in the case of a country which is not a member of the North Atlantic Treaty Organization, notifies the Committees on Armed Services and Foreign Relations of the Senate and the Committees on Armed Services and Foreign Affairs of the House of Representatives at least 30 days before the date on which such country is designated by the Secretary under subsection (a).

(c) The Secretary of Defense may not use the authority of this subchapter to procure from any foreign government as a routine or normal source any goods or services reasonably available from United States commercial sources.

(d) The Secretary shall prescribe regulations to ensure that contracts entered into under this subchapter are free from self-dealing, bribery, and conflict of interests.

**§2x53. Law applicable to acquisition and cross-servicing agreements**

(a) Except as provided in subsection (b), acquisition of logistic support, supplies, and services under section 2x51 of this title and agreements entered into under section 2x52 of this title shall be made in accordance with *prudent procurement practices*.

(b) Sections 2207 and chapter 137 of this title and sections 3709, 3735, and 3741 of the Revised Statutes (41 U.S.C. §§ 5, 13, and 22) shall not apply to acquisitions made under the authority of section 2x51 of this title or to agreements entered into under section 2x52 of this title.

**§2x54. Methods of payment for acquisitions and transfers by the United States**

(a) Logistics support, supplies, and services may be acquired or transferred by the United States under the authority of this subchapter on a reimbursement basis or by replacement-in-kind or exchange of supplies or services of an equal value.

(b)(1) In entering into agreements with the Government of another North Atlantic Treaty Organization country or other foreign country for the acquisition or transfer of logistic support, supplies, and services on a reimbursement basis, the Secretary of Defense shall negotiate for adoption of the following pricing principles for reciprocal application:

(A) The price charged by a supplying country for logistics support, supplies, and services specifically procured by the supplying country from its contractors for a recipient country shall be no less favorable than the price for identical items or services charged by such contractors to the armed forces of the supplying country, taking into account price differentials due to

delivery schedules, points of delivery, and other similar considerations.

(B) The price charged a recipient country for supplies furnished by a supplying country from its inventory, and the price charged a recipient country for logistics support and services furnished by the officers, employees, or governmental agencies of a supplying country, shall be the same as the price charged for identical supplies, support, or services acquired by an armed force of the supplying country from such governmental sources.

(2) To the extent that the Secretary of Defense is unable to obtain mutual acceptance by the other country involved of the reciprocal pricing principles for reimbursable transactions set forth in paragraph (1)--

(A) the United States may not acquire from such country any logistic support, supply, or service not governed by such reciprocal pricing principles unless the United States forces commander acquiring such support, supply, or service determines (after price analysis) that the price thereof is fair and reasonable; and

(B) transfers by the United States to such country under this subchapter of any logistic support, supply, or service that is not governed by such reciprocal pricing principles shall be subject to the pricing provisions of the Arms Export Control Act (22 U.S.C. § 2751 et seq.).

(3) To the extent that indirect costs (including charges for plant and production equipment), administrative surcharges, and contract administration costs with respect to any North Atlantic Treaty Organization country or other foreign country are not waived by operation of the reciprocal pricing principles of paragraph (1), the Secretary of Defense may, on a reciprocal basis, agree to waive such costs.

(4) The pricing principles set forth in paragraph (2) and the waiver authority provided in paragraph (3) shall also apply to agreements with North Atlantic Treaty Organization subsidiary bodies under this subchapter.

(c) In acquiring or transferring logistics support, supplies, or services under the authority of this subchapter by exchange of supplies or services, the Secretary of Defense may not agree to or carry out the following:

(1) Transfers in exchange for property the acquisition of which by the Department of Defense is prohibited by law.

(2) Transfers of source, byproduct, or special nuclear materials or any other material, article, data, or thing of value the transfer of which is subject to the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.).

(3) Transfers of chemical munitions.

## **§2x55. Liquidation of accrued credits and liabilities**

(a) Credits and liabilities of the United States accrued as a result of acquisitions and transfers of logistic support, supplies, and services under the authority of this subchapter shall be liquidated not less often than once every three months by direct payment to the entity supplying such support, supplies, or services by the entity receiving such support, supplies, or services.

(b) Payment-in-kind or exchange entitlements accrued as a result of acquisitions and transfers of logistic support, supplies, and services under authority of this subchapter shall be satisfied within 12 months after the date of the delivery of the logistic support, supplies, or services.

## **§2x56. Crediting of receipts**

Any receipt of the United States as a result of an agreement entered into under this subchapter shall be credited to applicable appropriations, accounts, and funds of the Department of Defense.

## **§2x57. Limitation on amounts that may be obligated or accrued by the United States**

(a)(1) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable liabilities that the United States may accrue under this subchapter (before the computation of offsetting balances) with other member countries of the North Atlantic Treaty Organization and subsidiary bodies of the North Atlantic Treaty Organization may not exceed \$150,000,000 in any fiscal year, and of such amount not more than \$25,000,000 in liabilities may be accrued for the acquisition of supplies (other than petroleum, oils, and lubricants).

(2) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable liabilities that the United States may accrue under this subchapter (before the computation of offsetting balances) with a country which is not a member of the North Atlantic Treaty Organization, but with which the United States has one or more acquisition or cross-servicing agreements, may not exceed \$10,000,000 in any fiscal year, and of such amount not more than \$2,500,000 in liabilities may be accrued for the acquisition of supplies (other than petroleum, oils, and lubricants). The \$10,000,000 limitation specified in this paragraph is in addition to the limitation specified in paragraph (1).

(b)(1) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable credits that the United States may accrue under this subchapter (before the computation of offsetting balances) with other member countries of the North Atlantic Treaty Organization and subsidiary bodies of the North Atlantic Treaty Organization may not exceed \$100,000,000 in any fiscal year.

(2) Except during a period of active hostilities involving the armed forces, the total amount of reimbursable credits that the United States may accrue under this subchapter (before the computation of offsetting balances) with a country which is not a member of the North Atlantic Treaty Organization, but with which the United States has one or more acquisition and

cross-servicing agreements may not exceed \$10,000,000 in any fiscal year. Such limitation specified in this paragraph is in addition to the limitation specified in paragraph (1).

*(c) When the Secretary of Defense certifies that the armed forces of the United States are, or imminently shall become, involved in a contingency operation, the restrictions set forth in subsections (a) and (b) above are waived for a period not to exceed 180 days.*

#### **§2x58. Inventories of supplies not to be increased**

Inventories of supplies for elements of the armed forces may not be increased for the purpose of transferring supplies under the authority of this subchapter.

#### **§2x59. Procurement of communications support and related supplies and services**

**(a)(1)** As an alternative means of obtaining communications support and related supplies and services, the Secretary of Defense, subject to the approval of the Secretary of State, may enter into a bilateral arrangement with any allied country or allied international organization or may enter into a multilateral arrangement with allied countries and allied international organizations, under which, in return for being provided communications support and related supplies and services, the United States would agree to provide to the allied country or countries or allied international organization or allied international organizations, as the case may be, or may enter into a multilateral arrangement with allied countries and allied international organizations, equivalent value of communications support and related supplies and services. The term of an arrangement entered into under this subsection may not exceed five years.

*(2) Nothing in paragraph (1) shall limit the authority of the Secretary of Defense to temporarily furnish or receive communications support and related supplies, in the absence of a formal agreement, to an allied country to meet emergent operational requirements of both countries or incident to an exercise, provided that such periods of interconnection or access, as applicable, do not exceed 90 days and the exchanges can be conducted on conditions of reciprocity. If the interconnection is maintained for joint or multilateral defense purposes, then the costs of maintaining such circuits may be allocated among the various users.*

**(b)(1)** Any arrangement entered into under this section shall require that any accrued credits and liabilities resulting from an unequal exchange of communications support and related supplies and services during the term of such arrangement would be liquidated by direct payment to the party having provided the greater amount of communications support and related supplies and services. Liquidations may be made at such times as the parties in an arrangement may agree upon, but in no case may final liquidation in the case of an arrangement be made later than 30 days after the end of the term for which the arrangement was entered into.

**(2)** Parties to an arrangement entered into under this section shall annually reconcile accrued credits and liabilities accruing under such agreement. Any liability of the United States resulting from a reconciliation shall be charged against the applicable appropriation available to the Department of Defense (at the time of the reconciliation) for obligation for communications

support and related supplies and services.

(3) Payments received by the United States shall be credited to the appropriation from which such communications support and related supplies and services have been provided.

(c) The Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives copies of all documents evidencing an arrangement entered into under subsection (a) not later than 45 days after entering into such an arrangement.

**§2x60. Authority to accept *direct payment or contribution*, use of real property, services, and supplies from foreign countries in connection with mutual defense agreements and occupational arrangements**

(a) Authority To Accept.--The Secretary of Defense may accept from a foreign country, for the support of any element of the armed forces in an area of that country--

(1) real property or the use of real property and services and supplies for the United States or for the use of the United States in accordance with a mutual defense agreement or occupational arrangement;

(2) services furnished as reciprocal international courtesies or as services customarily made available without charge; and

(3) *direct payment or contribution. Any such direct payment or contribution received by the United States from a foreign country in accordance with a mutual defense agreement or occupational arrangement accepted in a fiscal year shall be credited to appropriations of the Department of Defense that are available for that fiscal year for the purposes for which the contributions are made. The contributions so credited shall be--*

*(A) merged with the appropriations to which they are credited; and*

*(B) available for the same time period as those appropriations.*

*(b) The limitation upon the authority of the Secretary of Defense to accept direct payment or contribution, the use of real property, services and supplies, from foreign countries in connection with mutual defense agreements or occupational arrangements while in an area of that country, shall not apply in the case of joint or bilateral exercises involving the United States and the providing nation.*

(c) Quarterly Reports.--(1) Not later than 30 days after the end of each quarter of each fiscal year, the Secretary of Defense shall submit to Congress a report on property, services, and supplies accepted by the Secretary under this section during the preceding quarter. The Secretary shall include in each such report a description of all property, services, and supplies having a value of more than \$1,000,000.

(2) In computing the value of any property, services, and supplies referred to in paragraph (1), the Secretary shall aggregate the value of--

(A) similar items of property, services, and supplies accepted by the Secretary during the quarter concerned; and

(B) components which, if assembled, would comprise all or a substantial part of an item of equipment or a facility.

**(d) Authority to Use Property, Services, and Supplies.--**Property, services, or supplies referred to in subsection (a) may be used by the Secretary of Defense without specific authorization, except that such property, services, and supplies may not be used in connection with any program, project, or activity if the use of such property, services, or supplies would result in the violation of any prohibition or limitation otherwise applicable to that program, project, or activity.

**(e) Annual Audit by GAO.--**The Comptroller General of the United States shall conduct an annual audit of property, services, and supplies accepted by the Secretary of Defense under this section and shall submit a copy of the results of each such audit to Congress.

#### **§2x70. Standardization of equipment with North Atlantic Treaty Organization members**

**(a)** It is the policy of the United States to standardize equipment, including weapons systems, ammunition, and fuel, procured for the use of the armed forces of the United States stationed in Europe under the North Atlantic Treaty or at least to make that equipment interoperable with equipment of other members of the North Atlantic Treaty Organization. To carry out this policy, the Secretary of Defense shall--

(1) assess the costs and possible loss of non-nuclear combat effectiveness of the military forces of the members of the Organization caused by the failure of the members to standardize equipment;

(2) maintain a list of actions to be taken, including an evaluation of the priority and effect of the action, to standardize equipment that may improve the overall non-nuclear defense capability of the Organization or save resources for the Organization; and

(3) initiate and carry out, to the maximum extent feasible, procurement procedures to acquire standardized or interoperable equipment, considering the cost, function, quality, and availability of the equipment.

**(b)** Progress in realizing the objectives of standardization and interoperability would be enhanced by expanded inter-Allied procurement of arms and equipment within the North Atlantic Treaty Organization. Expanded inter-Allied procurement would be made easier by greater reliance on licensing and coproduction cooperative agreements among the signatories of the North Atlantic Treaty. If constructed to preserve the efficiencies associated with economies of scale, the agreements could minimize potential economic hardship to parties to the agreements and increase

the survivability, in time of war, of the North Atlantic Alliance's armaments production base by dispersing manufacturing facilities. In conjunction with other members of the Organization and to the maximum extent feasible, the Secretary shall--

(1) identify areas in which those cooperative agreements may be made with members of the Alliance; and

(2) negotiate those agreements.

(c)(1) It is the sense of Congress that weapons systems being developed wholly or primarily for employment in the North Atlantic Treaty Organization theater should conform to a common Organization requirement in order to proceed toward joint doctrine and planning and to facilitate maximum feasible standardization and interoperability of equipment, and that a common Organization requirement should be understood to include a common definition of the military threat to the members of the Organization.

(2) It is further the sense of Congress that standardization of weapons and equipment within the Organization on the basis of a "two-way street" concept of cooperation in defense procurement between Europe and North America can only work in a realistic sense if the European nations operate on a united and collective basis. Therefore, the governments of Europe are encouraged to accelerate their present efforts to achieve European armaments collaboration among all European members of the Organization.

(d) Before February 1, 1989, and biennially thereafter, the Secretary shall submit a report to Congress that includes--

(1) each specific assessment and evaluation made and the results of each assessment and evaluation, and the results achieved with the members of the North Atlantic Treaty Organization, under subsections (a)(1) and (2) and (b);

(2) procurement action initiated on each new major system not complying with the policy of subsection (a);

(3) procurement action initiated on each new major system that is not standardized or interoperable with equipment of other members of the Organization, including a description of the system chosen and the reason for choosing that system;

(4) the identity of--

(A) each program of research and development for the armed forces of the United States stationed in Europe that supports, conforms, or both, to common Organization requirements of developing weapon systems for use by the Organization, including a common definition of the military threat to the Organization; and

(B) the common requirements of the Organization to which those programs conform or which they support;

(5) action of the Alliance toward common Organization requirements if none exist;

(6) efforts to establish a regular procedure and mechanism in the Organization to determine common military requirements;

(7) a description of each existing and planned program of the Department of Defense that supports the development or procurement of a weapon system or other military equipment originally developed or procured by members of the Organization other than the United States and for which funds have been authorized to be appropriated for the fiscal year in which the report is submitted, including a summary listing of the amount of funds--

(A) appropriated for those programs for the fiscal year in which the report is submitted; and

(B) requested, or proposed to be requested, for those programs for each of the two fiscal years following the fiscal year for which the report is submitted; and

(8) a description of each weapon system or other military equipment originally developed or procured in the United States and that is being developed or procured by members of the Organization other than the United States during the fiscal year for which the report is submitted.

(e) If the Secretary decides that procurement of equipment manufactured outside the United States is necessary to carry out the policy of subsection (a), the Secretary may determine under section 2 of title III of the Act of March 3, 1933 (41 U.S.C. § 10a), that acquiring that equipment manufactured in the United States is inconsistent with the public interest.

(f) The Secretary shall submit the results of each assessment and evaluation made under subsection (a)(1) and (2) to the appropriate North Atlantic Treaty Organization body to become an integral part of the overall Organization review of force goals and development of force plans.



**Chapter 8  
Commercial Items**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

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<b>8. COMMERCIAL ITEMS</b> .....	<b>1</b>
<b>8.0. Introduction</b> .....	<b>1</b>
<b>8.1. Background</b> .....	<b>3</b>
<b>8.2. The DOD Acquisition Challenge in a Time of Build-Down</b> .....	<b>11</b>
<b>8.3. Panel Recommendations</b> .....	<b>17</b>
8.3.1. Definition of Commercial Items: 10 U.S.C. § 2302.....	17
8.3.2. Policy: 10 U.S.C. § 2301.....	24
8.3.3. Procurement Planning: 10 U.S.C. § 2325.....	24
8.3.4. Regulations: Proposed Section 2xx1.....	26
8.3.5. Precedence: Exemptions; Relation to Other Laws.....	30
8.3.6. Specific Acquisition Procedures and Restrictions.....	41
8.3.7. Pricing of Commercial Item Contracts; Audit; Remedies.....	42
8.3.8. Pricing.....	43
8.3.9. Government's Right to Documentation.....	44
8.3.10. Government's Remedy for Inaccurate Documentation.....	45
8.3.11. Government's Right to Audit.....	46
<b>8.4. Proposed Statutory Provisions on Commercial Items</b> .....	<b>49</b>
8.4.1. Proposed Amendments to 10 U.S.C. § 2301.....	49
8.4.2. Proposed Amendments to 10 U.S.C. § 2302.....	50
8.4.3. Proposed Amendments to 10 U.S.C. § 2320(a)(3).....	51
8.4.4. Proposed Amendments to 10 U.S.C. § 2325.....	51
8.4.5. Proposed Amendments relating to Defense Trade and Cooperation.....	52
8.4.6. Proposed New Subchapter to Title 10.....	54

## 8. COMMERCIAL ITEMS

### 8.0. Introduction

The Panel proposes a comprehensive new approach to address the acquisition of commercial items both as end items and as components in defense-unique products. In so doing, the Panel has drawn on legislative initiatives over the past decade (as well as on DFARS Part 211) and has attempted to incorporate the language and concepts of those laws. Existing law has not, however, been successful in achieving the benefits of commercial-military integration and has not resulted in broad use of commercial items in DOD systems. The reasons for this are complex. While opposition to commercial items within the defense procurement community has been cited as a factor,<sup>1</sup> recent congressional<sup>2</sup> and Government studies,<sup>3</sup> expert commentary,<sup>4</sup> and testimony before the Panel identified procurement statutes (and implementing regulations) themselves as a major barrier to greater use of commercial items. As discussed in detail below, the Panel has responded by proposing:

- Stronger policy language in favor of the use of commercial and nondevelopmental items in 10 U.S.C. § 2301;
- A new definition of commercial items in 10 U.S.C. § 2302;
- An expanded exemption for "adequate price competition" in the Truth in Negotiation Act, 10 U.S.C. § 2306a, which applies to commercial items, and relief from inappropriate requirements for cost or pricing data when a contract for commercial items or services, awarded competitively, is modified (See Chapter 1.3 of this Report).
- New exemptions to technical data requirements in commercial item acquisitions in 10 U.S.C. § 2320;
- A new structure for "Buy American" restrictions in a proposed new chapter on Defense Trade and Cooperation (*see* Chapter 7 of this report); and
- A new subchapter for commercial item acquisitions which creates a new rule structure and provides for exemptions from statutes that create barriers to the use of commercial items, and includes provisions on pricing, documentation, and audit rights tailored for commercial item acquisitions.

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<sup>1</sup>See, e.g., S. Rep. No. 99-331, 99th Cong., 2d Sess. 265-66 (1986), *reprinted in* 1986 U.S. CODE, CONG. & ADMIN. NEWS 6413, 6460-61.

<sup>2</sup>*Report of the Structure of U.S. Defense Industrial Base Panel of the Comm. on Armed Services of the House of Representatives, Future of the Defense Industrial Base* 13-15, 16 (April 7, 1992).

<sup>3</sup>E.g., U.S. Congress, Office of Technology Assessment, *Holding the Edge: Maintaining the Defense Technology Base* 9-10, 13-14, 172-177 (1989).

<sup>4</sup>*Center for Strategic and International Studies, Integrating Commercial and Military Technologies for National Strength* 15 (March 1991) [hereafter "CSIS Study"].

Unlike other chapters in this Report, this chapter does not address specific, pre-existing law, but sets out an analysis cutting across much of the work discussed in detail in other chapters. Because of its unique subject matter, this chapter first discusses the history of attempts to improve defense use of commercial items and then the rationale for each section of proposed legislation, some of which is also discussed in other chapters. For convenience of the reader, the text of all proposed provisions is set out in one place in subchapter 8.4.

## 8.1. Background

The idea that DOD could benefit from broader use of commercial items has been advanced for at least 20 years. In 1972, for example, the Commission on Government Procurement urged that commercial products replace Government-designed items to avoid the high cost of developing unique products.<sup>5</sup> Six years later DOD implemented its Acquisition and Distribution of Commercial Products (ADCOP)<sup>6</sup> program which sought to facilitate the acquisition of commercial products by eliminating Government specifications and contract clauses that did not reflect commercial practices. At the same time, various elements within DOD began assessing how commercial and foreign subsystems and components might be used in weapons systems.

Congressional direction to acquire commercial products dates to at least 1984, when the Competition in Contracting Act (CICA) was enacted. CICA requires Federal agencies to "promote the use of commercial products whenever practicable."<sup>7</sup> CICA also provides a statutory basis for multiple award schedule contracting, which has become a primary method for Government purchase of commercial products.<sup>8</sup> In addition, in the Defense Procurement Reform Act of 1984, Congress mandated that DOD use "standard or commercial parts" when developing or acquiring defense-specific products "whenever such use is technically acceptable and cost effective."<sup>9</sup>

In June 1986, the President's Blue Ribbon Commission on Defense Management (the Packard Commission) again emphasized the benefits to DOD of using commercial items: lower costs and shorter lead times in fielding new products and systems. The Commission urged DOD to adopt the policy that:

... DOD should make greater use of components, systems, and services available "off-the-shelf." It should develop new or custom-made items only when it has been established that those readily available are clearly inadequate to meet military requirements.<sup>10</sup>

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<sup>5</sup> Report of the Commission on Government Procurement, part D (1972).

<sup>6</sup> Acquisition and Distribution of Commercial Products Program; see DOD Directive 5000.37 (September 29, 1978). To implement ADCOP, DOD attempted to establish qualified commercial products lists. This aspect of ADCOP was blocked by Congress because it would have precluded small businesses that sold only to DOD from continuing to sell their products as commercial products. See generally W.T. Kirby, *Expanding the Use of Commercial Products and "Commercial-Style" Acquisition Techniques in Defense Procurement: A Proposed Legal Framework in President's Blue Ribbon Commission on Defense Management, Final Report: A Quest for Excellence*, App. H, at 87-88 (1986).

<sup>7</sup> 10 U.S.C. § 2301(b)(6).

<sup>8</sup> 10 U.S.C. § 2302(2)(c).

<sup>9</sup> Pub. L. No. 98-525, § 1202, 98 Stat. 2588 (1984). Section 1216 of this law added 10 U.S.C. § 2323, which required that spare parts be purchased at a price no more than the lowest price allowed to commercial customers. Section 2323 did not prove to be necessary or cost-effective and was repealed by the Defense Authorization Act of 1991, Pub. L. No. 101-510, § 804, 104 Stat. 1485, 1591 (1990).

<sup>10</sup> *President's Blue Ribbon Commission on Defense Management, Final Report: A Quest for Excellence* 60 (1986) [hereafter "the Packard Commission Report"].

As the Commission explained:

No matter how DOD improves its organization or procedures, the defense acquisition system is unlikely to manufacture products as cheaply as the commercial marketplace. DOD cannot duplicate the economies of scale possible in products serving a mass market, nor the power of the free market system to select and perpetuate the most innovative and efficient producers . . .

A case in point is the integrated circuit . . . This year [1986] DOD will buy almost \$2 billion worth of microchips, most of them manufactured to military specifications. The unit cost of a military microchip typically is three to ten times that of its commercial counterpart. This is a result of the extensive testing and documentation DOD requires and of smaller production runs . . . Moreover, the process of procuring microchips made to military specification involves substantial delay. As a consequence, military microchips typically lag a generation (three to five years) behind commercial microchips.<sup>11</sup>

Later in 1986, Congress added section 2325 to Title 10, which mandated that DOD use "nondevelopmental items" where such items would meet DOD's needs.<sup>12</sup> Nondevelopmental items were defined to include "any item of supply that is available in the commercial marketplace."<sup>13</sup> In addition, section 2325 required DOD to define its requirements so that they could be met through the use of nondevelopmental items and to undertake market research to determine "whether nondevelopmental items are available or could be modified to meet agency needs" prior to developing a DOD-unique product requirement.<sup>14</sup> The purpose of this legislation was to break DOD's "long-standing bias to use military specifications."<sup>15</sup>

In 1989, Congress directed DOD to issue streamlined regulations governing commercial products and to rescind conflicting and inconsistent regulations.<sup>16</sup> In addition, Congress directed DOD to design and implement a "simplified uniform contract" for commercial items<sup>17</sup> and

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<sup>11</sup>*Id.* at 60-62.

<sup>12</sup>National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 907, 100 Stat. 3816, 3917 (1986), adding 10 U.S.C. § 2325.

<sup>13</sup>10 U.S.C. § 2325(d)(1).

<sup>14</sup>10 U.S.C. § 2325(a)(2), (a)(4).

<sup>15</sup>S. Rep. No. 99-331, *supra* note 1, at 265.

<sup>16</sup>National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 824(b)(1), 103 Stat. 1352, 1505 (1989).

<sup>17</sup>*Id.* §§ 824(b)(2), 824(b)(3). After hearing comments from many industry and Government sources, the Panel concluded that the concept of a "simplified uniform contract" is not a good one for a number of reasons. First, and perhaps foremost, a uniform contract imposed by regulation is highly likely to contain some clauses that some commercial contractors simply will not accept. Accordingly, the uniform contract can itself become a source of exclusion. Second, it is simply impossible to imagine what a uniform contract for all industries would look like. A uniform contract for data processing equipment, for example, would need clauses implementing Government and industry data processing standards, but these would be woefully out of place in a contract for ketchup. The Panel

prescribed that inspection and warranty clauses be consistent with commercial practices.<sup>18</sup> In addition, the Secretary was directed to revise regulations implementing the catalog and market price exemption to the Truth in Negotiation Act (TINA)<sup>19</sup> to facilitate the purchase of nondevelopmental and modified nondevelopmental items without a requirement for the submission of cost or pricing data.<sup>20</sup> Finally, in 1991, Congress directed DOD, prior to making a contract for DOD-unique items, to conduct market research to determine the availability and suitability of nondevelopmental items to meet DOD's needs.<sup>21</sup>

This legislation has resulted in Parts 210 and 211 of the Defense Acquisition Regulation Supplement. However, even the "simplified" contract described in DFARS Part 211 mandates the use of over 100 clauses as opposed to the handful of terms and conditions typically found in commercial items contracts.

Finally, the National Defense Authorization Act for Fiscal Year 1993 mandates the modification of DOD acquisition policy to encourage integration of the civilian and military industrial base:

It is the policy of Congress that the United States attain the national technology and industrial base objectives set forth in [10 U.S.C. § 2501(a)] through acquisition policy reforms that have the following objectives: . . .

(2) Reducing the reliance of the Department of Defense on technology and industrial base sectors that are economically dependent on Department of Defense business.

(3) Reducing Federal Government barriers to the use of commercial products, processes and standards.<sup>22</sup>

While the course set by Congress since 1984 is plain, none of the legislation passed to date has actually caused or permitted commercial items to be procured in abundance by DOD. The reasons for the shortfall of commercial items purchases include:

- Legislation has not created a uniform definition for commercial items. Instead, various, conflicting definitions have been implemented in regulation.<sup>23</sup>

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recommends as an alternative approach a set or sets of uniform terms and conditions, which is the approach adopted by commercial companies when they purchase supplies. As recognized in, for example, the Uniform Commercial Code, such terms and conditions are matters to be bargained over, not unilaterally imposed. The Panel has implemented a similar approach in section 2xx1 of its proposed statute.

<sup>18</sup>*Id.* §§ 804(b)(4), 804(b)(5). The Panel has implemented these provisions in section 2xx1 of its proposed statute.

<sup>19</sup>10 U.S.C. § 2306a(b)(1)(B).

<sup>20</sup>Pub. L. No. 101-189, *supra* note 16, § 824(b)(6).

<sup>21</sup>National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 814, 104 Stat. 1485, 1595 (1990), *amending* 10 U.S.C. § 2325(a).

<sup>22</sup>Pub. L. No. 102-484, § 4211, 106 Stat. 2315, 2662 (1992), *enacting* 10 U.S.C. § 2501(c).

- Legislation has not amended the Truth In Negotiation Act (10 U.S.C. § 2306a), and as a result has left intact a statute which greatly impedes commercial buying.
- Legislation has not created exemptions from socioeconomic laws, trade restrictions, and Executive Orders and implementing regulations, or from procurement integrity, costing, audit, and other requirements, all of which require a commercial company to fundamentally alter the way it conducts business.
- Congress has consistently faulted DOD's practices and regulations for constricting the flow of commercial products, while often failing to recognize the effect of ever-increasing legislation that has placed special burdens on companies solely because they contract with the Federal Government.

Recent studies of DOD acquisition practices have uniformly concluded that the myriad of Federal laws and regulations applicable only to Federal -- and particularly DOD -- contractors has created a significant barrier to the entry of commercial firms into Federal contracting. A 1990 report on 20 case studies of how commercial companies sell to the Federal Government reached the following conclusions:

In general, the greater the commercial sales base [a company has], the more likely [a company] will either separate [its] commercial and military operations *or abstain from military business*. Companies such as IBM, Motorola, Boeing, Hewlett-Packard, Digital Equipment Corporation (DEC), and Intel fall into this category. For these firms, overall corporate compliance with Government procurement regulations for what constitutes only a small portion of their total sales bases could force them to

- implement extremely elaborate and expensive cost accounting systems and staff;
- make radical revisions to commercial procurement practices and long-term supplier relationships;
- release highly confidential information to competitors;
- make changes in the transportation of goods and materials;

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<sup>23</sup>For example, FAR 11.001 defines a "commercial product" to be a "product . . . sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices." FAR 15.804-3(c)(3) contains a similar definition, but drops the requirement for "established catalog or market prices." Neither FAR definition includes modified commercial items, although the concept of modification is added (but handled differently) in FAR 11.001 under "commercial-type product" and in DFARS 211.7001(a). Only the DFARS definition includes goods not yet sold to the general public, *see* DFARS 211.7001, while the DFARS definition of nondevelopmental item also includes a "previously developed item of supply" built to a Government specification. *See* DFARS 210.001.



- overturn existing compensation and fringe benefit practices;
- revise production techniques to accommodate specialized process specifications and/or quality assurance and inspection provisions, including serial number tracking rather than Total Quality Management (TQM) techniques;
- risk closure of the entire facility in the event of reporting errors or other perceived legal or regulatory abuses.<sup>24</sup>

In the past, the minimal use of commercial items by DOD has often been attributed to DOD's reluctance to use the tools available to it. Now, in the aftermath of the expansion during the 1980's of laws applicable only to Federal contractors, the barriers to greater use of commercial items are primarily the statutes which require Government contractors to adopt unique, expensive business practices on pain of extraordinary civil and criminal penalties. Over and over again, the Panel heard testimony that mandatory, Government-unique business methods and systems in four areas create the greatest barriers: accounting systems; specifications and standards; rights in technical data; and Government-specific statutes that mandate fundamental changes in business practices.

### **Accounting Systems**

One of the most expensive and disruptive requirements involves mandatory adherence to cost principles and accounting standards enumerated in statute,<sup>25</sup> in the FAR,<sup>26</sup> and by the Cost Accounting Standards Board (CASB).<sup>27</sup> Where the Government contracts on a "cost plus" or complex incentive basis, there is a bona fide need for a uniform, specialized accounting system which protects the Government from the imposition of unreasonable charges. Indeed, this unique system of regulation arose precisely because Generally Accepted Accounting Principles (GAAP) have little to say about recording, reporting, and allocating costs actually incurred. Therein lies the problem: Companies that do not sell to the Federal Government keep their books in accordance with GAAP and, if required to meet Government cost accounting requirements, would have to implement a completely separate accounting system at great expense.

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<sup>24</sup>CSIS Study at 15. A 1990 workshop at DSMC on "Why Firms are Leaving the Defense Market" confirms the CSIS conclusions. Industry participants in the study identified 34 major reasons why firms had left or were planning to leave the defense market. Among these reasons were: criminalization of the procurement process; audit procedures inconsistent with those typically used by industry; inappropriate overlays of defense-unique requirements on commercial products; inappropriate application of regulations, specifications, and standards; excessive costs of doing business with DOD; technical data rights; proliferation of regulations; and unnecessary calls for cost or pricing data.

<sup>25</sup>10 U.S.C. § 2324.

<sup>26</sup>FAR Part 31.

<sup>27</sup>41 U.S.C. § 422; 48 C.F.R. Part 99.

A sidebar in the 1991 industrial base study of the Office of Technology Assessment (OTA) summarizes the problem:

### **How Government Auditing Requirements Isolate the Defense Industry**

Government-imposed accounting practice tends to isolate the defense industry from the rest of the economy . . . With few exceptions, companies that do both military and commercial work set up special Government-products divisions to do the defense work, even when the military and civilian technology is similar enough that economies of scale would accrue by keeping production under one roof. . . .

The combination of accounting practice and Government access forces companies to separate Government and commercial work, for several reasons. First, Government accounting practice does not conform to modern commercial standards of accounting. . . . In general, Government contracts require far greater detail in allocating costs than do commercial management information systems, and errors in accounting on Government contracts can bring criminal charges against business executives, causing them to devote inordinate amounts of effort to matters of no commercial consequence. Commercial firms cannot achieve consistency by adopting Government standards because the added cost of Government accounting procedures must be borne ultimately by the customers, placing the firm at a commercial price disadvantage relative to firms that do no Government work. . . .

Firms must not only collect cost information but open their books to U.S. Government auditors . . . The only exception to the auditing requirement is when contracts are awarded strictly on the basis of price. This exception actually undermines efforts to award contracts based on best value rather than lowest cost.

. . . If a company thoroughly integrated its civil and military production, then virtually no company information would be excluded from such Government audits. In the end, most companies choose to set up a separate Government-products division rather than try to untangle overhead and other charges between commercial and Government work or to allow Government inspectors access to their commercial books.<sup>28</sup>

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<sup>28</sup>U.S. Congress, Office of Technology Assessment, *Redesigning Defense: Planning the Transition to the Future U.S. Defense Industrial Base 66* (July 1991).

## **Specifications and Standards**

The specification and standard problem -- over specification and detail enforced by large numbers of auditors and inspectors -- arises without clear delineation from statutes, regulations, good intentions, practice, and habit. For example, it is easy to mock DOD's procrustean specification for a fruitcake, but one must recall that DOD wrote this specification because it could not otherwise have made a purchase while complying with CICA's requirement for "full and open competition."<sup>29</sup> The problem for commercial companies, as with Government-unique accounting principles, is that compliance with Government standards often requires a departure from commercial practices, not to mention the company's own processes which have led to commercially successful products. To the extent that DOD standards are out of date or out of touch with commercial practice, the cost of compliance increases.

## **Rights in Technical Data**

Commercial vendors fiercely protect proprietary information. Under current statutes and regulations, DOD is allowed to obtain a substantial portion of the very technical know-how and proprietary data that is the life blood of modern enterprise. Increasingly, commercial companies will not sell their best technologies to DOD because they simply will not put their proprietary data at risk.

## **Socioeconomic Legislation**

A buyer in the commercial marketplace seldom if ever insists that a seller change its hiring, promotion, compensation, benefits, subcontracting, or transportation practices as a condition of making a sale. But the Federal Government does this as a matter of course in almost every contract it awards. The problem is not that any particular requirement is so onerous as to dissuade companies from dealing with the Federal Government; but when a combination of frequently changing requirements are levied on contractors -- some inconsistent with others, most requiring audit and the generation of reports, and all inconsistent with commercial practice -- the burden on commercial companies is very great. A comment received from a contracts manager at Data General Corporation<sup>30</sup> summarizes the barriers perceived by commercial companies when they attempt to provide products to the Federal Government:

First -- My corporation is a commercial firm selling commercial products and services using any reasonable definition of commerciality. The critical point to note is that the products we sell have been conceived; engineered; parts, components and sub-

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<sup>29</sup>10 U.S.C. § 2305. By contrast, consumers need no specification for fruitcake because they are not required by law to have standards for the responsiveness of items they purchase. One comment has suggested that DOD's preference for detailed specifications arises from the need to retain quality in a system which demands that all sellers be allowed to bid under an objective standard of responsiveness and that award go to the lowest price. See generally W.T. Kirby, *supra* note 6, at 82-86.

<sup>30</sup>Letter dated July 1, 1992, from Arthur S. Dandenau, Data General Corporation, to Donald L. Freedman, Executive Secretary.

assemblies have been procured; manufactured, tested and, in instances, are "in the box" before we sell to any customers. Therefore, a significant number of regularly used Government clauses . . . cannot factually apply to the Government's purchase of such products. A customer cannot expect to buy such products receiving our standard prices and getting immediate or very quick shipment, and yet attempt to direct where we purchase aluminum ingots, jeweled bearings, miniature bearings, or the sources of supply to be used for its Contract . . . [S]uch purchases do not and cannot result in our having a subcontract plan . . . because the materials we need were already sourced and procured well before the Government order.

Second -- My corporation has and will continue to comply with Federal and State laws of a socioeconomic nature . . . However, I see no appropriate reason why Government contracts have to make the obligations of such laws also appear as contract clauses. This increases the paperwork, administration expenses, and risks involved in bidding and performing Government contracts . . .

Third -- . . . I suggest that when any law or regulation is being reviewed, . . . the appropriate questions should be:

(1) Is it one that is normally needed or imposed in commercial transactions? If not, there is a high degree of probability that the requirement will eliminate some bidders and/or increase the costs of the procurement to the contractor and, subsequently, to the Government; and

(2) Is the regulation practical and appropriate when it is attempted to be applied to the purchase of products which are "off-the-shelf" or in a state that requires minor additional work prior to shipment?

In summary, the history of commercial product acquisition efforts is one of good intentions that have failed to bear fruit because none of the efforts to date have created a complete, systematic statutory and regulatory structure for buying commercial products. Instead, statutes and regulations designed for buying Government-unique products -- and perhaps unobjectionable for this purpose -- have been allowed to remain as barriers. For reasons stated in the following sections, the "build-down" of DOD requires that Congress make a complete and systematic revision of existing law to remove significant statutory barriers that today make commercial buying extremely difficult.

## **8.2. The DOD Acquisition Challenge in a Time of Build-Down**

Now that the defense build-up of the 1980s has turned into the build-down of the 1990s, defense procurement policy must be reshaped to ensure the long-term goal of retaining an adequate defense technical and industrial base. Declining purchases of defense-unique products mean higher units costs, declining profits, and exit of capacity from defense-specific industries. At the same time, the high cost of doing business with the Government is causing companies to leave or never to enter the defense market.<sup>31</sup>

In the absence of deliberate policies, the DTIB [defense technical and industrial base] is likely to converge toward an arsenal structure as current procurement laws impede civil-military integration and reduced levels of production eliminate competition.<sup>32</sup>

In this environment, continued reliance by DOD on defense-unique products can only mean higher costs and loss of industrial base for DOD. One of the principal solutions for this dilemma is to encourage DOD agencies to use commercial products to the maximum extent possible. This approach promises:

- Lower prices through greater competition;
- Lower prices through lower costs typically associated with high volume commercial production;
- A broader industrial base, because the base is maintained not just by DOD, but by the national economy as a whole;
- Increased surge capacity, because DOD needs can be met by diverting supplies that would ordinarily go to the civilian market, rather than by building or rehabilitating defense plants to build defense-unique products;
- Increased access to cutting edge technologies, which are increasingly emerging earlier in the commercial marketplace than in defense industries.

Moreover, even if DOD spending and the defense technical and industrial base were not declining, greater use of commercial items would still make sense for two reasons. First, commercial items tend to be much less expensive than their defense-unique counterparts. Second, commercial items are increasingly more technically advanced than defense-unique products,

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<sup>31</sup>*See, e.g.,* Office of Technology Assessment, *Redesigning Defense*, *supra* note 28, at 16: The current procurement process discourages many qualified firms from bidding on defense contracts because of the large amounts of paperwork involved and military specifications that are often excessively demanding.

<sup>32</sup>*Id.* at 10.

primarily because the pace of introduction of new commercial items generally exceeds that of the fielding of new military products.<sup>33</sup>

While cost comparisons are extremely difficult, as the Panel's own work has confirmed, there is a consensus among recent studies that current procurement policies drive the overhead required in the defense industry far above that which is required in commercial companies. For example, the Office of Technology Assessment reports studies showing that the entire regulatory regime adds 10 to 50% to the cost of doing business with the Government, an amount equal to tens of *billions* of dollars annually.<sup>34</sup> The Center for Strategic and International Studies (CSIS) reported on a case study of a company which performed both military and civilian contracts, and concluded that the military division of the company had higher product costs because the number of administrative personnel in the military division was eight times higher per dollar of sales and twice as high as a percentage of total personnel as the commercial division.<sup>35</sup>

Personnel in Military vs. Commercial Divisions	Number			Number Per Billion	
	Commercial	Military	Total	Commercial	Military
Annual Sales (\$ Billions)	\$10	\$4	\$14		
Administrative Personnel	3,842	9,979	13,821	384	2,495
Engineering	7,557	13,605	21,162	756	3,401
Manufacturing	25,548	18,306	43,854	2,555	4,577
Quality Control	2,835	2,583	5,418	284	640
Facilities	2,177	3,038	5,215	218	760
Logistics	1,896	1,399	3,095	170	350
Computing	1,211	5,425	6,636	121	1,358
Other	170	629	799	17	157
<b>Total</b>	<b>45,036</b>	<b>54,984</b>	<b>100,000</b>	<b>4,504</b>	<b>13,741</b>
<b>Ratio of Admn. to Total Employment</b>	<b>9%</b>	<b>18%</b>	<b>14%</b>		

CSIS also found that at Pratt & Whitney, 52 people were employed solely to accommodate Government auditors' requests for reports, at a total cost to the Government of \$13 million annually (for Government and contractor personnel).<sup>36</sup> Similarly, General Electric reported that it required two full time employees to handle the administrative load created by each Government representative assigned to its engine programs, for a total administrative cost to GE of \$3 million per year.<sup>37</sup>

A study performed by the American Defense Preparedness Association (ADPA) for the Panel found similar results. Specifically, in November 1991, the Panel asked ADPA to perform a study to determine whether the costs of producing a military product were higher than the costs

<sup>33</sup>Jacques S. Gansler testified before the Panel in January 1992 and summarized a number of studies of the "cycle time" necessary to develop new products. He noted the Defense Science Board Streamlining Task Force study of November 1990 which found that average "cycle time" for new DOD-unique products is 17.2 years versus 7.9 years for civilian products. Other data showed cycle times from 1.5 to 4 times longer for military variants of commercial electronics items.

<sup>34</sup>U.S. Congress, Office of Technology Assessment, *Holding the Edge*, supra note 3.

<sup>35</sup>CSIS Study at 24.

<sup>36</sup>*Id.* at 19.

<sup>37</sup>*Id.* at 19-20.

of producing an equivalent commercial product and to see whether it was possible to attribute cost differences to specific areas of legislation or regulation. George K. Krikorian of the DSMC faculty was tasked to do the study, which was carried out with the assistance of the American Defense Preparedness Association (ADPA). Twelve companies that do both Government and commercial business were interviewed and provided data.<sup>38</sup> Mr. Krikorian found: "the Department of Defense pays a premium from 30 to 50% more for products than the same or similar items sold to a commercial enterprise. In some cases, the costs may be 100% higher." The companies responding to the report found it difficult to relate added costs to specific statutes or regulations, but were able to estimate the increase in cost to DOD by functional area as follows:

Operation	Added Cost (% increase in cost)
Purchasing, subcontracting, subcontract administration	5-19%
Manufacturing, production, assembly labor ("touch labor")	2-8%
Testing, inspection, and quality assurance	10-13%
Contract and financial administration; compliance, and oversight	6-17%

Mr. Krikorian's study, like the CSIS study, found that a great deal of the cost increase was in the area of administration. For example, one of the study participants reported the following "head count" ratios between its Government and commercial divisions:<sup>39</sup>

Operation	Ratio of Military:Commercial
Business Center; Contract Compliance	5:1
Accounting, Compliance	5:1
Auditing	13:1
Purchasing and Subcontracting Administration	3:1
Legal Counsel	2:1
Overall Ratio	5:1

Materials costs were another area where Government regulations increased costs without a concomitant benefit. One respondent stated:

The cost category that differs most between Government and commercial contracts is material. Our experience indicates that in both arenas, material is becoming a larger percentage of the product cost than it has been in the past . . . Government contract practices have not kept up with those in the commercial sector. The once

<sup>38</sup>The study was performed between March and May 1992. Twelve companies eventually participated in the study and were drawn from a wide spectrum of industry, including aircraft engines, radar systems, satellites, avionics, and communications. All were corporate members of ADPA.

<sup>39</sup>These figures were confirmed by another participant in the study that reported a 42% cost premium for the military version of an avionics product when compared to a civilian product of similar functionality. One-third of the 42% cost increase related to regulatory compliance. The military division producing this product had 3.8 times as many finance personnel and 9.1 times as many contract administration personnel as the civilian division (normalized for revenue).

effective Government practices now seem to be driving their material cost above those in the commercial arena.

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Specific data indicates that when integrated circuits of comparable performance (Mil-Spec ceramic compared to commercial ceramic) are used, a potential reduction of 60% (nominal) can be achieved . . . . When factored in with all the other material used in the make-up of a product, the total material cost could be reduced by as much as 35% . . . . Material costs on a program run 55% of the total, so the impact to the program could result in a reduction of 19.2%. With the material content increasing, this category could have even more significance with time.

The Krikorian study found other inefficiencies in the military divisions of the companies studied. These included interference with the long-term supplier and subcontractor alliances which the commercial divisions typically used to reduce cost, improve quality, and remove administrative difficulties. In addition, Government regulation and oversight frequently created delays, rescheduling, and rework. Finally, military quality requirements were inconsistent with current "best practices" in Total Quality Management (TQM).<sup>40</sup>

The second reason for "buying commercial" is to gain access to modern technology. In many fields, DOD is no longer the primary technology driver in the U.S. economy. The Krikorian and CSIS studies found, for example, that all of the industrial firms surveyed had established separate divisions to perform DOD work because the costs imposed by DOD regulations would otherwise have jeopardized their commercial business. As a result, research and development efforts were not performed in the same organization. Whenever research and development conducted by each division had "spin-offs" for the other, it was usually the commercial division that created new technologies which were then transferred to the military division.<sup>41</sup>

While there are many reasons why DOD should buy commercial products and components, it is also evident to the Panel that there are many legitimate reasons why DOD cannot purchase commercial items to the same degree and in precisely the same way as commercial companies. These include:

- Some items simply do not have commercial counterparts, such as nuclear submarines, fighter aircraft, and tanks.
- DOD, like any large organization, must have some uniformity and consistency in the equipment it uses to reduce training and fielding costs.<sup>42</sup>

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<sup>40</sup>Paper presented by Mr. Krikorian to the June 3, 1992 meeting of the Panel, at 3-4.

<sup>41</sup>*Id.* at 2-3.

<sup>42</sup>Uniformity and consistency do not, however, rule out the use of modified commercial products. For example, in the recent Navy Lapheld II procurement, the Navy specified a keyboard layout that all vendors had to meet and



- DOD has far flung contracting activities that must operate with some sort of central guidance and uniform procedures.
- DOD must field systems worldwide and maintain logistics systems that support such fielding.
- DOD must be able to obtain maintenance and repair services in remote and often dangerous locations.
- DOD generally keeps products in the field longer than the commercial sector, which may create unique requirements for spare parts and warranties.
- DOD's systems in some cases require greater performance or reliability in more adverse conditions than those in the commercial market.
- DOD must have access to products in time of war, when foreign supplies may be unavailable.
- DOD may require a level of secrecy about its requirements and acquisition programs that is inconsistent with commercial buying practices.
- DOD must ensure the existence of an adequate defense technology and industrial base.

Because of these factors, flexibility must be given to DOD to determine whether it is in the best interest of national defense to buy commercial items in a specific instance, even though it is abundantly clear that commercial items should be more frequently used as end items and components. The Panel has decided to provide this flexibility by recommending regulations to determine how to purchase supplies when commercial items will meet DOD's needs rather than attempting to define those circumstances in statute.

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permitted limited engineering modifications to commercial products to permit these products to be modified to have the required keyboard.

### **8.3. Panel Recommendations**

The commercial item statute proposed by the Panel consists of a new, core subchapter to be added to chapter 137 of Title 10 of the United States Code, plus specific amendments to other existing sections of Title 10. The new and amended provisions are intended to work together as a single piece of legislation. Nonetheless, the Panel felt that rational codification required some portions of the legislation, such as rights in technical data and "buy American" preferences, to be implemented by amendments to existing chapters dealing with those topics.

#### **8.3.1. Definition of Commercial Items: 10 U.S.C. § 2302**

The Panel spent a great deal of time drafting a commercial item definition. An ad hoc committee of the Panel<sup>43</sup> was appointed to review existing commercial items definitions and to review suggestions from DOD, other Government agencies, CSIS, the public, and industry groups, including the American Bar Association, the Council of Defense and Space Industry Associations (CODSIA), the Electronic Industries Association (EIA), and the Integrated Dual-Use Commercial Companies. The ad hoc committee met frequently over a six month period and circulated numerous drafts of proposed definitions for comment. In addition, the Panel itself debated the definition for several months and held a number of open discussion sessions which were attended by spokespersons for many interested segments of the public, as well as by representatives of various Government agencies (both within and outside DOD). The definition adopted by the Panel, which has been placed as an addition to the general definitions found in 10 U.S.C. § 2302, is as follows:

(5) The term "commercial item" means

(A) property, other than real property, which: (i) is sold or licensed to the general public for other than Government purposes; (ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than Government purposes; or (iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the general public;

(B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions and the Government and commercial services are or will be provided by the same workforce, plant, or equipment;

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<sup>43</sup>Messrs. Madden, Peters, and Quigley.

(C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) or (B) if unmodified will be deemed to be a commercial item when modified for sale to the Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than "commercial" merely because sales of such item to the general public for other than Governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.

In crafting the commercial item definition, the Panel made a number of important choices which are discussed immediately below.

#### **8.3.1.1. Single Definition versus Multiple Definitions**

The Panel determined that ease of administration required a single definition for commercial items to be used uniformly throughout DOD. From the outset, the Panel believed that a primary purpose of defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations which have created barriers to the acquisition of commercial items. This focus was different from the focus of those who had drafted earlier statutory and regulatory definitions of commercial items since those definitions had attempted to solve different problems such as ensuring a reasonable price, ensuring a quality product, or reducing the risk of new technology.<sup>44</sup> Once the Panel had defined the universe of items which should be acquired with a minimum of regulation unique to Government contractors, the Panel went on to deal specifically with pricing (in proposed section 2xx5) and quality (in proposed section 2xx4) rather than attempting to load these functions into the definition.<sup>45</sup>

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<sup>44</sup>See generally W.T. Kirby & J. L. Ursini, *Commercial Products Procurement*, 91-3 BRIEFING PAPERS 1, 3-4 (1991).

<sup>45</sup>The Panel did not attempt to provide a legislative solution for the risk inherent in purchasing a new product that has neither been tested in the commercial marketplace nor tested in the manner of items developed specifically for DOD. However, the Secretary has been given authority in proposed section 2xx1 to deal with this risk by regulation.

### 8.3.1.2. Property versus Services

After surveying the statutory barriers to broader use of commercial items, the Panel reached the conclusion that statutes primarily create barriers to the acquisition of manufactured products. In general, statutes create barriers because they disrupt established manufacturing methods, sources of supply, and personnel practices. For example, commercial companies generally try to establish long-term supplier and subcontractor relationships, and often have a supplier and subcontractor base in place well before the first unit of a commercial item is manufactured. As a result, the requirement that Government contractors establish subcontracting plans cannot be implemented at all with respect to shipments from inventory and can be implemented only with great difficulty and disruption in order to fulfill a specific DOD contract. Similarly, Government quality assurance requirements are frequently inconsistent with commercial quality assurance methods that will also be in place at the outset of the manufacture of a commercial product.

By contrast, these statutes do not create the same type of barriers to the acquisition of commercial services. With some exceptions,<sup>46</sup> companies that sell commercial services to DOD appear to be able to comply with statutes governing service contractors, such as the Service Contract Act<sup>47</sup> and the Vietnam Era Veterans Readjustment Act,<sup>48</sup> with less disruption to existing practices. Moreover, smaller companies, which may have the greatest difficulty in complying with unique statutory requirements, should become largely exempt from such statutes under the Panel's proposed simplified acquisition threshold amendments.<sup>49</sup> In some areas in which service providers may be equally affected with commercial manufacturers (e.g., TINA), the Panel has recommended amendments to specific statutes that give some relief to both commercial manufacturers and service providers. The Panel concluded that it did not have sufficient information to recommend exempting "pure" service contractors from additional Government-specific statutes and regulations. However, the Panel believes that further study of this issue could show a need for broader relief for service contractors.

### 8.3.1.3. Ancillary Services

Although the Panel decided to cover primarily "property" within the commercial item definition, it also decided that some types of services ancillary to the acquisition of property also had to be included within the definition of a commercial item to avoid creating barriers to the acquisition of the commercial items themselves. Industry groups advised the Panel that commercial products are typically installed, maintained, and repaired by workers in commercial companies whose business practices will not comply with contract-specific statutory and regulatory restrictions. A similar argument was made for training services, which would use the same material, instructors, and classrooms regardless of whether a product is sold to the Government or sold commercially. Again, the argument was made that it made no sense -- and

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<sup>46</sup>For example, the Panel was told by a supplier of data network services that it faced many of the same hurdles as manufacturers.

<sup>47</sup>41 U.S.C. §§ 351-358.

<sup>48</sup>38 U.S.C. § 4212.

<sup>49</sup>See Chapter 4 of this Report.

indeed created a barrier to acquisition of commercial items themselves -- to require a commercial company to change its classrooms or its sources of repair parts, or to comply with the Service Contract Act, as a condition of accepting a Government contract for the performance of what would otherwise be a service provided to the general public.

The Panel accepted this argument, but imposed the additional requirement that to enjoy commercial item status, such ancillary services had to be offered contemporaneously to the general public under similar terms and conditions -- so that the "Government and commercial services are or will be provided by the same workforce, plant, or equipment."<sup>50</sup> The Panel used these phrases to ensure that the Government is receiving essentially the same thing that is being provided to the general public. On the other hand, the Panel was aware that, because of factors such as security clearances, different workers may provide the Government service from those who provide the service to the public. The use of the term "workforce" was not intended to permit a contractor to use separated facilities or an entirely different workforce since: (1) the purpose of the commercial item statute is to permit integration of commercial and military workforces, plants, and equipment; and (2) the integration requirement ensures that DOD gains the benefits of competition on quality and price inherent in the commercial marketplace. Similar concerns caused the Panel to require that the service be offered "contemporaneously" to DOD and the general public. Again, this does not mean that the service must be offered to both DOD and the general public at the same moment in time, since DOD should be able to be the first purchaser of a new commercial item if it chooses to be. But there must be some reasonable expectation that the service provided to DOD will also be provided to the general public. A gap of a few months might be reasonable, but a gap of several years between the date the service is offered to DOD and the date it is offered to the general public would not be.

#### **8.3.1.4. Modified Products**

Past practice has limited commercial acquisition to "off-the-shelf" items or "minor modifications" of off-the-shelf items. It was the Panel's conclusion that such a narrow policy on modifications does not recognize current commercial reality. Today, a commercial buyer can often buy a modified commercial product from a commercial vendor if the cost of the modification is not great compared to the cost of the commercial item or to the value of the contract. Because DOD will often be a "large buyer" and will often have somewhat unique needs, DOD should have the same flexibility as a commercial company to obtain modifications that would be available to, for example, a Fortune 100 company. Accordingly, the Panel has recommended the addition of section 2302(5)(C) which permits the acquisition of a modified item as a commercial item if the unmodified item would itself meet the criteria for commercial item status and the modification "(i) is of the type customarily provided in the commercial marketplace" and "(ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency."

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<sup>50</sup>See proposed 10 U.S.C. § 2302(4)(B).

### **8.3.1.5. New Products; Combinations of Products; Products Sold In Small Quantities to the General Public**

The Panel extended the concept of "commercial item" to new products<sup>51</sup> and to products sold in small quantities to the general public<sup>52</sup> in order to ensure that the Government is not foreclosed from buying "cutting edge" technology simply because it is an early, major buyer of that technology. The purpose of this provision is to encourage the acquisition of new technology from the commercial sector rather than "growing it in-house." Moreover, given the long lead-times frequently faced in the Government procurement cycle, it will often be essential to make purchases at the cutting edge of technology in order to ensure that an item is still current technology by the time it is fielded.

In addition, the Panel expressly defined a system made out of a combination of commercial items as a commercial item so long as the combination was of the sort that would be made for a nongovernmental buyer. The purpose of this provision was to allow DOD to contract for systems, such as personal computer systems, which typically are sold commercially as systems even though products from various vendors may be assembled or integrated by yet another vendor before the sale takes place. The Panel's definition covers combinations of commercial items even if the precise system being ordered by DOD had not been assembled before and sold commercially.

Finally, the Panel wanted to be clear that DOD is not to be precluded from buying an item as a commercial product simply because some arbitrary percentage of sales has not been made to the general public.<sup>53</sup> So long as the contracting officer can determine that an item is designed for general nongovernmental use and can determine that the price for that item is reasonable, an item can be purchased as a commercial item. In this regard, the proposed section on the pricing of commercial items (section 2xx5) provides a mechanism for determining price reasonableness even where an item does not meet the requirements for "established market or catalog price" under current statutes and regulations.

### **8.3.1.6. Items Produced by "Dual-Use" Manufacturers**

As the defense budget shrinks from its 1986 high, it is clear that DOD demand alone will be inadequate to sustain the current size and surge capacity of today's defense-unique industrial base.<sup>54</sup> If, therefore, there is to be an adequate industrial base, DOD must be able to draw on both defense-unique and commercial companies for the products it needs. Recently enacted section 2501(c) of Title 10 puts the matter succinctly:

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<sup>51</sup>See proposed 10 U.S.C. § 2302(4)(A)(ii).

<sup>52</sup>See proposed 10 U.S.C. § 2302(4)(D).

<sup>53</sup>In recommending the adoption of 10 U.S.C. § 2302(4)(D), the Panel rejected the percentage of sales tests currently used for the catalog pricing exemption under TINA as tests relevant to commercial item acquisition policy.

<sup>54</sup>See, e.g., *Future of the Defense Industrial Base*, *supra* note 2, at 1-2.

(c) CIVIL-MILITARY INTEGRATION POLICY. -- It is the policy of Congress that the United States attain the national technology and industrial base objectives set forth in subsection [2501](a) through acquisition policy reforms that have the following objectives . . .

(3) Reducing Federal Government barriers to the use of commercial products, *processes*, and standards. (emphasis added).<sup>55</sup>

As a first step toward integration, the Panel recommends a proposed section 10 U.S.C. § 2302(5)(E), which is intended to remove barriers to the use of commercial processes, such as the manufacture of paint or castings, which frequently are used not to produce a product to the manufacturer's specifications but to the specifications of the buyer. Because the end item produced by such a process is generally not intended to be sold to the general public -- and is not a modification of something sold to the general public -- but to be used by the purchaser as a part of a larger item, such items were not otherwise described by the commercial item definition. Nonetheless, the Panel felt that the same concern for removing barriers to commercial-military integration -- which justified removing barriers to the acquisition of commercial items -- also required regulatory and statutory relief to a supplier of commercial processes to nongovernmental buyers. Otherwise, a commercial manufacturer would frequently be required as a condition of accepting a Government order to change its fundamental manner of doing business when the need is for greater development of flexible manufacturing in integrated facilities.<sup>56</sup> However, the Panel believes that regulatory relief should be granted only when the process and item being offered to DOD is in fact made in the same plant and with essentially the same equipment and workforce as an item made for a nongovernment buyer. Otherwise, the effect of including suppliers of processes could have the unintended consequence of deregulating defense-unique business units within companies which provided similar commercial items out of commercial business units. Since the point of integration is to have defense items manufactured in facilities that are sustained by the general public, the Panel felt strongly that regulatory relief should be targeted at true dual-use facilities.

#### 8.3.1.7. Existing Sources; Nondevelopmental Items

While the Panel's emphasis has been on promoting the use of commercial products both as end items and as components, it recognizes that widespread use of commercial items will create a transition problem for businesses that are today supplying the DOD-unique products that will be supplanted by commercial items. Accordingly, the Panel has provided that nondevelopmental items and existing sources of supply will ordinarily be permitted to compete for DOD's procurement dollars on an equal footing with commercial replacements. In addition, the Panel has specifically provided that current policy on set-asides for small, minority, and small disadvantaged businesses will not be disturbed by the new statute.<sup>57</sup> As a result, small businesses which today

<sup>55</sup>Added by Pub. L. No. 102-484, § 4211, *supra* note 22.

<sup>56</sup>See, for example, 10 U.S.C. §§ 2511, 2512, *added by* Pub. L. No. 102-484, *supra* note 22.

<sup>57</sup>See proposed section 2xx3. Elsewhere the Panel has recommended raising the existing small purchase threshold to a new "simplified acquisition threshold" of \$100,000 and provided that all procurements under this amount will

supply many defense-unique articles for which there are commercial equivalents should continue to have a market for their products.<sup>58</sup>

### 8.3.1.8. Commercial Companies

The Panel was urged by CSIS and industry groups to attempt to develop a statutory structure for a "commercial company" -- to be defined generally as a company or business unit most of whose business was not with the Federal Government. This concept has great appeal since, as CSIS has found, statutes governing Government contractors as such will create the greatest barriers to commercial-military integration when applied to companies that have shaped their procedures, processes, vendor base, and personnel policies for the commercial marketplace. Thus, exemptions to such statutes could be more readily tailored when applied on a company-by-company basis than on a contract-by-contract basis. However, when the Panel circulated a draft commercial company statute, it was met with enormous opposition as being both over- and under-inclusive. In addition, a number of smaller vendors argued that they would not be eligible for commercial company status while larger competitors would be eligible, which would give the smaller companies a great cost disadvantage in competing against larger competitors for Government business. The Panel made a number of efforts (aided by CSIS and CODSIA) to develop a definition of commercial company that was less problematic. Unfortunately, as the deadline for this Report was reached, no satisfactory substitute language had been found. Thus, while the Panel has not adopted a "commercial company" concept in its recommendations, it is not because the Panel rejected the concept, but only because reduction of the concept to statutory language proved to be more difficult and time-consuming than originally hoped. Given the importance to the defense industrial base of flexible and dual-use manufacturing processes and plants, the Panel hopes that further work will be done by others to determine whether additional statutory authority is needed to remove barriers to purchasing the product of such processes and plants.

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be reserved for small business under the existing "rule of two." See Chapter 4 of this Report; 15 U.S.C. § 644(j); FAR 13.105. As a result, small businesses furnishing Government-unique products will be sheltered from competitive pressure until they can move into commercial markets.

<sup>58</sup>In the past, Congress has objected to regulatory changes that would replace existing small business sources with commercial companies. See generally Kirby, *supra* note 6, at 87-88. Indeed, the Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, which directed the Secretary to increase the use of commercial items, was accompanied by a report which

caution[ed] DOD that in implementing the [commercial items] demonstration program, it should encourage the participation of those firms that have previously been supplying DOD with military uniforms and items of individual clothing in accordance with existing military specifications. Specifically, DOD may not apply any "commerciality" requirement with respect to the eligibility of an offeror or to the product being offered.

H. Conf. Rep. No. 101-331, 101st Cong., 1st Sess. 613 (1989). The Panel's recommended approach will allow existing suppliers to compete against new suppliers of commercial items.



### 8.3.2. Policy: 10 U.S.C. § 2301

The policy on acquisition of commercial items is stated in two places, 10 U.S.C. § 2301 and a new section 2xx1. Since 1984, CICA has provided in section 2301 that it is the policy of Congress that DOD must "promote the use of commercial products whenever practicable."<sup>59</sup> However, as more specifically discussed in Chapter 1.1.1 of this Report, the Panel determined that the policy statement in CICA needed to be amended to reflect more accurately the policies needed to guide defense procurement in the post-Cold War era of fiscal restraint. This was accomplished in three ways. First, to promote commercial-military integration, an amendment to section 2301 was recommended to emphasize that commercial items shall be used by DOD whenever practicable, both as end items and as components.<sup>60</sup> Second, to cut the costs of defense-unique procurement, when commercial items are not available or do not meet DOD's requirements, the Panel has recommended requiring DOD to use suitable nondevelopmental items prior to developing unique defense goods.<sup>61</sup> Finally, the Panel has become aware of instances in which the FAR and DFARS needlessly inhibit the acquisition of commercial items. Accordingly, the Panel has amended section 2301(b)(5) to prohibit regulations which needlessly interfere with the acquisition of commercial and nondevelopmental items.

### 8.3.3. Procurement Planning: 10 U.S.C. § 2325

Section 2325 in Title 10 requires DOD to develop its acquisition requirements to ensure the maximum use of commercial and nondevelopmental items.<sup>62</sup> The Panel has recommended moving the definition of nondevelopmental item from this section to 10 U.S.C. § 2302(6) and has suggested minor amendments to the remainder of this section to reflect its recommendations on commercial items. As amended, section 2325 will require DOD to:

- Define its requirements so that commercial and other nondevelopmental items may be procured to fulfill those requirements; and
- Prior to acquiring a defense-unique item, to perform market research to determine whether commercial or nondevelopmental items, or modified commercial or nondevelopmental items, can be used in place of a defense-unique item.

Since under both section 2325 and under proposed section 2xx1, commercial and nondevelopmental items are required to be used only "to the maximum extent practicable," it is obviously essential that DOD's requirements not be drawn in such a way that only defense-unique products can meet those requirements. The declining defense budget, the cost and industrial base advantages of commercial items, thoughtful and innovative regulatory

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<sup>59</sup>10 U.S.C. § 2301(b)(6). This policy is implemented in DOD Directive 5000.1, C.1.c.

<sup>60</sup>See §§ 2301(a)(2), 2301(b)(5).

<sup>61</sup>See §§ 2301(a)(3), 2301(b)(b), 2301(b)(6).

<sup>62</sup>Nondevelopmental items are defined in section 2325(d) to include "any item of supply that is available in the commercial marketplace." The Panel has recommended minor modifications to section 2325 to reflect the commercial item amendments proposed here.

implementation, and the training mandated by section 824(d) of Public Law Number 101-189, should ensure good faith compliance with section 2325.

### **8.3.4. Regulations: Proposed Section 2xx1**

The proposed new Chapter of Title 10 implements the general guidance of section 2301 with directions to the Secretary of Defense to issue regulations governing the procurement of three types of items: commercial end items; commercial components; and nondevelopmental items. Specifically, proposed section 2xx1 states:

#### **SECTION 2XX1. POLICY**

(a) **REQUIRED USE OF COMMERCIAL ITEMS.** – In accordance with the policies stated in section 2301, whenever commercial items will satisfy the needs of the Department of Defense, the Department

(1) shall purchase commercial items using those practices prescribed in this subchapter and in regulations issued hereunder and

(2) shall by regulation require prime contractors, and subcontractors at all levels, that furnish other than commercial items, to incorporate commercial items as components to the maximum extent practicable.

(b) **REGULATIONS; UNIFORM TERMS AND CONDITIONS.**

(1) **END ITEMS.** – The Secretary of Defense shall promulgate regulations implementing this subchapter, which shall contain a set or sets of uniform terms and conditions to be included in contracts for the acquisition of commercial end items. Such uniform terms and conditions shall be modeled to the maximum extent practicable on commercial terms and conditions and shall include only those contract clauses, including clauses requiring terms and conditions to be flowed down to subcontractors, that are---

(A) required to implement provisions of law applicable to commercial item acquisitions;

(B) essential for the protection of the Federal Government's interest in an acquisition; or

(C) determined by the Secretary to be consistent with standard commercial practice.

The regulations to be issued hereunder shall also establish standards and procedures for waiving such uniform terms or conditions, other

than those required by statute, as may be useful to the acquisition of commercial items in a particular procurement or class of procurements.

(2) COMPONENTS. - The Secretary of Defense shall issue regulations implementing the preference for commercial components set out in section 2301(b)(5). Such regulations shall provide that prime contractors and subcontractors furnishing other than commercial items as end items or components may not require suppliers furnishing commercial items as components to comply with any clause, term or condition except those---

(A) required to implement provisions of law applicable to subcontractors furnishing commercial items;

(B) essential for the protection of the prime contractor or higher tier subcontractor in a particular acquisition; or

(C) determined to be consistent with standard commercial practice.

(c) EXISTING OR PRIOR SOURCES; NONDEVELOPMENTAL ITEMS. -

(1) The Secretary of Defense, the Secretary of a military department or the head of a defense agency may determine that it is in the Government's interests to permit existing or prior sources or suppliers of nondevelopmental items to participate in a competition for a commercial item when a nondevelopmental item or an item furnished by an existing or prior source will compete with a commercial item under the same terms, conditions, and evaluation and award criteria.

(2) Nondevelopmental items or items furnished by an existing or prior source which must be modified to meet the requirements of a solicitation for commercial items may be offered under such a solicitation, but only when the modifications are

(A) necessary to comply with the Government's solicitation requirements and

(B) do not alter the function or essential physical characteristics of the items to be supplied.

(3) The policies, procedures, solicitation provisions and contract clauses applicable to commercial items under this

subchapter shall also apply to nondevelopmental items and items furnished by an existing or prior source which are permitted to participate in a competition conducted under this title.

#### **8.3.4.1. End Items**

With respect to end items, section 2xx1(a) implements the general policy of section 2301 by mandating that DOD acquire commercial end items "whenever commercial items will satisfy the needs of DOD."<sup>63</sup> The Panel intends by this that commercial items should become the norm, not the exception, for end items other than those unique to DOD's war-fighting role. This will require agencies to perform market research, to look diligently for commercial items in the early stages of the procurement process, and to use commercial items, including modified commercial items when these will meet the minimum needs of the agency. In determining the needs of DOD, the Panel intends that DOD have the latitude to select a defense-unique acquisition plan when required by, for example, industrial base or security concerns. However, the authority to reject commercial items on public interest or national defense grounds should be exercised very sparingly and at a level above that of the contracting officer. The Panel also intends that DOD will use its waiver authority to remove from standard contract terms and conditions any clause that unreasonably restricts competition by putting significant burdens on a substantial number of suppliers of a commercial item.

The Secretary of Defense is required by section 2xx1(b)(1) to promulgate regulations implementing the end item provisions of the new chapter. While the details of these regulations are largely left to the Secretary of Defense,<sup>64</sup> section 2xx1(b)(1) requires the Secretary of Defense to draft uniform terms and conditions for various types of procurements and to establish an administrative structure under which standard terms and conditions could be varied if authorized by appropriate authority. The Panel has recommended this structure for two reasons.

First, DOD must have some means to control the actions of far-flung contracting activities. The only practical way to achieve this control is for DOD to mandate standard terms and conditions that are to be used in the ordinary course of business. Most large commercial companies similarly rely on standardized terms and conditions -- often written in very small type on the reverse of purchase order forms -- to control the actions of individual contracting officials and to implement routine elements of a transaction, such as billing, payment, inspection and acceptance, shipping, and packaging.

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<sup>63</sup>"In accordance with the policies stated in section 2301, whenever commercial items will satisfy the needs of the DOD, the Department (1) shall purchase commercial items using those practices prescribed in this subchapter and in regulations issued hereunder and (2) shall by regulation require prime contractors, and subcontractors at all levels, that furnish other than commercial items, to incorporate commercial items as components to the maximum extent practicable."

<sup>64</sup>Section 2xx1 restricts the terms and conditions that may be implemented to those strictly necessary to comply with statutes and the needs of DOD, plus clauses consistent with commercial practice. The Panel did not take a position on the use of qualified products lists or qualified source lists, although both have been urged by commentators. See, e.g., W.T. Kirby, *supra* note 6, at 89-91. The use of such lists is left to the discretion of DOD, subject to the requirements of 10 U.S.C. § 2319 (see Chapter 1.2.6. of this Report).

Second, DOD must have the flexibility at an appropriate level of authority to modify or waive standard terms and conditions if the need for, or value of, a commercial item outweighs the benefit of trading on the standard DOD form. The principal problem DOD faces today in buying commercial items and in attracting commercial companies as sellers is DOD's inability to waive terms and conditions imposed by statute, Executive Order, or regulation. The Panel has recommended exemption of commercial item acquisitions from many of the statutes that today impede the acquisition of commercial items, and application of the principles stated in proposed section 2xx1 should similarly remove many regulatory barriers. This does not mean, however, as some industry comments have suggested, that DOD must never ask for a term or condition that falls outside current commercial custom. Successful commercial buyers ask for unique terms and conditions all the time. Whether they get such terms and conditions depends on how much the seller wants the business and how costly it will be for the seller to comply with a unique request. This, in turn, will depend on how different that unique request is from those which are customary in the industry.

Today, DOD is in the unhappy position of asking (as required by statute) for any number of unique terms and conditions that are extremely expensive for commercial sellers to implement, while at the same time being constrained by statutory competition requirements from offering sustained purchases of an item from one particular source. This is a "lose-lose" situation for commercial sellers. Nonetheless, it was apparent from industry comments that some commercial sellers would be prepared to accept some Government-specific terms and conditions on some orders, and that the willingness (or ability) of sellers to comply with Government-specific terms and conditions will differ by industry, by company, and by the size of the order. Accordingly, the Panel found no reason to absolutely prohibit DOD from negotiating for unique terms and conditions if an appropriate level of contracting authority thought this should be done.

In summary, DOD must be willing and able to bargain in the commercial marketplace if it is to be able to rely successfully on commercial items: but it must have one or more sets of standard terms and conditions in order to start the process. Hopefully, by using various sets of terms and conditions, making class waivers as authorized by section 2xx1(b), and by taking advantage of the statutory exemptions created in section 2xx3, DOD will be able to buy in the commercial marketplace on its standard terms and conditions in the majority of cases.

#### **8.3.4.2. Components**

The Secretary's authority to issue regulations implementing the use of commercial items as component parts is established by section 2xx1(b)(2). While the Panel felt that manufacturers of commercial components should be as free as possible from Government regulation inconsistent with commercial practices, it also recognized that prime contractors supplying Government-unique items will have good reason to want to flow down some Government-unique clauses to subcontractors. For example, if the prime contractor must accept a Government-unique warranty, the prime contractor will doubtless want equivalent warranty protection from its suppliers regardless of whether they supply defense-unique or commercial parts. Similarly, a prime contractor may want a commercial vendor who uses a unique part to substitute a commercial component in order to provide more sources for spare parts. Accordingly, the Panel did not

foreclose some regulation of commercial component manufacturers. On the other hand, suppliers of Government-unique products should not be allowed to pass down willy-nilly all contract clauses they must accept. Accordingly, the Secretary is given authority in section 2xx1(b)(2) to regulate the flow down of Government-unique clauses to vendors of commercial components. How this should be done will depend heavily on the nature of the end items being procured, and has been left to the Secretary to determine. The Panel urges the Secretary in using this authority to extend to its vendors of Government-unique items relief from flow down obligations of the same general nature that section 2xx1(b)(1) and section 2xx3(a) have extended to the Secretary himself.<sup>65</sup>

#### **8.3.4.3. Existing or Prior Sources; Nondevelopmental Items**

The Panel has recommended permitting products produced by existing or prior sources<sup>66</sup> and nondevelopmental items<sup>67</sup> to compete with commercial products under the same terms and conditions applicable to commercial items.<sup>68</sup> The reasons for this are two-fold.

First, with respect to existing sources, the Panel was told that, because of the use of Government specifications in the past, DOD's current sources for many items that have commercial equivalents are Government specialty companies, many of them small businesses. No purpose would be served by excluding products made by these companies from commercial item acquisitions since these products have been previously accepted by DOD. In addition, to avoid placing these companies at a competitive disadvantage, the Panel felt that they should be exempt from statutes and regulations to the same extent as their commercial competitors.

Second, nondevelopmental items, even if Government-unique, are in existence and available, and may well provide viable alternatives to commercial items. Again, the Panel could see no reason for DOD to cut itself off from an available source of supply simply because commercial items may theoretically be less expensive and technically superior to some equivalent Government-unique items. To avoid an unfair cost advantage, nondevelopmental items offered in competition with commercial items will be exempt from statutes and regulations to the same extent.

#### **8.3.5. Precedence: Exemptions; Relation to Other Laws**

Section 2xx3 of the proposed chapter exempts procurements of commercial items from those statutes which appeared to the Panel, after review of recent industrial base literature and lengthy discussions with industry and Government representatives, to create barriers to the use of

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<sup>65</sup>For example, the Secretary should consider allowing prime contractors to use the procedures and criteria established in section 2xx5 to establish the reasonableness of the price of commercial components and, if this were done, should give the prime contractor equivalent relief from TINA, 10 U.S.C. § 2306a.

<sup>66</sup>Existing or prior sources are defined in section 2xx2(e) as "a business entity that is furnishing or has previously furnished items to the Government, including items supplied in accordance with Government-unique product descriptions, drawings, or specifications."

<sup>67</sup>"Nondevelopmental item" has the meaning prescribed in proposed 10 U.S.C. § 2302(7).

<sup>68</sup>See generally proposed section 2xx1(c).

commercial items. In addition, it establishes a rule of construction intended to prevent inadvertent repeal and defines the relationship of commercial item acquisition to simplified acquisition procedures and set-asides.

#### **8.3.5.1. Exemptions**

Many commentators suggested to the Panel that the best method for facilitating the acquisition of commercial items was to exempt commercial acquisitions from all laws, other than laws requiring full and open competition, that are not generally applicable to United States companies. Typical of the statutory language proposed is the following:

(a) EXEMPTIONS FROM PRESENT LAW.--Procurements of commercial items shall be conducted pursuant to Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403(6)) and shall be exempt from any other requirements of law not specifically reserved in this subchapter, unless the same requirements are equally applicable to business entities which are not under contract to the Federal Government.

While the Panel used this concept as one guide to identify statutory barriers to the use of commercial items, it did not (as discussed in Chapter 8.3.4 and generally throughout Chapter 4) believe it was necessary or appropriate for DOD to give up all contract-unique socioeconomic, ethics, and regulatory policies as a condition of obtaining commercial items. Accordingly, the Panel used as additional criteria for exemptions such considerations as (i) whether compliance with a statute was practical if a commercial item was purchased out of inventory; (ii) whether compliance would disrupt sources of supply, personnel practices, and business methods that would typically be in place in a company which served primarily the commercial market; and (iii) whether compliance with a contract-unique requirement would impose substantial expense on a "typical" commercial company.

In fashioning exemptions, the Panel is not recommending the abandonment of policies underlying laws to which exemptions have been recommended. However, many of the policies required to be implemented in contracts today -- such as nondiscrimination, equal employment, fair employment, and wage, hour, and workplace safety standards -- are also implemented in statutes of general applicability. As a result, the Panel believes the costs of contractual implementation -- and the benefits of avoiding contractual implementation -- exceed the marginal benefit to be gained by added unique contract clauses on top of existing general statutory applications of the policy. Alternatively, there may be ways to tailor the statutory implementation of policies to avoid substantial impacts on commercial operations. As discussed in Chapter 6, for example, a broad range of statutes prohibit improper activity by anyone who does business with the Government. As presently drafted, these statutes require contractual implementation which conflicts with commercial practice. While the Panel is recommending exemption from such laws, *as currently drafted*, the Panel is *not* recommending exemption from the amended statutes proposed in Chapter 6 which implement the same policies in a manner that commercial vendors can accept.



In summary, the Panel attempted to draw a balance between the goals established by Congress for acquiring commercial products and the goals established by laws which impose contract-unique requirements. While the Panel recognizes that this balance is somewhat arbitrary and might be drawn differently by others, what is presented here is a consensus reached after months of public discussion and debate and very hard study by all of the Panel members.

The Panel took three different approaches to the implementation of exemptions. First, as discussed in this Chapter, the Panel drafted a new commercial items subchapter for Title 10, which contains provisions which replace or supplement existing law. For example, section 2xx5 contains pricing and audit provisions that supplement the Truth in Negotiation Act,<sup>69</sup> and replace audit and access to records statutes.<sup>70</sup> Second, the Panel drafted exempting language for insertion in appropriate sections of individual statutes. Examples of this are provisions dealing with rights in technical data<sup>71</sup> and the Buy American Act,<sup>72</sup> in both of which a simple exemption was not an appropriate solution. Third, the Panel implemented the remaining exemptions in proposed section 2xx3(a), which is set out below. Table 1, which follows the text of section 2xx3, summarizes the reasons for each exemption contained in section 2xx3(a). Table II below identifies those statutes (falling into the first and second categories discussed above) for which exemption or amendments would be required if the recommendations of this Panel are not accepted.<sup>73</sup>

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<sup>69</sup>10 U.S.C. § 2306a.

<sup>70</sup>10 U.S.C. § 2313.

<sup>71</sup>10 U.S.C. §§ 2320-21.

<sup>72</sup>41 U.S.C. §§ 10a-10d.

<sup>73</sup>While the Panel's charter is to examine statutes, in the process of examining statutory barriers to commercial items, the Panel identified regulations and Executive Orders that also require amendment if barriers to commercial-military integration are to be removed. Specifically, FAR 52.225-10, which requires vendors to avoid payment of duties on items destined for the Government, should be amended to contain a commercial item exemption since a commercial vendor will usually not know at the time of import to whom an item will be sold. Similarly, Executive Order 11246 and implementing regulations (FAR 52.222-21 through 28) require that clauses be inserted in all Government contracts which require sellers to have affirmative action programs and which require pre-award on-site equal opportunity clearance. While the Executive Order permits exemptions to be made by regulation, none have been made, even though the antidiscrimination requirements of the Executive Order are also enforced by Title VII of the Civil Rights Act of 1964, a statute applicable to all employers regardless of Government contractor status. This strict application of the Executive Order prevents, for example, use of credit cards for small purchases, since there is no contract in a credit card purchase in which the required clauses can be written down. Executive Order 10582 and subsequent amending Orders implement a components test under the Buy American Act, which is also used for the DOD Balance of Payment program. Such component tests may needlessly exclude commercial items substantially transformed in the United States. Elsewhere (see Chapter 7) the Panel has recommended that a substantial transformation test be used for determining whether an item is "American." The same test should be used in regulations. Finally, the Defense Production Act and Defense Priority Rating System, 50 U.S.C. App. 2061-69, has been implemented by regulations imposing flow down that may disrupt established subcontractor systems. The regulations should be modified to delete the flow down requirement when commercial items are being acquired. In addition, 50 U.S.C. 2071(b) provides: "The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds: (1) such material is a scarce and critical material essential to the national defense . . ." This finding has not been made to support the regulations.

**§ 2xx3. Precedence; Relations to other Laws**

(a) EXEMPTIONS FROM PRESENT LAW.—Procurements of commercial items shall not be subject to the following laws:

- 10 U.S.C. § 2393
- 10 U.S.C. § 2402
- 10 U.S.C. § 2408
- 10 U.S.C. § 2507
- 10 U.S.C. § 2631
- 15 U.S.C. §§ 637(d)(4), 637(d)(5), 637(d)(6)
- 15 U.S.C. §§ 644(d), 644(e), 644(f)
- 29 U.S.C. § 793
- 31 U.S.C. § 1352 note
- 38 U.S.C. § 4212
- 41 U.S.C. §§ 51-58
- 41 U.S.C. § 701
- 46 U.S.C. App. § 1241(b)

As stated above, the purpose of exempting procurements of commercial items from the statutes listed above is to eliminate the barrier to entry of commercial items. The Panel recognizes that the Secretary may wish to retain in regulations some of the statutory requirements to which exemptions are made by section 2xx3(a). Nothing in this section precludes that. Indeed, the Secretary has been given authority by proposed section 2xx1(b)(1) to seek to impose on commercial contractors those Government-unique requirements that the Secretary finds to be important and cost-justified in specific procurements or classes of procurements. Without the exemptions conferred in section 2xx3(a), however, the Secretary would be without authority to waive statutorily mandated requirements in the manner contemplated by section 2xx1(b). Moreover, the exemption created in section 2xx3(a) does not relieve a contractor that has already contractually committed a business unit to abide by the statutes listed in section 2xx3(a) as a result of contracts for Government-unique items.

Table I, set out immediately below, lists each statutory provision for which the Panel has recommended an exemption in § 2xx3(a) and the regulations that today implement each provision, and summarizes the Panel's reasons for recommending an exemption for commercial items.

TABLE I<sup>74</sup>

Statute	Regulations Based on Statute	Flow down	Description of Regulations	Reasons for Commercial Item Exemption	Ch
10 U.S.C. § 2393	52.209-5 and -6	Yes to first tier	Prohibits prime contractor from using debarred or suspended subcontractors.	Prohibition on doing business with debarred or suspended prime contractors is not a problem. A commercial seller will often have established its sources of supply or subcontractors prior to sale to the Government. Therefore, exemption from subcontractor approval provisions is required.	6.11
10 U.S.C. § 2402	52.203-6	Yes	Prohibits primes from entering into any agreement with subcontractor which prevents subcontractor from selling any item or process directly to U.S.	The flow down is not consistent with commercial practices, in which subcontractor system will be established before a contract is awarded. If U.S. needs direct purchase of subcontracted items, let it negotiate for them. The Panel's primary recommendation is that this statute be repealed.	3.9
10 U.S.C. § 2408	252.203-7001	Yes to first tier	Prohibition of employment of persons convicted of fraud.	Commercial sellers should be able to utilize their established employees in performing Government contracts. There is no reason to burden commercial sellers with need to screen employees when they get an occasional Government contract.	6.4
10 U.S.C. § 2507	DFARS Part 225	No	Section 2507 contains specific U.S. source restrictions applicable to the acquisition of identified products.	To the extent that this section requires sellers of commercial items to vary the source of components, it interferes with the ability of DOD to buy those items. The Panel has recommended a complete revision of this section, which would include a repeal of most restrictions currently contained in section 2507. However, an exemption is required from the remaining restrictions.	7.1
10 U.S.C. § 2631	252.247-7022, -7023, -7024	Yes--regs seem to flow down; statute does not	Requires transportation of items by sea in U.S. Flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts.	7.1

<sup>74</sup>The Panel made great efforts to identify every statute that might create a barrier to commercial items. As explained in Appendix D to this Report, a master list of such statutes was compiled from a number of DOD and industry sources which was then culled to create the table set out here. While an exhaustive effort has been made to identify relevant statutes, it is possible a relevant statute has been missed. The statutes reviewed by the Panel are set out in Appendix D.

15 U.S.C. § 637(d)	52.219-8; -9; -16; 19.705; 19.708; 226.7; 252.211.-7003; -7020	Yes	Subcontracting with small and small disadvantaged businesses; small business subcontracting plans; liquidated damages. Section 637(d) requires that small businesses be given the "maximum practicable opportunity" to participate in Government contracts as subcontractors and mandates that the clause set out in section 637(d)(3) be placed in all contracts other than small purchase contracts, personal service contracts, and contracts to be performed outside of the U.S. Section 637(d)(4) mandates the negotiation of a small and minority subcontracting plan in all negotiated procurements in excess of \$500,000. Adherence to the plan is policed by liquidated damages. There is no exemption for contracts for commercial items.	There is no problem with the policy prescribed by section 637(d)(3). In negotiated procurements of commercial items, the subcontracting plan mandated by section 637(d)(4) may well conflict with the established subcontracting arrangements of the commercial supplier and is obviously impractical when goods are sold to the Government from inventory. While section 647(d)(4)(B)(iv) limits use of the clause to situations "which offer subcontracting possibilities," comments received from industry indicate that this exception is not being properly applied to exempt even shipments of commercial items from inventory. For the same reason, commercial item contracts should be exempt from section 637(d)(5), which essentially extends the requirements in section 637(d)(4) to contracts awarded through competition, and section 637(d)(6) which contains the clauses implementing section 637(d)(5). The Panel recommends, therefore, express exemption to sections 637(d)(4), 637(d)(5), and 637(d)(6) for commercial item contracts.	4.3
15 U.S.C. §§ 644(d), (e), and (f)	52.220-3; -4	Yes	Preference for labor surplus area contracting. Requires U.S. to give priority to small and labor surplus area contractors. Subcontracting plan required for negotiated contracts over \$500,000.	The regulations create a subcontracting obligation that is inconsistent with normal commercial practices, in which subcontracts are arranged well in advance of shipments. The regulations do not contain any exemption for commercial items. While the regulations do not appear to be required by 15 U.S.C. § 644, the regulation writers seem to think otherwise. To avoid any doubt, therefore, an exemption is granted.	4.3
29 U.S.C. § 793	52.222-36	Yes	Rehabilitation Act of 1973; requires affirmative action to employ and advance handicapped individuals. Act applies to companies with 50 or more employees or annual U.S. contracts of \$50,000 or more.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts. Especially since discrimination against the handicapped is prohibited for all employers under Americans with Disabilities Act, there should be an exemption for commercial items.	4.2
31 U.S.C. § 1352 note	52.203-11; -12	Yes	Byrd Amendment.	Probably does not apply to commercial suppliers with respect to contracts for commercial supplies, but should be exempted for clarity.	6.11
38 U.S.C. § 4212	52.222-3.	Yes	Affirmative action for disabled and Vietnam Era Veterans.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts. In addition, this statute has a sunset provision and will no longer be a requirement after 1994.	4.2

41 U.S.C. §§ 51-58	52.203-7	Yes	Anti-Kickback Act; prohibits payments from any subcontractor to any prime or any employee of the prime; violation voids contract.	While many companies may prohibit some forms of payments by subcontractors to employees, commercial practice typically permits some forms of gratuities (such as meals or entertainment) that will be prohibited by this law. Accordingly, it constitutes too much of a burden for commercial seller to "police" existing supplier networks to ensure compliance for occasional Government contracts.	6.11
41 U.S.C. § 701	52.223-5; -6	Yes	Drug Free Workplace certifications. This section requires employers to establish drug-free awareness programs and to report any convictions by their employees for drug-related offenses.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts.	4.2
46 U.S.C. App. 1241(b)	52.247-64	Not in statute; flow down in regs.	Preference for U.S. Flag Vessels; requires 50% or more of gross tonnage of materials and equipment procured under Government contracts be transported in U.S. Flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts.	7.1

Table II (below) identifies those statutes which the Panel has recommended for amendment or repeal, or for which substitute language has been proposed in the Panel's commercial item subchapter. If the Panel's recommendations with respect to the commercial item subchapter or statutes listed in Table II are not adopted, the exemptions or amendments would be needed to the statutes listed in Table II to remove barriers to commercial items.

TABLE II

Current Statute	Regulations Based On Statute	Flow down	Description of Regulations	Comments	Ch
10 U.S.C. §2306a	252.211-7010-7011; 52.215-22; 52.215-23	Yes	Truth in Negotiation Act ("TINA"); Price reduction for defective cost or pricing data—contract modifications ; audit of cost or pricing data	Proposed 2xx5 provides an additional source of authority for pricing purchases of commercial items. Even as amended by the Panel, section 2306a is not adequate to provide a complete solution for commercial items. If the Panel's proposed section 2xx5 is not adopted, some other comprehensive amendment to §2306a as currently drafted will be required since there is little doubt that the provisions of §2306a create the single greatest impediment to the purchase of commercial items.	1.3
10 U.S.C. §2313	52.215-1; 52.215-2	Yes	Examination of books and records of contractor by DOD.	Proposed section 2xx5(d) is intended to provide the Government's exclusive audit right under a contract. See the discussion of section 2xx5(d) for the rationale	2.3
10 U.S.C. § 2313(b)	252.211-7011	Yes	This section requires contractor to permit GAO audit of any books, documents, papers, or records of contractor or subcontractor relating to a negotiated contract.	Proposed section 2xx5(d) is intended to provide the Government's exclusive audit right under a contract. See the discussion of section 2xx5(d) for the rationale.	2.3
10 U.S.C. § 2320-21	252.211-7015 through 7017	Yes	Rights in technical data and computer software.	The requirements of these statutes are inconsistent with normal commercial practices on data rights. The Panel has proposed specific amendments to section 2320 (which have the effect of modifying the coverage of section 2321 as well) to deal with this problem. If these amendments are not adopted, then exemption will be required.	5.1
10 U.S.C. § 2324	252.231-7001	No	Allowable costs under defense contracts; prescribes costs that may be incurred in overhead pools; Penalties for unallowable costs.	The Panel has recommended that the detailed provisions on cost allowability contained in this section be repealed since they have been implemented in regulation for many years. If this course is adopted, there is no need for an exemption. In addition, because the Panel has recommended that commercial items be purchased solely under fixed price contracts, this section will have little or no applicability to commercial items as proposed. Should flexibly priced contracts be used to purchase commercial items, commercial sellers might have to be exempted from the detailed cost principles contained in this section because it would require changes to a commercial seller's established accounting system.	2.2

10 U.S.C. § 2384	Part 217.7300	No	Requires seller to mark supplies with name of seller, national stock number, and contractor part number; if seller is not the manufacturer, statute requires item to be marked with name of actual manufacturer. There is an exemption for commercial items purchased competitively or at an established catalog or market price.	Section 2384(b) contains an exemption for items sold under the market or catalog price exemption in TINA. This is not broad enough to accommodate all commercial items, so that an exemption to section 2384(b) is required to implement the Panel's commercial item approach and such an amendment has been recommended by the Panel. If 2384 (b) is amended as proposed, then there is no need for an exemption.	1.6
10 U.S.C. § 2397	252.203-7000		Prohibition on Compensation to Former DOD Employees	The Panel has recommended repeal. Reports intended to identify employees switching sides between DOD and major defense firms; useless paperwork burden in commercial context.	6.7
10 U.S.C. § 2397a	252.203-7000		Prohibition on Compensation to Former DOD Employees	The Panel has recommended repeal. Restrictions on job negotiations with defense contractors; duplication of other law and would unnecessarily burden commercial practices.	6.6
10 U.S.C. § 2397b	252.203-7000		Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Forbids plant representatives and senior defense negotiators from working for major defense firms; cost of screening for occasional retirees would far exceed return for commercial sellers.	6.7
10 U.S.C. § 2397c	252.203-7000		Prohibition on Compensation to Former DOD Employees	The Panel has recommended repeal. Reports and penalties for the foregoing 2397 restrictions would have no independent purpose.	6.7
10 U.S.C. § 2406	252.215-7001	No	Contractor records; requires contractor to permit access to records relating to cost or pricing data under covered contracts, which are major weapons systems contracts where 10 U.S.C. § 2306a is applicable.	The Panel has proposed that section 2406 be repealed as part of consolidating all audit statutes into a revised version of 10 U.S.C. § 2313. If the Panel's proposal is not adopted, then an exemption would be required for commercial items.	2.3
10 U.S.C. § 2506	25.1 and 25.2	Yes	DOD variant of Buy American Act using component test to identify "American" product.	Application of current component-oriented Buy American Act restrictions to commercial buying may irrationally exclude items DOD wants to procure. If Buy American Act is modified as the Panel has recommended to include "substantial transformation" test, then should not be a problem.	7.1
41 U.S.C. §§ 10a-10d	25.1 and 25.2	Yes	Buy American Act	Applications of current component-oriented Buy American Act restrictions to commercial buying may irrationally exclude items DOD wants to procure. If Executive Order implementing Buy American Act is modified to include "substantial transformation" test or if Panel substitute is adopted, then should not be a problem.	7.1

41 U.S.C. § 422	52.230; 3-4	Yes	Cost Accounting Standards (CAS); Cost Accounting Standards Board (CASB).	Statute establishes Cost Accounting Standards Board and provides broad authority to the Board to promulgate regulations. 41 U.S.C. § 422(f)(2) exempts contracts and subcontracts based on established catalog or market prices (as defined in TTNA) from CAS coverage. This exemption should be broadened to include commercial items as defined in proposed section 2302. In addition, section 422(k) should be changed to clarify that it has no application to contracts for commercial items even though such items may be made by a company that must comply with CAS because it furnishes CAS-covered items as well as commercial items. The Panel has recommended that the CASB make modifications through its rule making functions since it has authority to create classes of exemptions. See generally Chapter 2, subchapter 2.4. If the CASB does not take such action, then an exemption would be required.	2.4
41 U.S.C. § 423	52.203-8;-9;-10	No	Procurement Integrity Act -- Requirement for certificate of procurement integrity.	The certifications required by this section cannot be imposed without a major administrative burden of tracking all procurement integrity restrictions, which are totally inconsistent with commercial practices and should not apply. The Panel has recommended as its primary recommendation that this statute be repealed and replaced by totally new language and that its fundamental prohibition on the improper use of private information be incorporated in this section and in 18 U.S.C. § 207. If that proposal is adopted, there would be no need for an exemption from either the new section 423 or the proposed section 207	6.9

### 8.3.5.2. Rules of Construction

A rule of construction is established by section 2xx3(b) to prevent inadvertent repeal of portions of the commercial acquisition statutes by subsequent legislation:

(b) PRINCIPLE OF CONSTRUCTION WITH FUTURE LAWS. -- The provisions of this subchapter are intended to be an integrated whole. Accordingly, to prevent inadvertent amendment or repeal of a portion of this subchapter and notwithstanding any other provision of law hereafter enacted, this subchapter and the sections of the United States Code expressly referenced in this subchapter shall not be held to have been amended unless a law specifically refers to and amends this subchapter or the sections of the United States Code expressly referenced herein.

Congress will pass socioeconomic and acquisition legislation for years to come, and there is little doubt that legislative draftsmen will fail to remember in all cases to consider the impact of



such legislation on commercial item acquisition. Accordingly, to prevent a build-up of further barriers to commercial item acquisition, no legislation passed after the date of passage of the proposed commercial item legislation should apply to the acquisition of commercial items unless specific consideration is given to the impact of that legislation on commercial item acquisition. Thus, section 2xx3(b) provides that unless subsequent legislation specifically refers to or amends the proposed commercial item subchapter or one of the statutes incorporated by reference into it, the courts shall not construe the commercial items statute to have been amended. The proposed language is modeled on 25 U.S.C. § 2511(d).

#### **8.3.5.3. Set-Asides and Simplified Purchase Procedures**

Section 2xx3 provides that commercial-style practices take precedence over conflicting simplified procedures established under 10 U.S.C. § 2304(g) and that nothing in the commercial item chapter will prevent set-asides under, for example, 15 U.S.C. § 644(j) (small-business small-purchase preference) or the minority small business program administered under section 8(a) of the Small Business Act

(c) **RELATION TO SIMPLIFIED PROCEDURES.** – When commercial items are being procured, the provisions of this subchapter, and regulations issued hereunder, shall take precedence over any conflicting regulations issued pursuant to section 2304(g); provided, however, that nothing in this section shall affect the set-aside for small businesses established by 15 U.S.C. § 644(j).

(d) **SET-ASIDES PRESERVED.** – Nothing in this subchapter shall prevent the Secretary of Defense from restricting the award of prime contracts for commercial items to any source as may from time to time be prescribed or permitted by law.

On the first point, the Panel believes that commercial vendors should not have to face inconsistent sets of regulations. On the other hand, neither vendors nor DOD should be burdened with more procedures than would otherwise be required to make a small purchase. Accordingly, the Panel recommends that simplified purchase procedures be available for making commercial purchases so long as those procedures do not increase barriers to the use of commercial products. On the second point, while set-asides may reduce the opportunity for sales of commercial items, they do not create a barrier to the acquisition of commercial products acquired through other means and, if otherwise appropriate and authorized by statute, contracts for commercial items should be set aside for small, minority, and small disadvantaged businesses in accordance with present practice. The Secretary has authority under existing law and under section 2xx1(b) to establish regulations governing set-asides for commercial items to the extent that the law otherwise permits.

### **8.3.6. Specific Acquisition Procedures and Restrictions**

Specific acquisition procedures and restrictions are set out in a proposed section 2xx4, as follows:

#### **§ 2XX4. SPECIFIC ACQUISITION PROCEDURES AND RESTRICTIONS**

(a) **RESTRICTION TO FIRM, FIXED PRICE CONTRACTS.** – Except where commercial items are to be provided as a portion of a contract which also provides for the delivery of other than commercial items, only firm, fixed price contracts or fixed price contracts with economic price adjustment provisions shall be used to acquire commercial end items under this subchapter.

(b) **ECONOMIC PRICE ADJUSTMENT.** – Solicitations for commercial end items shall not require contract performance for a term longer than customary industry practice for the product to be acquired unless a contract provides for economic price adjustment.

(c) **PRODUCT DESCRIPTIONS.** – Commercial items shall be acquired using product descriptions as prescribed in section 2325 of this title. Notwithstanding the foregoing, nondevelopmental items and items supplied by an existing or prior source that are built to specific Government designs, military standards, or military specifications may be accepted where such items otherwise meet the requirements of a solicitation.

(d) **CONTRACT QUALITY REQUIREMENTS.** –

(1) To the maximum extent practical, regulations issued under this subchapter shall permit contractors providing commercial items to use their existing quality assurance systems and quality programs.

(2) To the maximum extent practical, regulations issued under this subchapter shall prohibit Government inspection or test of commercial items prior to tender of those items by the contractor for acceptance by the Government.

(e) **RIGHTS IN TECHNICAL DATA.** – Rights in technical data for commercial end items and components shall be acquired only as specified in section 2320.

(f) **DEFENSE TRADE RESTRICTIONS.** – Acquisition of commercial items from foreign sources shall be governed by Chapter 1XX of this Title.

In fashioning section 2xx4, the Panel drew on prior legislation, DFARS Part 211, its own research, and discussions with and comments from industry six specific restrictions on the form of regulations to be issued under proposed section 2xx1. These restrictions and their source in prior law (if any) are as follows:

Restriction	Source
1. Restriction to firm, fixed price contracts <sup>75</sup>	DFARS 211.7004-1(b)
2. Economic Price Adjustment	DFARS 211.7004-1(c)
3. Use of Product Descriptions	10 U.S.C. § 2325(a); DFARS 211.7004-1(d)
4. Restriction on quality assurance and inspection requirements	Public Law Number 101-189, § 824(b)(5); DFARS 211.7004-1(e), (f)
5. Rights in Technical Data	DFARS 211.7004-1(h)
6. Defense Trade Restrictions	DFARS Part 225

Rights in technical data applicable to commercial item procurements were developed by the Panel as part of its general recommendations on data rights, and are discussed in Chapter 5 of this Report. Defense trade restrictions were similarly the subject of the Panel's comprehensive revision of existing "Buy American" restrictions, which resulted in a proposed new chapter in Title 10 applicable to defense trade and cooperation.<sup>76</sup>

### 8.3.7. Pricing of Commercial Item Contracts; Audit; Remedies

The Panel was told repeatedly that companies which primarily sell to the commercial marketplace do not have accounting systems that will permit them to supply cost or pricing data as required by the Truth in Negotiation Act (10 U.S.C. § 2306a). Testimony received by the Panel and studies by, among others, the Office of Technology Assessment and CSIS, have found that because of the high cost of implementing a Government-specific accounting system, commercial companies will often forego doing business with DOD rather than implement a cost accounting system that would permit them to comply with TINA. Thus, if DOD is to be able to acquire commercial items for which there is not adequate price competition as that concept is currently defined in TINA and implementing regulations -- such as a modified commercial item or cutting-edge technology protected from direct competition by patent, copyright, or trade secret -- appropriate relief from TINA had to be found.

The Panel has recommended in Chapter 1.3 of this Report amendments to 10 U.S.C. § 2306a that (1) expand and clarify the exemption for adequate price competition when applied to

<sup>75</sup>One commentator noted that commercial items are sometimes delivered under contracts calling for a mix of commercial and defense-unique items. In this situation, proposed section 2xx4 (a) would lift the restriction to firm-fixed price contracts.

<sup>76</sup>See Chapter 7 of this Report.

items purchased from a business unit which produces the same or similar items for the commercial market using the same or similar production processes and (2) exempt certain contract modifications to contracts awarded under the expanded definition of adequate price competition and under catalog or market pricing. If adopted, these amendments will reduce, but not eliminate, the TINA-related impediments to purchases of commercial items. Therefore, the Panel believes that additional authority to require and use "documentation" -- a defined term that stops short of cost or pricing data -- to support price analysis for commercial items, including modifications to such items and modification to commercial item contracts, is necessary. Section 2xx5 of the proposed commercial item subchapter, discussed below, provides such authority and an appropriate exemption from TINA.

### **8.3.8. Pricing**

The Panel has proposed that pricing of commercial item contracts be made in accordance with a new section 2xx5(a), which provides as follows:

**(a) REQUIREMENT FOR DETERMINATION OF PRICE REASONABLENESS. --**

(1) When a procurement for a commercial item has been conducted under full and open competition as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(6)), or when the price agreed upon is based on established catalog or market prices of commercial items sold in substantial quantities to the general public, the contracting officer may presume that the price contained in the most advantageous evaluated offer (price and all other factors considered) received in response to a solicitation, or a price based on established catalog or market prices, is fair and reasonable unless the contracting officer has information that the price is not fair and reasonable. Prior to the award of a contract where price is based on catalog or market prices, the contracting officer shall make reasonable efforts to establish the currency and accuracy of such prices.

(2) When subsection (1) is not applicable, or for contract modifications, or when pricing a modification to a commercial item, the contracting officer shall use price analysis relying, if needed, on documentation submitted under subsection (b), to determine that the price is fair and reasonable.

(3) When the contracting officer is able to make a determination of price reasonableness under this section, the acquisition will be exempt from section 2306a of this Title.

The Panel believes that most commercial item acquisitions can be conducted through competition as defined in 10 U.S.C. §§ 2302 and 2304 and in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(6)) or on the basis of established catalog or market prices as defined in FAR 15.804-3(c). In these cases, the proposed subsection provides that the contracting officer may presume that the price in the most advantageous offer,<sup>77</sup> or a price based on established catalog or market prices, is fair and reasonable absent information to the contrary. The proposed section does, however, require the contracting officer to perform some "due diligence" prior to award when the price is based on catalog or market prices.

Where competition or established catalog or market prices are not available, subsection 2xx5(a)(2) mandates that the contracting officer use price analysis to determine the reasonableness of a price. This provision recognizes the practical fact that most, if not all, companies selling commercial items will not have accounting systems that can produce data adequate for cost analysis or "cost or pricing data" as currently defined. The Panel also recognizes that there may be unusual circumstances in which the reasonableness of a proposed price cannot be established through price analysis as contemplated in section 2xx5. If this occurs, then under section 2xx5(a)(3), the provisions of TINA again apply to the acquisition. If at that point a contractor can meet whatever requirements TINA places on the acquisition -- possibly including certified cost or pricing data -- the transaction can go forward. The Panel emphasizes that under the combined authorities of the proposed section 2xx5 and TINA, a contract will not be awarded unless the Government can establish the reasonableness of the contract price by some reliable method, or an exemption is available.

### **8.3.9. Government's Right to Documentation**

As stated above, in what should be the majority of cases, there will be no need for the contracting officer to perform price analysis under section 2xx5(a)(2). However, in those cases in which price analysis is required, the best source of pricing information may well be from an offeror. Proposed subsection 2xx5(b) provides that the contracting officer can ask for such information to assist in making a price reasonableness determination:

#### **(b) GOVERNMENT'S RIGHT TO REQUIRE DOCUMENTATION. --**

(1) The contracting officer may require the offeror to supply documentation relevant to the determinations to be made under subsection (a)(2). All documentation received from an offeror, if not otherwise in the public domain and if requested by the offeror and marked as confidential, shall be treated by the Government as

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<sup>77</sup>The price contained in the most advantageous offer is not necessarily the lowest price offered. Where a contracting officer in a competitive procurement has selected an offer with a price higher than the lowest offered, the contracting officer has necessarily compared the winning offer to the offer with the lowest price and has found that the extra cost is justified under the announced source selection criteria. In such circumstances, there is no apparent need for further price analysis to establish the reasonableness of the price in the winning offer, and the offer can be accepted.

confidential and exempt from disclosure to the extent permitted by the Freedom of Information Act.

(2) The rights conferred by this subsection do not include the right to require cost or pricing data as defined in section 2306a of this title, or the equivalent.

The Panel has intentionally referred to the information to be supplied by an offeror as "documentation" and not "data" to emphasize that subsection 2xx5(b) does *not* authorize the contracting officer to ask for cost or pricing data as defined in 10 U.S.C. § 2306a and its implementing regulations. What is intended is that the contracting officer can ask for information that an offeror may have on hand as part of its ordinary commercial operations. After discussions with industry, the Panel concluded that most vendors of commercial items can provide some form of documentation that would materially assist a contracting officer in determining that a price is reasonable using price analysis. The type of documentation will probably differ from contract to contract, from industry to industry, and from contractor to contractor. For example, a contractor might be able to give examples of recent sale prices, even though such prices would fall short of meeting the TINA exemption for established catalog or market prices.<sup>78</sup> Alternatively, a contractor might be able to demonstrate an established market price for a commercial item and provide that information along with an engineering estimate of the cost of modifying the item.

On the other hand, industry was adamant that it was frequently difficult, particularly in a large or far-flung organization, for an offeror to have sufficient information to be able to certify that documentation supplied was in fact representative of all sales by the offeror or that the price offered was the lowest offered to any commercial customer for sales on similar terms and conditions. The Panel believes that industry is correct on this point, and has expressly refrained from requiring any representation of any kind that documentation furnished is complete or that a price offered to the Government is the lowest offered to any other customer. Again, if an offeror is not willing to provide, or cannot provide, a sufficient basis for a determination of price reasonableness, and the contracting officer cannot find other information supporting a conclusion that a price is reasonable, the Government's remedy is to proceed under TINA or walk away from the transaction.

### **8.3.10. Government's Remedy for Inaccurate Documentation**

For the sake of parallel treatment to 10 U.S.C. § 2306a, the Panel has recommended a new subsection 2xx5(c), which creates a contract remedy applicable when an offeror "knowingly or negligently" provides inaccurate documentation:

(c) GOVERNMENT'S REMEDY FOR INACCURATE DOCUMENTATION. –  
When documentation is submitted pursuant to subsection (b), the Government shall be entitled to a reduction in price, and the return of any overpayment, with interest thereon, if an offeror knowingly

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<sup>78</sup>See 10 U.S.C. § 2306a(b)(1)(B).

or negligently submits materially inaccurate or misleading documentation in support of a contract or modification, the contracting officer relies on such documentation in reaching a determination that a price is reasonable, and because of such reliance the price significantly exceeds that which would otherwise have been accepted. For purposes of applying this subsection, a contracting officer will be rebuttably presumed to have relied upon all material documentation supplied by an offeror.

This remedy is not intended to replace existing contract fraud remedies or criminal penalties for false claims and false statements.<sup>79</sup> Instead, it is provided because the Government should have no less a remedy than a private buyer when a contract price is based on fraud or negligent misrepresentation and in recognition of the fact that circumstances may make a contractual remedy more appropriate and useful than the full panoply of sanctions for fraud.<sup>80</sup>

### **8.3.11. Government's Right to Audit**

In order to make effective the Government's right to receive a price reduction for inaccurate documentation, the Panel has provided in subsection 2xx5(d) for access to the offeror's books and records in those situations in which documentation has been provided:

(d) GOVERNMENT'S RIGHT TO AUDIT. --The United States shall have the right to audit all documentation provided by an offeror under subsection (b) and all books and records of the offeror directly relating to such documentation; provided however, that if the offeror has made no representation as to the completeness of the documentation supplied, the United States shall have no right to audit for completeness. The audit right created by this section shall expire one year after the date of award of the contract or the date of the modification of a contract with respect to which documentation was provided. When contract price is established under section 2xx5 of this Title, the Government shall have no audit rights other than those set out in this subsection.

This subsection is intended to replace all other existing audit rights (including those in 10 U.S.C. §§ 2306a and 2313).<sup>81</sup> The Panel received testimony from industry that vendors of commercial items will not ordinarily for their own purposes retain the sort of documentation to be supplied under proposed subsection 2xx5(b) for any great length of time. Indeed, industry argued

<sup>79</sup>*E.g.*, 18 U.S.C. §§ 287 and 1001 and the Civil False Claims Act, 32 U.S.C. § 3279.

<sup>80</sup>GAO commented that the Panel should extend the right to renegotiate contract price to circumstances in which documentation is inaccurate through no fault of the offeror. The Panel rejected this suggestion as (a) inconsistent with private commercial law and (b) inconsistent with the thrust of the Panel's purpose of fostering civil-military integration by facilitating transactions based on existing commercial practices in which price-related data is not collected for the purpose of certifying accuracy to the Government. The massive criminal sanctions applicable to offerors should ensure reasonable care in making documentation submissions, and GAO has pointed to no documented need for strict civil liability to ensure that pricing is fair and reasonable.

<sup>81</sup>The Panel has recommended consolidating the audit rights currently found in 10 U.S.C. §§ 2306a, 2313, and 2406 into a consolidated, amended § 2313. See Chapter 2.3 of this Report.

that any audit right should terminate with award of a contract. On the other hand, the Defense Contract Audit Agency (DCAA) and GAO both commented that it would not be practical to audit a reasonable number of commercial item contracts if the audit right expired with award. GAO suggested that audit should be available up to three years after award or one year after final payment. The Panel believes that one year after award is a reasonable compromise between the needs of DOD and current industry practice, especially since the number of commercial item contracts awarded annually under subsection 2xx5(a)(2) should be small. Moreover, in many commercial items contracts, the period for audit permitted by subsection 2xx5(d) may not be very different from GAO's suggestion of one year after final payment. Absent a compelling demonstration by DCAA or GAO that audit resources cannot be made available within a year after award, the period available for audit should not be extended.



## **8.4. Proposed Statutory Provisions on Commercial Items**

### **8.4.1. Proposed Amendments to 10 U.S.C. § 2301**

It is therefore the policy of the Congress that –

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(2) to the maximum extent practicable, the Department of Defense shall acquire commercial items to meet its needs and shall require prime contractors and subcontractors, at all levels, which furnish other than commercial items, to incorporate to the maximum extent practicable commercial items as components of items being supplied to the Department;

(3) when commercial items and components are not available, practicable or cost effective, the Department shall acquire, and shall require prime contractors and subcontractors to incorporate, other nondevelopmental items and components to the maximum extent practicable;

\* \* \* \* \*

(8) the head of an agency shall use advance procurement planning and market research and state contract requirements in such a manner as is necessary to:

(i) obtain full and open competition with due regard to the nature of the property or services to be acquired;

(ii) facilitate the acquisition by the agency and its contractors of commercial items at or based on commercial market prices;

(iii) facilitate the acquisition by the agency and its contractors of nondevelopmental items in accordance with the requirements of this chapter; and

(iv) facilitate agency access to commercial technologies and the skills available in the commercial market place to develop new technologies.

(b) Further, it is the policy of Congress that procurement policies and procedures for the agencies named in section 2303 of this title shall in accordance with the requirements of this title--

\* \* \* \* \*

(5) promote the acquisition and use of commercial items and of other nondevelopmental items both as end items and components by

(i) encouraging contracting officers to exercise sound judgment in purchasing and facilitating the purchase by contractors of commercial items at or based on commercial market prices, without requiring contractors to incur additional costs;

(ii) avoiding the imposition of arbitrary restrictions or tests not required by law on the purchasing or pricing of commercial items; and

(6) promote the acquisition and use of commercial items and of other nondevelopmental items by requiring descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.

#### **8.4.2. Proposed Amendments to 10 U.S.C. § 2302**

In this chapter: . . .

(5) The term "commercial item" means --

(A) property, other than real property, which --

(i) is sold or licensed to the general public for other than Government purposes;

(ii) has not been sold or licensed to the general public, but is developed or is being developed primarily for use for other than Government purposes; or

(iii) is comprised of a combination of commercial items, or of services and commercial items, of the type customarily combined and sold in combination to the public;

(B) The term "commercial item" also includes services used to support items described in subparagraph (A), such as installation, maintenance, repair and training services, whether such services are procured with the commercial item or under a separate contract; provided such services are or will be offered contemporaneously to the general public under similar terms and conditions; and the Government and commercial services are or will be provided by the same workforce, plant, or equipment;

(C) With respect to a specific solicitation, an item meeting the criteria set forth in subparagraphs (A) and (B) if unmodified will be deemed to be a commercial item when modified for sale to the Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than "commercial" merely because sales of such item to the general public for other than governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or

specifications to produce similar items for the general public using the same workforce, plant, or equipment.

#### **8.4.3. Proposed Amendments to 10 U.S.C. § 2320(a)(3)**

(3) . . . the Secretary of Defense shall prescribe regulations for contracts for commercial items or components, where technical data is specified to be delivered by a contractor or subcontractor, which prohibit the Government from obtaining unlimited rights to technical data; provided, however, that unlimited rights may be obtained when necessary to the extent specified in paragraphs (a)(2)(C) and (D).

#### **8.4.4. Proposed Amendments to 10 U.S.C. § 2325**

The Secretary of Defense shall ensure that, to the maximum extent practicable--

(1) requirements of the Department of Defense with respect to a procurement of supplies are stated in terms of--

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that commercial or nondevelopmental items may be procured to fulfill such requirements;

(3) such requirements are fulfilled through the procurement of commercial or nondevelopmental items; and

(4) prior to developing new specifications, the Department conducts market research to determine whether commercial or nondevelopmental items are available or could be modified to meet agency needs.

## **8.4.5. Proposed Amendments relating to Defense Trade and Cooperation**

### **§2x10. Definitions**

(a) As used in this subchapter, the following are defined terms—

(1) In this section, "American goods" means--

(A) an end product that is mined, produced, or manufactured in the United States;  
or

(B) an end product that is manufactured in the United States but which includes components mined, produced, or manufactured outside the United States if such end product is substantially transformed within the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

(2) "goods which are other than American goods" means an end product not meeting the requirements of subsection (a)(1).

### **§ 2x11. Policy on Purchases of Foreign Goods**

(a) Funds appropriated to the Department of Defense may not be obligated under a covered contract for procurement of goods which are other than American goods unless adequate consideration is given to the following: . . .

(3) The bids or proposals of all other firms in the United States which have offered to furnish American goods.

(4) The United States balance of payments.

(5) The cost of shipping goods which are other than American goods.

(6) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.

\* \* \* \* \*

(b) Consideration of the matters referred to in paragraphs (1) through (9) of subsection (a) shall be given in the manner set out in this Subchapter.

**§ 2x12. Items Restricted to American Sources**

(a) **AUTHORITY OF THE SECRETARY.** – The Secretary of Defense is hereby authorized to require the Department to acquire only American goods and related American services for specific items as the Secretary may find necessary to protect the United States national defense technology and industrial base or the United States mobilization base, or to further national security. The President may restrict or condition the authority granted by this subsection by Executive Order.

(b) **RESTRICTIONS ON ACQUISITION OF GOODS FROM COUNTRIES WHICH DISCRIMINATE AGAINST AMERICAN GOODS AND RELATED AMERICAN SERVICES.** – Section 10b-1 of Title 41 shall apply to the Department of Defense except that section shall have no application to the acquisition of commercial items and components as defined in 10 U.S.C. §§ 2302(5) and 2xx2 or to contracts the value of which is below the simplified acquisition threshold defined in 10 U.S.C. § 2302(7).

## **8.4.6. Proposed New Subchapter to Title 10**

### **§ 2XX1. POLICY**

**(a) REQUIRED USE OF COMMERCIAL ITEMS.** – In accordance with the policies stated in section 2301, whenever commercial items will satisfy the needs of the Department of Defense, the Department

(1) shall purchase commercial items using those practices prescribed in this subchapter and in regulations issued hereunder and

(2) shall by regulation require prime contractors, and subcontractors at all levels, that furnish other than commercial items, to incorporate commercial items as components to the maximum extent practicable.

**(b) REGULATIONS; UNIFORM TERMS AND CONDITIONS.**

(1) **END ITEMS.** – The Secretary of Defense shall promulgate regulations implementing this subchapter, which shall contain a set or sets of uniform terms and conditions to be included in contracts for the acquisition of commercial end items. Such uniform terms and conditions shall be modeled to the maximum extent practicable on commercial terms and conditions and shall include only those contract clauses, including clauses requiring terms and conditions to be flowed down to subcontractors, that are–

(A) required to implement provisions of law applicable to commercial item acquisitions;

(B) essential for the protection of the Federal Government's interest in an acquisition; or

(C) determined by the Secretary to be consistent with standard commercial practice.

The regulations to be issued hereunder shall also establish standards and procedures for waiving such uniform terms or conditions, other than those required by statute, as may be useful to the acquisition of commercial items in a particular procurement or class of procurements.

(2) **COMPONENTS.** – The Secretary of Defense shall issue regulations implementing the preference for commercial components set out in section 2301(b)(5). Such regulations shall provide that prime contractors and subcontractors furnishing other than commercial items as end items or components may not require suppliers furnishing commercial items as components to comply with any clause, term or condition except those–

(A) required to implement provisions of law applicable to subcontractors furnishing commercial items;

(B) essential for the protection of the prime contractor or higher tier subcontractor in a particular acquisition; or

(C) determined to be consistent with standard commercial practice.

**(c) EXISTING OR PRIOR SOURCES; NONDEVELOPMENTAL ITEMS. -**

(1) The Secretary of Defense, the Secretary of a military department or the head of a defense agency may determine that it is in the Government's interests to permit existing or prior sources or suppliers of nondevelopmental items to participate in a competition for a commercial item when a nondevelopmental item or an item furnished by an existing or prior source will compete with a commercial item under the same terms, conditions and evaluation and award criteria.

(2) Nondevelopmental items or items furnished by an existing or prior source which must be modified to meet the requirements of a solicitation for commercial items may be offered under such a solicitation, but only when the modifications are (A) necessary to comply with the Government's solicitation requirements and (B) do not alter the function or essential physical characteristics of the items to be supplied.

(3) The policies, procedures, solicitation provisions and contract clauses applicable to commercial items under this subchapter shall also apply to nondevelopmental items and items furnished by an existing or prior source which are permitted to participate in a competition conducted under this title.

**§ 2XX2. DEFINITIONS**

As used in this subchapter-

(a) "Commercial item" has the meaning prescribed in section 2302(5).

(b) "Component" means any item supplied to the Government as part of an end item or of another component.

(c) "Existing or prior source" means a business entity that is furnishing or has previously furnished items to the Government, including items supplied in accordance with Government-unique product descriptions, drawings, or specifications.

(d) "Nondevelopmental item" has the meaning prescribed in section 2302(6).

### **§ 2XX3. PRECEDENCE; RELATIONS TO OTHER LAWS**

(a) **EXEMPTIONS FROM PRESENT LAW.**—Procurements of commercial items shall not be subject to the following laws:

10 U.S.C. § 2393  
10 U.S.C. § 2402  
10 U.S.C. § 2408  
10 U.S.C. § 2507  
10 U.S.C. § 2631  
15 U.S.C. §§ 637(d)(4), 637(d)(5), 637(d)(6)  
15 U.S.C. §§ 644(d), 644(e), 644(f)  
29 U.S.C. § 793  
31 U.S.C. § 1352 note  
38 U.S.C. § 4212  
41 U.S.C. §§ 51-58  
41 U.S.C. § 701  
46 U.S.C. App. § 1241(b)

(b) **PRINCIPLE OF CONSTRUCTION WITH FUTURE LAWS.** – The provisions of this subchapter are intended to be an integrated whole. Accordingly, to prevent inadvertent amendment or repeal of a portion of this subchapter and notwithstanding any other provision of law hereafter enacted, this subchapter and the sections of the United States Code expressly referenced in this subchapter shall not be held to have been amended unless a law specifically refers to and amends this subchapter or the sections of the United States Code expressly referenced herein.

(c) **RELATION TO SIMPLIFIED PROCEDURES.** – When commercial items are being procured, the provisions of this subchapter, and regulations issued hereunder, shall take precedence over regulations issued pursuant to section 2304(g); provided, however, that nothing in this section shall affect the set-aside for small businesses established by 15 U.S.C. § 644(j).

(d) **SET-ASIDES PRESERVED.** – Nothing in this subchapter shall prevent the Secretary of Defense from restricting the award of prime contracts for commercial items to any source as may from time to time be prescribed or permitted by law.

### **§ 2XX4. SPECIFIC ACQUISITION PROCEDURES AND RESTRICTIONS**

(a) **RESTRICTION TO FIRM, FIXED PRICE CONTRACTS.** – Except where commercial items are to be provided as a portion of a contract which also provides for the delivery of other than commercial items, only firm, fixed price contracts or fixed price contracts with economic price adjustment provisions shall be used to acquire commercial end items under this subchapter.

(b) **ECONOMIC PRICE ADJUSTMENT.** – Solicitations for commercial end items shall not require contract performance for a term longer than customary industry practice for the product to be acquired unless a contract provides for economic price adjustment.



(c) **PRODUCT DESCRIPTIONS.** – Commercial items shall be acquired using product descriptions as prescribed in section 2325 of this title. Notwithstanding the foregoing, nondevelopmental items and items supplied by an existing or prior source that are built to specific Government designs, military standards, or military specifications may be accepted where such items otherwise meet the requirements of a solicitation.

(d) **CONTRACT QUALITY REQUIREMENTS.** –

(1) To the maximum extent practical, regulations issued under this subchapter shall permit contractors providing commercial items to use their existing quality assurance systems and quality programs.

(2) To the maximum extent practical, regulations issued under this subchapter shall prohibit Government inspection or test of commercial items prior to tender of those items by the contractor for acceptance by the Government.

(e) **RIGHTS IN TECHNICAL DATA.** – Rights in technical data for commercial end items and components shall be acquired only as specified in section 2320.

(f) **DEFENSE TRADE RESTRICTIONS.** – Acquisition of commercial items from foreign sources shall be governed by Chapter 1XX of this Title.

#### **§ 2XX5. PRICING; DOCUMENTATION; AUDIT**

(a) **REQUIREMENT FOR DETERMINATION OF PRICE REASONABLENESS.** --

(1) When a procurement for a commercial item has been conducted under full and open competition as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(6)), or when the price agreed upon is based on established catalog or market prices of commercial items sold in substantial quantities to the general public, the contracting officer may presume that the price contained in the most advantageous evaluated offer (price and all other factors considered) received in response to a solicitation, or a price based on established catalog or market prices, is fair and reasonable unless the contracting officer has information that the price is not fair and reasonable. Prior to the award of a contract where price is based on catalog or market prices, the contracting officer shall make reasonable efforts to establish the currency and accuracy of such prices.

(2) When subsection (1) is not applicable, or for contract modifications, or when pricing a modification to a commercial item, the contracting officer shall use price analysis relying, if needed, on documentation submitted under subsection (b), to determine that the price is fair and reasonable.

(3) When the contracting officer is able to make a determination of price reasonableness under this section, the acquisition will be exempt from section 2306a of this Title.

**(b) GOVERNMENT'S RIGHT TO REQUIRE DOCUMENTATION. —**

(1) The contracting officer may require the offeror to supply documentation relevant to the determinations to be made under subsection (a)(2). All documentation received from an offeror, if not otherwise in the public domain and if requested by the offeror and marked as confidential, shall be treated by the Government as confidential and exempt from disclosure to the extent permitted by the Freedom of Information Act.

(2) The rights conferred by this subsection do not include the right to require cost or pricing data as defined in section 2306a of this title, or the equivalent.

**(c) GOVERNMENT'S REMEDY FOR INACCURATE DOCUMENTATION. —** When documentation is submitted pursuant to subsection (b), the Government shall be entitled to a reduction in price, and the return of any overpayment, with interest thereon, if an offeror knowingly or negligently submits materially inaccurate or misleading documentation in support of a contract or modification, the contracting officer relies on such documentation in reaching a determination that a price is reasonable, and because of such reliance the price significantly exceeds that which would otherwise have been accepted. For purposes of applying this subsection, a contracting officer will be rebuttably presumed to have relied upon all material documentation supplied by an offeror.

**(d) GOVERNMENT'S RIGHT TO AUDIT. —** The United States shall have the right to audit all documentation provided by an offeror under subsection (b) and all books and records of the offeror directly relating to such documentation; provided however, that if the offeror has made no representation as to the completeness of the documentation supplied, the United States shall have no right to audit for completeness. The audit right created by this section shall expire one year after the date of award of the contract or the date of the modification of a contract with respect to which documentation was provided. When contract price is established under section 2xx5 of this Title, the Government shall have no audit rights other than those set out in this subsection.

**Appendices**

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**STREAMLINING  
DEFENSE  
ACQUISITION LAWS**

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**Report  
of the  
Acquisition Law Advisory Panel**

**to the  
United States Congress**



**January  
1993**

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# APPENDIX A

## TABLE of STATUTES

5 U.S.C. Appendix 5	401-408	6-215
5 U.S.C. Appendix 6	101-111	6-219
5 U.S.C.	1	2-71
5 U.S.C.	2	2-71
5 U.S.C.	3	2-71
5 U.S.C.	4	2-71
5 U.S.C.	5	2-71
5 U.S.C.	6	2-71
5 U.S.C.	7	2-71
5 U.S.C.	8	2-71
5 U.S.C.	8a	2-71
5 U.S.C.	8b	2-71
5 U.S.C.	8c	2-71
5 U.S.C.	8d	2-71
5 U.S.C.	8e	2-71
5 U.S.C.	8f	2-71
5 U.S.C.	9	2-71
5 U.S.C.	10	2-71
5 U.S.C.	11	2-71
5 U.S.C.	12	2-71
5 U.S.C.	101	6-215
5 U.S.C.	102	6-215
5 U.S.C.	103	6-215
5 U.S.C.	104	6-215
5 U.S.C.	105	6-215
5 U.S.C.	106	6-215
5 U.S.C.	107	6-215
5 U.S.C.	108	6-215
5 U.S.C.	109	6-215
5 U.S.C.	110	6-215
5 U.S.C.	111	6-215
5 U.S.C.	401	6-211
5 U.S.C.	402	6-211
5 U.S.C.	403	6-211
5 U.S.C.	404	6-211
5 U.S.C.	405	6-211

5 U.S.C. 406	6-211
5 U.S.C. 407	6-211
5 U.S.C. 408	6-211
5 U.S.C. 552	5-87
5 U.S.C. 581	2-145
5 U.S.C. 582	2-145
5 U.S.C. 583	2-145
5 U.S.C. 584	2-145
5 U.S.C. 585	2-145
5 U.S.C. 586	2-145
5 U.S.C. 587	2-145
5 U.S.C. 588	2-145
5 U.S.C. 589	2-145
5 U.S.C. 590	2-145
5 U.S.C. 591	2-145
5 U.S.C. 592	2-145
5 U.S.C. 593	2-145
5 U.S.C. 701	1-219
5 U.S.C. 702	1-219
5 U.S.C. 703	1-219
5 U.S.C. 704	1-219
5 U.S.C. 705	1-219
5 U.S.C. 706	1-219
5 U.S.C. 7353	6-75
7 U.S.C. 2131	Appendix E
10 U.S.C. 130	5-91
10 U.S.C. 131	Appendix E
10 U.S.C. 132	Appendix E
10 U.S.C. 133	Appendix E
10 U.S.C. 133a	Appendix E
10 U.S.C. 134	Appendix E
10 U.S.C. 135	Appendix E
10 U.S.C. 136	Appendix E
10 U.S.C. 137	Appendix E
10 U.S.C. 138	Appendix E
10 U.S.C. 139	Appendix E
10 U.S.C. 140	Appendix E
10 U.S.C. 141	Appendix E
10 U.S.C. 1621	Appendix E
10 U.S.C. 1622	Appendix E

10 U.S.C. 1623	Appendix E
10 U.S.C. 1624	Appendix E
10 U.S.C. 1701	Appendix E
10 U.S.C. 1702	Appendix E
10 U.S.C. 1703	Appendix E
10 U.S.C. 1704	Appendix E
10 U.S.C. 1705	Appendix E
10 U.S.C. 1706	Appendix E
10 U.S.C. 1707	Appendix E
10 U.S.C. 1721	Appendix E
10 U.S.C. 1722	Appendix E
10 U.S.C. 1723	Appendix E
10 U.S.C. 1724	Appendix E
10 U.S.C. 1725	Appendix E
10 U.S.C. 1731	Appendix E
10 U.S.C. 1732	Appendix E
10 U.S.C. 1733	Appendix E
10 U.S.C. 1734	Appendix E
10 U.S.C. 1735	Appendix E
10 U.S.C. 1736	Appendix E
10 U.S.C. 1737	Appendix E
10 U.S.C. 1741	Appendix E
10 U.S.C. 1742	Appendix E
10 U.S.C. 1743	Appendix E
10 U.S.C. 1744	Appendix E
10 U.S.C. 1745	Appendix E
10 U.S.C. 1746	Appendix E
10 U.S.C. 1761	Appendix E
10 U.S.C. 1762	Appendix E
10 U.S.C. 1763	Appendix E
10 U.S.C. 1764	Appendix E
10 U.S.C. 2xx1	8-26
10 U.S.C. 2001a	Appendix E
10 U.S.C. 2201a	3-339
10 U.S.C. 2201b	3-337
10 U.S.C. 2201c	3-337
10 U.S.C. 2202	3-381
10 U.S.C. 2203	3-343
10 U.S.C. 2204	3-347
10 U.S.C. 2205	3-349
10 U.S.C. 2206	3-351

10 U.S.C. 2207	6-81
10 U.S.C. 2208	1-287; 3-355
10 U.S.C. 2209	3-359
10 U.S.C. 2210	3-361
10 U.S.C. 2211	3-365
10 U.S.C. 2212	3-289
10 U.S.C. 2215	Appendix E
10 U.S.C. 2216	Appendix E
10 U.S.C. 2217	3-367
10 U.S.C. 2271	3-385
10 U.S.C. 2272	3-385
10 U.S.C. 2273	3-385
10 U.S.C. 2274	3-385
10 U.S.C. 2275	3-385
10 U.S.C. 2276	3-385
10 U.S.C. 2277	3-385
10 U.S.C. 2278	3-385
10 U.S.C. 2279	3-385
10 U.S.C. 2301	8-49, 43
10 U.S.C. 2302	1-21; 8-50, 44
10 U.S.C. 2303	1-29
10 U.S.C. 2304	1-39
10 U.S.C. 2305	1-65
10 U.S.C. 2306	1-77
10 U.S.C. 2306a	1-131
10 U.S.C. 2307	2-11
10 U.S.C. 2308	1-287
10 U.S.C. 2309	3-369
10 U.S.C. 2310	1-293
10 U.S.C. 2311	1-287
10 U.S.C. 2312	2-105
10 U.S.C. 2313	2-77
10 U.S.C. 2314	3-389
10 U.S.C. 2315	3-219
10 U.S.C. 2316	1-301
10 U.S.C. 2317	1-89
10 U.S.C. 2318	1-91
10 U.S.C. 2319	1-95
10 U.S.C. 2320	5-13
10 U.S.C. 2320(a)(3)	8-51
10 U.S.C. 2321	5-13

10 U.S.C. 2322	4-85
10 U.S.C. 2323	Appendix E
10 U.S.C. 2324	2-43
10 U.S.C. 2325	1-97; 8-51, 45
10 U.S.C. 2326	1-303
10 U.S.C. 2327	7-71
10 U.S.C. 2328	5-93
10 U.S.C. 2329	1-309
10 U.S.C. 2331	1-313
10 U.S.C. 2341	7-139
10 U.S.C. 2342	7-139
10 U.S.C. 2343	7-139
10 U.S.C. 2344	7-139
10 U.S.C. 2345	7-139
10 U.S.C. 2346	7-139
10 U.S.C. 2347	7-139
10 U.S.C. 2348	7-139
10 U.S.C. 2349	7-139
10 U.S.C. 2350	7-139
10 U.S.C. 2350a	7-89
10 U.S.C. 2350b	7-99
10 U.S.C. 2350c	7-109
10 U.S.C. 2350d	7-113
10 U.S.C. 2350e	7-117
10 U.S.C. 2350f	7-147
10 U.S.C. 2350g	7-151
10 U.S.C. 2350h	7-121
10 U.S.C. 2350i	7-107
10 U.S.C. 2351	1-153
10 U.S.C. 2352	1-155
10 U.S.C. 2353	1-157
10 U.S.C. 2354	1-161
10 U.S.C. 2355	2-17
10 U.S.C. 2356	1-163
10 U.S.C. 2357	Appendix E
10 U.S.C. 2358	1-167
10 U.S.C. 2359	Appendix E
10 U.S.C. 2360	1-173
10 U.S.C. 2361	1-175
10 U.S.C. 2362	3-81
10 U.S.C. 2363	5-59
10 U.S.C. 2364	1-179



10 U.S.C. 2366	3-85
10 U.S.C. 2367	1-183
10 U.S.C. 2368	1-185
10 U.S.C. 2369	3-391
10 U.S.C. 2370	1-187
10 U.S.C. 2371	1-189
10 U.S.C. 2372	1-193
10 U.S.C. 2381	1-319
10 U.S.C. 2382	2-61
10 U.S.C. 2383	2-107
10 U.S.C. 2384	1-323
10 U.S.C. 2384a	3-393
10 U.S.C. 2385	3-395
10 U.S.C. 2386	5-103
10 U.S.C. 2387	3-397
10 U.S.C. 2388	3-305
10 U.S.C. 2389	3-399
10 U.S.C. 2390	Appendix E
10 U.S.C. 2391	Appendix E
10 U.S.C. 2392	4-87
10 U.S.C. 2393	6-223
10 U.S.C. 2394	3-309
10 U.S.C. 2394a	3-311
10 U.S.C. 2395	3-371
10 U.S.C. 2396	Appendix E
10 U.S.C. 2397	6-115
10 U.S.C. 2397b	6-117
10 U.S.C. 2397c	6-121
10 U.S.C. 2398	3-313
10 U.S.C. 2399	3-93
10 U.S.C. 2400	3-103
10 U.S.C. 2401	3-401
10 U.S.C. 2402	3-407
10 U.S.C. 2403	2-111
10 U.S.C. 2404	3-315
10 U.S.C. 2405	2-151
10 U.S.C. 2406	2-85
10 U.S.C. 2408	6-205
10 U.S.C. 2409	6-207
10 U.S.C. 2409a	6-207
10 U.S.C. 2410	2-159

10 U.S.C. 2410a	1-327
10 U.S.C. 2410b	2-93
10 U.S.C. 2411	4-89
10 U.S.C. 2412	4-89
10 U.S.C. 2413	4-89
10 U.S.C. 2414	4-89
10 U.S.C. 2415	4-89
10 U.S.C. 2416	4-89
10 U.S.C. 2417	4-89
10 U.S.C. 2418	4-89
10 U.S.C. 2421	3-409
10 U.S.C. 2422	3-411
10 U.S.C. 2423	3-413
10 U.S.C. 2424	3-415
10 U.S.C. 2430	3-11
10 U.S.C. 2431	3-15
10 U.S.C. 2432	3-19
10 U.S.C. 2433	3-33
10 U.S.C. 2434	3-45
10 U.S.C. 2435	3-51
10 U.S.C. 2436	3-57
10 U.S.C. 2437	3-57
10 U.S.C. 2438	3-61
10 U.S.C. 2439	3-65
10 U.S.C. 2451	Appendix E
10 U.S.C. 2452	Appendix E
10 U.S.C. 2452N	Appendix E
10 U.S.C. 2453	Appendix E
10 U.S.C. 2454	Appendix E
10 U.S.C. 2455	Appendix E
10 U.S.C. 2456	Appendix E
10 U.S.C. 2457	7-155
10 U.S.C. 2458	Appendix E
10 U.S.C. 2461	3-243
10 U.S.C. 2462	3-251
10 U.S.C. 2463	3-257
10 U.S.C. 2464	3-259
10 U.S.C. 2465	3-265
10 U.S.C. 2466	3-269
10 U.S.C. 2467	3-275
10 U.S.C. 2468	3-279

10 U.S.C. 2481	3-319
10 U.S.C. 2482	Appendix E
10 U.S.C. 2483	3-321
10 U.S.C. 2484	Appendix E
10 U.S.C. 2485	Appendix E
10 U.S.C. 2486	Appendix E
10 U.S.C. 2487	Appendix E
10 U.S.C. 2488	Appendix E
10 U.S.C. 2489	Appendix E
10 U.S.C. 2490	3-323
10 U.S.C. 2504	7-81
10 U.S.C. 2505	7-85
10 U.S.C. 2506	7-43
10 U.S.C. 2507	7-47
10 U.S.C. 2515	3-199
10 U.S.C. 2531	7-81
10 U.S.C. 2532	7-85
10 U.S.C. 2533	7-43
10 U.S.C. 2534	7-47
10 U.S.C. 2631	7-69
10 U.S.C. 2690	3-325
10 U.S.C. 4501	3-109
10 U.S.C. 4502	3-113
10 U.S.C. 4503	1-195
10 U.S.C. 4504	3-117
10 U.S.C. 4505	3-119
10 U.S.C. 4506	3-121
10 U.S.C. 4531	3-127
10 U.S.C. 4532	3-283
10 U.S.C. 4533	3-129
10 U.S.C. 4534	2-121
10 U.S.C. 4535	3-131
10 U.S.C. 4536	Appendix E
10 U.S.C. 4537	3-133
10 U.S.C. 4538	3-135
10 U.S.C. 4540	3-137
10 U.S.C. 4541	3-149
10 U.S.C. 4542	7-59
10 U.S.C. 7201	3-159
10 U.S.C. 7203	3-161
10 U.S.C. 7210	5-107

10 U.S.C. 7211	Appendix E
10 U.S.C. 7212	3-137
10 U.S.C. 7213	3-163
10 U.S.C. 7229	3-165
10 U.S.C. 7230	3-169
10 U.S.C. 7291	Appendix E
10 U.S.C. 7291N	Appendix E
10 U.S.C. 7296	3-171
10 U.S.C. 7297	Appendix E
10 U.S.C. 7298	3-173
10 U.S.C. 7299	4-29
10 U.S.C. 7299a	3-175
10 U.S.C. 7301	3-179
10 U.S.C. 7302	3-181
10 U.S.C. 7303	1-197
10 U.S.C. 7304	3-183
10 U.S.C. 7305	3-187
10 U.S.C. 7306	3-191
10 U.S.C. 7307	3-195
10 U.S.C. 7308	3-199
10 U.S.C. 7309	7-65
10 U.S.C. 7310	3-203
10 U.S.C. 7311	3-205
10 U.S.C. 7312	2-19
10 U.S.C. 7313	3-209
10 U.S.C. 7314	3-291
10 U.S.C. 7341	4-135
10 U.S.C. 7342	4-137
10 U.S.C. 7343	4-139
10 U.S.C. 7344	7-123
10 U.S.C. 7345	4-141
10 U.S.C. 7361	3-211
10 U.S.C. 7362	3-211
10 U.S.C. 7363	3-211
10 U.S.C. 7364	2-21; 3-211
10 U.S.C. 7365	3-211
10 U.S.C. 7366	3-211
10 U.S.C. 7367	3-211
10 U.S.C. 7521	2-23
10 U.S.C. 7522	1-199
10 U.S.C. 7523	Appendix E
10 U.S.C. 7524	Appendix E

10 U.S.C. 9501	3-109
10 U.S.C. 9502	3-113
10 U.S.C. 9503	1-201
10 U.S.C. 9504	3-117
10 U.S.C. 9505	3-119
10 U.S.C. 9506	3-121
10 U.S.C. 9511	3-151
10 U.S.C. 9512	3-151
10 U.S.C. 9513	3-151
10 U.S.C. 9531	3-127
10 U.S.C. 9532	3-283
10 U.S.C. 9534	2-123
10 U.S.C. 9535	3-131
10 U.S.C. 9536	Appendix E
10 U.S.C. 9537	3-133
10 U.S.C. 9538	3-135
10 U.S.C. 9540	3-137
10 U.S.C. 9541	3-149
15 U.S.C. 631	4-91
15 U.S.C. 631a	4-91
15 U.S.C. 631b	4-91
15 U.S.C. 632	4-91
15 U.S.C. 1535	2-125
15 U.S.C. 1536	2-125
15 U.S.C. 3701	5-43
15 U.S.C. 3710a	5-43
15 U.S.C. 3710b	5-43
15 U.S.C. 3710c	5-43
15 U.S.C. 3710d	5-43
17 U.S.C. 101	Appendix E
17 U.S.C. 102	Appendix E
17 U.S.C. 103	Appendix E
17 U.S.C. 104	Appendix E
17 U.S.C. 106	Appendix E
17 U.S.C. 107	Appendix E
17 U.S.C. 108	Appendix E
17 U.S.C. 109	Appendix E
17 U.S.C. 110	Appendix E
17 U.S.C. 111	Appendix E
17 U.S.C. 112	Appendix E

17 U.S.C. 113	Appendix E
17 U.S.C. 114	Appendix E
17 U.S.C. 115	Appendix E
17 U.S.C. 116	Appendix E
17 U.S.C. 116A	Appendix E
17 U.S.C. 117	Appendix E
17 U.S.C. 118	Appendix E
17 U.S.C. 119	Appendix E
17 U.S.C. 201	Appendix E
17 U.S.C. 202	Appendix E
17 U.S.C. 203	Appendix E
17 U.S.C. 204	Appendix E
17 U.S.C. 205	Appendix E
17 U.S.C. 301	Appendix E
17 U.S.C. 302	Appendix E
17 U.S.C. 303	Appendix E
17 U.S.C. 304	Appendix E
17 U.S.C. 305	Appendix E
17 U.S.C. 401	Appendix E
17 U.S.C. 402	Appendix E
17 U.S.C. 403	Appendix E
17 U.S.C. 404	Appendix E
17 U.S.C. 405	Appendix E
17 U.S.C. 406	Appendix E
17 U.S.C. 407	Appendix E
17 U.S.C. 408	Appendix E
17 U.S.C. 409	Appendix E
17 U.S.C. 410	Appendix E
17 U.S.C. 411	Appendix E
17 U.S.C. 412	Appendix E
17 U.S.C. 501	Appendix E
17 U.S.C. 502	Appendix E
17 U.S.C. 503	Appendix E
17 U.S.C. 504	Appendix E
17 U.S.C. 505	Appendix E
17 U.S.C. 506	Appendix E
17 U.S.C. 507	Appendix E
17 U.S.C. 508	Appendix E
17 U.S.C. 509	Appendix E
17 U.S.C. 510	Appendix E
17 U.S.C. 601	Appendix E
17 U.S.C. 602	Appendix E

17 U.S.C. 603	Appendix E
17 U.S.C. 701	Appendix E
17 U.S.C. 702	Appendix E
17 U.S.C. 703	Appendix E
17 U.S.C. 704	Appendix E
17 U.S.C. 705	Appendix E
17 U.S.C. 706	Appendix E
17 U.S.C. 707	Appendix E
17 U.S.C. 708	Appendix E
17 U.S.C. 709	Appendix E
17 U.S.C. 710	Appendix E
17 U.S.C. 801	Appendix E
17 U.S.C. 802	Appendix E
17 U.S.C. 803	Appendix E
17 U.S.C. 804	Appendix E
17 U.S.C. 805	Appendix E
17 U.S.C. 806	Appendix E
17 U.S.C. 807	Appendix E
17 U.S.C. 808	Appendix E
17 U.S.C. 809	Appendix E
17 U.S.C. 810	Appendix E
17 U.S.C. 901	Appendix E
17 U.S.C. 902	Appendix E
17 U.S.C. 903	Appendix E
17 U.S.C. 904	Appendix E
17 U.S.C. 905	Appendix E
17 U.S.C. 906	Appendix E
17 U.S.C. 907	Appendix E
17 U.S.C. 908	Appendix E
17 U.S.C. 909	Appendix E
17 U.S.C. 910	Appendix E
17 U.S.C. 911	Appendix E
17 U.S.C. 912	Appendix E
17 U.S.C. 913	Appendix E
17 U.S.C. 914	Appendix E
18 U.S.C. 2	Appendix E
18 U.S.C. 3	Appendix E
18 U.S.C. 4	Appendix E
18 U.S.C. 201	6-63
18 U.S.C. 202	6-67
18 U.S.C. 203	6-69

18 U.S.C. 207	6-103
18 U.S.C. 208	6-87
18 U.S.C. 209	6-73
18 U.S.C. 218	6-155
18 U.S.C. 281	6-109
18 U.S.C. 286	6-11
18 U.S.C. 287	6-13
18 U.S.C. 371	6-15
18 U.S.C. 431	6-197
18 U.S.C. 432	6-197
18 U.S.C. 641	6-199
18 U.S.C. 792	Appendix E
18 U.S.C. 793	Appendix E
18 U.S.C. 798	Appendix E
18 U.S.C. 874	6-209
18 U.S.C. 1001	6-17
18 U.S.C. 1031	6-19
18 U.S.C. 1341	6-21
18 U.S.C. 1343	6-21
18 U.S.C. 1346	6-21
18 U.S.C. 1516	2-89
18 U.S.C. 1905	6-131
18 U.S.C. 4082	4-31
19 U.S.C. 1202	Appendix E
19 U.S.C. 1309	Appendix E
19 U.S.C. 2112	Appendix E
19 U.S.C. 2242	Appendix E
19 U.S.C. 2501	7-37
19 U.S.C. 2502	7-37
19 U.S.C. 2503	7-37
19 U.S.C. 2504	7-37
19 U.S.C. 2511	7-37
19 U.S.C. 2512	7-37
19 U.S.C. 2513	7-37
19 U.S.C. 2514	7-37
19 U.S.C. 2515	7-37
19 U.S.C. 2516	4-33; 7-37
19 U.S.C. 2517	7-37
19 U.S.C. 2518	7-37
19 U.S.C. 2531	7-37
19 U.S.C. 2532	7-37



19 U.S.C. 2533	7-37
19 U.S.C. 2541	7-37
19 U.S.C. 2542	7-37
19 U.S.C. 2543	7-37
19 U.S.C. 2544	7-37
19 U.S.C. 2545	7-37
19 U.S.C. 2546	7-37
19 U.S.C. 2547	7-37
19 U.S.C. 2551	7-37
19 U.S.C. 2552	7-37
19 U.S.C. 2553	7-37
19 U.S.C. 2554	7-37
19 U.S.C. 2561	7-37
19 U.S.C. 2562	7-37
19 U.S.C. 2571	7-37
19 U.S.C. 2572	7-37
19 U.S.C. 2573	7-37
19 U.S.C. 2581	7-37
19 U.S.C. 2701	7-41
19 U.S.C. 2702	7-41
19 U.S.C. 2703	7-41
19 U.S.C. 2704	7-41
19 U.S.C. 2705	7-41
19 U.S.C. 2706	7-41
22 U.S.C. 2354	Appendix E
22 U.S.C. 2755	4-35
22 U.S.C. 2761(e)	5-79
22 U.S.C. 2794(7)	7-161
25 U.S.C. 1544	4-115
26 U.S.C. 6050A	Appendix E
28 U.S.C. 1346	2-165
28 U.S.C. 1491	1-257
28 U.S.C. 1498	5-97
28 U.S.C. 1499	Appendix E
28 U.S.C. 2671	Appendix E
28 U.S.C. 2672	Appendix E
28 U.S.C. 2673	Appendix E
28 U.S.C. 2674	Appendix E
28 U.S.C. 2675	Appendix E

28 U.S.C. 2676	Appendix E
28 U.S.C. 2677	Appendix E
28 U.S.C. 2678	Appendix E
28 U.S.C. 2679	Appendix E
28 U.S.C. 2680	Appendix E
29 U.S.C. 793	7-37
31 U.S.C. 101	Appendix E
31 U.S.C. 102	Appendix E
31 U.S.C. 103	Appendix E
31 U.S.C. 712	3-417
31 U.S.C. 1304	2-171
31 U.S.C. 1341	2-27
31 U.S.C. 1342	Appendix E
31 U.S.C. 1350	Appendix E
31 U.S.C. 1351	Appendix E
31 U.S.C. 1352	6-201
31 U.S.C. 1552	3-375
31 U.S.C. 3324	2-29
31 U.S.C. 3501	Appendix E
31 U.S.C. 3551	1-225
31 U.S.C. 3552	1-227
31 U.S.C. 3553	1-229
31 U.S.C. 3554	1-239
31 U.S.C. 3555	1-251
31 U.S.C. 3556	1-255
31 U.S.C. 3717	2-173
31 U.S.C. 3726	Appendix E
31 U.S.C. 3729	6-25
31 U.S.C. 3730	6-25
31 U.S.C. 3731	6-25
31 U.S.C. 3732	6-25
31 U.S.C. 3801	6-51
31 U.S.C. 3802	6-51
31 U.S.C. 3803	6-51
31 U.S.C. 3804	6-51
31 U.S.C. 3805	6-51
31 U.S.C. 3806	6-51
31 U.S.C. 3807	6-51
31 U.S.C. 3808	6-51

31 U.S.C. 3809	6-51
31 U.S.C. 3810	6-51
31 U.S.C. 3811	6-51
31 U.S.C. 3812	6-51
31 U.S.C. 3901	2-31
31 U.S.C. 3902	2-31
31 U.S.C. 3903	2-31
31 U.S.C. 3904	2-31
31 U.S.C. 3905	2-31
31 U.S.C. 3906	2-31
31 U.S.C. 3907	2-31
31 U.S.C. 6306	2-127
33 U.S.C. 410	Appendix E
33 U.S.C. 901	Appendix E
33 U.S.C. 941	Appendix E
33 U.S.C. 1368	4-121
35 U.S.C. 181	5-69
35 U.S.C. 182	5-69
35 U.S.C. 183	5-69
35 U.S.C. 184	5-69
35 U.S.C. 185	5-69
35 U.S.C. 186	5-69
35 U.S.C. 187	5-69
35 U.S.C. 188	5-69
35 U.S.C. 200	5-61
35 U.S.C. 201	5-61
35 U.S.C. 202	5-61
35 U.S.C. 203	5-61
35 U.S.C. 204	5-61
35 U.S.C. 205	5-61
35 U.S.C. 206	5-61
35 U.S.C. 207	5-61
35 U.S.C. 208	5-61
35 U.S.C. 209	5-61
35 U.S.C. 210	5-61
35 U.S.C. 211	5-61
35 U.S.C. 212	5-61
37 U.S.C. 801	6-113
38 U.S.C. 4212	4-41

40 U.S.C. 270a	4-43
40 U.S.C. 270b	4-43
40 U.S.C. 270c	4-43
40 U.S.C. 270d	4-43
40 U.S.C. 270e	4-43
40 U.S.C. 270f	4-43
40 U.S.C. 276a	4-49
40 U.S.C. 327	Appendix E
40 U.S.C. 328	Appendix E
40 U.S.C. 329	Appendix E
40 U.S.C. 330	Appendix E
40 U.S.C. 331	Appendix E
40 U.S.C. 332	Appendix E
40 U.S.C. 333	Appendix E
40 U.S.C. 471	Appendix E
40 U.S.C. 474	Appendix E
40 U.S.C. 481	Appendix E
40 U.S.C. 487	Appendix E
40 U.S.C. 541	1-103
40 U.S.C. 542	1-103
40 U.S.C. 543	1-103
40 U.S.C. 544	1-103
40 U.S.C. 751	Appendix E
40 U.S.C. 757	Appendix E
40 U.S.C. 759	1-269; 3-219
41 U.S.C. 5	Appendix E
41 U.S.C. 5a	Appendix E
41 U.S.C. 10a	7-25
41 U.S.C. 10b	7-25
41 U.S.C. 10b1	7-25
41 U.S.C. 10b2	7-25
41 U.S.C. 10c	7-25
41 U.S.C. 10d	7-25
41 U.S.C. 11	3-333
41 U.S.C. 11a	3-335
41 U.S.C. 12	1-329
41 U.S.C. 13	Appendix E
41 U.S.C. 13a	Appendix E
41 U.S.C. 14	Appendix E
41 U.S.C. 15	2-129
41 U.S.C. 20	2-135

41 U.S.C. 20a	Appendix E
41 U.S.C. 20b	Appendix E
41 U.S.C. 21	Appendix E
41 U.S.C. 22	6-197
41 U.S.C. 35	4-57
41 U.S.C. 36	4-57
41 U.S.C. 37	4-57
41 U.S.C. 38	4-57
41 U.S.C. 39	4-57
41 U.S.C. 40	4-57
41 U.S.C. 42	4-57
41 U.S.C. 43	4-57
41 U.S.C. 43a	4-57
41 U.S.C. 44	4-57
41 U.S.C. 45	4-57
41 U.S.C. 47	4-65
41 U.S.C. 51	6-211
41 U.S.C. 52	6-211
41 U.S.C. 53	6-211
41 U.S.C. 54	6-211
41 U.S.C. 55	6-211
41 U.S.C. 56	6-211
41 U.S.C. 57	6-211
41 U.S.C. 58	6-211
41 U.S.C. 251	Appendix E
41 U.S.C. 252	Appendix E
41 U.S.C. 253	Appendix E
41 U.S.C. 253a	Appendix E
41 U.S.C. 253b	Appendix E
41 U.S.C. 253c	Appendix E
41 U.S.C. 253d	Appendix E
41 U.S.C. 253e	Appendix E
41 U.S.C. 253f	Appendix E
41 U.S.C. 253g	Appendix E
41 U.S.C. 254	Appendix E
41 U.S.C. 254a	Appendix E
41 U.S.C. 255	Appendix E
41 U.S.C. 256	Appendix E
41 U.S.C. 258	4-67
41 U.S.C. 259	Appendix E
41 U.S.C. 260	Appendix E

41 U.S.C. 351	4-69
41 U.S.C. 351N	4-69
41 U.S.C. 352	4-69
41 U.S.C. 353	4-69
41 U.S.C. 354	4-69
41 U.S.C. 355	4-69
41 U.S.C. 356	4-69
41 U.S.C. 357	4-69
41 U.S.C. 358	4-69
41 U.S.C. 401	6-159
41 U.S.C. 402	Appendix E
41 U.S.C. 403	6-163
41 U.S.C. 404	Appendix E
41 U.S.C. 405	6-165
41 U.S.C. 405a	6-169
41 U.S.C. 405b	6-171
41 U.S.C. 406	6-173
41 U.S.C. 407	6-175
41 U.S.C. 408	6-177
41 U.S.C. 409	6-179
41 U.S.C. 410	6-181
41 U.S.C. 411	6-183
41 U.S.C. 412	6-185
41 U.S.C. 413	1-331
41 U.S.C. 414	6-187
41 U.S.C. 414a	Appendix E
41 U.S.C. 415	6-189
41 U.S.C. 416	1-107
41 U.S.C. 417	2-137
41 U.S.C. 417a	4-117
41 U.S.C. 418	1-117
41 U.S.C. 418a	Appendix E
41 U.S.C. 418b	6-191
41 U.S.C. 419	1-121
41 U.S.C. 420	2-65
41 U.S.C. 421	6-193
41 U.S.C. 422	2-95
41 U.S.C. 423a1b1c	6-95
41 U.S.C. 423a2b2	6-77
41 U.S.C. 423a3b3d	6-133
41 U.S.C. 423e	6-145

41 U.S.C. 423f	6-123
41 U.S.C. 423ghjm	6-149
41 U.S.C. 423k&l	6-153
41 U.S.C. 424	Appendix E
41 U.S.C. 601	2-177
41 U.S.C. 602	2-177
41 U.S.C. 603	2-177
41 U.S.C. 604	2-177; 6-53
41 U.S.C. 605	2-177
41 U.S.C. 606	2-177
41 U.S.C. 607	2-177
41 U.S.C. 608	2-177
41 U.S.C. 609	2-177
41 U.S.C. 610	2-177
41 U.S.C. 611	2-177
41 U.S.C. 612	2-177
41 U.S.C. 613	2-177
41 U.S.C. 701	4-75
42 U.S.C. 1651	Appendix E
42 U.S.C. 1701	4-79
42 U.S.C. 2000d	Appendix E
42 U.S.C. 2457	Appendix E
42 U.S.C. 5908	Appendix E
42 U.S.C. 6686	Appendix E
42 U.S.C. 6962	4-129
42 U.S.C. 7401	Appendix E
42 U.S.C. 7606	4-125
44 U.S.C. 3901	Appendix E
44 U.S.C. 3902	Appendix E
44 U.S.C. 3903	Appendix E
46 U.S.C. 1241	7-69
47 U.S.C. 305	Appendix E
49 U.S.C. 10701a	Appendix E
49 U.S.C. 10702	Appendix E
49 U.S.C. 10721	Appendix E
49 U.S.C. 10921	Appendix E
49 U.S.C. 11707	Appendix E

50 U.S.C. 1431	2-193
50 U.S.C. 1432	2-193
50 U.S.C. 1433	2-193
50 U.S.C. 1434	2-193
50 U.S.C. 1435	2-193
50 U.S.C. X2061-2170	7-125
Public Law Number 85-804	2-193
Public Law Number 91-379 103	2-101
Public Law Number 99-661 316	3-327
Public Law Number 101-165 9081	3-419
Public Law Number 101-189 821	1-333
Public Law Number 101-189 822	1-335
Public Law Number 101-510 809	3-67
Public Law Number 101-510 831	2-37
Public Law Number 101-511 8034	4-143
Public Law Number 101-511 8057	4-145
Public Law Number 101-511 8067	4-147
Public Law Number 102-484 842	3-327



## APPENDIX B

### Tracking System for Regulatory Implementation of Statutes

**The FAR System should cite the statutes which they implement; and**

**The FAR System should contain an index showing where each statute is implemented in the regulations.**

In preparing this Report, and in particular the sections titled, "Law in Practice," the Panel and staff found it difficult and time consuming to trace where and how the various statutes were implemented in the FAR and DFARS. No comprehensive tool exists to aid this process. The methodology generally employed was a manual and computer-assisted search of the regulations, sometimes supplemented by telephone calls to acquisition personnel who had expertise with certain issues and most likely would know if and where regulatory coverage of those issues existed. Undoubtedly, acquisition personnel in Government and industry alike must resort to similar tactics when endeavoring to ensure compliance with particular laws. Such methodologies consume far too many scarce resources in our increasingly competitive business environment; moreover, they are highly susceptible to error. Where the FAR and DFARS cited the statutes which they implemented, the task was markedly easier.

The Panel recommends adding two tools to the FAR system to alleviate the problem just described. First, the regulations should, to the maximum extent practicable, contain a citation to the statute or statutes which the regulations are implementing. The Panel is aware of, and applauds, the recent initiative to make such citations in the DFARS, and that there are currently significant citations in the FAR; however, the Panel believes that this discipline should be applied throughout the entire FAR system. This tool will facilitate tracing regulations back to their statutory sources.

The second tool will aid tracing statutes down to the implementing regulations. The FAR should contain a cross-referencing index which lists, in the order of increasing title and section numbers all of the significant statutes which impact federal procurement. The index would indicate which regulations implemented those statutes. Sufficient statutory authority exists at 41 U.S.C. § 421 for the Federal Acquisition Regulatory Council to make the necessary changes to the regulations.

The Panel recognizes that it will take considerable effort to conform the existing regulations to the Panel's recommendation. For that reason, the initial effort should be prospective. However, the task will be aided by the correlation of statutes and regulations in the "Law in Practice" sections of this Report. Because the Report will never be more helpful to the creation of the two tools than now, the Panel recommends that efforts to implement these tools begin immediately.

The effort to maintain the two tools once the regulations are conformed will be *de minimus*. This would not have been true a decade ago, prior to the widespread use of microcomputers. However, today's technology will make it a simple matter to reference the law in the implementing regulation and to modify the index when a law affecting procurement is passed.

This recommendation is consistent with the Panel's charter: an index and reference in the regulations will aid future streamlining efforts. For example, when a statute is repealed, recodified, or amended, the needed regulatory change will be easily identified and accommodated. In addition, where a regulation implements more than one statute, printing this fact in the regulation may prompt inquiry into whether the statutes should be consolidated or otherwise amended to avoid unnecessary duplication.

This proposed recommendation is also consistent with two of the Panel's objectives. Placing an index in the regulations and identifying the correlation between regulations and the statutes they implement will help educate all Government and industry personnel engaged in the acquisition process and thereby encourage their exercise of sound judgment. It will also reduce the burden on all Government and industry acquisition personnel in verifying that all relevant statutes and regulations are complied with.

## APPENDIX C

### DOMESTIC SOURCE RESTRICTIONS AND PRODUCT PREFERENCES

#### C.1. Introduction

A working group of the Panel was assigned to review all domestic source restrictions. Since such restrictions have historically been placed in provisions of annual appropriations and authorization acts, the past 15 years of defense authorization and appropriation acts were reviewed for provisions that might contain source restrictions and product preferences. In addition, the Panel reviewed an exhaustive report issued by the Secretary of Defense to the Congress in 1989 concerning "The Impact of Buy American Restrictions Affecting Defense Procurement." The Report contained a compilation of domestic source restrictions accompanied by case studies of both Congressionally and DOD mandated restrictions.

Ultimately the Panel decided to recommend that no source restriction be retained except those that had been codified into various titles of the United States Code because, among other things, the Panel recommends that source restrictions be accomplished by DOD regulation and not by statute. See proposed section 2x12 in Chapter 7.4 of this Report. As a result of this decision, the Panel also opted to remove the legislative background discussion for most source restrictions to this Appendix, since this material was no longer of major importance to Chapter 7, but might be of historical significance to others interested in the history of DOD acquisition statutes. The next section (C.2) is the legislative background discussion; while Section C.3 is a summary table of the Congressionally Mandated Domestic Source Restrictions. These two sections are derivatives of the 1989 SECDEF report and a compilation of the work of the Panel staff. The material presented here is current through the passage of Public Law 102-484, the National Defense Authorization Act for Fiscal Year 1993.

## **C.2. Legislative Background of Congressionally Mandated Domestic Source Restrictions**

### **120MM MORTARS AND AMMUNITION Legislative Background**

#### **99th Congress**

December 19, 1985: President Reagan signed Pub. L. No. 99-190, the FY86 Department of Defense Appropriations Act, containing the following section:

Sec. 8095. None of the funds in this Act may be obligated for procurement of 120mm mortars or 120mm mortar ammunition manufactured outside of the United States: Provided, That this limitation shall not apply to procurement of such mortars or ammunition required for testing, evaluation, type classification or equipping the Army's Ninth Infantry Division (Motorized).

July 2, 1986: President Reagan signed Pub. L. No. 99-349, the Urgent Supplemental Appropriations Act, 1986, containing the following provision:

**SEC. 5. REVISION OF CERTAIN PROVISIONS OF PUBLIC LAW 99-190.**

(c) 120mm Mortar - Of the funds appropriated in the Department of Defense Appropriations Act 1986, for procurement of the 120mm mortar, obligations, and expenditures may be incurred only in accordance with the requirements set forth in House Report 99-235 and section 8095 of the Department of Defense Appropriations Act, 1986 (as contained in section 101(b) of Public Law 99-190).

The same language appearing in Pub. L. No. 99-190, Sec. 8095 appeared in Pub. L. No. 99-591, the FY87 DOD Appropriations Act, signed October 30, 1986.

#### **100th Congress**

December 22, 1987: President Reagan signed Pub. L. No. 100-202, FY88 Department of Defense Appropriations Act, with the following section:

Sec. 8077. None of the funds appropriated in this Act to the Department of the Army may be obligated for procurement of 120mm mortars or 120mm mortar ammunition manufactured outside of the United States: Provided, That this limitation shall

not apply to procurement of such mortars or ammunition required for testing, evaluation, type classification or equipping the Army's Ninth Infantry Division (Motorized).

The same language appearing in Pub. L. No. 100-202, section 8077 appeared in Pub. L. No. 100-463, section 8064, the FY89 DOD Appropriations Act, signed October 1, 1988.

## **SDI CONTRACTS** Legislative Background

### **99th Congress**

December 19, 1985: President Reagan signed Pub. L. No. 99-190, the FY86 Department of Defense Appropriations Act, containing the following section:

Sec. 8108. No funds appropriated under this Act for the Strategic Defense Initiative Program shall be earmarked by any agency of the United States Government or any contractor exclusively for contracts with non-United States contractors, subcontractors, or vendors, or exclusively for consortia containing non-United States contractors, subcontractors, vendors, prior to source selection in order to meet a specific quota or allocation of funds to any allied nation. Furthermore, it is the sense of the Congress that, whenever possible, the Secretary of Defense and others should attempt to award Strategic Defense Initiative contracts to United States contractors, subcontractors, and vendors unless such awards would degrade the likely results obtained from such contracts: Provided, That allied nations should be encouraged to participate in the Strategic Defense Initiative research effort on a competitive basis and be awarded contracts on the basis of technical merit.

The same language appearing in Pub. L. No. 99-190, appeared in Pub. L. No. 99-591, the FY87 DOD Appropriations Act, section 9088, signed October 30, 1986. However, the provision was not in either the FY88 or FY89 DOD Appropriations Acts.

### **100th Congress**

December 4, 1987: President Reagan signed Pub. L. No. 100-180, the FY88 and 89 National Defense Authorization Acts containing the following section:

SEC. 222. PROHIBITION OF CERTAIN CONTRACTS  
WITH FOREIGN ENTITIES.

(a) SDI contracts With Foreign Entities-Funds appropriated to or for the use of the Department of Defense may not be used for the purpose of entering into or carrying out any contract with a foreign government or a foreign firm if the contract provides for the conduct of research, development, testing, or evaluation in connection with the Strategic Defense Initiative program.

(b) Temporary Suspension of Prohibition Upon Certification of the Secretary of Defense.--The prohibition in subsection (a) shall not apply to a contract in any fiscal year if the Secretary of Defense certifies to Congress in writing at any time during such fiscal year that the research, development, testing, or evaluation to be performed under such contract cannot be competently performed by a United States firm at a price equal to or less than the price at which the research, development, test, or evaluation would be performed by a foreign firm.

(c) Exceptions for Certain Contracts-The prohibition in subsection (a) shall not apply to a contract awarded to a foreign government or foreign firm if--

(1) the contract is to be performed within the United States;

(2) the contract is exclusively for research, development, test, or evaluation in connection with antitactical ballistic missile systems; or

(3) that foreign government or foreign firm agrees to share a substantial portion of the total contract cost.

(d) Definitions.-- In this section:

(1) The term "foreign firm" means a business entity owned or controlled by one or more foreign nationals or a business entity in which more than 50 percent of the stock is owned or controlled by one or more foreign nationals.

(2) The term "United States firm" means a business entity other than a foreign firm.

(e) Transition.-- The prohibition in subsection (a) shall not apply to a contract entered into before the date of the enactment of this Act.

## **REPAIR AND MAINTENANCE OF NAVAL VESSELS**

### **Legislative Background**

**99th Congress**

October 30, 1986: President Reagan signed Pub. L. No. 99-591, the FY87 Department of Defense Appropriations Act, containing the following section:

Sec. 9101. No naval or any vessel owned and operated by the Department of Defense home ported in the United States may be overhauled, repaired, or maintained in a foreign owned and operated shipyard located outside the United States, except for voyage repairs.

The same language in Pub. L. No. 99-591, section 9101, is contained in every DOD Appropriations Act through FY89.

### **100th Congress**

September 29, 1988: President Reagan signed Pub. L. No. 100-456, the FY89 National Defense Authorization Act, containing the following section:

#### **SEC. 1224. LIMITATION ON REPAIR OF NAVAL VESSELS IN FOREIGN SHIPYARDS**

(a) In General. - Section 7309 of title 10, United States Code, is amended by adding at the end of the following new subsection:

"(c)(1) A naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) the home port of which is in the United States may not be overhauled, repaired, or maintained in a shipyard outside the United States.

"(2) Paragraph (1) does not apply in the case of the voyage repairs."

(b) Clerical Amendments. - (1) The heading of that section is amended to read as follows:

"Sec. 7309. Restrictions on construction or repair of vessels in foreign shipyards."

(2) The item relating to such section in the table of sections at the beginning of chapter 633 of such title is amended to read as follows:

"7309. Restrictions on construction or repair of vessels in foreign shipyards."

(c) Effective Date. - Subsection (c) of section 7309 of title 10, United States Code, as added by subsection (a), shall apply with respect to any contract for overhaul, repair, or maintenance of a vessel that is entered into after the end of the 30-day period beginning on the date of the enactment of this Act.

### **101st Congress**

Pub. L. No. 101-511 - Nov. 5, 1990

Sec. 8043: None of the funds available to the Department of the Navy, may be used to enter into any contract for the overhaul, repair, or maintenance of any naval vessel home ported on the West Coast of the United States which includes charges for interport differential as an evaluation factor for award.

## **102d Congress**

Pub. L. No. 102-484 – Oct. 22, 1992

Sec. 1012: Section 7309 of Title 10, United States Code, is amended by adding at the end the following new subsection:

(e) In the case of a naval vessel the homeport of which is not in the United States (or a territory of the United States), the Secretary of the Navy may not during the 15-month period preceding the planned reassignment of the vessel to a homeport in the United States (or a territory of the United States) begin any work for the overhaul, repair, or maintenance of the vessel that is scheduled to be for a period of more than six months.

## **VALVES AND MACHINE TOOLS**

### **Legislative Background**

## **99th Congress**

October 30, 1986: President Reagan signed Pub. L. No. 99-591, the FY87 Department of Defense Appropriations Act, containing the following section:

Sec. 9188.(a) None of the funds made available by this Act to the Department of Defense may be used to procure the Federal Supply Classes of machine tools set forth in subsection (b) of this section, for use in any government-owned facility or property under control of the Department of Defense, which machine tools were not manufactured in the United States or Canada.

(b) The procurement restrictions contained in subsection (a) shall apply to Federal Supply Classes of metal working machinery in categories numbers 3408, 3410-3419, 3426, 3433, 3441-3443, 3446, 3448, 3449, 3460, and 3461.

(c) When adequate domestic supplies of the classifications of machine tools identified in subsection (b) are not available to meeting Department of Defense requirements on a timely basis, the procurement restrictions contained in subsection (a) may be waived on a case by case basis by the Secretary of the Service Branch responsible for the procurement.



(d) Subsection (a) shall not apply to contracts which are binding as of the date of enactment of this Act.

### **100th Congress**

The same provision in Pub. L. No. 99-591 was also contained in Pub. L. No. 100-202, the FY88 DOD Appropriations Act, section 8085, signed December 22, 1987.

September 28, 1988: President Reagan signed Pub. L. No. 100-456, the National Defense Authorization Act, containing the following section:

#### **SEC. 822. SOURCE FOR PROCUREMENT OF CERTAIN VALVES AND MACHINE TOOLS**

Section 2507 of title 10, United States Code, as redesigned by section 821, is amended by adding at the end the following new subsection:

"(d) Valves and Machine Tools.

(1) During fiscal years 1989, 1990, and 1991, funds appropriated or otherwise made available to the Department of Defense may not be used to enter into a contract for the procurement of items described in paragraph (2) that are not manufactured in the United States or Canada.

"(2) Items covered by paragraph (1) are the following:

"(A) Powered and non-powered valves in Federal Supply Classes 4810 and 4820 used in piping for naval surface ships and submarines.

"(B) MACHINE TOOLS IN THE FEDERAL SUPPLY CLASSES for metal-working machinery numbered 3405, 3408, 3410 through 3419, 3426, 3433, 3438, 3441 through 3443, 3446, 3448, 3460, and 3461.

"(3) The Secretary of Defense may waive the requirement of paragraph (1) with respect to the procurement of an item if the Secretary determines that any of the following apply with respect to that item:

"(A) The restriction would cause unreasonable costs or delays to be incurred.

"(B) United States producers of the item would not be jeopardized by competition from a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

"(C) Satisfactory quality items manufactured in the United States or Canada are not available.

"(D) The restriction would impede cooperative programs entered into between the Department of Defense and a foreign country and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

"(E) The procurement is for an amount less than \$25,000 and simplified small purchase procedures are being used

"(F) The restriction would result in the existence of only one United States or Canadian source for the item.

"(4) The provisions of this section may be renewed with respect to any item by the Secretary of Defense at the end of fiscal year 1991 for an additional two fiscal years if the Secretary determines that a continued restriction on that item is in the national security interest."

October 1, 1988: President Reagan signed Pub. L. No. 100-463, the FY89 Department of Defense Appropriations Act containing the following section:

Sec. 8069. (a) None of the funds made available by this Act to the Department of Defense may be used to procure the Federal Supply Classes of machine tools set forth in subsection (b) if this section, for use in any government-owned facility or property under control of the Department of Defense, which machine tools were not manufactured in the United States or Canada.

(b) The procurement restrictions contained in subsection (a) shall apply to Federal Supply Classes of metal working machinery in categories numbered 3405, 3408, 3410-3419, 3426, 3433, 3438, 3441-3443, 3445, 3446, 3448, 3449, 3460, and 3461.

(c) When adequate domestic supplies of the classifications of machine tools identified in subsection (b) are not available to meet Department of Defense requirements on a timely basis, the procurement restrictions contained in subsection (a) may be waived on a case by case basis by the Secretary of the Service Branch responsible for the procurement.

(d) Subsection (a) shall not apply to contracts which are binding as of the date of enactment of this Act.

Supporting Materials:

H.R. Rep. No. 100-753, pp. 103-04.

102nd Congress

Pub. L. No. 102-190, §834

(a) EXTENSION THROUGH FISCAL YEAR 1996. Section 2507(d) of title 10, United States Code is amended in paragraph (1) by striking out "During fiscal years 1989, 1990, and 1991," and inserting in lieu thereof "Effective through fiscal year 1996,".

(b) APPLICABILITY. Such section is further amended

(1) by striking out paragraph (4);

(2) by redesignating paragraph (3) as paragraph (5); and

(3) by inserting the following new paragraphs after paragraph (2):

"(3) Contracts covered by paragraph (1) include the following:

"(A) Contracts for the procurement of items described in paragraph (2) for use in any property under the control of the Department of Defense, including government-owned, contractor-operated facilities.

"(B) Contracts entered into by contractors on behalf of the Department of Defense for the procurement of items described in paragraph (2) for the purposes of providing the items to other contractors as Government-furnished equipment.

"(4) In any case in which a contract subject to the requirement of paragraph (1) includes the procurement of more than one Federal Supply Class of machine tools of machine tools and accessories described in paragraph (2), each supply class shall be evaluated separately for purposes of determining whether the limitation in this subsection applies."

## **AIR CIRCUIT BREAKERS**

### **Legislative Background**

#### **100th Congress**

September 28, 1988: President Reagan signed Pub. L. No. 100-456, the National Defense Authorization Act, containing the following section:

Section 2507 of title 10, United States Code, as redesigned by section 821, is amended by adding at the end the following new subsection:

"(f) AIR CIRCUIT BREAKERS .--

(1) The Secretary of Defense may not procure air circuit breakers for naval vessels unless--

(A) the air circuit breakers are produced or manufactured in the United States; and

(B) substantially all of the components of the air circuit breakers are produced or manufactured in the United States.

(2) For purposes of paragraph (1)(B), substantially all of the components of air circuit breakers shall be considered to be

produced or manufactured in the United States if the aggregate cost of the components produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States.

(3) Paragraph (1) does not prevent the procurement of spares and repair parts needed to support air circuit breakers produced or manufactured outside the United States.

(4) The Secretary of Defense may waive the limitation in paragraph (1) on a case-by- case basis with respect to any procurement if the Secretary determines that carrying out a proposed procurement in accordance with the limitation in that case--

(A) is not in the national security interests of the United States;

(B) will have an adverse effect on a United States company; or

(C) will result in procurement from a United States company that, with respect to the sale of air circuit breakers, fails to comply with applicable Government procurement regulations or the antitrust laws of the United States.

(5) Whenever the Secretary proposes to grant a waiver under paragraph (4), the Secretary shall submit a notice of the proposed waiver, together with a statement of the reasons for the proposed waiver, to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives. The waiver may then be granted only after the end of the 30-day period beginning on the date on which the notice is received by those committees."

## **ANCHOR AND MOORING CHAIN**

### **Legislative Background**

#### **100th Congress**

December 22, 1987: President Reagan signed Pub. L. No. 100-202, FY88 Department of Defense Appropriations Act, with the following section:

Sec. 8125.(a) None of the funds available to the Department of Defense may be used for procurement of welded shipboard anchor chain and mooring chain (of all types four or less inches in diameter) manufactured outside of the United States or Canada.

(b) When adequate domestic supplies of welded shipboard anchor chain and mooring chair (of all types four or less inches in diameter) are not available to meet Department of Defense requirements on a

timely basis, the procurement restrictions contained in subsection (a) may be waived on a case-by-case basis by the Secretary of the Service responsible for the procurement.

October 1, 1988: President Reagan signed Pub. L. No. 100-463, the FY89 Department of Defense Appropriations Act containing the following section:

Sec. 8089. None of the funds in this Act may be available for the purchase by the Department of Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under manufactured outside the United States.

### **101st Congress**

Pub. L. No. 101-165, § 9051

Pub. L. No. 101-511 – Nov. 5, 1990

Sec. 8041. None of the funds in this Act may be available for the purchase by the Department of Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under unless the anchor and mooring chain are manufactured in the United States from components which are substantially manufactured in the United States: Provided, That for the purpose of this section manufactured will include cutting, heat treating, quality control, testing of chain and welding (including the forging and shot blasting process): Provided further, That for the purpose of this section substantially all of the components of anchor and mooring chain shall be considered to be produced or manufactured in the United States exceeds the aggregate cost of the components produced or manufactured outside the United States: Provided further, That when adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the Committees on Appropriations that such an acquisition must be made in order to acquire capability for national security purposes.

### **CERTAIN CHEMICAL WEAPONS ANTIDOTE** Legislative Background

### **100th Congress**

December 4, 1987: President Reagan signed Pub. L. No. 100-180, the FY88 and 89 National Defense Authorization Act, containing the following section:

**SEC. 124. LIMITATION ON PROCUREMENT OF CERTAIN  
CHEMICAL WEAPONS ANTIDOTE**

(a) Limitation. -- Section 2400 of title 10, United States Code, is amended--

(1) by inserting "(a) Buses.-- "before "Funds appropriated";  
and

(2) by adding at the end the following:

"(b) Chemical Weapons Antidote Manufactured Overseas.--Funds appropriated to the Department of Defense may not be used for the procurement of chemical weapons antidote contained in automatic injectors (or for the procurement of the components for such injectors) determined to be critical under the Industrial Preparedness Planning Program of the Department of Defense unless--

"(1) such injector or component is manufactured in the United States by a company which is an existing producer under the industrial preparedness program at the time the contract is awarded and which--

"(A) has received all required regulatory approvals;  
and

"(B) has the plant, equipment, and personnel to perform the contract in existence in the United States at the time the contract is awarded; or

"(2) the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition, determines that such procurement from a source in addition to a source described in paragraph (1) is critical to the national security."

**SUPERCOMPUTERS  
Legislative Background**

**100th Congress**

December 22, 1987: President Reagan signed Pub. L. No. 100-202, FY88 Department of Defense Appropriations Act, with the following section:

Sec. 8112. Funds appropriated or made available in this Act shall be obligated and expended to continue to fully utilize the facilities at the United States Army Engineer's Waterways Experiment Station, including the continued availability of the supercomputer capability and the planned upgrade of this capability: Provided, That none of the funds in this Act may be

used to purchase any supercomputer which is not manufactured in the United States, unless the Secretary of Defense certifies to the Armed Service and Appropriations Committees of Congress that such an acquisition must be made in order to acquire capability for national security purposes that is not available from United States manufacturers.

October 1, 1988: President Reagan signed Pub. L. No. 100-463, the FY89 Department of Defense Appropriations Act containing the following section:

Sec. 8082. Funds appropriated or made available in this Act shall be obligated and expended to continue to fully utilize the facilities at the United States Army Engineer's Waterways Experiment Station, including the continued availability of the supercomputer capability and the planned upgrade of this capability: Provided, That none of the funds in this Act may be used to purchase any supercomputer which is not manufactured in the United States, unless the Secretary of Defense certifies to the Armed Services and Appropriations Committees of Congress that such an acquisition must be made in order to acquire capability for national security purposes that is not available from the United States manufacturers: Provided further, That of the funds appropriated for "Other Procurement Army" for fiscal year 1988, those funds provided for a supercomputer may only be obligated to purchase a system to be installed at a competitively selected independent academic institution: Provided further, That of the funds appropriated for "Other Procurement Army" in fiscal year 1989, \$27,400,000 shall be obligated to purchase a supercomputer system to be installed at the United States Army Engineer's Waterways Experiment Station.

August 23, 1988: President Reagan signed Pub. L. No. 100-418, the Omnibus Trade and Competitiveness Act of 1988, containing the following section:

**SEC. 1307. SUPERCOMPUTER TRADE DISPUTE.**

(a) Findings.-- The Congress finds that --

(1) United States manufacturers of supercomputers have encountered significant obstacles in selling supercomputers in Japan, particularly to government agencies and universities;

(2) Japanese government procurement policies and pricing practices have denied United States manufacturers access to the Japanese supercomputer market;

(3) it has been reported that officials of the Ministry of International Trade and Industry of Japan have told United States

Government officials that Japanese government agencies and universities do not intend to purchase supercomputers from United States manufacturers, or take steps to improve access for United States manufacturers;

(4) the United States Government in August 1987 signed an agreement with the Government of Japan establishing procedures for the procurement of United States supercomputer by the Government of Japan;

(5) concern remains as to implementation of the procurement agreement with the Government of Japan;

(6) there have been allegations that Japanese manufacturers of supercomputers have been offering supercomputers at drastically discounted prices in the markets of the United States, Japan, and other countries;

(7) deep price discounting raises the concern that Japan's large-scale vertically integrated manufacturers of supercomputers have targeted the supercomputer industry with the objective of eventual domination of the global computer market ; and

(8) the supercomputer industry plays a central role in the technological competitiveness and national security of the United States.

(b) Sense of Congress.--It is the sense of the Congress that the United States Trade Representative and other appropriate officials of the United States Government should --

(1) give the highest priority to concluding and enforcing agreements with the Government of Japan which achieve improved market access for United States manufacturers of supercomputers and end day predatory pricing activities of Japanese companies in the United States, Japan, and other countries; and

(2) continue to monitor the efforts of United States manufacturers of supercomputers to gain access to the Japanese market, recognizing that the Government of Japan may continue to manipulate the government procurement process to maintain the market dominance of Japanese manufacturers.

## **PAN CARBON FIBERS**

### **Legislative Background**

#### **100th Congress**

December 22, 1987: President Reagan signed Pub. L. No. 100-202, the FY88 DOD Appropriations Act, containing the following section:



Sec. 8088. The Secretary of Defense shall take such action as necessary to assure that a minimum of 50 percent of the polyacrylonitrile (PAN) carbon fiber requirement be procured from domestic sources by 1992: Provided, That the annual goals to achieve this requirement be as follows: 15 percent of the total DOD requirement by 1988; 15 percent of the total DOD requirement by 1989; 20 percent of the total DOD requirement by 1990; 25 percent of the total DOD requirement by 1991; and 50 percent of the total DOD requirement by 1992.

**Supporting Materials:**

Senate Report Number 100-235, p. 344.

The same language appearing in Pub. L. No. 100-202 also appears in Pub. L. No. 100-463, the FY89 DOD Appropriations Act, section 8133, signed October 1, 1988.

**101st Congress**

Pub. L. No. 101-511 – Nov. 5, 1990

Sec. 8048. The Secretary of Defense shall take such action as necessary to assure that a minimum of 50 percent of the polyacrylonitrile (PAN) carbon fiber requirement be procured from domestic sources by 1992; Provided, That the annual goals to achieve this requirement be as follows: 15 percent of the total DOD requirement by 1988; 15 percent of the total DOD requirement by 1989; 20 percent of the total DOD requirement by 1990; 25 percent of the total DOD requirement by 1991; and 50 percent of the total DOD requirement by 1992.

**NIGHT VISION IMAGE INTENSIFIER DEVICES**

**Legislative Background**

**101st Congress**

Pub. L. No. 101-165

Sec. 8054. None of the funds appropriated in this Act may be available for offshore procurement of second or third generation night vision image intensifier tubes and devices: Provided, That when adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis by certifying in writing to the

Committees on Appropriations that such an acquisition must be made in order to acquire capability for national security purposes.

## **TRANSPORTATION BY OCEAN VESSELS**

### **Legislative Background**

#### **58th Congress**

April 28, 1904: President Roosevelt signed S. 2263 (ch. 1766, 22 Stat. 518), an act requiring the employment of U.S. vessels for public purposes (Cargo Preference Act of 1904), containing the following :

The vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable in which case contracts shall be made under the law as it now exists: Provided, That no greater charges be made by such vessels for transportation of like goods for private parties or companies.

#### **Supporting Materials**

House Report Number 1893, 58th Cong, 2d Sess.

Senate Report Number 182, 58th Cong, 2d Sess.

#### **73rd Congress**

March 26, 1934: President Roosevelt signed House Joint Resolution Number 207 (ch 90, 48 Stat. 500), requiring that Government financed exporting of products be shipped in U.S. Vessels, containing the following:

That it is the sense if the Congress that in loans made under the Reconstruction Finance Corporation or any other instrumentality of the Government to foster the exporting of agricultural or other products, provision shall be made that such products shall be carried exclusively in vessels of the United States, unless, as to any of all of such products, the Shipping Board Bureau, after investigation, shall certify to the Reconstruction Finance Corporation or any other instrumentality of the Government that vessels of the United States are not available in sufficient numbers, or in sufficient tonnage capacity, or on necessary sailing schedule, or at reasonable rates.

#### **74th Congress**

June 29, 1936: President Roosevelt signed H.R. 8555 (ch. 858, 49 Stat. 1985), the Merchant Marine Act of 1936, containing the following provisions:

SEC. 204, (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, are hereby transferred to the United States Maritime Commission.

SEC 90f. Any officer or employee of the United States traveling on official business overseas or to or from any of the possessions of the United States shall travel and transport his personal effects on ships registered under the laws of the United States where such ships are available unless the necessity of the mission requires the use of a ship under a foreign flag: Provided, That the Comptroller General of the United States shall not credit any allowance for travel or shipping expenses incurred on a foreign ship in the absence of satisfactory proof of the necessity therefor.

### 83rd Congress

August 26, 1954: President Eisenhower signed S. 3233 (ch. 936, 68 Stat. 832), amending the Merchant Marine Act of 1936, containing the following:

That section 901 of the Merchant Marine Act, 1936, as amended is hereby amended by inserting "(a)" after "SEC. 901." and by adding at the end of the section the following new subsection:

"(b) whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with such furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographical

areas; Provided, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of section 901(b) and so notifies the appropriate agency or agencies; And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of Public Resolution Numbered 17, Seventy-third Congress (48 Stat. 500) as amended."

#### **84th Congress**

May 28, 1956: President Eisenhower signed S. 2286 (ch 325, 70 Stat. 187,) amending the Merchant Marine Act of 1936, containing the following:

That section 901 of the Merchant Marine Act of 1936, as amended, is amended by adding at the end thereof an new subsection as follows:

"(c) That notwithstanding any other provision of law, privately owned American shipping services may be utilized for the transportation of motor vehicles owned by Government personnel whenever transportation of such vehicles at Government Expense is otherwise authorized by law."

August 10, 1956: President Eisenhower signed a recodification of Title 10 U.S.C. (ch. 1041, '70A Stat. 146), containing the following section codifying the Cargo Preference Act of 1904 (see above):

Sec. 2631. Supplies: preference to United States vessels

Only vessels of the United States or belonging to the United States may be used on the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made by transporting like goods for private persons.

#### **Supporting Materials**

For an explanation of the charges from the 1904 Act, see Explanatory Notes listed after 10 U.S.C. § 2631.

#### **85th Congress**

April 29, 1957: President Eisenhower transmitted Reorganization Plan No. 1 of 1957 to Congress abolishing the Reconstruction Finance Corporation (RFC). See 46 U.S.C. § 1241-1 and Codification notes following the section for the effect the abolition of the RFC had on the Act of March 26, 1934 (see above).

### **87th Congress**

September 21, 1961: President Kennedy signed Pub. L. No. 87-266 amending the Merchant Marine Act of 1936, containing the following:

That section 901(b) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1241) is hereby amended by inserting at the end thereof the following: "For purposes of this section, the term 'privately owned United States-flag commercial vessels' shall not be deemed to include any vessel which, subsequent to the date of enactment of this amendment shall have been either (a) built outside the United States, (b) rebuilt outside of the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years: Provided, however, That the provisions of this amendment shall not apply where, (1) prior to the enactment of this amendment, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be rebuilt abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment; or (2) where prior to the enactment of this amendment, the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment."

### **91st Congress**

October 21, 1970: President Nixon signed Pub. L. No. 91-469, amending the Merchant Marine Act of 1936, containing the following section:

SEC 27. Section 901 of the Merchant Marine Act, 1936 (46 U.S.C. § 1241) is amended as follows:  
(a) By redesignating subsection (b) as (b)(1).

(b) By striking the words "section 901 (b) "in redesignated subsection (b)(1) and inserting in lieu thereof the words "section 901 (b)(1)".

(c) By adding a new subsection (b)(2) to read as follows:

"(2) Every department or agency having responsibility under this subsection shall administer its programs with respect to this subsection under regulations issued by the Secretary of Commerce. The Secretary of Commerce shall review such administration and shall annually report to the Congress with respect thereto.

### **97th Congress**

August 6, 1981: President Reagan signed Pub. L. No. 97-31, revising laws pertaining to the Maritime Administration substituting the Secretary of Transportation for the Secretary of Commerce in section 901(b) of the Merchant Marine Act of 1936, and substituting the Secretary of Transportation for the Maritime Commission in the Act of March 26, 1934 (46 U.S.C. § 1241-1).

### **Non-legislative Changes**

August 7, 1985: President Reagan signed a memorandum delegating to the Secretary of Defense functions vested in the President under the Cargo preference Act of 1904.

## **FOOD, CLOTHING, FABRICS, SPECIALTY METALS, AND HAND OR MEASURING TOOLS**

### **Legislative Background**

### **77th Congress**

April 5, 1941: President Roosevelt signed Pub. L. No. 29, 77th Cong, 1st Sess. (55 Stat. 123, ch 41), the FY41 Fifth Supplemental National Defense Appropriations Act, contained the following provision under the "Quartermaster Corps" title in the section on "Clothing and Equipage, Army":

Provided further, That no part of this or any other appropriation contained in this Act shall be available for the procurement of any article of food or clothing not grown or produced in the United States or its possessions, except to the extent that the head of the department concerned shall determine that articles of food or clothing grown or produced in the United States or its possessions cannot be procured of satisfactory quality and in sufficient quantities and at reasonable prices as and when needed, and except procurements by vessels in foreign waters and by establishments located outside the continental United States, except the Territories of Hawaii and Alaska, for the personnel attached thereto.

June 30, 1941: President Roosevelt signed Pub. L. No. 139, 77th Cong, 1st Sess. (55 Stat. 366, ch. 262), the FY42 Military Appropriations Act contained a section under the "Quartermaster Corps on Subsistence of the Army", which included:

The same provision can be found in Pub. L. No. 649, 77th Cong, 2d Sess. (62 Stat. 647), the FY43 Military Appropriation Act.

#### **80th Congress**

June 24, 1948: President Truman signed Pub. L. No. 766, 80th Cong, 2d Sess. (62 Stat. 647), the FY49 Military Functions Appropriations Act, containing the following provisions under the section on "Subsistence of the Army".

Provided further, That no part of this or any other appropriation contained in this Act shall be available for the procurement of any article of food or clothing not grown or produced in the United States or its possessions, except to the extent that the Secretary of the Army shall determine that articles of food or clothing grown or produced in the United States or its possessions cannot be procured of satisfactory quality and in sufficient quantities and at reasonable prices as and when needed, and except procurements by vessels in foreign waters and by establishments located outside the continental United States, except the Territories of Hawaii and Alaska, for personnel attached thereto.

#### **81st Congress**

Both the FY50 and FY51 Appropriations Acts contained the same provisions as in Pub. L. No. 766, 80th Cong, 2d Sess. (62 Stat. 647), in the Section on Substance of the Army.

#### **82d Congress**

October 18, 1951: President Truman signed Pub. L. No. 179, 82d Cong, 1st Sess (65 Stat. 423, ch. 512), the FY52 DOD Appropriations Act, containing the following provisions in the "Subsistence of the Army" section.

Provided further, That no part of this or any other appropriation contained in this Act shall be available for the procurement of any article of food or clothing not grown or produced in the United States or its possessions except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing grown or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements by vessels in foreign waters and emergency

procurements or procurements of perishable foods by establishments located outside the continental United States, except the Territories of Hawaii and Alaska, for the personnel attached thereto: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions.

July 10, 1952: President Truman signed Pub. L. No. 488, 82d Cong., 2d Sess. (66 Stat. 517, ch. 630), the FY53 DOD Appropriations Act, containing the following provisions in the "Maintenance and Operations of the Army" section:

Provided, That no part of this or any other appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton or wool grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements by vessels in foreign waters and emergency procurements or procurement of perishable foods by establishments located outside the continental United States, except the Territories of Hawaii and Alaska, for personnel attached thereto: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions

### **83rd Congress**

August 1, 1953: President Eisenhower signed Pub. L. No. 179, 83rd Cong., 1st Sess. (67 Stat. 336, ch. 305), the FY54 DOD Appropriations Act, containing the following section:

SEC. 644. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton or wool (whether in the form of fiber or yarn or contained in fabrics materials, or manufacture articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton or wool grown, reprocessed, reused or produced in the United States or its possessions cannot be procured as and when needed at United



States market prices and except procurements by vessels in foreign waters and emergency procurements or procurements of perishable foods by establishments located outside the continental United States, except the Territories of Hawaii and Alaska, for the personnel attached thereto: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations.

The same language appearing in Pub. L. No. 639, 84th Cong., 2d Sess., section 626 appeared in Pub. L. No. 458, 83rd Cong., 2d Sess. (68 Sta. 337, ch. 432), the FY55 DOD Appropriations Act, Sec. 733, signed June 30, 1954.

#### **84th Congress**

July 13, 1955: President Eisenhower signed Pub. L. No. 157, 84th Cong., 1st Sess. (69 Stat. 301), the FY56 DOD Appropriations Act, containing the following section:

SEC. 630. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, spun silk yarn for cartridge cloth (subject to the same conditions as apply to other commodities in this paragraph) or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, spun silk yarn for cartridge cloth, or wool grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurement outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the continental United States, except the territories of Hawaii and Alaska for the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used or the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations.

## **85th Congress**

The same language appearing in Pub. L. No. 639, 84th Cong., 2d Sess., section 626 appeared in the following laws:

Pub. L. No. 85-117, section 25, FY58 DOD Appropriations Act, signed August 2, 1957.

Pub. L. No. 85-724, section 625, FY59 DOD Appropriations Act, signed August 22, 1958.

## **86th Congress**

**August 1959:** President Eisenhower signed Pub. L. No. 86-166, the FY60 DOD Appropriations Act, containing the following section:

**SEC. 523.** No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, spun silk yarn for cartridge cloth, or wool grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations.

**July 7, 1960:** President Eisenhower signed Pub. L. No. 86-601, the FY61 DOD Appropriations Act containing the following section:

**SEC. 623.** No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that

satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, spun silk yarn for cartridge cloth, or wool grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

The same language appearing in Pub. L. No. 90-96, section 623 appeared in Pub. L. No. 90-580, the FY69 DOD Appropriations Act, section 523, signed October 17, 1968.

#### **87th Congress**

The same language appearing in Pub. L. No. 86-601, section 523 appeared in Pub. L. No. 87-144, section 623, FY62 DOD Appropriations Act signed August 17, 1961.

August 9, 1962: President Kennedy signed Pub. L. No. 87-577, the FY63 DOD Appropriations Act, containing the following section:

SEC. 523. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, or wool grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by

establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

### **88th Congress**

The same language appearing in Pub. L. No. 87-577, section 523 appeared in the following laws:

Pub. L. No. 88-149, section 523, FY64 DOD Appropriations Act, signed October 17, 1963.  
Pub. L. No. 88-446, section 523, FY65 DOD Appropriations Act, signed September 29, 1965  
Pub. L. No. 89-687, section 623, FY67 DOD Appropriations Act, signed October 15, 1966.

### **89th Congress**

The same language appearing in Pub. L. No. 87-577, section 523, appeared in the following laws:

Pub. L. No. 89-213, section 623, FY66 DOD Appropriations Act, signed September 29, 1965.  
Pub. L. No. 89-687, section 623, FY67 DOD Appropriation Act, signed October 15, 1966.

### **90th Congress**

September 29, 1967: President Johnson signed Pub. L. No. 90-96, the FY68 DOD Appropriations Act, containing the following section:

SEC. 623. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except

procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

The same language appearing in Pub. L. No. 90-96, section 623 appeared in Pub. L. No. 90-580, the FY69 DOD Appropriations Act, section 523, signed October 17, 1968.

### **91st Congress**

The same language appearing in Pub. L. No. 90-96, section 623 appeared in the following laws:

Pub. L. No. 91-171, the FY70 DOD Appropriations Act, section 624 in signed December 29, 1969.

Pub. L. No. 91-668, the FY71 DOD Appropriation Act, section 824 signed January 11, 1971.

### **92d Congress**

The same language appearing in Pub. L. No. 90-96, section 623 appeared in Pub. L. No. 92-204, the FY72 DOD Appropriations Act, section 724, signed December 18 1971.

October 26, 1972: President Nixon signed Pub. L. No. 92-570, the FY73 DOD Appropriations Act, containing the following section:

SEC. 724. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals

grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

### **93rd Congress**

The same language appearing in Pub. L. No. 92-570, section 724 appeared in the following laws:

Pub. L. No. 93-238, the FY74 DOD Appropriation Act, section 724, signed January 2, 1974.

Pub. L. No. 93-437, the FY75 DOD Appropriations Act, section 723, signed October 8, 1974.

### **94th Congress**

February 9, 1976: President Ford signed Pub. L. No. 94-212, the FY76 DOD Appropriations Act containing the following section:

SEC. 723. No part of any appropriation contained in this Act shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blend, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals including stainless steel flatware, grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign

waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

September 22, 1976: President Ford signed Pub. L. No. 94-419, the FY77 DOD Appropriations Act, containing the following section:

SEC. 723. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals including stainless steel flatware, grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

## 95th Congress

September 21, 1977: President Carter signed Pub. L. No. 95-111, the FY78 DOD Appropriations Act, containing the following section:

**SEC. 823.** No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals including stainless steel flatware, grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 814 of the Department of Defense Appropriations Authorization Act, 1976: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used or the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further,



That none 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.

The same language appearing in Pub. L. No. 95-111, section 823 appeared in Pub. L. No. 95-457, the FY79 DOD Appropriations Act, section 824, signed October 13, 1978.

#### **96th Congress**

The same language appearing in Pub. L. No. 95-111, section 823 appeared in Pub. L. No. 96-154, the FY80 DOD Appropriations Act, section 724, signed December 21, 1979.

December 15, 1980: President Carter signed Pub. L. No. 96-527, the FY81 DOD Appropriations Act, containing the following section:

**SEC. 724.** No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals including stainless steel flatware, grown, reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States Government or United States firms under approved programs serving defense requirements or where such procurement

is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 814 of the Department of Defense Appropriations Authorization Act, 1976: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations, other than certain contracts not involving fuel made on a test basis by the Defense Logistics Agency with a cumulative value not to exceed \$3,400,000,000, as may be determined by the Secretary of Defense pursuant to existing laws and regulations as not to be inappropriate therefor by reason of national security consideration: Provided further, That the Secretary specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards of such contracts will be made at a reasonable price and that no award shall be made for such contracts if the price differential exceed 5 per centum: Provided further, That none 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.

### **97th Congress**

December 29, 1981: President Reagan signed Pub. L. No. 97-114, the FY82 DOD Appropriation Act, containing the following section:

SEC. 723. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) or specialty metals including stainless steel flatware, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool, or specialty metals including stainless steel flatware, grown,

reprocessed, reused, or produced in the United States or its possession cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States of the personnel attached thereto: Provided, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its Possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations other than certain contracts not involving fuel made on a test basis by the Defense logistics Agency with a cumulative value not to exceed \$5,000,000,000, as may be determined by the Secretary of Defense pursuant to existing laws and regulations as not to be inappropriate therefor by reason of national security considerations: Provided further, That the Secretary specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards of such contracts will be made at a reasonable price and that no award shall be made for such contracts if the price differential exceed 5 per centum: Provided further, That none 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.

December 21, 1982: President Reagan signed Pub. L. No 97-377, the FY83 DOD Appropriations Act, containing the following section:

SEC. 723. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and

when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of foreign produced specialty metals used in the production of manufacture of weapons or weapon systems made outside the United States, except those specialty metals which contain nickel from Cuba, or the procurement of chemical warfare protective clothing produced outside the United States, if such procurement is necessary to comply with agreements with foreign governments: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations other than certain contracts not involving fuel made on a test basis by the Defense Logistics Agency with a cumulative value not to exceed \$4,000,000,000, as may be determined by the Secretary of Defense pursuant to existing laws and regulations as not to be inappropriate therefor by reason of national security considerations: Provided further, That the Secretary specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards of such contracts will be made at a reasonable price and that no award shall be made for such contracts if the price differential exceed 2.2 per centum: Provided further, That none 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.

## **98th Congress**

December, 1983: President Reagan signed Pub. L. No. 98-212, the FY84 DOD Appropriations containing the following section:

SEC. 721A. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed,

reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 2457 of title 10, United States Code: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations other than certain contracts not involving fuel made on a test basis by the Defense Logistics Agency with a cumulative value not to exceed \$4,000,000,000, as may be determined by the Secretary of Defense pursuant to existing laws and regulations as not to be inappropriate therefor by reason of national security considerations: Provided further, That the Secretary specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards of such contracts will be made at a reasonable price and that no award shall be made for such contracts of the price differential exceed 2.2 per centum: Provided further, That none 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.

The same language appearing in Pub. L. No. 98-212, section 721A appeared in Pub. L. No. 98-473, the FY 85 DOD Appropriations Act, section 8019, signed October 12, 1984.

### **99th Congress**

December 19, 1985: President Reagan signed Pub. L. No. 99-190, the FY86 Department of Defense Appropriations Act containing the following section:

**SEC. 8016.** No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 2457 of title 10,

United States Code: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

October 30, 1986: President Reagan signed into Pub. L. No. 99-591, the FY87 Department of Defense Appropriations Act, containing the following section:

SEC. 9011. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles of food or clothing or any form of cotton, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments

comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 2457 of title 10, United States Code: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none 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.

## **100th Congress**

**December 22, 1987: President Reagan signed Pub. L. No. 100-202, FY88 Department of Defense Appropriations Act, with the following section:**

**SEC. 8011. No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$10,000 shall be available for the procurement of any article of food, clothing, tents, tarpaulins, covers, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles or items of food, individual equipment, tents, tarpaulins, covers, or clothing or any form of cotton, or other natural fiber products, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement**



is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 2457 of title 10, United States Code: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none of the funds appropriated in this Act shall be used except that, so far as practicable, all contracts will be awarded on a formally advertised competitive bid basis to the lowest responsible bidder.

October 1, 1988: President Reagan signed Pub. L. No. 100-463, the FY89 Department of Defense Appropriations Act containing the following section:

**SEC. 8010.** No part of any appropriation contained in this Act, except for small purchases in amounts not exceeding \$25,000 shall be available for the procurement of any article of food, clothing, tents, tarpaulins, covers, cotton, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or specialty metals including stainless steel flatware, or hand or measuring tools, not grown, reprocessed, reused, or produced in the United States or its possessions, except to the extent that the Secretary of the Department concerned shall determine that satisfactory quality and sufficient quantity of any articles or items of food, individual equipment, tents, tarpaulins, covers, or clothing or any form of cotton, or other natural fiber products, woven silk and woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, wool, or specialty metals including stainless steel flatware, grown, reprocess, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices and except procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or

procurements of perishable foods by establishments located outside the United States for the personnel attached thereto: Provided, That nothing in this section shall preclude the procurement of specialty metals or chemical warfare protective clothing produced outside the United States or its possessions when such procurement is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements or where such procurement is necessary in furtherance of the standardization and interoperability of equipment requirements within NATO so long as such agreements with foreign governments comply, where applicable, with the requirements of section 36 of the Arms Export Control Act and with section 2457 of title 10, United States Code: Provided further, That nothing herein shall preclude the procurement of foods manufactured or processed in the United States or its possessions: Provided further, That no funds herein appropriated shall be used for the payment of a price differential on contracts hereafter made for the purpose of relieving economic dislocations: Provided further, That none of the funds appropriated in this Act shall be used except that, so far as practicable, all contracts will be awarded on a formally advertised competitive bid basis to the lowest responsible bidder.

**CONSTRUCTION OF MAJOR COMPONENTS OF THE HULL AND  
SUPERSTRUCTURE OF NAVAL VESSELS**  
Legislative Background

**88th Congress**

August 19, 1964: President Johnson signed Pub. L. No. 88-446, the FY65 DOD Appropriations Act containing the following provision in the "Shipbuilding and Conversions, Navy" sections:

Provided, That none of the funds herein provided for the construction or conversion of any navel vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel.

**89th Congress**

The same provisions Pub. L. No. 88-446 was also contained in Pub. L. No. 89-213, the FY66 DOD Appropriations Act signed September 29, 1965.

The same provisions in Pub. L. No. 88-446 was also contained in Pub. L. No. 89-687, the FY67 DOD Appropriations Act, signed October 15, 1966.

### **90th Congress**

September 29, 1967: President Johnson signed Pub. L. No. 90-96, the FY68 DOD Appropriations Act, containing the following provision in the "Shipbuilding and Conversion, Navy" section:

Provided, That none of the funds herein provided for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel: Provided further, That none of the funds therein provided shall be used for the construction of any naval vessel in foreign shipyards.

The same provision in Pub. L. No. 90-96 was also contained in every DOD Appropriations Act through FY89.

### **97th Congress**

September 8, 1982: President Reagan signed Pub. L. No. 97-252, the 1983 DOD Authorization Act containing the following section:

SEC. 1127 (a). Chapter 633 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"7309. Restriction on construction of naval vessels in foreign shipyards

"(a) Except as provided in subsection (b), no naval vessel, and no major component of the hull or superstructure of a naval vessel, may be constructed in a foreign shipyard.

"(b) The President may authorize exceptions to the prohibition in subsection (a) when he determines that it is in the national security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date such determination is received by Congress . . ."

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

"7309. Restriction on construction of naval vessels in foreign shipyards."

### **98th Congress**

October 12 1984: President Reagan signed Pub. L. No. 98-473, the FY85 DOD Appropriations Act, containing the following section:

SEC. 8095. Section 7309(a) of title 10, United States Code, is amended-

(1) by inserting "and no vessel of any other military department," after "no naval vessel"; and

(2) by striking out "a naval" and inserting in lieu thereof "any such".

### 99th Congress

November 8, 1985: President Reagan signed Pub. L. No. 99-145, the 1986 DOD Authorization Act, containing the following section:

SEC. 1303 GENERAL CLERICAL AMENDMENTS

(a) Amendment to Title 10.--Title 10, United States Code, is amended as follows:

(A) The heading of section 7309 is amended by striking out the fifth word.

(B) The item relating to that section in the table of section at the beginning of chapter 633 is amended by striking out the fifth word.

### 100th Congress

December 4, 1987: President Reagan signed Pub. L. No. 100-180, FY88 and 89 National Defense Authorization Act, containing the following section:

SEC. 1103. DOMESTIC CONSTRUCTION OF CERTAIN VESSELS

Section 7309(a) of title 10 United States Code, is amended by striking out "no naval vessel, and no vessel of any other military department," and inserting in lieu thereof "no vessel to be constructed for any of the armed forces."

September 28, 1988: President Reagan signed Pub. L. No. 100-448, the Coast Guard Authorization Act of 1988, containing the following section:

"Sec. 665. Restriction on construction of vessels in foreign shipyards

"(a) Except as provided in subsection (b), no Coast Guard vessel, and no major component of the hull or superstructure of a Coast Guard vessel, may be constructed in a foreign shipyard.

"(b) The President may authorize exception to the prohibition in subsection (a) when the President determines that it is in the nations security interest of the United States to do so. The President shall transmit notice to Congress of any such determination, and no contract may be made pursuant to the exception authorized until the end of the 30-day period beginning on the date the notice of such determination is received by Congress."

(b) Conforming Amendment-- The analysis of chapter 17 of title 14, United States Code, is amended by adding at the end the following:  
"665. Restriction on construction of vessels in foreign shipyards."

### **MULTIPASSENGER MOTOR VEHICLES (BUSES)** Legislative Background

#### **90th Congress**

September 20, 1968: President Johnson signed Pub. L. No. 90-500, FY Military Procurement Authorizations, containing the following section:

SEC. 404. No funds authorized for appropriation for the use of the Armed Forces of the United States under the provisions of this Act or the provisions of any other law shall be available for the purchase, lease, rental, or other acquisition of multipassenger motor vehicles (buses) other than multipassenger motor vehicles (buses) manufactured in the United States, except as may be authorized by regulations promulgated by the Secretary of Defense solely to insure that compliance with this prohibition will not result in either an uneconomical procurement action or one which would adversely affect the national interests of the United States.

#### **97th Congress**

October 12, 1982: President Reagan signed Pub. L. No. 97-295, making technical amendments to Titles 10, 14, 37, and 38 of the U.S. Code, which repealed section 404 of Pub. L. No. 90-500 which had been codified as a note to 10 U.S.C § 2303, and inserted a new section to Title 10 of the U.S. Code:

"Sec. 2400. Limitation on procurement of buses

"Funds appropriated for use by the armed forces are available to acquire a multipassenger motor vehicle (bus) only if the vehicle is manufactured in the United States. However, the Secretary of Defense may prescribe regulations authorizing the

acquisition of a multipassenger motor vehicle (bus) not manufactured in the United States, but only to ensure that compliance with this section will not result in an uneconomical procurement action or adversely affect the national interest."

**Supporting Materials:**

See the Historical and Revision Notes listed under 10 U.S.C. § 2400 for an explanation of the changes from Pub. L. No. 90-500, section 404.

**100th Congress**

December 4, 1987: President Reagan signed Pub. L. No. 100-180, the FY88 and 89 National Defense Authorization Act, changing the heading of 10 U.S.C. § 2400 to "Miscellaneous procurement limitations," necessitated by the addition of a section on restriction on chemical weapons antidote procurement.

**R&D CONTRACTING**  
Legislative Background

**92d Congress**

October 26, 1972: President Nixon signed Pub. L. No. 92-570, the FY73 DOD Appropriations Act containing the following section:

SEC. 744. None of the funds appropriated by this or any other act shall be available for entering into any contract or agreement with any foreign corporation, organization, person, or other entity for the performance of research and development in connection with any weapon system or other military equipment for the Department of Defense when there is a United States corporation, organization, person, or other entity equally competent to carry out such research and willing to do so at a lower cost.

**Supporting Materials:**

Vol. 118, Congressional Record, pp. 33033-34 (Sept. 30, 1972), Statement by Sen. Bayh upon offering the amendment on the floor of the Senate.

**TRANSPORTATION BY AIR CARRIERS**  
Legislative Background

**93rd Congress**

January 3, 1975: President Ford signed Pub. L. No. 93-623m the International Air Transportation Fair Competitive Practices Act of 1974, containing the following section:

SEC. 5. (a) TITLE XI of the Federal Aviation Act of 1958 (49 U.S.C. § 1501 and the following) is amended by adding at the end thereof the following new section:

**"TRANSPORTATION OF GOVERNMENT-FINANCED  
PASSENGERS AND PROPERTY"**

"SEC. 1117. Whenever any executive department of other agency or instrumentality of the United States shall procure, contract for, or otherwise obtain for its own account or in furtherance of the purposes or pursuant to the terms of any contract agreement, or other special arrangement made or entered into under which payment is made by the United States or payment is made from funds appropriated, owned, controlled, granted, or conditionally granted or unitized by or otherwise established for the account of the United States, or shall furnish to or for the account of any foreign nation, or any international agency, or other organization, of whatever nationality, without provisions for reimbursement, any transportation of persons (and their personal effects) or property by air between a place in the United States and a place in the United States and a place outside thereof or between two places both of which are outside the United States, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations of exemption of the Civil Aeronautics Board and to the extent service by such carriers is available. The Comptroller General of the United States shall disallow any expenditure from appropriated funds for payment for such personnel or cargo transportation on an air carrier not holding a certificate under section 401 of this Act in the absence of satisfactory proof of the necessity therefor. Nothing in this section shall prevent the application to such traffic of the anti discrimination provisions of this Act."

Supporting Material:

House Report Number 93-1475, as reprinted in the 1974 USCCAN, p.7466.

**96th Congress**

February 15, 1980: President Carter signed Pub. L. No. 96-192, the International Air Transportation Competition Act of 1979, containing the following section:

SEC. 21. Section 1117 of the Federal Aviation Act of 1958 (49 U.S.C. § 1617) is amended to read as follows:

**"Transportation of Government-Financed Passengers and Property**

**"Transportation Between the United States and a Place Outside Thereof**

**"Sec. 1117. (a) Except as provided in subsection (c) of this section, whenever any executive department or other agency or instrumentality of the United States shall procure, contract for, or otherwise obtain for its own account or in furtherance of the purposes or pursuant to the terms of any contract agreement, or other special arrangement made or entered into under which payment is made by the United States or payment is made from funds appropriated, owned, controlled, granted, or conditionally granted or unitized by or otherwise established for the account of the United States, or shall furnish to or for the account of any foreign nation, or any international agency, or other organization, of whatever nationality, without provisions for reimbursement, any transportation of persons (and their personal effects) or property by air between a place in the United States and a place outside therefor, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is available.**

**"Transportation Between Two places Outside The United States**

**"(b) except as provided in subsection (c) of this section, whenever persons (and their personal effects) or property described in subsection (a) of this section are transported by air between two places both of which are outside the United States, the appropriate agency or agencies shall take such steps as may be necessary to assure that such transportation is provided by air carriers holding certificates under section 401 of this Act to the extent authorized by such certificates or by regulations or exemption of the Civil Aeronautics Board and to the extent service by such carriers is available.**

**"Transportation Pursuant to Bilateral Agreement**



"(c) Nothing in this section shall preclude the transportation of persons (and their personal effects) or property by foreign air carriers if such transportation is provided for under their terms of a bilateral or multilateral air transport agreement between the United States and a foreign government or governments and if such agreement (1) is consistent with the goals for international aviation policy set forth in section 1102(b) of this Act and (2) provides for the exchange of rights or benefits of similar magnitude.

**"Disallowance of Improper Expenditure by Comptroller General**

"(d) The Comptroller General of the United States shall disallow any expenditure from appropriated funds for payment for personnel or cargo transportation in violation of this section in the absence of satisfactory proof of the necessity therefor. Nothing in this section shall prevent the application to such traffic of the anti discrimination provisions of this Act."

**Supporting Materials:**

Senate Report Number 96-329, pp. 12, 23.

House Report Number 96-717 (Conference Report), pp. 20-21.

**ADMINISTRATIVE MOTOR VEHICLES**  
**Legislative Background**

**97th Congress**

December 29, 1981: President Reagan signed Pub. L. No. 97-114, the FY82 DOD Appropriations Act, containing the following section:

SEC 783. None of the funds available in this Act shall be used by the Secretary of a military department to make a contract for the purchase of administrative motor vehicles that are manufactured outside the United States or Canada unless the contractor was selected through competitive bidding without a differential in favor of foreign manufacturers: Provided, That this section does not apply to contracts for amounts less than \$50,000, nor to existing contracts.

**Supporting Materials:**

House Report Number 97-333, p.289.  
Senate Report Number 97-273, p. 128.

September 8, 1982: President Reagan signed Pub. L. No. 97-252, the FY83 DOD Authorization Act, containing the following section:

**Purchase of Foreign-Made Administrative Motor Vehicles**

SEC. 1126. (a) The Secretary of a military department may, after the date of the enactment of this Act, enter into contracts for the purchase of administrative motor vehicles without regard to section 783 of Pub. L. No. 97-114.

(b) None of the funds appropriated pursuant to authorizations in this Act may be used by the Secretary of a military department to make a contract or agreement for the purchase of administrative motor vehicles that are manufactured outside the United States or Canada unless the contractor was selected through competitive bidding without a differential in favor of foreign manufacturers. This subsection does not apply to contracts for amounts less than \$50,000 or any contract or agreement in effect on the date of the enactment of this Act with the Federal Republic of Germany, the United Kingdom, or Italy, so long as the vehicles procured under such contract or agreement are standardized or interoperable with the vehicles of the host country.

**Supporting Materials:**

Senate Report Number 97-330, pp. 148-49.

House Report Number 97-749 (Conference Report), pp. 180-81.

**100th Congress**

December 4, 1987: President Reagan signed Pub. L. No. 100-180, the FY88 and 89 National Defense Authorization Act, containing the following section:

**Part B – Other Acquisition Matters**

**SEC. 823. RESTRICTION ON PURCHASE OF FOREIGN-  
MADE ADMINISTRATIVE MOTOR VEHICLES**

(a) Vehicles for Use Inside the United States.- Neither the Secretary of Defense nor the Secretary of a military department may enter into a contract during the period beginning on the date of the enactment of this Act and ending on September 30, 1989, for the procurement of administrative motor vehicles that are manufactured in a country other than the United States or Canada and are for use inside the United States unless the type of motor

vehicle proposed to be procured is not available in sufficient and reasonably available quantities and satisfactory quality from a manufacturer in the United States or Canada

(b) Vehicle for Use Overseas.— (1) Neither the Secretary of Defense nor the Secretary of a military department may enter into a contract during the period beginning on the date of enactment of this Act and ending on September 30, 1989, for the procurement of administrative motor vehicles that are manufactured in a country other than the United States or Canada and are for use outside the United States (other than motor vehicles intended for use in security, intelligence, and criminal investigative operations) unless firms which manufacture similar vehicles in the United States or Canada are afforded a fair opportunity to compete for the contract.

(2) In awarding any contract subject to paragraph (1), the Secretary of Defense or the Secretary of the military department concerned may take into consideration the cost and availability of maintenance and other logistic services and supplies required for the operation of such vehicles.

(c) Exceptions.--This section shall not apply to the procurement of administrative motor vehicles in the case of a contract--

- (1) for an amount less than \$50,000; or
- (2) that is specifically authorized by law.

(d) Applicability.— (1) Except as provided in paragraph (2)(B), subsection (b) shall not apply in the case of a contract authorized or required to be entered into as provided under the terms of a country-to-country agreement for the support of United States Armed Forces in Europe if the agreement is in existence on the date of the enactment of this Act.

(2)(A) After the date of the enactment of this Act, the Secretary of Defense may not enter into a country-to-country agreement for the support of United States Armed Forces in Europe that is consistent with the limitations on the procurement of administrative motor vehicles under this section applicable during the period beginning on the date of the enactment of this Act and ending on September 30, 1989.

(B) If an agreement described in paragraph (1) is renewed or extended after the date of the enactment of this Act, the Secretary shall ensure that such agreement, as renewed or extended, is not inconsistent with the limitation on the procurement of administrative motor vehicles under this section applicable during the period beginning on the date for the enactment of this Act and ending on September 30, 1989.

Supporting Material:

**AIRCRAFT EJECTION SEATS**  
**Legislative Background**

**97th Congress**

December 21, 1982: President Reagan signed Pub. L. No. 97-377, the FY83 Department of Defense Appropriations Act containing a provision in the "Aircraft Procurement Navy" section relating to ejection seats in F/A-18 aircraft:

Provided, That none of the funds appropriated or made available pursuant to this paragraph for the F/A 18 aircraft program may be obligated or expended until the Secretary of the Navy submits to the Committees of Appropriations of the House of Representatives and the Senate a certified plan to incorporate a United States manufactured ejection seat system in F/A-18 aircraft purchased with fiscal year 1983 and future funds.

**Supporting Materials:**

House Report Number 97-943, pp. 127, 238-39.

House Report Number 97-980 (Conference Report), p. 12.

**98th Congress**

September 24, 1983: President Reagan signed Pub. L. No. 98-94, the Department of Defense Authorization Act 1984 containing section 1239, relating to the restriction contained in Pub. L. No. 97-377:

Sec. 1238: The Secretary of the Navy may carry out the F/A-18 aircraft program without regard to the first proviso in the paragraph under the heading "Aircraft Procurement Navy" in Title IV (procurement) of the Department of Defense of Appropriation Act, 1983 (as contained in Pub. L. No. 97-377; 96 Stat. 1841).

**Supporting Materials:**

House Report Number 98-107, p. 236.

Senate Report Number 98-213 (Conference report), p. 256.

December 8, 1983: President Reagan signed Pub. L. No. 98-212, the FY84 Department of Defense Appropriations Act, containing a general restriction on aircraft ejection seat procurement:

Sec. 781. None of the funds provided in this Act shall be used to procure aircraft ejection seats manufactured in any foreign nation

that does not permit United States manufacturers to compete for ejection seats procurement requirements in that foreign nation.

**Supporting Materials:**

Senate Report Number 98-292, p. 198.

House Report Number 98-567 (Conference Report), p. 75.

October 12, 1984: President Reagan signed Pub. L. No. 98-473, the FY85 Department of Defense Appropriations Act, containing the same restriction as contained in Pub. L. No. 989-212, but adds additional clarifying language:

Sec. 8074. None of the funds provided in this Act shall be used to procure aircraft ejection seats manufactured in any foreign nation that does not permit United States manufacturers to compete for ejection seat procurement requirements in that foreign nation. This limitation shall apply only to ejection seats proceed for installation on aircraft produced or assembled in the United States.

**Supporting Materials:**

Senate Report Number 98-636, p. 215.

House Report Number 98-1086, p. 268.

House Report Number 98-1159 (Conference Report), p. 106.

**99th Congress**

The same language appearing in Pub. L. No. 98-473, section 8074 appeared in the following laws:

Pub. L. No. 99-190, section 8057, FY86 Department of Defense Appropriations Act, signed Dec. 19, 1985.

Pub. L. No. 99-591, section 9052d, FY87 Department of Defense Appropriations Act, signed Oct. 30, 1986.

**100th Congress**

The same language appearing in Pub. L. No. 98-473, section 8074 appeared in the following laws:

Pub. L. No. 100-202, section 8054, FY88 Department of Defense Appropriations Act, signed Dec. 22, 1987.

Pub. L. No. 100-463, section 8044, FY89 Department of Defense Appropriations Act, signed Oct. 1, 1988.

Note: No supporting Congressional materials were available for the 99th or 100th Congress.

**TRANSFER OF LARGE-CALIBER CANNON PRODUCTION TECHNOLOGY**  
Legislative Background

## 97th Congress

December 29, 1981: President Reagan signed Pub. L. No. 97-114, the FY82 DOD Appropriations Act, containing the following section:

Sec. 782.(a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) No funds appropriated by this Act may be used for the transfer of a technical data package from any Government-owned and operated defense plant manufacturing large-caliber cannons to any foreign government in producing any defense item currently being manufactured or developed in a United States Government-owned, Government-operated, defense plant manufacturing large caliber cannons.

### Supporting Materials:

House Report Number 97-33, p. 289.

House Report Number 97-410 (Conference Report), p. 55.

## 98th Congress

December 8, 1983: President Reagan signed Pub. L. No. 98-212, the FY84 DOD Appropriations Act, containing the following section:

Sec. 765. (a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) No funds appropriate by this Act may be used for the transfer of a technical data package from any Government-owned and operated defense plant manufacturing large caliber cannons to any foreign government nor for assisting any such government, not for assisting any such government in producing any defense item currently being manufactured or developed in a United States Government-owned, Government-operated, defense plant manufacturing large caliber cannons.

(c) None of the funds in this Act shall be used, in any way, directly or indirectly, to sell or otherwise provide the AN/SQR-19 Towed Array Sonar to any foreign country, directly or indirectly, including any administrative and military and civilian personnel costs in

connection with the arrangement of the sale of the AN/SQR-19 Towed Array Sonar to any foreign country.

**Note:** Subsection (c) was repealed by Pub. L. No. 98-396, the FY84 Second Supplemental Appropriations Act, signed August 22, 1984.

**October 12, 1984:** President Reagan signed Pub. L. No. 98-473, the FY85 DOD Appropriations Act, containing the following section:

**SEC. 8057.** (a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) No funds appropriated by this Act may be used for the transfer of a technical data package from any Government-owned and operated defense plant manufacturing large caliber cannons to any foreign government, not for assisting any such government in producing any defense item currently being manufactured or developed in a United States Government-owned, Government-operated defense plant manufacturing large caliber cannons.

#### **99th Congress**

**December 19, 1985:** President Reagan signed Pub. L. No. 99-190, the FY87 DOD Appropriations Act, containing the following section:

**SEC. 8041.** (a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) No funds appropriated by this Act may be used for the transfer of a technical data package from any Government-owned and operated defense plant manufacturing large caliber cannons to any foreign government, nor for assisting any such government in producing any defense item currently being manufactured or developed in a United States Government-owned, Government-operated, defense plant manufacturing large caliber cannons.

**October 30, 1986:** President Reagan signed Pub. L. No. 99-591, the FY86 DOD Appropriations Act, containing the following section:

Sec. 9036. (a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) Technical Data Packages for Production of Large-Caliber Cannon.- (1) Chapter 433 of Title 10, United States Code, is amended by adding at the end the following new section:

"Sec. 4542. Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception

"(a) General Rule.- Funds appropriated to the Department of Defense may not be used-

"(1) to transfer to a foreign country a technical data package for a defense item being manufactured or developed in an arsenal; or

"(2) to assist a foreign country in producing such a defense item.

"(b) Exception.- The Secretary of the Army may use funds appropriated to the Department of Defense to transfer a technical data package, or to provide assistance, described in section (a) if -

"(1) the transfer of provision of assistance is to a friendly foreign country (as determined by the Secretary of Defense in consultation with the Secretary of State);

"(2) the Secretary of the Army determines that such action-

"(A) would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and

"(B) would not transfer technology (including production techniques) considered unique to the arsenal concerned; and

"(3) the Secretary of Defense enters into an agreement with the country concerned described in subsection (c).

"(c) Coproduction Agreements.- An agreement under this subsection shall be in the form of a Government-to-Government Memorandum of Understanding and shall include provisions that -

"(1) prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement;

"(2) require that production by the participating foreign country of the defense item to which the technical data package or assistance relates be shared with the arsenal concerned;

"(3) subject to such exceptions as may be approved under subsection(d), prohibit transfer by the participating foreign country to a third party or country of --



"(A) any defense article, technical data package, technology, or assistance provided by the United States under the agreement; and

"(B) any defense article produced by the participating foreign country under the agreement; and

"(4) require the Secretary of Defense to monitor compliance with the agreement and the participating foreign country to report periodically to the Secretary of Defense concerning the agreement.

"(d) Transfers to Third Parties.--A transfer described in subsection (b)(3) may be made if--

"(1) the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program in which the United States and the participating foreign country were partner; or

"(2) the President--

"(A) complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. § 2753 (d)) with respect to such transfer; and

"(B) certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large caliber cannon.

"(e) Notice and Reports to Congress.--(1) The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this section.

"(2) The Secretary shall submit to congress a semiannual report on the operation of this section and of agreements entered into under this section.

"(f) Arsenal Defined.--In this section, the term 'arsenal' means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon."

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

"4542. Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception."

(c) Effective Date.-- Section 4542 of title, 10, United States Code, as added by subsection (b), shall apply with respect to funds appropriated for fiscal years after fiscal year 1986.

November 14, 1986: President Reagan signed Pub. L. No. 99-661, the FY87 DOD Authorization Act containing the following section;

**SEC. 1203 LIMITATION ON TRANSFER OF CERTAIN  
TECHNICAL DATA PACKAGES**

(a) Technical Data Packages for production of Large-Caliber Cannon.- (1) Chapter 433 of Title 10, United States Code, is amended by adding at the end the following new section:

Sec. 9036. (a) None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to a foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

(b) Technical Data Packages for Production of Large-Caliber Cannon.- (1) Chapter 433 of Title 10, United States Code, is amended by adding at the end the following new section:

"Sec. 4542. Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception

"(a) General Rule.--Funds appropriated to the Department of Defense may not be used-

"(1) to transfer to a foreign country a technical data package for a defense item being manufactured or developed in an arsenal; or

"(2) to assist a foreign country in producing such a defense item.

"(b) Exception.- The Secretary of the Army may use funds appropriated to the Department of Defense to transfer a technical data package, or to provide assistance, described in section (a) if -

"(1) the transfer of provision of assistance is to a friendly foreign country (as determined by the Secretary of Defense in consultation with the Secretary of State);

"(2) the Secretary of the Army determines that such action-

"(A) would have a clear benefit to the preservation of the production base for the production of cannon at the arsenal concerned; and

"(B) would not transfer technology (including production techniques) considered unique to the arsenal concerned; and

"(3) the Secretary of Defense enters into an agreement with the country concerned described in subsection (c).

"(c) Coproduction Agreements.-- An agreement under this subsection shall be in the form of a Government-to-Government Memorandum of Understanding and shall include provisions that -

"(1) prescribe the content of the technical data package or assistance to be transferred to the foreign country participating in the agreement;

"(2) require that production by the participating foreign country of the defense item to which the technical data package or assistance relates be shared with the arsenal concerned;

"(3) subject to such exceptions as may be approved under subsection(d), prohibit transfer by the participating foreign country to a third party or country of –

"(A) any defense article, technical data package, technology, or assistance provided by the United States under the agreement; and

"(B) any defense article produced by the participating foreign country under the agreement; and

"(4) require the Secretary of Defense to monitor compliance with the agreement and the participating foreign country to report periodically to the Secretary of Defense concerning the agreement.

"(d) Transfers to Third Parties.– A transfer described in subsection (b)(3) may be made if–

"(1) the defense article, technical data package, or technology to be transferred is a product of a cooperative research and development program in which the United States and the participating foreign country were partner; or

"(2) the President--

"(A) complies with all requirements of section 3(d) of the Arms Export Control Act (22 U.S.C. § 2753 (d)) with respect to such transfer; and

"(B) certifies to Congress, before the transfer, that the transfer would provide a clear benefit to the production base of the United States for large caliber cannon.

"(e) Notice and Reports to Congress.– (1) The Secretary of the Army shall submit to Congress a notice of each agreement entered into under this section.

"(2) The Secretary shall submit to congress a semiannual report on the operation of this section and of agreements entered into under this section.

"(f) Arsenal Defined.--In this section, the term 'arsenal' means a Government-owned, Government-operated defense plant that manufactures large-caliber cannon."

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

"4542. Technical data packages for large-caliber cannon: prohibition on transfers to foreign countries; exception."

(c) Effective Date.– Section 4542 of Title 10, United States Code, as added by subsection (b), shall apply with respect to funds appropriated for fiscal years after fiscal year 1986.

## **100th Congress**

December 22, 1987: President Reagan signed Pub. L. No. 100-202, the FY88 DOD Appropriations Act, containing the following section:

SEC. 8036. None of the funds in this Act may be used to transfer any article of military equipment or data related to the manufacture of such equipment to foreign country prior to the approval in writing of such transfer by the Secretary of the military service involved.

The same section contained in Pub. L. No. 100-202 is also contained in Pub. L. No. 100-463, the FY89 DOD Appropriations Act, section 8034, signed October 1, 1988.

### **102nd Congress**

Pub. L. No. 102-190, §1086

(a) EXTENSION OF EXCEPTION TO ALL FRIENDLY FOREIGN COUNTRIES. Subsection (b)(1) of section 4542 of title 10, United States Code, is amended by striking out "member nation" and all that follows through "major non-NATO ally" and inserting in lieu thereof "friendly foreign country".

(b) CROSS-REFERENCE CORRECTIONS. Such section is further amended

(1) in subsection (c)(3), by striking out "subsection (d)" and inserting in lieu thereof "subsection (f)"; and

(2) in subsection (f), by striking out "subsection (b)(3)" and inserting in lieu thereof "subsection (c)(3)".

### **COAL OR COKE** Legislative Background

December 21, 1982 : President Reagan signed Pub. L. No. 97-377, the FY83 DOD Appropriations Act, containing the following section:

Sec. 778. None of the funds available to the Department of Defense during the current fiscal year shall be used by the Secretary of a military department to purchase coal or coke from foreign nations for use at United States defense facilities in Europe when coal from the United States is available.

The same provisions in Pub. L. No. 97-377 has also been contained in every DOD Appropriations Act through FY89.

### **FLOATING STORAGE OF PETROLEUM** Legislative Background

**98th Congress**

August 22, 1984: President Reagan signed Pub. L. No. 98-396, the FY84 Second Supplemental appropriations Act, containing the following section:

**CHAPTER III  
DEPARTMENT OF DEFENSE - MILITARY**

**General Provisions**

None of the funds available to the Department of Defense may be used for the floating storage of petroleum product except in vessels of or belonging to the United States.

**101st Congress**

Pub. L. No. 101-511 - Nov. 5, 1990

Sec. 8020. None of the funds available to the Department of Defense may be used for the floating storage of petroleum or petroleum products except in vessels of or belonging to the United States.

The same provision has appeared in every DOD Appropriations Act from FY85 through FY92.

**CARBONYL IRON POWDERS  
Legislative Background**

**101st Congress**

Pub. L. No. 101-511, §835 Nov. 5, 1990

(a) LIMITATION. Section 2507 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(e) CARBONYL IRON POWDERS.(1) The Secretary of Defense shall require that only domestically manufactured carbonyl iron powders may be used in a system or item procured by or provided to the Department of Defense.

"(2) The Secretary of Defense may waive the restriction required by paragraph (1) if the Secretary certifies that such a restriction is not in the national interest.

"(3) After September 30, 1994, the Secretary may terminate the restriction required under paragraph (1) if the Secretary determines that continuing the restriction is not in the national interest.

"(4) In this subsection:

"(A) The term 'domestically manufactured' means manufactured in a facility located in the United States or Canada by an entity more than 50 percent of which is owned or controlled by citizens of the United States or Canada.

"(B) The term 'carbonyl iron powders' means powders or particles produced from the thermal decomposition of iron penta carbonyl."

(b) EFFECTIVE DATE. Section 2507(e) of title 10, United States Code, as added by subsection (a), shall apply with respect to systems or items procured by or provided to the Department of Defense after the date of the enactment of this Act.

## **102nd Congress**

Pub. L. No. 102-190, §835

Section 2507(e) of title 10, United States Code, is amended

(1) in paragraph (1), by striking out "The Secretary" and inserting in lieu thereof "Until January 1, 1993, the Secretary";

(2) by striking out paragraph (3);

(3) in paragraph (4)(A), by striking out "by an entity" and all that follows and inserting in lieu thereof a period; and

(4) by redesignating paragraph (4) as paragraph (3).

### **BALL BEARINGS AND ROLLER BEARINGS**

## **102nd Congress**

October 22, 1993: President George Bush signed Pub. L. No. 102-484, the Defense Authorization Act of 1993 with the following section.

Sec. 833. During fiscal years 1993, 1994, and 1995, the Secretary of Defense may not procure ball bearings or roller bearings other than in accordance with subpart 225.71 of part 225 of the Defense Federal Acquisition Regulation Supplement, as in effect on the date of the enactment of this Act.

### **RESTRICTION ON PURCHASE OF SONOBUOYS**

## **102nd Congress**

October 22, 1993: President George Bush signed Pub. L. No. 102-484, the Defense Authorization Act of 1993 with the following section

(a) In general.-- Section 2534 of title 10, United States Code, as redesignated by section 4202(a) and as amended by section 831, is further amended by adding at the end the following new subsection:  
"(f) SONOBUOYS - (1)The Secretary of Defense may not procure a sonobuoy manufactured in a foreign country if united States firms that manufacture sonobuoys are not permitted to compete on an equal basis with foreign manufacturing firms for the sale of sonobuoys in that foreign country.

"(2) The Secretary may waive the limitation in paragraph (1) with respect to a particular procurement of sonobuoys if the Secretary determines that such procurement is in the national security interests of the United States.

"(3) In this subsection, the term 'United States firm' has the meaning given such term in section 2532(d)(1) of this title."

(b) Effective Date.-- Subsection (f) if section 2534 of Title 10 United States Code, as added by subsection (a), shall apply with respect to solicitations for contracts issued after the expiration of the 120 day period beginning on the date of the enactment of this Act.

### C.3. Table of Congressionally Mandated Domestic Source Restrictions

CONGRESSIONALLY MANDATED DOMESTIC SOURCE RESTRICTIONS				
Restrictions/Preference Comments	Amendments/Changes	Nature of Restriction	Exemptions/Waivers	OSD Comments
Transportation by ocean Vessels: 33 Stat. 518 (Cargo Preference Act of 1904) (1904-Present) 10 USC 2631 (See also 46 USC App. 1241)	1961-Definition of privately owned U.S.-flag commercial vessels added.	Precludes transport of Army, Navy, Air Force, or merchant marine supplies by other than U.S. vessels	None stated. Presidential waiver based on unreasonable costs. (In 1985, Presidential waiver authority was delegated to the Secretary of Defense (SecDef).)	The restriction has not been evaluated to determine its impact on DoD and U.S. industry.
Food and clothing: (Berry Amendment) PL77-29 (1941) Fabrics PL82-488 (1952)  Specialty metals: PL92-570 (1972)  Hand/measuring tools: PL97-377 (1982-Present)	1952-Fabrics added. 1972-Specialty metals added. 1976-Stainless steel flatware added by PL94-212; threshold established at \$10,000 by PL94-419. 1977-Waiver authority added for specialty metals and chemical warfare protective clothing. 1982-Hand/measuring tools added. 1988-Threshold increased to \$25,000 by PL100-463.	Restricts DoD procurements to U.S. sources; \$25,000 threshold.	SecDef may waive on the basis of a determination that satisfactory quality and quantity are not available in the United States. Small purchases under \$25,000; Items for use outside the U.S.; domestic non-availability; specialty metals and chemical warfare protective clothing purchases when necessary to comply with international agreements and approved defense programs, or to promote RSI with NATO and Israel.	In cases where DoD demand is a very small part of industry shipments, broadly based restrictions do not protect either total U.S. industry or specific DoD items.
Construction of major components of the hull and super-structure of naval vessels; (Burns-Tollefson Amendment) PL88-446 (1964-Present)	1982-Waiver authority added by PL97-252. 1987-Revised by PL100-180 to include all DoD vessels, not just naval vessels. 1988-Coast Guard vessels added to restriction by PL100-448.	Restricts construction of vessels for any of the Armed Forces or Coast Guard to domestic shipyards.	None stated. President may authorize exceptions for national security purposes with notice to Congress.	Consideration has not been given to exempting non-critical vessels.
Carbonyl iron powders: 10 USC 2507(e) [Restriction expires after Jan. 1, 1993]	None.	Restricts DoD Procurement to U.S. sources.	SecDef may waive if the restriction is not in the national interest.	See DFARS 225.7014.
Ball bearing and roller bearings: PL102-484, § 832	None.	During FY93-95 SecDef must provide ball and roller bearings in accordance with DFARS SubPart 225.21	See DFARS exceptions for small purchase and commercial products.	No comment.
Sonobuoys: PL102-484, § 833 10 USC 2507(g)	None.	Restricts sonobuoy procurement from foreign countries which discriminate against U.S. sonobuoy manufacturers.	SecDef may waive if in national security interests.	No comment.



## CONGRESSIONALLY MANDATED DOMESTIC SOURCE RESTRICTIONS

Restrictions/Preference Comments	Amendments/Changes	Nature of Restriction	Exemptions/Waivers	OSD Comments
Multipassenger motor vehicles (buses); PL 90-500 (1968-Present) 10 USC 250(a)	None.	Prohibits purchasing, leasing, rental or other procurement of foreign buses.	None stated. (See comments.) SecDef is authorized by regulation exceptions to ensure purchases do not result in uneconomical procurement that adversely effect U.S. national interests.	The DFARS authorizes the head of the contracting activity (HCA) to make "exceptions" for urgent requirements for periods not to exceed time required for procurement or delivery of U.S. buses; when necessary to meet special but nonrecurring requirements; when foreign buses are available at no direct or indirect procurement cost to the United States.
R&D contracting: (Bayh Amendment) PL 92-570 (1972-Present)	None.	Prohibits contracting with foreign sources for R&D in connection with weapon systems and military equipment when a U.S. source is equally competent and can offer lower prices.	None Stated. No stated waiver authority.	When a U.S. and foreign source are considered equally competent the contracting officer must determine which source will provide required services at the lower estimated cost. This is tantamount to full and open competition.
Transportation by air carriers; PL 93-623 (1975-Present)	1980-Exemption provided under bilateral or multilateral air transport agreements with foreign governments if the agreement (1) is consistent with international aviation policy and (2) provides for exchange of similar rights and benefits.	Prohibits overseas transportation of Government-financed passengers and cargo by other than U.S. air carriers.	Restriction does not apply if U.S. carriers are not available. (Also see changes.)	The restriction has not been evaluated to determine its impact on DoD and U.S. industry.
Administrative motor vehicles; PL 97-114 (1981-1989)	1982-Added exemption for agreements with FRG, UK and Italy if vehicles procured are standardized or interoperable with those of host country. 1987-Added distinctions for vehicles used in U.S. and overseas and provided a termination date of 30 September 1989.	Restricts procurement of vehicles to U.S. and Canada unless contractor selected through competitive bidding; reciprocal access/opportunity to compete are required for vehicles used overseas.	1. Contracts less than \$50,000; 2. Contracts specifically authorized by law; 3. Vehicles used overseas for security, intelligence, and criminal investigative operations. SecDef and Service Secretaries may waive restriction if required vehicles are not available in sufficient quantity/satisfactory quality from the U.S. or Canada.	The restriction does not apply to prior contracts under agreements to support U.S. forces in Europe, but the SecDef may not enter into, renew, or extend such agreements during the restricted period unless the agreements include this restriction.

## CONGRESSIONALLY MANDATED DOMESTIC SOURCE RESTRICTIONS

Restrictions/Preference Comments	Amendments/Changes	Nature of Restriction	Exemptions/Waivers	OSD Comments
Aircraft ejection seats: PL 97-377 (1982-1989)	Original restriction suspended F/A-18 program unless U.S. seats were installed. In FY84, PL 98-212 substituted a reciprocity restriction applicable to all U.S. seat procurements.	Restricts DoD procurement to U.S. and foreign sources whose governments provide reciprocal market access to U.S. firms.	Restriction does not apply to foreign countries that permit U.S. firms access to their seat procurements. Since FY85, restriction applies only to ejection seats installed in U.S. produced aircraft. No stated waiver authority.	Original restriction was inspired by cost of UK seat for F/A-18 compared to U.S. candidate seat and concern about U.S. industry/jobs.
Large-caliber cannon production technology: (Stratton Amendment) PL97-114 PL99-661 (1982-Present) 10 USC 4542	1986-For fiscal year after FY86, exemptions were allowed (as stated) that were not included in the original restriction. 1990-transfers to "friendly foreign countries" permitted.	Precludes transfer to a foreign country of technical data for a defense item manufactured in a U.S. arsenal or assistance to a foreign country in producing such items.	Transfer to friendly countries permitted if the technology is not unique, if transfer preserves production base of the U.S. arsenal, and if SecDef enters into a coproduction MOU circumscribing third-country transfers. Any third-country transfers are subject to Presidential certification of compliance with the Arms Export Control Act and beneficial impact on U.S. production base for cannon. No stated waiver authority. Secretary of the Army determines exemptions on a case-by-case basis with strict requirements to report to the Congress.	The restriction is controversial because it affects international armaments cooperation programs.
Coal or coke: (for use at DoD facilities in Europe) PL97-377 (1982-Present)	None.	Prohibits purchases of coal from non-U.S. suppliers.	Restriction does not apply if U.S. coal or coke are not available. No stated waiver authority.	The restriction has caused concern in the U.S. about high overseas shipping costs and in foreign countries about U.S. "dirty coal."
Air Circuit Breakers: (for naval vessels) 10 USC 2507(f)	None.	50% components test for U.S. manufacture.	Exemption for spares and repair parts.	No comment.
Floating storage of petroleum: PL 98-396 (1984-Present)	None.	Restricts floating storage of petroleum except in U.S. vessels.	None stated. No stated waiver authority.	The restriction has not been evaluated to determine its impact on DoD and U.S. industry.

## CONGRESSIONALLY MANDATED DOMESTIC SOURCE RESTRICTIONS

Restrictions/Preference Comments	Amendments/Changes	Nature of Restriction	Exemptions/Waivers	OSD Comments
120mm mortars and 120mm mortar ammunition: PL99-190 (1985-Present)	None.	Restricts DoD procurement to U.S. sources.	Not applicable for mortars or ammunition required for testing and evaluation, type classification, or equipping the Army's Ninth Infantry Division (Motorized). No stated waiver authority.	The restriction duplicates the provisions of the Arsenal Act of 1950, as amended, which requires the Secretary of the Army to purchase supplies from U.S. arsenals.
RDT&E contracts for the SDI program: PL 100-180 (1985-Present)	None.	Restricts SDI RDT&E to U.S. sources.	Exempts foreign contracts performed in the U.S. and contracts for antiballistic missile systems, or contracts where foreign government/firm shares substantial costs. SecDef may suspend temporarily if he certifies to Congress that no U.S. firm can perform such RDT&E at equal or less cost.	DFARS permits head of contracting activity certification that RDT&E cannot be competitively performed by a U.S. firm at a price equal to or less than that of a foreign firm.
Repair and maintenance of naval vessels: PL99-591 (1986-Present) 10 USC 7309	1993-PL102-484, § 1012, provides that U.S. homeported vessels may not engage in foreign repairs during 15 months prior to return to U.S.	Prohibits overhaul, repair, and maintenance of U.S. homeported naval vessels in foreign-owned shipyards.	Waiver authority for voyage repairs and exemption for inflatable boats.	Other alternatives, including an industry action plan and incentives for modernization and restructuring have not been considered.
Machine tools: (Mattingly Amendment) PL 99-591 (1986-87) PL 100-202 (1987-88) PL 100-463 (1988-91)  (See also certain values and machine tools below).	1988-For FY89 (PL100-463), the restriction was expanded to include 24 machine tool FSCs.	Restricts DOD procurement of selected machine tools in 24 Federal Supply Classes (FSCs) to U.S. and Canadian manufacturers and applies to machine tools for use in DOD-owned or controlled facilities.	None stated. May be waived on case-by-case basis by Service Secretary if adequate domestic supply of machine tools is not available to meet DOD needs on a timely basis.	DOD's share of U.S. market is limited (about 10%). A "Domestic Action Plan" to revitalize U.S. machine tool industry, by direction of the President, has been implemented by the Department of Commerce with DOD input.
Anchor chain and mooring chain: PL101-511 (1987-Present) PL100-463 (for FY89)	PL100-202 restricted purchases to domestic (U.S. and Canadian) suppliers; OSD-imposed restriction DFARS Subpart 225.7.	Restricts DoD procurement to U.S. sources only.(See changes.)	None stated. Service Secretary responsible for procurement may waive if DoD requirements cannot be met on a timely basis from U.S. sources.	The restriction has caused a Canadian manufacturer to open a plant in the United States, and triggered protests by reciprocal MOU countries, since mooring chain is not a mobilization item.

## CONGRESSIONALLY MANDATED DOMESTIC SOURCE RESTRICTIONS

Restrictions/Preference Comments	Amendments/Changes	Nature of Restriction	Exemptions/Waivers	OSD Comments
Certain chemical weapons antidote: PL 100-180 (1987-Present) 10 USC 2597(b)	None.	Restricts DOD procurement of antidote in automatic injectors (and components) to U.S. companies that are DOD Industrial Preparedness Planning (IPP) producers (and other conditions).	None stated. May be waived if the SecDef through the Under Secretary of Defense for Acquisition, determines that an additional source is critical to U.S. national security.	To avoid the restriction, a Dutch firm has begun production of injectors and antidotes in the United States.
Supercomputers: PL 100-202 (1987)	FY88 funds may be obligated only for system competitively selected for sources. Installations at academic institutions.	Restricts Army procurement to U.S.	None stated. May be waived if SecDef certifies to Congress that foreign acquisition is necessary to acquire capability not available from U.S. manufacturers.	No comment.
PAN carbon fibers: PL 100-202 (1987-Present)	None.	Requires that 50% of DOD requirements be procured from domestic sources by 1992.	No stated exemptions or waiver authority.	Annual goals to achieve requirements are: 15% of total DOD requirements by 1988-89, 20% by 1990, 25% by 1991, and 50% by 1992.
Certain valves and machine tools: PL 100-456 (1988-Present) 10 USC 2507(d)	None.	Restricts DOD procurement of certain valves (2 FSCs) and machine tools (24 FSCs) to U.S. and Canadian manufacturers. Renewed effective through FY96.	None stated. May be waived by SecDef under any of six circumstances: unreasonable cost or delay; U.S. producers not jeopardized by foreign country and that country provides reciprocal access; satisfactory quality items are not available from U.S. or Canadian sources; restriction impedes cooperative programs with a foreign country and that country provides reciprocal access; procurement is less than \$25,000 and small purchase procedures are used; or restriction would result in a sole source for the item in the U.S. or Canada.	The FY89 DOD Appropriations Act (PL100-463) continued the machine tool restriction of the FY87 and FY88 appropriations acts (PL99-591 and PL 100-202), and expanded the restriction by adding three new FSC codes to correspond to the FY89 Authorization Act (PL 100-456), but did not alter the waiver authority. Therefore the two current statutory restrictions (PL 100-456 and PL 100-463) are not in full agreement.
Night vision image intensifier tubes and devices: PL 101-165	None.	Restricts DOD Procurement of 2nd and 3rd generation night vision devices unless manufactured in U.S. or Canada.	Exception where: (a) inadequate domestic supplies are available to meet DOD requirement on a timely basis; and (b) a certification to Congress of such an acquisition for national security purposes.	No comment.

## APPENDIX D

### STATUTORY EXEMPTIONS FOR COMMERCIAL ITEM CONTRACTS

In the early stages of drafting the proposed commercial item statute discussed in Chapter 8 of this Report, the Panel became aware of general complaints that existing statutes and regulations hindered the acquisition of commercial items because they imposed requirements on vendors of those items that were inconsistent with typical commercial practice and could not be implemented for Government contracts at all or only at a cost disproportionately greater than the profits to be made. In response to these complaints, the Panel's commercial items working group contacted DOD and industry for specific examples of statutes or regulations which should be modified to facilitate commercial item acquisition. Ultimately, the Panel obtained a number of lists of regulations, statutes, and Executive Orders, from which it created the omnibus table set out in this Appendix. Much of this material had been gathered by DOD and industry at the time of the Defense Management Review or at the time DFARS Part 211 was being debated. In general, the lists focused on regulations rather than statutes. Supporting materials related to each statute and Executive Order in the table -- including the statute itself, related regulations, and any recent commentary -- were collected and placed by the staff into a five-volume compendium.

The omnibus table was then distributed to each Working Group. The Working Group to which a statute had been assigned for general analysis was asked to review the statute with specific reference to whether or not the statute placed a burden on the acquisition of commercial items sufficient to justify an exemption for commercial item contracts. If a Working Group recommended an exemption, that recommendation was taken to the Panel as a whole for decision. A reduced table was prepared, which was reviewed during the final drafting of the Report for consistency with the Panel's other recommendations. The Panel's recommendations on exemptions were also circulated to interested parties for comment and were debated at a number of Panel meetings at which the public was invited to participate in the discussions. The table set out in Chapter 8 of the Report contains the Panel's final recommendations on statutory exemptions required to remove burdens to the acquisition of commercial items. So that others may make their own judgment about statutes for which an exemption may be required, the Panel is publishing in this Appendix the omnibus table from which its analysis began.

In addition, in the course of reviewing the omnibus table, it became apparent that a statute itself might not require an exemption, but that regulations based on the statute did not adequately account for commercial item contracts. Certain Executive Orders were also identified as imposing significant burdens. Because the mandate of the Panel is to review statutes, not regulations or Executive Orders, the final table in Chapter 8 is limited to *statutes* for which an exemption is required. So that the Panel's work will not be lost, the omnibus table set out below includes regulations and Executive Orders that were identified to the Panel as barriers to commercial item acquisitions. The Panel has taken no position on whether the regulations or Executive Orders should be revised.

**Omnibus Table Of Laws, Regulations And Executive Orders  
Identified As Potential Barriers To Commercial Item Acquisition**

Statute	Regulations Based on Statute	Description of Statutes and Regulations	Reasons for Commercial Item Exemption
10 U.S.C. § 2207	52.203-3	Prohibition on gratuities. Requires clause permitting termination of contract obtained through bribe, gift, or gratuity; provides for exemplary damages in an amount equal to 3 to 10 times actual damages.	None. Termination provision is similar to common law remedy; exemplary damages seem extreme, but punitive damages in similar amounts might be available at common law.
10 U.S.C. § 2301 note	252.219-7001	Small business set-asides.	None. Set-asides at the prime contractor level are not a problem for commercial contracting.
10 U.S.C. § 2306a	252.211-7010 -7011; 52.215-22; 52.215-23	Truth in Negotiation Act (TINA); Price reduction for defective cost and pricing data - contract modifications; audit of cost or pricing data.	Proposed 2xx5 provides an additional source of authority for pricing purchases of commercial items. Even as amended by the Panel, section 2306a is not adequate to provide a complete solution for commercial items. If the Panel's proposed section 2xx5 is not adopted, some other comprehensive amendment to §2306a as currently drafted will be required since there is little doubt that the provisions of §2306a create the single greatest impediment to the purchase of commercial items.
10 U.S.C. § 2307(e)	252.232-7006	Permits contracting officer to reduce or suspend advance and progress payments upon suspicion of fraud.	None.
10 U.S.C. § 2313	52.215-1; 52.215-2	Examination of books and records of contractor by DOD.	Proposed section 2xx5(d) is intended to provide the Government's exclusive audit right under a contract. See the discussion of section 2xx5(d) in Chapter 8 for the rationale.

10 U.S.C. § 2320-2321	252.211-7015 through -7017	Rights in technical data and computer software; validation of proprietary data restrictions.	The requirements of this statute are inconsistent with normal commercial practices on data rights. The Panel has proposed specific amendments to section 2320 to deal with this problem.
10 U.S.C. § 2323		Set-asides for section 1207 entities.	None. Set-asides at the prime contractor level do not create any problem.
10 U.S.C. § 2324	252.231-7001	Allowable costs under defense contracts; prescribes costs that may be incurred in overhead pools; Penalties for unallowable costs.	The Panel has recommended that the detailed provisions on cost allowability contained in this section be repealed since they have been implemented in regulation for many years. If this course is adopted, there is no need for an exemption. In addition, because the Panel has recommended that commercial items be purchased solely under fixed price contracts, this section will have little or no applicability to commercial items as proposed. Should flexibly priced contracts be used to purchase commercial items, commercial sellers might have to be exempted from the detailed cost principles contained in this section because it would require changes to a commercial seller's established accounting system.
10 U.S.C. § 2327	252.209-7001	Requires prime to make disclosure of ownership or control by a foreign government that supports terrorism; prohibits prime contracts with companies owned or controlled by such governments.	None. The Panel did, however, recommend repeal of this provision. See generally Chapter 7 of the Report.
10 U.S.C. § 2384(b)	Part 217.7300	Requires seller to mark supplies with name of seller, National Stock Number, and contractor part number; if seller is not the manufacturer, statute requires item to be marked with name of actual manufacturer. There is an exemption for commercial items purchased competitively or at an established catalog or market price.	Section 2384(b) contains an exemption for items sold under the market or catalog price exemption in TINA. This is not broad enough to accommodate all commercial items, so that an exemption in section 2384(b) is required to implement the Panel's commercial item approach and such an amendment has been recommended by the Panel. If 2384(b) is amended as proposed then there is no need for an exemption.
10 U.S.C. § 2393	52.209-5, -6	Prohibits prime contractor from using debarred or suspended subcontractors.	Prohibition on doing business with debarred or suspended prime contractors does not create a problem. A commercial seller will often have established its sources of supply and subcontractors prior to sale to the Government. Therefore, exemption from subcontractor approval provisions is required.

10 U.S.C. § 2397	252.203-7000	Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Reports intended to identify employees switching sides between DOD and major defense firms; useless paperwork burden in commercial context.
10 U.S.C. § 2397a	252.203-7000	Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Restrictions on job negotiations with defense contractors; duplication of other law and would unnecessarily burden commercial practices.
10 U.S.C. § 2397b	252.203-7000	Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Forbids plant representatives and senior defense negotiators from working for major defense firms; cost of screening for occasional retirees would far exceed return for commercial sellers.
10 U.S.C. § 2397c	252.203-7000	Prohibition on Compensation to Former DOD Employees.	The Panel has recommended repeal. Reports and penalties for the foregoing section 2397 restrictions would have no independent purpose.
10 U.S.C. § 2402	52.203-6	Prohibits primes from entering into any agreement with subcontractor which prevents subcontractor from selling any item or process directly to U.S.	The flow-down is not consistent with commercial practices, in which subcontractor system will be established before a contract is awarded. If U.S. needs direct purchase of subcontracted items, let it negotiate for them. The Panel's primary recommendation is that this statute be repealed.
10 U.S.C. § 2403	252.246-7001	Major Weapons Systems; Warranty of Data; requires primes to warrant that system will work as required and be free from defects.	Probably not relevant to commercial item contracts.
10 U.S.C. § 2406	252.215-7001	Contractor records; requires contractor to permit access to records relating to cost and pricing data under covered contracts, which are major weapons systems contracts where 10 U.S.C. § 2306a is applicable.	The Panel has proposed that section 2406 be repealed as part of consolidating all audit statutes into a revised version of 10 U.S.C. § 2313. If the Panel's proposal is not adopted then an exemption would be required for commercial items.
10 U.S.C. § 2408	252.203-7001	Prohibition of employment of persons convicted of fraud.	Commercial sellers should be able to utilize their established employees in performing Government contracts. There is no reason to burden commercial sellers with need to screen employees when they get an occasional Government contract.



10 U.S.C. § 2409a	252.203-7003	Prohibition against retaliation against employee who discloses U.S. information evidencing a violation of law; applies to contracts over \$500,000; commercial item contracts awarded without cost and pricing data are exempt.	None. The common law of most jurisdictions makes such retaliation a tort.
10 U.S.C. § 2410	252.233-7000	Certification of claims and requests for adjustments.	None.
10 U.S.C. § 2410b		Requires SECDEF to regulate contractor inventory accounting systems.	None. The statute itself creates no problems since it only authorizes regulations; regulations must deal sensibly with vendors of commercial items.
10 U.S.C. § 2416	252.205-7000	Requires contractors to provide DOD names of persons performing subcontracting, with address and phone number.	None.
10 U.S.C. § 2506	25.1 and 25.2	DOD variant of Buy American Act using component test to identify "American" product.	Application of current component-oriented Buy American Act restrictions to commercial buying may irrationally exclude items DOD wants to procure. If Buy American Act is modified as the Panel has recommended to include "substantial transformation" test, then should not be a problem. <i>See generally</i> Chapter 7 of the Report.
10 U.S.C. § 2507	DFARS Part 225	Section 2507 contains specific U.S. source restrictions applicable to the acquisition of identified products.	To the extent that this section requires sellers of commercial items to vary the source of components, it interferes with the ability of DOD to buy those items. The Panel has recommended a complete revision of this section, which would include a repeal of most restrictions currently contained in section 2507. However, an exemption is required from the remaining restrictions. <i>See generally</i> Chapter 7 of the Report.
10 U.S.C. § 2631	252.247-7022, -7023, -7024	Requires transportation of items by sea in U.S. flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts.
12 U.S.C. § 2779	252.225-7027	Limitation on fees and sales commissions in sales to foreign governments.	None.

15 U.S.C. § 637(d)	52.219-8; -9; -16; 19.705; 19.708; 226.7; 252.211 -7003; -7020	Subcontracting with small and small disadvantaged businesses; small business subcontracting plans; liquidated damages. Section 637(d) requires that small businesses be given "maximum practicable opportunity" to participate in Government contracts as subcontractors and mandates that the clause set out in section 637(d)(3) be placed in all contracts other than small purchase contracts, personal service contracts, and contracts to be performed outside of the U. S. Section 637(d)(4) mandates the negotiation of a small and minority subcontracting plan in all negotiated procurements in excess of \$500,000. Adherence to the plan is policed by liquidated damages. There is no exemption for contracts for commercial items.	There is no problem with the policy prescribed by section 637(d)(3). In negotiated procurements of commercial items, the subcontracting plan mandated by section 637(d)(4) may well conflict with established subcontracting arrangements of the commercial supplier and is obviously impractical when goods are sold to the Government from inventory. While section 647(d)(4)(B)(iv) limits use of the clause to situations "which offer subcontracting possibilities," comments received from industry indicate that this exception is not being properly applied to exempt even shipments of commercial items from inventory. For the same reason, commercial item contracts should be exempt from section 637(d)(5), which extends the requirements in section 637(d)(4) to contracts awarded through competition, and section 637(d)(6) which contains the clauses implementing section 637(d)(5). The Panel recommends, therefore, express exemptions to sections 637(d)(4), 637(d)(5), and 637(d)(6) for commercial item contracts.
15 U.S.C. § 644(d), (e), and (f)	52.220-3; -4	Preference for labor surplus area contracting. Requires U.S. to give priority to small and labor surplus area contractors. Subcontracting plan required for negotiated contracts over \$500,000.	The regulations create a subcontracting obligation that is inconsistent with normal commercial practices, in which subcontracts are arranged well in advance of shipments. The regulations do not contain any exemption for commercial items. While the regulations do not appear to be required by 15 U.S.C. § 644, the regulation writers seem to think otherwise. To avoid any doubt, therefore, an exemption is granted.
18 U.S.C. § 431	52.203-1	Prohibits contracts with Members of Congress. Any contract violating this clause is null and void.	None.
18 U.S.C. § 432	52.203-1	Punishes any official who knowingly enters into a U.S. contract with Members of Congress.	None.
18 U.S.C. § 1905	52.215-12	Prohibits U.S. from disclosing trade secret information.	None.

19 U.S.C. § 1202	52.225-10	Duty-Free entry.	The statute does not create a problem. The regulations are intended to ensure that the Government does not pay duties on goods being furnished under Government contracts. Since the essence of a commercial item is that it is built without regard to the ultimate purchaser, a vendor of a commercial item will not be able to determine when it is necessary to obtain a duty-free certificate. The regulations should be amended to exempt commercial items.
19 U.S.C. § 1309	52.225-10	Duty-Free entry.	The statute does not create a problem. Implementing regulations are intended to ensure that the Government does not pay duties on goods being furnished under Government contracts. Since the essence of a commercial item is that it is built without regard to the ultimate purchaser, a vendor of a commercial item will not be able to determine when it is necessary to obtain a duty-free certificate. The regulations should be amended to exempt commercial items.
19 U.S.C. § 2501 et seq.	252.225-7006, -7007	Trade Agreements Act of 1979; DOD Balance of Payment Program.	The Trade Agreements Act does not create burden for items substantially transformed in U.S. Balance of Payments program using component test for origin and should be revised to use substantial transformation test. <i>See generally</i> Chapter 7 of the Report.
19 U.S.C. § 2701 et seq.	52.225-10	President may grant duty-free entry status.	The statute does not create a problem. Implementing regulations are intended to ensure that the Government does not pay duties on goods being furnished under Government contracts. Since the essence of a commercial item is that it is built without regard to the ultimate purchaser, a vendor of a commercial item will not be able to determine when it is necessary to obtain a duty-free certificate. The regulations should be amended to exempt commercial items. <i>See generally</i> Chapter 7 of the Report.
22 U.S.C. § 2370	52.225-11	Restrictions on certain foreign purchases. Permits embargo of Cuba.	None.
22 U.S.C. § 2755	252.225-7028	Prohibits sales to countries that discriminate on the basis of race, religion, national origin, or sex.	None.

26 U.S.C. § 6050M	52.204-3	Taxpayer identification. Requires contractors to furnish Taxpayer Identification Number (TIN).	None. Might be a problem if regulations require reporting of TIN of subcontractors.
28 U.S.C. § 1498; 35 U.S.C. § 283	27.203; 52.227-1	Patent infringement; sole remedy against U.S.; injunctive relief prohibited.	The Panel has recommended modifying section 1498 to permit DOD to withhold consent to patent infringement in commercial item acquisitions, but also recommended that section 283 be modified to preclude injunctive relief against performance of a Government contract even if consent is withheld.
29 U.S.C. § 793	52.222-36	Rehabilitation Act of 1973; requires affirmative action for employment and advancement of handicapped individuals. Act applies to companies with 50 or more employees or annual U.S. contracts of \$50,000 or more.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts. Especially since discrimination against the handicapped is prohibited for all employers under Americans with Disabilities Act, there should be an exemption for commercial items.
31 U.S.C. § 203	52.232-23	Assignment of Claims Act; prohibits assignment of contract claims except to bona fide financial institution.	This should not be a problem, since most commercial financing could be arranged through an eligible financial institution with, if necessary, escrow arrangements.
31 U.S.C. § 1352 note	52.203-11; -12	Byrd Amendment.	Probably does not apply to commercial suppliers with respect to contracts for commercial supplies, but should be exempted for clarity.
31 U.S.C. § 3726	252.242-7002; 52.232-33	Submission of commercial freight bills for audit; Assignment of claims.	None. Applies only to transportation performed at Government expense by carriers or freight forwarders.
31 U.S.C. § 3901	252.211-7001	Prompt payment act.	None.
33 U.S.C. § 1368		Clean Water Act; prohibition against manufacturing products in debarred facility.	None. Facility is debarred only so long as it is out of compliance with Clean Water Act. Commercial vendors should know whether any of their facilities are debarred and whether commercial items were manufactured in those facilities.
35 U.S.C. §§ 181-88	52.227-10	Patent secrecy order.	Statute applies whether or not a Government contract is being performed; regulations tie to Government contracts. Since this applies regardless of contract, it can be applied to commercial items.

38 U.S.C. § 4212	52.222-35	Affirmative action for disabled and VietNam Era Veterans.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts. In addition, this statute has a sunset provision and will no longer be a requirement after 1994.
40 U.S.C. § 327-333	52.222-4	Contract work hours and safety standards act. Requires 40 hour work week and 1.5 time for overtime.	Should not be a problem because requirements are essentially the same as those under the Fair Labor Standards Act, which applies to all U.S. companies.
41 U.S.C. §§ 10a-10d	25.1 and 25.2	Buy-American Act.	Application of current component-oriented Buy American Act restrictions to commercial items may irrationally exclude items DOD wants to procure. If Executive Order implementing Buy American Act is modified to include "substantial transformation" test, or if Panel substitute is adopted, then should not be a problem. See extensive discussion in Chapter 7 of the Report.
41 U.S.C. § 22	52.203-1	Members of Congress are not to share in any Government contract.	None.
41 U.S.C. § 34-45	52.222-19	Walsh-Healey Public Contracts Act of 1936.	None. Panel recommends that this Act be repealed because it no longer serves a purpose.
41 U.S.C. §§ 51-58	52.203-7	Anti-Kickback Act; prohibits payments to any prime or any employee of the prime; from any subcontractor; violation voids contract.	While many companies may prohibit some forms of payments by subcontractors to employees, commercial practice typically permits some forms of gratuities (such as meals or entertainment) that will be prohibited by this law. Accordingly, it constitutes too much of a burden for commercial seller to "police" existing supplier networks to ensure compliance for occasional Government contracts.
41 U.S.C. § 405	52.204-4	Contractor Establishment Code.	None.

41 U.S.C. § 422	52.230-3; -4	Cost Accounting Standards (CAS); Cost Accounting Standards Board (CASB).	Statute establishes Cost Accounting Standards Board and provides broad authority to Board to promulgate regulations. 41 U.S.C. § 422(f)(2) exempts contracts and subcontracts based on established catalog or market prices (as defined in TINA) from CAS coverage. This exemption should be broadened to include commercial items as defined in proposed section 2302. In addition, section 422(k) should be changed to clarify that it has no application to contracts for commercial items even though such items may be made by a company that must comply with CAS because it furnishes CAS-covered items as well as commercial items. The Panel has recommended that the CASB make these modifications through its rule making function, since it has authority to create classes of exemptions. <i>See generally</i> Chapter 2, subchapter 2.4. If the CASB does not take such action, then an exemption would be required.
41 U.S.C. § 423	52.203-8; -9; -10	Procurement Integrity Act -- Requirement for certificate of procurement integrity.	The certification required by this section cannot be imposed without a major administrative burden of tracking all procurement integrity restrictions, which are totally inconsistent with commercial practices and should not apply. The Panel has recommended as its primary recommendation that this statute be repealed and replaced by totally new language and that its fundamental prohibition on the improper use of private information be incorporated in this section and in 18 U.S.C. § 207. If that proposal is adopted, there would be no need for an exemption from either the new section 423 or the proposed section 207.
41 U.S.C. § 601-13	52.233-1; -17	Disputes; interest.	None. The disputes procedure is not very different from commercial alternative dispute resolution clauses.

41 U.S.C. § 701	52.223-5; -6	Drug Free Workplace certifications. This section requires employers to establish drug-free awareness programs and to report any convictions by their employees for drug-related offenses.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts.
42 U.S.C. § 7606		Clean Air Act.	None. Facility is debarred only so long as it is out of compliance with Clean Air Act. Commercial vendors should know whether any of their facilities are debarred and whether commercial items were manufactured in those facilities.
46 U.S.C. App. 1241(b)	52.247-64	Preference for U.S. flag vessels; requires 50% or more of gross tonnage of materials and equipment procured under Government contracts be transported in U.S. flag vessels.	Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees and other commercial business procedures in performing Government contracts. <i>See generally</i> Chapter 7 of the Report.
49 U.S.C. § 1517	47.401; -405; 52.247-63(e) (flow-down)	Fly America Act.	None. Applies only to flights paid for by U.S., so no interference with ordinary transportation methods used by seller except for final transportation to Government.
50 U.S.C. App. 2061-2170	52.212-7; -8	Defense Production Act; Defense Priority Rating System; Exon-Florio Amendment.	The statute does not create a problem, but the flow-down requirements in the regulations may disrupt established subcontractor systems. The regulations should be modified to delete the flow-down requirement when commercial items are being acquired. In addition, 50 U.S.C. § 2071(b) states: "The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) such material is a scarce and critical material essential to the national defense . . ." This finding has not been made to support the regulations. <i>See generally</i> Chapter 7 of the Report.
EO 10865; EO 10909	52.204-2	Safeguarding of classified information.	None.
EO 11246	52.222-21; -22; -24, -28	Certification of non-segregated facilities; Previous contract compliance reports; Pre-Award on-site equal opportunity compliance review; Equal opportunity pre-award clearance of subcontracts.	None.

EO 11738	52.223-1	Clean Air and Water Certification.	None.
EO 11755	52.222-3	Convict labor.	None.
EO 11758	52.222-37	Employment reports on special disabled.	None.
EO 12138	252.211-7020; 52.219-13	Business type -- Commercial Items; utilization of women-owned small business.	None.



## APPENDIX E

### OTHER ACQUISITION STATUTES

#### E.1. Introduction

As indicated in the Approach section of the introduction, the Panel identified for review over 889 acquisition-related statutory provisions with a goal to minimize the possibility of missing any important statutory provisions. As a result of this thorough search, the Panel identified many statutory provisions that were only marginally related to the acquisition process. Subsequently, the Panel decided that action on these statutory provisions would not specifically promote the objectives Congress set forth in its tasking to the Panel. Typically, these provisions did not directly impact the buyer-seller relationship in the context of DOD procurement. Consequently, the number of statutory provisions the Panel reviewed in depth was less than the total number originally identified. Those statutory provisions considered outside the scope of the Panel's charter and not subjected to a detailed review are listed in this Appendix for information. They fell into two main categories: (1) Statutes Marginally Affecting The Buyer-Seller Relationship, and (2) Parallel Statutory Provisions.

#### E.2. Statutes Marginally Affecting The Buyer-Seller Relationship

The charter of the Panel under Pub. L. No. 101-510 directed that DOD acquisition laws be reviewed and recommendations be made to eliminate or amend any such laws that are adversely impacting the establishment and administration of effective and efficient buyer-seller relationships. In selecting the laws for review, the Panel determined that certain laws, originally selected for review, did not directly impact the buyer-seller relationship. Accordingly, the Panel decided not to review these laws in detail. Statutory provisions that fell into these categories included (a) those that dealt with the structure of DOD organizational components, (b) those that addressed acquisition corps issues, including training, (c) those that were related to commissary matters, and (d) statutes that involved non-appropriated activities. In addition, statutes that dealt with traditional supply type issues, such as cataloging, standardization, transportation, distribution, and storage also were not reviewed. These statutory provisions are listed below by their code citations and short titles for informational purposes only.

7 U.S.C. § 2131	Congressional statement of policy
10 U.S.C. § 131	Office of the Secretary of Defense

10 U.S.C. § 132	Deputy Secretary of Defense
10 U.S.C. § 133	Under Secretary of Defense for Acquisition
10 U.S.C. § 133a	Deputy Under Secretary of Defense for Acquisition
10 U.S.C. § 134	Under Secretary of Defense for Policy
10 U.S.C. § 135	Director of Defense Research and Engineering
10 U.S.C. § 136	Assistant Secretaries of Defense
10 U.S.C. § 137	Comptroller
10 U.S.C. § 138	Director of Operational Test and Evaluation
10 U.S.C. § 139	General Counsel
10 U.S.C. § 140	Inspector General
10 U.S.C. § 141	Assistant to the Secretary of Defense for Atomic Energy
10 U.S.C. § 1621	Definitions
10 U.S.C. § 1623	Education, training, and experience requirements: general and flag officers
10 U.S.C. § 1624	Training program: Quality assurance personnel
10 U.S.C. § 1701	Management policies
10 U.S.C. § 1702	Under Secretary of Defense for Acquisition: authorities and responsibilities
10 U.S.C. § 1703	Director of Acquisition Education, Training, and Career Development
10 U.S.C. § 1704	Service acquisition executives: authorities and responsibilities
10 U.S.C. § 1705	Directors of Acquisition Career Management in the military department
10 U.S.C. § 1706	Acquisition career program boards
10 U.S.C. § 1707	Personnel in the Office of the SECDEF and in the Defense Agencies
10 U.S.C. § 1721	Designation of acquisition positions
10 U.S.C. § 1722	Career development
10 U.S.C. § 1723	General education, training, and experience requirements
10 U.S.C. § 1724	Contracting positions: qualification requirements
10 U.S.C. § 1725	Office of Personnel Management approval
10 U.S.C. § 1731	Acquisition Corps: in general
10 U.S.C. § 1732	Selection criteria and procedures
10 U.S.C. § 1733	Critical acquisition positions
10 U.S.C. § 1734	Career development
10 U.S.C. § 1735	Education, training, and experience requirements for critical acquisition positions
10 U.S.C. § 1736	Applicability
10 U.S.C. § 1737	Definitions and general provisions
10 U.S.C. § 1741	Policies and programs: establishment and implementation
10 U.S.C. § 1742	Intern Program
10 U.S.C. § 1743	Cooperative education program
10 U.S.C. § 1744	Scholarship program
10 U.S.C. § 1745	Additional education and training programs available to acquisition personnel
10 U.S.C. § 1746	Defense acquisition university structure
10 U.S.C. § 1761	Management information system
10 U.S.C. § 1762	Report to Secretary of Defense
10 U.S.C. § 1763	Reassignment of authority

10 U.S.C. § 1764	Authority to establish different minimum experience requirements
10 U.S.C. § 2390	Prohibition on the sale of certain defense articles from the stocks of the Department of Defense
10 U.S.C. § 2391	Military base reuse studies and community planning assistance
10 U.S.C. § 2396	Advances for pmts for compliance with foreign laws, rent in foreign countries, tuition and pay for supplies of armed forces of friendly foreign countries
10 U.S.C. § 2451	Defense supply management
10 U.S.C. § 2452	Duties of Secretary of Defense
10 U.S.C. § 2452N	Duties of Secretary of Defense
10 U.S.C. § 2453	Supply catalog: distribution and use
10 U.S.C. § 2454	Supply catalog: new or obsolete items
10 U.S.C. § 2456	Coordination with General Services Administration
10 U.S.C. § 2458	Inventory management policies
10 U.S.C. § 2482	Commissary stores: private operation
10 U.S.C. § 2484	Commissary stores: expenses
10 U.S.C. § 2485	Donation of unmarketable food: Commissary stores and other activities
10 U.S.C. § 2486	Commissary stores: merchandise that may be sold; uniform surcharges & pricing
10 U.S.C. § 2487	Commissary stores: limitation on release of sales information
10 U.S.C. § 2488	Nonappropriated fund instrumentalities: purchase of alcoholic beverages
10 U.S.C. § 2489	Overseas package stores: treatment of United States wines
10 U.S.C. § 2631	Supplies: preference to United States vessels
10 U.S.C. § 4536	Equipment: post bakeries, schools, kitchens, and mess halls
10 U.S.C. § 7211	Attendance at meetings of technical, professional, or scientific organizations
10 U.S.C. § 7291	Classification
10 U.S.C. § 7291N	Depot level maintenance of ships home ported in Japan (Pub. L. No. 101-189, S.1614)
10 U.S.C. § 7297	Changing category or type: limitation
10 U.S.C. § 7523	Tolls and fares: payment or reimbursement
10 U.S.C. § 7524	Marine mammals: use for national defense purposes
10 U.S.C. § 9511	Definitions
10 U.S.C. § 9536	Equipment: bakeries, schools, kitchens, and mess halls
17 U.S.C. § 101	Subject matter & scope of copyright
17 U.S.C. § 102	Subject matter of copyright: In general
17 U.S.C. § 103	Subject matter of copyright: Compilations and derivative works
17 U.S.C. § 104	Subject matter of copyright; national origin
17 U.S.C. § 106	Exclusive rights in copyrighted works
17 U.S.C. § 107	Limitations on exclusive rights: fair use
17 U.S.C. § 108	Limitations on exclusive rights: Reproduction by libraries and archives
17 U.S.C. § 109	Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord
17 U.S.C. § 110	Limitations on exclusive rights: Exemption of certain performances and displays

17 U.S.C. § 111	Limitations on exclusive rights: Secondary transmissions
17 U.S.C. § 112	Limitations on exclusive rights: Ephemeral recordings
17 U.S.C. § 113	Scope of exclusive rights in pictorial, graphic, and sculptural works
17 U.S.C. § 114	Scope of exclusive rights in sound recordings
17 U.S.C. § 115	Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords
17 U.S.C. § 116	Scope of exclusive rights in nondramatic musical works: Compulsory license for public performances by means of coin-operated phonorecords players
17 U.S.C. § 116A	Negotiated licenses for public performances by means of coin-operated phonorecord players
17 U.S.C. § 117	Scope of exclusive rights: Use in conjunction with computers and similar information systems
17 U.S.C. § 118	Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting
17 U.S.C. § 119	Limitations on exclusive rights: Secondary transmissions of superstations and network stations for private home viewing
17 U.S.C. § 201	Ownership of copyright
17 U.S.C. § 202	Ownership of copyright as distinct from ownership of material object
17 U.S.C. § 203	Termination of transfers and licenses granted by the author
17 U.S.C. § 204	Execution of transfers of copyright ownership
17 U.S.C. § 205	Recordation of transfers and other documents
17 U.S.C. § 301	Preemption with respect to other laws
17 U.S.C. § 302	Duration of copyright: Works created on or after January 1, 1978
17 U.S.C. § 303	Duration of copyright: Works created but not published or copyrighted before January 1, 1978
17 U.S.C. § 304	Duration of copyright: Subsisting copyrights
17 U.S.C. § 305	Duration of copyright: Terminal date
17 U.S.C. § 401	Notice of copyright: Visually perceptible copies
17 U.S.C. § 402	Notice of copyright: Phonorecords of sound recordings
17 U.S.C. § 403	Notice of copyright: Publications incorporating United States Government works
17 U.S.C. § 404	Notice of copyright: Contributions to collective works
17 U.S.C. § 405	Notice of copyright: Omission of notice on certain copies and phonorecords
17 U.S.C. § 406	Notice of copyright: Error in name or date on certain copies and phonorecords
17 U.S.C. § 407	Deposit of copies or phonorecords for Library of Congress
17 U.S.C. § 408	Copyright registration in general
17 U.S.C. § 409	Application for copyright registration
17 U.S.C. § 410	Registration of claim and issuance of certificate
17 U.S.C. § 411	Registration and infringement actions
17 U.S.C. § 412	Registration as prerequisite to certain remedies for infringement
17 U.S.C. § 501	Infringement of copyright
17 U.S.C. § 502	Remedies for infringement: Injunctions

17 U.S.C. § 503	Remedies for infringement: Impounding and disposition of infringing articles
17 U.S.C. § 504	Remedies for infringement: Damage and profits
17 U.S.C. § 505	Remedies for infringement: Costs and attorney's fees
17 U.S.C. § 506	Criminal offenses
17 U.S.C. § 507	Limitations on actions
17 U.S.C. § 508	Notification of filing and determination of actions
17 U.S.C. § 509	Seizure and forfeiture
17 U.S.C. § 510	Remedies for alteration of programming by cable systems
17 U.S.C. § 601	Manufacture, importation, and public distribution of certain copies
17 U.S.C. § 602	Infringing importation of copies or photorecords
17 U.S.C. § 603	Importation prohibitions: Enforcement and disposition of excluded articles
17 U.S.C. § 701	The Copyright Office: General responsibilities and organization
17 U.S.C. § 702	Copyright Office regulations
17 U.S.C. § 703	Effective date of actions in Copyright Office
17 U.S.C. § 704	Retention and disposition of articles deposited in Copyright Office
17 U.S.C. § 705	Copyright Office records: Preparation, maintenance, public inspection, and searching
17 U.S.C. § 706	Copies of Copyright Office records
17 U.S.C. § 707	Copyright Office forms and publications
17 U.S.C. § 708	Copyright Office fees
17 U.S.C. § 709	Delay in delivery caused by disruption of postal or other services
17 U.S.C. § 710	Reproductions for use of the blind and physically handicapped: Voluntary licensing forms and procedures
17 U.S.C. § 801	Copyright Royalty Tribunal: establishment and purpose
17 U.S.C. § 802	Membership of the Tribunal
17 U.S.C. § 803	Procedures of the Tribunal
17 U.S.C. § 804	Institution and conclusion of proceedings
17 U.S.C. § 805	Staff of the Tribunal
17 U.S.C. § 806	Administrative support of the Tribunal
17 U.S.C. § 807	Deduction of costs of proceedings
17 U.S.C. § 808	Reports
17 U.S.C. § 809	Effective date of final determinations
17 U.S.C. § 810	Judicial review
17 U.S.C. § 901	Definitions
17 U.S.C. § 902	Subject matter of protection
17 U.S.C. § 903	Ownership, transfer, licensing and recordation
17 U.S.C. § 904	Duration of protection
17 U.S.C. § 905	Exclusive rights in mask works
17 U.S.C. § 906	Limitations on exclusive rights: reverse engineering; first sale
17 U.S.C. § 907	Limitations on exclusive rights: innocent infringement
17 U.S.C. § 908	Registration of claims of protection
17 U.S.C. § 909	Mask work notice
17 U.S.C. § 910	Enforcement of exclusive rights
17 U.S.C. § 911	Civil actions

17 U.S.C. § 912	Relation to other laws
17 U.S.C. § 913	Transitional provisions
17 U.S.C. § 914	International transitional provisions
18 U.S.C. § 2	Principals
18 U.S.C. § 3	Accessory after the fact
18 U.S.C. § 4	Misprision of felony
18 U.S.C. § 792	Harboring or concealing persons
18 U.S.C. § 793	Gathering, transmitting, or losing defense information
18 U.S.C. § 798	Disclosure of classified information
19 U.S.C. § 1202	Revised tariff schedules
19 U.S.C. § 1309	Supplies for certain vessels and aircraft
19 U.S.C. § 2112	Nontariff
19 U.S.C. § 2242	Identification of countries that deny adequate protection, or market access for intellectual property rights
22 U.S.C. § 2354	Procurement
26 U.S.C. § 6050A	Reporting requirements of certain fishing boat operators
28 U.S.C. § 1499	Liquidated damages withheld Contract Work Hours and Safety Standards Act
28 U.S.C. § 2671	Definitions
28 U.S.C. § 2672	Administrative adjustment of claims
28 U.S.C. § 2673	Reports to Congress
28 U.S.C. § 2674	Liability of United States
28 U.S.C. § 2675	Disposition by federal agency as prerequisite; evidence
28 U.S.C. § 2676	Judgment as bar
28 U.S.C. § 2677	Compromise
28 U.S.C. § 2678	Attorney fees; penalty
28 U.S.C. § 2679	Exclusiveness of remedy
28 U.S.C. § 2680	Exceptions
31 U.S.C. § 101	Agency
31 U.S.C. § 102	Executive agency
31 U.S.C. § 103	United States
31 U.S.C. § 1342	Limitation on voluntary services
31 U.S.C. § 1350	Criminal penalty
31 U.S.C. § 1351	Reports on violations
31 U.S.C. § 3501	Definition
31 U.S.C. § 3726	Payment for transportation
33 U.S.C. § 410	Exception to floating loose timber, sack rafts, etc.; violations of regulations; penalty
33 U.S.C. § 901	Short title
33 U.S.C. § 941	Safety rules and regulations
40 U.S.C. § 327	"Secretary" defined
40 U.S.C. § 328	Forty hour week; overtime compensation; contractual conditions; liability of employees for violation; withholding funds to satisfy liabilities of employers
40 U.S.C. § 329	Contracts subject to this subchapter; workers covered; exceptions

40 U.S.C. § 330	Report of violations & withholding of funds for unpaid wages & liquidated damages
40 U.S.C. § 331	Limitations, variations, tolerances, and exemptions
40 U.S.C. § 332	Violations; penalties
40 U.S.C. § 333	Health and safety standards in building trades and construction industry
40 U.S.C. § 474, 481, and 487	Federal Property and Administrative Services Act of 1949
40 U.S.C. § 471	Congressional declaration of policy
40 U.S.C. § 751	General services administration
40 U.S.C. § 757	Information Technology Fund
41 U.S.C. § 5	Advertisements for proposals and contracts for supplies or services for Government departments; application to Government sales and contracts to sell and to Government corporations
41 U.S.C. § 5a	Definitions
41 U.S.C. § 13	Contracts limited to one year
41 U.S.C. § 14	Restriction on purchases of land
41 U.S.C. § 20a	Exemption of contracts concerning national-forest lands
41 U.S.C. § 20b	Exemption of leases, contracts, etc., concerning use of lands or waters under jurisdiction of Department of Interior
41 U.S.C. § 259	Definitions
41 U.S.C. § 260	Laws not applicable to contracts
41 U.S.C. § 402	Congressional findings and purpose
41 U.S.C. § 404	Establishment of Office of Federal Procurement Policy; appointment of administrator
41 U.S.C. § 414a	Personnel evaluation
41 U.S.C. § 424	Advocate for the acquisition of commercial products
42 U.S.C. § 1651	Compensation authorized
42 U.S.C. § 2000d	Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on grounds of race, color, national origin
42 U.S.C. § 2457	Property rights in inventions
42 U.S.C. § 5908	Patents and inventions
42 U.S.C. § 6686	Critical Technologies Institute
42 U.S.C. § 7401	Congressional finding and declaration of purpose
44 U.S.C. § 3901	Purpose and establishment of the Office of Inspector General
44 U.S.C. § 3902	Appointment of IG; supervision; removal
44 U.S.C. § 3903	Duties, responsibilities, authority and reports
47 U.S.C. § 305	Government owned stations
49 U.S.C. § 10701a	Standards for rates for rail carriers
49 U.S.C. § 10702	Authority for carriers to establish rates, classifications, rules, and practices
49 U.S.C. § 10721	Government traffic
49 U.S.C. § 10921	Requirement for certificate, permit or licenses
49 U.S.C. § 11707	Liability of common carriers under receipts and bill of lading
50 U.S.C. § 1	Trading with the Enemy Act of 1917 (Creation, purpose and composition council)

Pub. L. No. 98-525 § 1252 Plans for management of technical data and competition improvements  
 Pub. L. No. 99-348 § 501 Military Retirement Reform Act of 1986 Creates USD(A)  
 Pub. L. No. 99-433 Goldwater-Nichols Department of Defense Reorganization Act of 1986  
 Pub. L. No. 99-440 Restrictions on foreign purchases  
 Pub. L. No. 99-145 IXA Defense Acquisition Improvement Act  
 Pub. L. No. 100-843 Contracting goal for minorities in printing  
 Pub. L. No. 100-463 Department of Defense Appropriations Act, 1989  
 Pub. L. No. 100-526 § 8125 Defense Authorization Amendments and Base Closure and Realignment Act  
 Pub. L. No. 101-510 § 9087 Toshiba Corporation  
 Pub. L. No. 101-189 § 842 Defense Industrial Information & Critical Industries Planning  
 Pub. L. No. 101-189 § 851 Authority to Contract with Universe Press.  
 Pub. L. No. 101-189 § 1614 Depot Level Maintenance of Ships Homeported in Japan  
 Pub. L. No. 101-510 § 800 Advisory Panel on Streamlining and Codifying Acquisition Law  
 Pub. L. No. 101-510 § 822 Critical Technologies Institute  
 Pub. L. No. 101-510 § 922 Authorization of Pilot Program for Depot Maintenance Competition  
 Pub. L. No. 101-510 § 1121 Procurement Flexibility for Small Purchase  
 Pub. L. No. 101-511 § 8001 Publicity  
 Pub. L. No. 101-511 § 8006 Exclusions of certain materials  
 Pub. L. No. 101-511 § 8014 Dollar limitations  
 Pub. L. No. 101-511 § 8017 Influencing Congressional matters  
 Pub. L. No. 101-511 § 8039 Monetary limitations on passenger vehicles  
 Pub. L. No. 101-511 § 8087 Cost studies



### E.3 Parallel Statutory Provisions

The chart below lists the statutory provisions in Title 41 that have a parallel reference in Title 10. The Panel did not review these Title 41 statutory provisions but did recommend certain changes to their parallel statutes in Title 10. Congress originally structured these statutory provisions in Title 41 and Title 10 to create parallelism in civilian agency and DOD procurement. The Panel did not make any decisions on the merits of maintaining parallelism. The Title 41 statutory provisions are listed below for information purposes. It is suggested that the Congressional committees responsible for the oversight of federal procurement government wide should review these Title 41 statutory provisions and determine if similar changes to those recommended in Title 10 should also be made in Title 41.

<u>Title 41</u>	<u>Parallel statute in Title 10</u>
41 U.S.C. § 251	10 U.S.C. § 2301
41 U.S.C. § 252a	10 U.S.C. § 2303(a)
41 U.S.C. § 253	10 U.S.C. § 2304
41 U.S.C. § 253a	10 U.S.C. § 2305(a)
41 U.S.C. § 253b	10 U.S.C. § 2305(b)
41 U.S.C. § 253c	10 U.S.C. § 2319
41 U.S.C. § 253d	10 U.S.C. § 2321
41 U.S.C. § 253e	10 U.S.C. § 2301(a)(4)
41 U.S.C. § 253f	10 U.S.C. § 2384(a)
41 U.S.C. § 253g	10 U.S.C. § 2402
41 U.S.C. § 254	10 U.S.C. §§ 2306, 2306(a), 2313
41 U.S.C. § 255	10 U.S.C. § 2307
41 U.S.C. § 256	10 U.S.C. § 2324
41 U.S.C. § 257	10 U.S.C. § 2310
41 U.S.C. § 418a	10 U.S.C. §§ 2320, 2321

## APPENDIX F

### ADVISORY PANEL SUPPORT STAFF

In addition to the Advisory Panel and the task force members, many other people contributed significantly to this report. The Advisory Panel received outstanding support from the following individuals who worked for or with the Advisory Panel members:

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