Procurement Bill Simplifies Buying

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Document Outline

In a rare display of bipartisanship, the Senate on Sept. 22 cleared legislation to streamline federal purchasing, with the aim of speeding the acquisition process and saving the government money.

The bill, which President Clinton signed Oct. 13 (S 1587 — PL 103–355), was a key element in the administration's “reinventing government” initiative spearheaded by Vice President Al Gore.

The measure encouraged federal agencies to buy more goods off the shelf in routine commercial transactions, rather than conducting elaborate negotiations to secure items designed to meet unique government specifications.

Boxscore

Federal Procurement Overhaul — S1587 (HR 2238). The bill streamlined federal purchasing and encouraged agencies to buy more items commercially.

Reports: H Rept 103–545, Parts 1 and 2; S Repts 103–258, 103–259; conference report H Rept 103–712.

KEY ACTION

June 8 — Senate passed S 1587 by voice vote.

June 27 — House passed S 1587 by voice vote after substituting revised text of HR 2238.

Aug. 23 — Senate adopted the conference report by voice vote.

Sept. 20 — House adopted conference report, 425–0, with technical changes.

Sept. 22 — Senate cleared bill by voice vote.

Oct. 13 — President signed the bill — PL 103–355.

It also exempted commercial purchases and the purchase of most goods and services costing less than $100,000 from many of the complex procedural requirements that typically delayed and boosted the price of

federal purchases. Some of those rules had been designed to head off waste, fraud and abuse; others were intended to promote social policies, such as the development of small and minority-owned companies.

The core argument for revising acquisition laws was that the cumulative impact of these requirements made the purchasing process unduly rigid, complex, expensive and slow. But the large number of interests with a stake in the existing system made the effort to simplify it a complex one.

The final version of S 1587 was the upshot of four years of work, with nearly half that time focused on bipartisan negotiations among members and staff of the government operations, Armed Services and Small Business committees of both chambers.

Ultimately, the legislative effort succeeded because some of the most contentious proposals were dropped. For instance, contrary to the recommendations of both a 1990 Pentagon advisory panel and Gore's proposal for streamlining government, the bill did not exempt contracts worth less than $100,000 from legislation that required payment of “locally prevailing wages” on federally funded projects. The Davis-Bacon Act of 1931 applied that rule to construction projects worth at least $2,000. The Service Contract Act of 1965 applied it to contracts for maintenance and other blue-collar services worth at least $2,500.

Republicans had long contended that the practical effect of these laws was to inflate wages. But organized labor defended them zealously, and after besting the unions in late 1993 in the fight for the North American Free Trade Agreement, the administration backed away from challenging Davis-Bacon. *(NAFTA, 1993 Almanac, p. 171)*

Similarly, liberals opposed to foreign arms sales quashed the Pentagon panel's recommendation to make U.S.-built weapons more attractive to foreign governments by repealing a law that required a surcharge on overseas arms sales to recoup part of the cost of developing the weapons.

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Background

The drive to streamline government purchasing got rolling in earnest in 1990, when Congress included in the annual defense authorization bill a provision sponsored by Sen. Jeff Bingaman, D-N.M. requiring the Pentagon to set up a blueribbon panel to recommend changes in existing procurement laws. Named for the section of legislation that established it, the so-called Section 800 panel issued an 1,800-page report in January 1993 that recommended amending or repealing nearly 300 laws. The report called for greater reliance on commercial products and simplified contracting methods for small and commercial purchases. *(1990 Almanac, p. 671)*

Those themes were echoed in the report issued in September 1993 by Gore's reinventing government task force. They also became the core elements of the agenda pursued by the House and Senate committees that began working on S 1587 and various counterpart bills in late 1993. *(1993 Almanac, p. 191)*

In addition to the high visibility that Clinton and Gore gave the issue, Defense Secretary William J. Perry, whose agency accounted for three-quarters of the federal government's $200 billion annual procurement budget, made procurement streamlining one of his top priorities. He maintained that a revamped purchasing system would give the Pentagon easier access to cutting-edge technology being developed in the marketplace. And he warned that projected Pentagon budgets would not cover the significant increase in weapons

procurement slated to begin in fiscal 1997 unless the department used more businesslike acquisition methods and financial management systems to stretch its purchasing dollars.

For the most part, the changes embodied in S 1587 did not alter the tightly regulated process by which the Pentagon bought major weapons systems for which there were no commercial counterparts. But the changes were still expected to substantially reduce Pentagon overhead costs. That was because while the commercial purchases affected by the simplified procedures made up only a small fraction of the Pentagon's procurement budget, they accounted for the vast bulk of the contracts that were written.

In a related move, Perry signed a potentially far-reaching order June 29 intended to slash the number of purchases for which the Pentagon required the supplier to meet highly detailed and unique specifications ("mil-specs") regulating not only how an item performed but also how it was manufactured.

"Instead of relying on mil-specs to tell our contractors how to build something," Perry said, "we're going to tell them what we want it to do and then let them build it."

Perry predicted that the shift would save billions of dollars annually. And, as with the streamlined procurement rules, Perry argued that eliminating the unique military specifications would allow the Pentagon to do business with a broader range of high-tech companies. Many such companies were loath to deal with federal purchasing rules they deemed too rigid, too complicated and too expensive.

Perry conceded that unique specifications made sense when Pentagon-sponsored research was at the cutting edge of technology. "But in the fields of technology most important to the Defense Department today — semiconductors, computers, software, telecommunications — the technical leadership is in industry," Perry said.

1993 Action

Congress got a start on procurement reform legislation in 1993. The House Government Operations Committee gave voice vote approval July 28 to a bill (HR 2238 — H Rept 103–545, Part 1) sponsored by Chairman John Conyers Jr., D-Mich. In the Senate, Governmental Affairs Committee Chairman John Glenn, D-Ohio introduced a companion bill (S 1587), but the committee did not act on it in 1993. *(1993 Almanac, p. 197)*

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Senate Committee

In the Senate, two committees — Governmental Affairs and Armed Services — approved S 1587 (S Rept 103–258; S Rept 103–259) in quick succession April 26.

The Governmental Affairs Committee approved a substitute amendment for S 1587 by voice vote after agreeing — also by voice vote — to drop provisions that would have exempted some contracts from laws requiring federal officials to give preference to goods shipped in U.S.-registered ships. The Armed Services panel approved the amended bill, 22–0.

Both versions of the bill:

- Authorized simplified procedures and waived many procurement-related laws for any contract worth less than $100,000. Under existing law, the threshold for such simplified purchases was $25,000.
- Authorized simplified contracts and waived certain procurement laws for contracts to buy commercial items on commercial terms.
- Expanded the definition of a “commercial” item to include products on the cutting edge of technology that had not yet been widely sold but were intended for the commercial market.
- Allowed federal agencies to make purchases of less than $2.500 virtually without restriction.
- Required federal agencies to participate in a publicly accessible computer network over which contract bids could be solicited and received electronically. Clinton already had ordered all federal purchasing agencies to participate in such a computer network. Nearly 250 Pentagon offices, which accounted for 80 percent of small defense purchases, were slated to be on-line within two years.
- Eliminated in many cases the “flowdown” rule, by which federal legal obligations cascaded down through an entire network of subcontractors, encompassing even suppliers with only a minuscule share of the federal contract.

In language not contained in the companion bill that was moving through the House, the committee measure authorized the Pentagon to manage six acquisition projects as “pilot programs” to test more far-reaching waivers of procurement laws that otherwise would be left intact by the pending bills.

The Senate bill also included provisions to waive, in some cases, procurement laws intended to steer more federal contracts toward small and minority-owned businesses. Similar provisions were dropped from HR 2238 at the insistence of the House Small Business Committee.

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Senate Floor

The Senate passed S 1587 by voice vote June 8.

The bill had emerged from months of bipartisan deliberations among members and staff of the Governmental Affairs, Armed Services and Small Business committees. Stressing the need for greater efficiency in a time of budgetary constraint, Glenn said the bill reflected “a fine balance of the many interests affected by our procurement system.”

Although they did not try to alter S 1587 significantly on the Senate floor, advocates of the politically potent small business community emphasized that they would try to shift that, balance as the bill moved through the legislative process.” The laws that took 20 years to refine to help develop small and [minority-owned and women-owned] businesses need to be kept in place,” declared Small Business Committee member Carol Moseley-Braun, D-Ill. In assenting to Senate passage of the bill, she said, she was relying on assurances by Gore that “these concerns will be addressed in conference.”

The Senate adopted by voice vote an amendment by Paul Wellstone, D-Minn. exempting small businesses from a provision limiting the reimbursement that companies could demand from the government for legal fees in successful challenges to a contract award.

The bill allowed companies to be reimbursed for attorney's fees and fees for expert witnesses up to a maximum of $75 per hour. Noting that many experienced lawyers charged much higher fees, Wellstone and Small

Business Committee Chairman Dale Bumpers, D-Ark. insisted that the limit would unduly handicap a small company that felt it had been wronged but that had to hire outside legal talent.

Other amendments adopted by voice vote included the following:

- By Charles E. Grassley, R-Iowa requiring that payments to contractors under accelerated procedures be allowed only if the payments were specifically matched with obligations.
- By Grassley, requiring the General Accounting Office to review the independence of legal advice being provided to inspectors general.
- By Kent Conrad, D-N.D. barring contractors from being reimbursed by the government for entertainment costs.
- By Moseley-Braun, setting a non-binding goal of awarding 5 percent of the total value of federal contracts and subcontracts to companies owned by women.

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House Committee

The House Armed Services Committee approved a substitute version of the bill by voice vote April 21 (HR 2238 — H Rept 103–545, Part 2). The committee language was offered by Chairman Ronald V. Dellums, D-Calif. and ranking Republican Floyd D. Spence, S.C.

As approved by the committee, HR 2238:

- Authorized greatly simplified procedures and waived many procurement-related laws, for any contract costing less than $100,000. Unlike the Senate bill, the measure allowed the new threshold only if the agency participated in a new publicly accessible computer system.
- Authorized similarly simplified contracting procedures for contracts to buy commercial products and expanded the definition of a commercial item to include cutting-edge products that were not yet widely sold but were intended for the commercial market.
- Allowed federal agencies to make purchases of less than $2,500 virtually without restriction.
- Required federal agencies to participate within five years in a publicly accessible computer system through which most federal contracts would be advertised and awarded.
- Eliminated from some procurement laws the flowdown principle that stipulated that certain federal requirements be met not only by a prime contractor but also by subcontractors.

Federal Procurement Bill Provisions

Following are the major provisions of S 1587 as enacted:

Small and 'Micro' Purchases

The bill authorized greatly simplified contracts for any purchase that cost less than $100,000, waiving the paperwork and recordkeeping requirements of 15 existing laws.

Once an agency plugged into a publicly accessible Federal Acquisition Computer Network (designated FACNET) over which contract bids could be solicited and received electronically, it was exempt from the

existing requirement that any bid solicitation for a contract of more than $25,000 be delayed until 15 days after the agency had published a notice of the impending solicitation in the *Commerce Business Daily.*

The bill also increased from $25,000 to $50,000 the value below which contracts could be awarded by so-called simplified procedures, which involved less administrative work. The threshold for these simplified procedures was raised to $100,000 for any agency that plugged into FACNET. But that limit was to revert to $50,000 after five years unless, by then, the agency had implemented an expanded version of FACNET that allowed a broader range of transactions to be conducted electronically.

Agencies had even greater leeway to make so-called micro purchases that cost less than $2,500. Instead of filling out forms, for example, an office manger could send someone to the nearest discount store for office supplies.

Commercial Items

The bill simplified contracting for commercial purchases along the same lines as those for small purchases. It waived more than 30laws that required companies to provide the government with data they did not routinely collect for their internal purposes and that were not required by commercial customers.

In addition, the conference report expanded the definition of what constituted a “commercial” item that could be bought under the liberalized procedures. Existing law defined commercial items as products that were sold to the public in substantial quantities at established catalog or market prices. The bill expanded the definition to include: items that had evolved from existing commercial items because of advances in technology; items that had been modified in relatively minor ways to meet government requirements; and services that were sold competitively, in the commercial marketplace, at established catalog prices for specific tasks.

In the case of commercial purchases, federal procurement laws generally were to apply only to prime contractors – not to their subcontractors, the subcontractors’ subcontractors and so forth.

In an important boost to commercial purchases, the bill strengthened the exemption of all purchases of commercial items from the requirement that contractors provide federal officials with meticulously detailed cost or pricing data, and that they certify the data to be “current, accurate and complete.”

Imposed by the 1962 Truth in Negotiations Act, the data requirement was intended to protect the government against pricegouging when market forces could not be relied on to produce a “fair and reasonable” price – for instance, when a weapons contract was negotiated with a specific company without competition. But critics long had complained that overly cautious procurement bureaucrats routinely applied these rules to situations in which market competition clearly was strong enough to protect the government's interest in getting a fair price.

The bill also permanently increased to $500,000 the level above which the data requirement applied to contracts for all federal agencies.

Small-Business, Minority Issues

Contracts worth more than $2,500 but less than $100,000 were reserved for small businesses, provided that at least two qualified companies bid on the job. Under existing law, this “small-business reserve” applied only to contracts worth less than $25,000.

The bill set a non-binding goal for civilian agencies of awarding to minority-owned companies contracts worth 5 percent of the total value of contracts and subcontracts awarded. To achieve that goal, agencies could use several techniques, such as restricting competition for some contracts to minority-owned firms or awarding a contract to such a company provided that its price was no more than 10 percent higher than the lowest bid. In effect, this provision extended the Defense Department's “Section 1207” program to other agencies.

The bill also established a non-binding goal for all agencies of awarding 5 percent of the total value of contracts and subcontracts to companies owned by women. This provision did not authorize the kind of set-asides and price differentials authorized for minority-owned companies.

The bill made no change in the existing requirement that most companies receiving $500,000 or more as federal contractors or subcontractors prepare “subcontracting plans” stating what percentage of work the company intended to farm out to small and minority-owned businesses. That requirement continued to “flow down” to subcontractors.

Contract Award Protests

The bill changed both the process by which losing bidders were given the bad news and the protest process through which they could appeal. The goal was to reduce the number of protests that were filed by contractors simply to force the government to disgorge information about the basis on which the winning firm was selected. Under the conference report:

- Bidders had to be notified of the result of a competition within three days of a contract award.
- Unsuccessful bidders could request a briefing on the selection within three days of that notification.
- That briefing, to occur within five days of the request, was supposed to report, among other things, the purchasing agency's evaluation of significant weaknesses in that contractor's bid. However, the bill specifically prohibited the briefing from including a point-by-point comparison of that contractor's bid with any other bid.

The bill also authorized the government to pay the fees of consultants and expert witnesses engaged by companies that filed contract award protests. It limited their fees to no more than $150 an hour, but that limit did not apply to consultants or experts retained by small businesses.

Other Provisions

The bill authorized several procurements to be managed on an experimental basis as “pilot programs” to test acquisition management changes beyond the scope of those authorized by the bill.

It also included a provision stipulating that the Pentagon's director of operational testing had the right to communicate directly with the secretary of Defense, without securing the approval of any other official. This reflected the view of Sens. William V. Roth Jr., R-Del. and David Pryor, D-Ark. and others who had contended for years that tests to establish whether a weapon would work under realistic conditions had to be conducted by officials who were not under the thumb of procurement bureaucrats with a vested interest in giving each weapon a passing grade.

Complaints From Small Business

Early in the committee's deliberations on the bill, Dellums and Spence agreed to exclude any provisions touching the jurisdiction of any committee other than Armed Services. Governmental Affairs and Small Business. For example, the Armed Services bill made no change in the Davis-Bacon Act that set wage rates on federally funded construction programs.

But in an April 14 letter to Dellums, Small Business Committee Chairman John J. LaFalce, D-N.Y. insisted that the bill be referred to his panel because of several provisions relating to small business.

Armed Services member James Bilbray, D-Nev. who also chaired the Small Business subcommittee on procurement, had been deeply involved in crafting the bill, and he said his subcommittee backed the disputed provisions. But LaFalce, a combative advocate for small business, insisted that he had not been kept abreast of the discussions. “Bilbray had no right to waive the jurisdiction of the Small Business Committee,“ LaFalce said.

LaFalce was particularly critical of a proposed provision to exempt many contracts from the existing requirement that most companies that received $500,000 or more as a federal contractor or subcontractor had to prepare “subcontracting plans.“ Those plans outlined how the company intended to farm out some of the work from each contract to small and minority-owned businesses.

Steven Kelman, director of the White House's Office of Federal Procurement Policy, told the House Small Business panel April 28 that many commercial companies simply refused to do business with the federal government rather than have their established business relationships with suppliers disrupted. Eliminating the subcontracting plans for commercial subcontractors, Kelman said, would “increase competition, lower the price the government pays and just introduce a modicum of common sense.”

But Guale Duran-Owens of the Minority Business Enterprise Legal Defense and Education Fund contended that mandatory subcontracting plans “seem to be the only inlet into the federal marketplace that small and, especially, disadvantaged businesses have.” Duran-Owens found a ready listener in LaFalce. “The administration is off on the wrong track on this one,“ he told Kelman.

Armed Services also dropped from its version of the bill a provision that would have repealed a law requiring that the government add a surcharge to recoup the cost of developing weapons when it sold them abroad.

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House Floor

The House passed S 1587 by voice vote on June 27, after substituting a modified version of its own bill, which had been crafted in negotiations between Armed Services and the Government Operations Committee.

Floor action had been delayed partly because of turf conflicts among committees.

Government Operations and Armed Services were at loggerheads over which panel would have more representatives when House conferees met with their Senate counterparts to craft a final version of the bill. They agreed that they would finesse that dispute by appointing several members who sat on both committees.

Also, at the insistence of the Small Business Committee, the House bill included no provisions dealing with federal acquisition laws designed to foster the growth of small businesses.

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Final Action

By voice vote, the Senate approved the conference report on the procurement bill (H Rept 103–712) Aug. 23. The House agreed to the report, 425–0, on Sept. 20. After a round of technical changes, the Senate cleared the bill Sept. 22 by voice vote. *(Vote 425, p. 128-H)*

House and Senate conferees had reached a compromise that raised the threshold for the use of simplified procedures on federal contracts to $50,000 — $100,000 if the agency used a computerized network to solicit and receive the contract.

The bill left intact the existing requirement that most companies receiving $500,000 or more as federal contractors or subcontractors prepare subcontracting plans. In their report, the conferees observed that existing law allowed a commercial firm to meet the requirement for a subcontracting plan by filing one plan to cover all of its operations for a year, instead of filing a separate plan for each federal contract. They implied that such an umbrella plan gave commercial firms sufficient flexibility to avoid disrupting their established supplier relationships.

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