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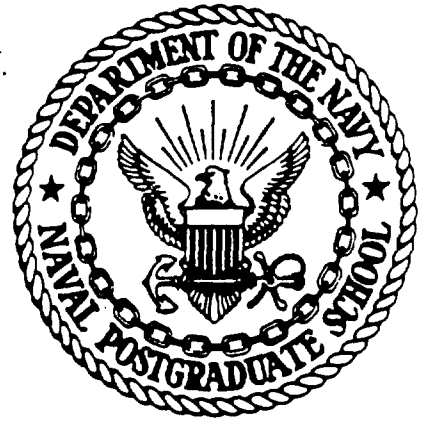

THESIS

THE COMPETITION IN CONTRACTING ACT OF 1984

by

Curtis Lee Coy

June 1986

Thesis Advisor: David V. Lamm

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SECURITY CLASSIFICATION OF THIS PAGE

AD-A171 394

REPORT DOCUMENTATION PAGE

1a. REPORT SECURITY CLASSIFICATION UNCLASSIFIED	1b. RESTRICTIVE MARKINGS
2a. SECURITY CLASSIFICATION AUTHORITY	3. DISTRIBUTION/AVAILABILITY OF REPORT Approved for public release; distribution is unlimited.
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE	
4 PERFORMING ORGANIZATION REPORT NUMBER(S)	5. MONITORING ORGANIZATION REPORT NUMBER(S)
6a. NAME OF PERFORMING ORGANIZATION Naval Postgraduate School 6b. OFFICE SYMBOL (If applicable) Code 54	7a. NAME OF MONITORING ORGANIZATION Naval Postgraduate School
6c. ADDRESS (City, State, and ZIP Code) Monterey, California 93943-5000	7b. ADDRESS (City, State, and ZIP Code) Monterey, California 93943-5000
8a. NAME OF FUNDING/SPONSORING ORGANIZATION 8b. OFFICE SYMBOL (If applicable)	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c. ADDRESS (City, State, and ZIP Code)	10. SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO. / TASK NO. / WORK UNIT ACCESSION NO.

11 TITLE (Include Security Classification)
THE COMPETITION IN CONTRACTING ACT OF 1984

12 PERSONAL AUTHOR(S)
COY, Curtis Lee

13a TYPE OF REPORT	13b. TIME COVERED	14. DATE OF REPORT (Year, Month, Day)	15. PAGE COUNT
Master's Thesis	FROM _____ TO _____	1986 June	123

16 SUPPLEMENTARY NOTATION

17 COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Competition, Competition in Contracting Act of 1984, procurement, procurement legislation, legislation, acquisition, acquisition process

19 ABSTRACT (Continue on reverse if necessary and identify by block number)

The research focused on the background, history and implementation of the Competition in Contracting Act of 1984. The research was conducted by a review of the current literature, field research and interviews with key individuals involved in the Federal acquisition process. The purpose of the research was to determine how and why the Competition in Contracting Act came about and the issues involved with its implementation. The major value of this paper is its contribution to the historical body of knowledge concerning the Competition in Contracting Act.

20 DISTRIBUTION/AVAILABILITY OF ABSTRACT	21. ABSTRACT SECURITY CLASSIFICATION
☒ UNCLASSIFIED/UNLIMITED ☐ SAME AS RPT ☐ DTIC USERS	UNCLASSIFIED
22a NAME OF RESPONSIBLE INDIVIDUAL David V. Lamm	22b TELEPHONE (Include Area Code) (408) 646-2775
	22c. OFFICE SYMBOL 54Lt

DD FORM 1473, 84 MAR — 83 APR edition may be used until exhausted. All other editions are obsolete.

SECURITY CLASSIFICATION OF THIS PAGE

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Approved for public release; distribution unlimited

The Competition in Contracting Act of 1984

by

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Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF SCIENCE IN MANAGEMENT

from the

NAVAL POSTGRADUATE SCHOOL
June 1986

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ABSTRACT

The research focused on the background, history and implementation of the Competition in Contracting Act of 1984. The research was conducted by a review of the current literature, field research and interviews with key individuals involved in the Federal acquisition process. The purpose of the research was to determine how and why the Competition in Contracting Act came about and the issues involved with its implementation. The major value of this paper is its contribution to the historical body of knowledge concerning the Competition in Contracting Act.

TABLE OF CONTENTS

DEDICATION

This thesis is dedicated to the following:

The dedicated and professional contract specialists at the Naval Ordnance Station, Indian Head, Maryland whose spirited devotion to the mission of NOS inspired me to continue in the proud profession of contracting. They gave so freely of their knowledge, experience and most importantly, friendship that I will always be in their debt. Specifically to the following individuals:

Mary Boswell, Contracts Branch Manager
Mary Ellen Hughes, Legal Counsel
Ernie Tunney, Contract Specialist
Dorothy Maddox, Contract Specialist
Kathy Keane, Contract Specialist
Mary Banks, Contract Specialist
Vi Garland, Contract Specialist
Bob Buffington, Contract Specialist
Ray Myers, Contract Specialist
Sue Pulliam, Contract Specialist
Dan Medlin, Contract Specialist
Mary Ann McBain, Contract Specialist
Dee Horne, Small Purchase Branch Manager
Sue Stennett, Contract Administrator (friend and former Secretary)

In addition, my work at the Naval Postgraduate School would not have been as fruitfull and fulfilling without the guidance and friendship shown by Dr. David V. Lamm. He was my inspiration during some very trying times. His encouragement, enthusiasum and professionalism will be the lasting memory of my stay in Monterey.

And finally, but certainly not least importantly to Lisa Lee Hegland. Her friendship and help during my time in Montery made me appreciate what life was all about. She made me smile again. Thank you, Lisa.

I. INTRODUCTION

A. GENERAL

> *Competition* is fundamental to our free enterpise system. . .I call upon each of you (Cabinet, Departments and Agencies) to assure that *competition* is the preferred method of procurement in your departments or agencies.[1]
>
> Ronald Reagan

> The Department of Defense components are to place maximum emphasis on *competitive* procurement. All personnel involved in the acquisition process from the first identification of the requirement through the execution of the purchase should recognize this responsibility. Contracts will be placed on other than a competitive basis only when clearly justified.[2]
>
> Casper Weinberger

> Increased competition in procurement of products and services is a major Navy objective for 1984.[3]
>
> John Lehman

Competition is often thought of as the backbone of the American free enterprise system. Until only recently, it was not necessarily the backbone of the defense procurement process. The figures of the Department of Defense competitive procurement in the 1970's and early 1980's indicated that, despite Federal procurement regulations that clearly delinated the preference for competition, the percentage of dollars spent non

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[1] "Competition in Federal Procurement," Presidential Memorandum, 11 August 1983.

[2] "Competitive Procurement," Secretary of Defense Memorandum, 9 September, 1982.

[3] "The Contracting Process," Senior Management Board Presentation by Supply Officer, Naval Ordnance Station, Indian Head, Maryland, 8 August 1984.

competitively hoovered around two thirds.[4] As a result of Congress' growing concern that Federal procurement dollars were not being spent wisely, the Competition in Contracting Act of 1984 was enacted and signed into law by President Reagan on July 18, 1984.[5] As part of Title VII of the Deficit Reduction Act, Public Law 98-369, the Competition in Contracting Act that went into effect on April 1, 1985 is perhaps the most pervasive change in Government contracting procedures and regulations since the Armed Forces Procurement Regulations of 1947.

It was because Congress considered competiton to be an imperative that must be imposed on Government procurement activities by force of law that the enactment of two other broad statutes also came about in 1984:

- The Defense Procurement Reform Act of 1984 (Title XII of Public Law 98-525, Department of Defense Authorization Act, 1985, signed October 19, 1984). Its primary provisions addressed reforms in the areas of standardized parts design in major weapon systems, replenishment parts, technical data, and sub-contracted parts and materials.
- The Small Business and Federal Procurement Competition Enhancement Act of 1984 (Public Law 98-577, signed October 30, 1984). The primary provisions of this law addresses standardized parts design in major systems, pricing, technical data, and qualifying contractors to bid on procurements.

As a result of these laws, specifically the Competition in Contracting Act, the statutory emphasis has now shifted from the method of procurement to the use of sources. No longer is how you procure the principal matter of the law; rather it is from whom you procure that is the foremost concern. Prior to the Competition in Contracting Act, the law stated preference for the "formal

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[4] "Competition in the Federal Procurement Process," Hearing before the Committee on Governmental Affairs, United States Senate, June 29, 1982, U.S. Government Printing Office, Washington, D.C., 1982.

[5] "The Competition in Contracting Act of 1984," Title VII of the Deficit Reduction Act, Public Law 98-369, 18 July 1984.

advertising" method over the "negotiated" method.[6] While the preference remains, the law now emphasizes competitive procurement from among multiple sources over procurement from single sources. As stated in a National Contracts Management Association (NCMA) training seminar for the Competition in Contracting Act, the key consideration confronting contracts managers today is not "Is there authority to negotiate?" but "Can this procurement be made on a competitive basis?".[7]

B. OBJECTIVES

This paper explores the various concepts of competition, its historical background, and the issues that brought about the Competition in Contracting Act of 1984. What was the impetus behind the necessity for Congress to legislate what was the written policy of the Federal Government and specifically the Department of Defense? The implementation of the Act within the Department of the Navy was also explored and finally, some inital conclusions regarding the impact of this significant legislation were drawn. This paper will not discuss those provisions of the act that deal with Automated Data Processing Equipment (ADPE), their implementation or the results of their enactment.

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[6] "Competition-The Law of the Land", National Contract Management Association, 1985. page 1.

[7] "Competition-The Law of the Land"

C. RESEARCH QUESTIONS

In pursuing the objectives of this study, the following research question was posed: What impact has the Competition in Contracting Act of 1984 had on the procurement process of the Department of the Navy?

In addressing this question and to explore the background behind the Act, the following subsidiary questions were established:

(1) What are the major provisions of the Competition in Contracting Act of 1984?

(2) How did the Competition in Contracting Act come about and why?

(3) What were the major issues surrounding the implementation of the Competition in Contracting Act?

(4) What were the major policy decisions that led to the implementation of the Competition in Contracting Act within the Navy and industry and what have been the implications of those policy decisions?

(5) How can the inital implementation of the Competion in Contracting Act be utilized to refine and improve competition?

D. RESEARCH METHODOLOGY

Information was obtained from a number of different sources. Preliminary research included a review of a wide range of contracting periodicals, magazines and newspapers. This literature was obtained from the Naval Postgraduate School Administrative Sciences Research Library; the Naval Postgraduate School Library; the Navy Liason Office in the United States House of Representatives; civilian contractors; the Naval Supply Systems Command; the Naval Sea Systems Command; the Naval Air Systems Command; the Naval Regional Contracting Center, Long Beach; the Naval Supply Center, Oakland; the Office of the Assistant Secretary of the Navy for

Acquisition and Logistics; the Defense Logistics Studies Information Exchange (DLSIE); various textbooks; and the staffs of various members of Congress. A more complete list of this material is contained in the bibliography.

The next phase of research was a fact finding trip to the Washington, D.C. area. It was during this phase of research that most of the substantive information concerning the historical background of the Competition in Contracting Act, its implementation and impact was found. Formal interviews were conducted with the following individuals:

Rear Admiral Stuart F. Platt, SC, USN, the Navy's Competition Advocate General

Captain William H. Hauenstein, SC, USN, Deputy Commander for Contracts, Naval Sea Systems Command

Captain Cecil A. Jarman, SC, USN, Deputy Commander for Contracts, Naval Supply Systems Command.

Mr. Jim Lewin, Chief Investigator, Committee on Government Operations, United States House of Representatives. Mr. Lewin works directly for Representative Brooks, the co-sponsor of the House version of the Competition in Contracting Act, H.R. 5184.

Ms. Colleen Preston, Counsel, Committee on Armed Services, United States House of Representatives.

Mr. Jeffrey A. Minsky, Investigator, Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, United States Senate. Mr. Minsky works directly for Senator Cohen, the co-sponsor of the Senate version of the Competition in Contracting Act, S. 338.

Mr. Harvey Gordon, Director, Government-Business Relations, Martin Marietta Aerospace.

Ms. Mary Boswell, Purchase Division Director, Supply Department, Naval Ordnance Station, Indian Head, Maryland.

Additional informal interviews while in Washington, D.C. were conducted at the Naval Air Systems Command, Office of Naval Acquisition Support

(ONAS), the United States Senate Small Business Committee, and the Navy Liason Office in the House of Representatives.

Finally, a number of informative telephone conversations were held with various local area contracting activities, civilian corporate managers, and Washington, D.C. Federal Government managers to insure accuracy of various details of the research. Included, but not limited to, were the Office of the Assistant Secretary of the Navy for Acquisition and Logistics; Naval Supply Center, Oakland; FMC Corporation; Naval Regional Contracting Center, Washington, D.C.; and Naval Air Station, Patuxent River.

E. ORGANIZATION OF THE RESEARCH

The research is divided into six chapters. In this Chapter, the objectives of the research have been set forth, the direction of the effort identified and methodologies for material and analysis presented.

Chapter II provides a theoretical review of the concept of competition and the various views on competition: economic, practical, business and political.

Chapter III is an historical review of competition in general and the specific background of how the Competition in Contracting Act came about as a legislative reform.

Chapter IV is the implementation of the Competition in Contracting Act. This chapter explores the issues and problems associated with the implementation of the Act and the realities of implementing a legislative concept.

Chapter V discussed the key issues that the Competition in Contracting Act and increased competition in general has brought about.

Chapter VI sets forth conclusions and recommendations regarding the Competition in Contracting Act in terms of what it has actually accomplished and the future issues/problems yet to be resolved.

Additionally, the appendices provide information that should be helpful to the reader in any further research in this area.

II. A THEORETICAL REVIEW OF THE CONCEPT OF COMPETITION

A. BACKGROUND

The concept of insuring fairness through free and open competition is not new. Legislative requirements to procure supplies and services through competitive formal advertising began in 1809[1] and were reemphasized in the Armed Services Procurement Act of 1947 and now the Competition in Contracting Act. Competitive bidding was and is believed to be an assured technique for wise expenditure of public funds. Competition is generally thought to lower prices, strengthen the defense industrial base, and increase public confidence in the integrity and fairness of our system of Government procurement.[2]

Webster defines competition as "the effort of two or more parties to secure the custom of a third party by the offer of the most favorable terms."[3] Modern price and economic theory classifies markets by degrees of competition. Product prices may depend in part on the amount of competition in the marketplace. The amount of competition in the marketplace depends on the type of market structure. A typical range of market structures is illustrated below:

--Perfect Competition

--Pure Competition

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[1] 2 U.S. Statute 536 (1809).

[2] Martin, Colonel Martin D., USAF, and Major Robert F. Golden, USAF. "Competition in Department of Defense Acquisition." Proceedings of the Ninth Annual DoD/FAI Acquisition Research Symposium. U.S. Naval Academy, Annapolis, Maryland, June 1980, page 12-15.

[3] Webster's New Collegiate Dictionary, G. & C. Merriam Company, Springfield, Massachusetts, 1977, page 230.

--Mononpolistic Competition

--Oligopoly

--Duopoly

--Monopoly[4]

In perfect competition, the market is characterized by homogeneous products, free mobility of resources, perfect market knowledge and many buyers and sellers with no single firm able to control price.[5] In this perfectly competitive market, price is set by the marketplace. In his book The Defense Industry, Jacques S. Gansler, a former Deputy Assistant Secretary of Defense for Material Acquisition, states that: "The free-market system is not operating to achieve economically efficient or strategically responsive behavior in the area frequently referred to as the 'military industrial complex'."[6] In a monopoly, the other end of the market structure spectrum, the market is characterized by one seller, a unique product, many barriers to market entry and exit, and imperfect market knowledge. In this structure, market results normally include higher profits and prices, less output, less employment, and lower wages as compared to a perfectly competitive market.[7] Within the Department of Defense, purchases may be made from firms in any of the market structures. While attempts have been made to classify the defense marketplace, the diversity of products makes a singular Department of Defense market structure virturally impossible. In a

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[4]Martin, page 13.

[5]Gould, J.P., and C.E. Ferguson. Microecomomic Theory. Homewood, Ill: Richard D. Irwin, Inc., 1980, page 241.

[6]Gansler, Jacques S. The Defense Industry. Cambridge, Massachusetts: The MIT Press, 1982, page1.

[7]Gansler, page 277.

paper by Captain Donald L. Brechtel, USAF, for the Federal Acquisition Research Symposium in 1983, the defense market structure was described as a bilateral monopoly. In a bilateral monopoly, there is one seller and one buyer. Prior to the recent Department of Defense competiton iniatives and the Competition in Contracting Act, the Department, in its need for highly complex and state-of-the-art weapons systems, is the single buyer. Due to the large investment required, the single source of supply is usually a large firm with the capability to develop products which meet the Department's highly specialized needs.[8]

In Purchasing and Materials Management, the authors take a much simplier view of the conditions of competition. They consider only three fundamental types of competition: pure, monopoly, and imperfect.[9] At the one end of the scale is pure (or perfect) competition. Under conditions of pure competition, the forces of supply and demand alone, not the individual actions of either buyers or sellers, determine prices. At the other end of the competitive scale is monopoly. Under conditions of monopoly, one seller controls the entire supply of a particular commodity, and thus is free to maximize his profits by regulating output and forcing a supply-demand relationship that is most favorable to him. The competitive area between the extremes of pure competition and monopoly is called imperfect competition. Imperfect competition takes two forms: 1) markets

[8]Brechtel, Donald L., Captain, U.S. Air Force, "Competitive Procurements: The Synergistic Linkage Among Government, Industry, and Academe", Proceedings of the 1983 Federal Acquisition Research Symposium, Williamsburg, Virginia, 7-9 December 1983, page 151.

[9]Dobler, Donald W., Lamar Lee, Jr. and David N. Burt, Purchasing and Materials Management, McGraw-Hill Book Company, New York, New York, 1984, page 149.

characterized by few sellers, or an oligopoly, and 2) those in which many sellers operate.[10]

B. DEPARTMENT OF DEFENSE POSITION ON COMPETITION

The position of the Department of Defense on competition, prior to the Competition in Contracting Act, is well documented. Relevant portions of public law, defense regulations, and policy directives are extracted below to demonstrate the clear mandate for competition:

> . . . Purchases of and contracts for property and services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if-(17 exceptions listed). . .In all negotiated procurements in excess of $10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered. . .[11]

> 1-300.1 Competition. All procurement, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.12

> Negotiated contracts shall be awarded on a competitive basis to the maximum practical extent.[13]

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[10]Dobler, page 149.

[11]The Armed Services Procurement Act of 1947.

[12]The Defense Acquisition Regulations, Part 1-300.1.

[13]The Federal Acquisition Regulations, prior to the Competition in Contracting Act.

> In order to ensure effective and efficient spending of public funds through fundamental reforms in government procurement, it is hereby ordered as follows: Section 1. To make procurement more effective in support of mission accomplishment, the heads of executive agencies engaged in the procurement of products and services from the private sector shall: (d) Establish criteria for enhancing effective competition and limiting noncompetitive actions. These criteria shall seek to improve competition by such actions as eliminating unnecessary government specifications and simplifying those that must retained, expanding the purchase of available commercial goods and services, and where practical, using functionally-oriented specifications or otherwise describing government needs so as to permit greater latitude for private sector response.[14]

> In a Navy case recently concluded after more than three years' duration United States District Judge Oberdorfer forcefully brought home a fundamental but often overlooked principle of defense procurement: that the requirement to seek competition is a continuing legal obligation, not just a platitude periodically dusted off for seminars and conferences. . .(The DAR), having the force and effect of law, imposes on procurement officials not only the need to challange the legitimacy of every sole source procurement, but the obligation, whenever possible, "to shift a procurement from sole source to competition". . .routine procurement practices the Navy viewed as proper and even patently sensible were viewed by a Federal District Court as being so contrary to law as to demand punishment. . .[15]

In response to the 1972 Commission on Government Procurement the Office of Federal Procurement Policy (OFPP) issued its Circular Number A-109 on April 5, 1976 entitled Major Systems Acquisition. In this policy circular, the OFPP stated the Executive Branch's management objectives for each agency acquiring major systems of which one was "Depend on,

[14]"Federal Procurement Reforms", Executive Order 12352, March 17 1982.

[15]"The Obligation to Foster Competition in Procurement," General Counsel of the Navy memorandum, April 7, 1983.

whenever ecomomically benifical, competition between similar or differing system design concepts throughout the entire acquisition process."[16] The Department of Defense policy directive for Major System Acquisition stated in 1982 as one of its objectives "Effective design and price competition for defense systems shall be obtained to the maximum extent practicable."[17] It went on to say that the extent of competition must be included in each acquisition stategy. It did not state that competition should or could be used throughout all stages of the acquisition process, specifically production competition.

Two years later, however, in the third annual report of the Defense Acquisition Improvement Program (DAIP), competition was one of the six major intiatives of the program. In this report, all areas of competition were discussed and emphasized.[18]

C. DEFINITIONS OF COMPETITION

The legislative efforts to implement competition as the law of the land was primarily a result of the perception that competition was an interpretative subject. The Competition in Contracting Act as implemented in the FAR defines "full and open competition" as that action in which all responsible sources are permitted to compete and a "sole source acquisition" as that act which is entered into or proposed to be entered into by an agency

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[16]"Major System Acquisition," Office of Federal Procurement Policy Circular Number A-109 dated April 5, 1976.

[17]"Major System Acquisition," Department of Defense Directive 5000.1 dated March 29, 1982.

[18]"Guidance on the Defense Acquisition Improvement Program," Memorandum from William H. Taft, Deputy Secretary of Defense dated June 6, 1984.

after soliciting and negotiating with only one source.[19] Those choices in between these two standards are now "other than full and open competition" and requires approval to use one of seven exceptions to be discussed later. This new standard for full and open competition was significantly different than the previous FAR requirement and is best analyzed by the House of Representative Report 98-1157:

> 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 Committees 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 favorite vendors and then assert that a "reasonable degree of competition" had been achieved. The Committee believes that full and open competition exists only when ***all qualified vendors are allowed to compete*** in an agency acquisition. (Emphasis added).[20]

In discussions with Congressional staffs, who for the most part constructed the Act, the terms effective, meaningfull or adequate competition were all considered before full and open competition became the statute. Posed the question of what is effective or meaningfull competition, one staff member said he considered it to be that the Government would bear less of a burden to consider every bid that came in as a response. It gives the Government more flexibility to turn off the competitive process and go with the bids they had. These terms, he went on to say, were purposefully left out of the Act

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[19]Federal Acquisition Regulations, Part 6.003.

[20]"Competition in Contracting Act of 1984," Report together with Separate and Dissenting Views, House of Representatives Report 98-1157, October 10, 1984.

because of Congress' general perception that the agencies would abuse this flexibility.

The Competition in Contracting Act did, however, establish one additional procurement techique that recognized the need for competitive procedures while excluding a particular source in order to establish or maintain an alternative source of supply. In approving this contracting technique, Congress specifically endorsed several contracting techniques currently utilized by the Department of Defense to increase competition. These innovative techniques include:[21]

- leader/follower procedure where the developer or sole source of a system (the leader) furnishes manufacturing assistance to a second contractor (the follower), selected by the Government using competitive procedures, to enable the follower company to become a second source
- joint teaming arrangement in which a team of two or more firms is awarded a development contract, using competitive procedures, with the effort to be split among the firms
- "fly-off technique" which two or more firms develop and validate separate competing systems to meet a specific Government need, this competitive parallel development results in a prototype demonstration, or "fly-off", between the two competitors

D. SUMMARY

This chapter described some of the theorical concepts of competition, the Department of Defense's postition on competition and finally some of the different types or interpretations of competition. The next chapter will discuss the history of the Competition in Contracting Act.

[21] "The Competition in Contracting Act," Federal Publications, Inc., 1986.

III. THE HISTORY OF THE COMPETITION IN CONTRACTING ACT

A. COMPETITION: A HISTORICAL PERSPECTIVE

Federal procurement policy dates back to the Second Continental Congress in 1792 when the first procurement statute was passed. It absolutely forbade sole source contracts.[1] By 1809, Congress established the requirement for competition in contracting, with formal advertising as the preferred method. The law stated in part that "all purchases and contracts for supplies or services shall be made either by open purchases, or by previously advertising for proposals."[2] Formal advertising procedures were developed in the ensuing years as experience under this statute demonstated the need for additional formalities or regulations. In 1861, Congress enacted a law to reaffirm the requirement for formal advertising in the form of 12 Statute 220 (1861).[3] Numerous Comptroller of the Treasury, Comptroller General, and court decisions implemented the statute by further defining the procedures to be followed.

Probably the most significant developments in procurement policy occurred in time of war. Prior to World War I, formal advertising procedures were similar to those practices today: specifications for a needed item were published; bids were solicited, and the contracts were awarded to

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[1]Hagberg, Chris, "Competition in Contracting Act Title VII of the Deficit Reduction Tax Act of 1984 or Section 2701-53 of That Act," October 31, 1984.

[2]2 U.S. Statute 536(1809).

[3]"Competition in Contracting Act of 1983," Report of the Senate Committee on Governmental Affairs, March 31, 1983, U.S Government Printing Office, Washington, D.C., page 4.

the lowest bidder. Exceptions to these procedures were granted for "public exigencies" and "personal services," and when "it was impracticable to secure competition."[4] During World War I, however, formal advertising procedures were too inflexible to mobilize Government resources. The War Industries Board, established to control wartime resources, relaxed the requirement for formal advertising and authorized procurement by negotiation.[5] The need for full utilization for the nation's industrial strength was the fundamental reason for this shift to negotiation. Wartime profiteering was curtailed when Government procurement returned to formal advertising on a fixed-price basis after the war. To alleviate any further complications, the War Policies Commission recommended in 1930 that formally advertised procurement be replaced by negotiated procurement as was done during the war. Rather than allow this wholesale shift, however, Congress provided more exceptions to the formal advertising requirement.[6]

During World War II, the statutory requirement for formal advertising was again relaxed. In December 1941, Congress passed the First War Powers Act, which authorized the President to give the departments involved in the war the power to make contracts "without regard to the provision of the law relating to the making, performance, amendment, or modification of contracts."[7]. The War Production Board, given control over wartime production and procurement under Executive Order 9024, went so far as to prohibit the use of formal advertising without specific authorization. Within

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[4]"Competition in Contracting Act of 1983," page 5.
[5]"Competition in Contracting Act of 1983," page 6.
[6]"Competition in Contracting Act of 1983," page 12.
[7]55 U.S. Statute 838 (1941).

this broad negotiating authority, competition was actively sought and wartime expertise demonstrated the wisdom of more flexible procedures.[8] As the end of the war approached, the Policy Procurement Board, a part of the War Production Board, was in charge of the preparatory work for formulating peacetime procurement regulations. In 1945, a task force of the Policy Procurement Board, consisting of officers from the federal procuring agencies, submitted recommendations for post-war procurement policy which were to establish the foundation for the Armed Services Procurement Act (ASPA). The thrust of the Board's recommendations was that flexibility in procurement was necessary to support the growth and sustainability of an industrial base. The Board was critical of the pre-war requirement for formal advertising and cited examples of its inadequacy. These examples were incorporated into the ASPA as the basis for the 17 exceptions to formal advertising.[9] Recognizing the need for more flexible peacetime procedures, the Congress passed the Armed Services Procurement Act in 1947. The ASPA was viewed by the legislative and executive branches from differing perspectives. The Service Secretaries stated that the "primary purpose of the Act is to permit the War and Navy Departments to award contracts by negotiation when the National Defense or sound business judgement dictates the use of negotiation." Congressional intent, however, provided "for a return to normal purchasing procedures through the advertising-bid method on the part of the armed services."[10] The ASPA did both by requiring the

[8] "Competition in Contracting Act of 1983," page 8

[9] 110 U.S. Code 2304(a)

[10] "Competition in Contracting Act of 1983," page 3.

use of formal advertising, with negotiation authorized by prescribed exceptions.

In 1949, Congress adopted the principles of the ASPA and passed the Federal Property and Administrative Services Act (FPASA) to govern civilian procurement procedures.[11] All but two of the ASPA's exeeptions to formal advertising, the need for a facility for mobilization and requirements involving substantial investment or long leadtimes, were included in the FPASA.[12] Based on recommendations by the Commission on Reorganization of the Executive Branch (part of the Hoover Commission appointed by President Truman) the FPASA created the General Services Administration (GSA) to serve as a central organization for federal services such as supply and procurement, records management, and building management. Control of procurement policy and, to a limited extent, certain procurement operations, were conferred upon the GSA at that time.

In the years following the enactment of the ASPA and the FPASA, negotiation became less the exception and more the rule. The two factors primarily responsible for the proliferation of negotiated procurements were the increased development of high technology military hardware and the Korean War.[13] Technology, particularly in the electronics and aerospace fields, experienced a huge leap forward in terms of sophistication and complexity requiring an even more flexible posture in procurement. By 1960, negotiation accounted for over 85 percent of all Federal contract

[11]Federal Property and Administrative Services Act of 1949, 40 U.S. Code 471.
[12]41 U.S. Code 252(c).
[13]"Competition in Contracting Act of 1983," page7.

dollars.[14] As a result, the ASPA was amended in 1962 to encourage the use of formal advertising, to clarify procedures and obtain more competition in negotiated procurement. The amendments strengthened the requirement for formal advertising by requiring its use "whenever feasible and practicable under the existing conditions and circumstances."[15] The amendments also required DoD and the National Aeronautics and Space Administration (NASA) to conduct "written and oral discussions" with all firms "within a competitive range" in negotiated procurements.[16] In addition, the amendments addressed congressional concern over noncompetitive contract prices being negotiated based on defective data submitted by contactors. This provision of the amendments, referred to as the Truth in Negotiations Act, required contracting officers to obtain all "current, complete, and accurate" cost and pricing data submissions from contractors in certain negotiated contracts over $100,000.[17] This dollar threshold was later raised to $500,000 in 1981.

Negotiated contracts continued to prevail as the "preferred" method of procurement throughout the 1960's and 1970's. In1969 Congress established the Commission on Government Procurement, a 12-member, bi-partisan body composed of representatives from the Legislative Branch, the Executive Branch and the private sector, to study the federal procurement process and recommend changes to improve its efficiency.[18] The Comptroller General of the United States was made a statutory member. The Commission completed

[14]"Competition in Contracting Act of 1983," page8.
[15]10 U.S. Code 2304(a).
[16]10 U.S. Code 2304(g).
[17]10 U.S.C. 2306(f)
[18]Public Law 91-129.

its 2 1/2 year study in December 1972 and submitted its report to Congress in early 1973 with 149 recommendations, the first of which was to establish an Office of Federal Procurement Policy.[19] The Commission's second recommendation was to enact legislation to eliminate inconsistencies in the ASPA and the FPASA by consolidating the two statutes and thus providing a common basis for procurement policies and procedures for all executive branch agencies.[20] The Commission further recommended that formal advertising should be retained as the preferred procurement procedure when the number of sources, existence of specifications, and other conditions justified its use, and that competitive negotiation should be authorized as "an acceptable and efficient alternative."[21] The Commission stated in its 1972 report: "the point is not that there should be more negotiation and less advertising, but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should prefer when market conditions are not appropriate for the use of formal advertising."[22]

The Office of Federal Procurement Policy (OFPP) was established in 1974 (Public Law 93-400), within the Office of Management and Budget, to provide overall direction in procurement policy.[23] The OFPP was empowered with directive authority to prescribe policies, regulations, procedures, and forms relating to procurement. The 1979 amendments to

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19"Report of The Commission on Government Procurement," Washington, D.C., U.S. Government Printing Office, December 1972.

20"Report of The Commission on Government Procurement".

21"Report of The Commission on Government Procurement".

22"Report of The Commission on Government Procurement".

23"Activities of the Office of Federal Procurement Policy", Report to the Congress, January-December 1984.

the OFPP Act (Public Law 96-83), which reauthorized the Office for another four years, redirected the OFPP to focus on three goals: the development of a uniform procurement system, a management system which would implement and enforce the procurement system, and legislative changes needed to implement both systems.[24] The OFPP submitted an integrated proposal for a Uniform Federal Procurement System on February 26, 1982, which incorporated many of the Commission's recommendations and eventually became the Federal Acquisition Regulations (FAR) inplemented on 1 April 1984. In addition to OFPP's proposal, Executive Order 12352 on Federal Procurement Reforms was issued on March 17, 1982, which confirmed the Administration's commitment to improving the effectiveness and efficiency of the procurement process.[25] One of the directives included in the Executive Order requires that criteria be established for "enhancing effective competiton and limiting noncompetitive actions."[26] In response to the President's direction, OFPP prepared and issued a policy letter establishing restrictions on non-competitive procurement. The language contained in the directive consolidated for the first time, on a government-wide basis, the procedures to be followed in using competition.

B. KEY LEGISLATIVE EVENTS LEADING UP TO THE COMPETITION IN CONTRACTING ACT

The first compehensive legislative action on acquisition reform came in July 1977 when Senators Lawton Chiles (D-Florida) and William Roth

[24]"Activities of the Office of Federal Procurement Policy"
[25]Executive Order 12352 dated 17 March 1982
[26]Executive Order 12352.

(D-Delaware) introduced the Federal Acquisition Act of 1977 (S. 1264).[27] This bill was based on a number of recommendations brought out from the Commission on Government Procurement. The bill sought, in the words of Senator Chiles "to consolidate and reform these 30-year old basic laws now controlling Federal contracting and replace them with a modern statute aimed at far more intense and innovative competition: A crackdown on sole source awards, and a severe cutback on detailed specifications and regulations."[28] Among other initiatives, S. 1264 was the first bill that sought to change the distinction between formal advertising and negotiation. Despite its good intentions, the Federal Acquisition Act of 1977 was not voted on in the Senate and died at the end of the 95th Congress.

In response to a November 16, 1979 request from the Chairman of the Task Force on Government Efficiency, House Committee on the Budget, Representative Stephen J. Solarz (D-New York), the General Accounting Office released its report entitled "DoD Loses Many Competitive Procurement Opportunities."[29] In this report, the GAO reviewed a sample of fiscal year 1979 Department of Defense noncompetitive contracts to determine if they were appropriately awarded. GAO concluded that 25 of the 109 noncompetitive contracts reviewed had been inappropriately awarded. On the basis of this study, GAO estimated that about $289 million of the

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[27]"Federal Acquisition Act of 1977," Hearings Before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs, United States Senate, July 18, 19, 22, 26, and 28, 1977, U.S. Government Printing Office, Washington, D.C..

[28]Testimony given by Senator Lawton Chiles to the Senate Subcommittee on Federal Spending, July 18, 1977, page 1.

[29]"DOD Loses Many Competitive Procurement Opportunities", General Accounting Office Report,29 July 1981.

noncompetitive procurement of items bought for the first time in fiscal year 1979 could have been competitive. Overall, GAO reported that within the Department of Defense out of a total of $62.1 billion awarded in FY 1979 only $22.6 billion was competitive, an increase of 5.1 percent since 1972. Figure 1, taken from the Hearing record on "Competition in the Federal Procurement Process" before the Senate Committee on Governmental Affairs, shows the competive awards of the Department of Defense from 1972 to 1980.

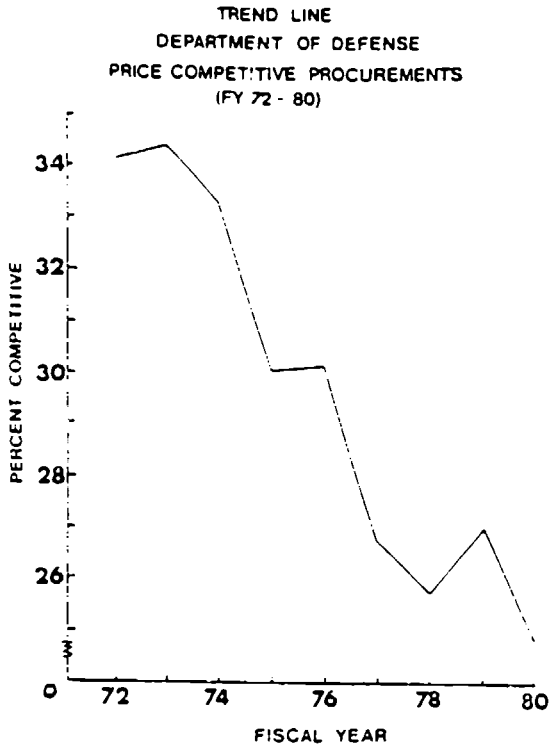

Figure 1.

This fairly consistent slide toward noncompetitive procurements was primarily a result of the following reasons, GAO reported:

- increased spending on and a concurrent loss of competition for petroleum and nuclear submarines,
- increased use of design and technical competition for major weapon systems, and

- greater emphasis on "set asides" for businesses owned and controlled by socially or economically disadvantaged persons.[30]

To reduce these inappropriate noncompetitive awards GAO went on to say the following recommendations should be followed by the Secretary of Defense:

- Provide to contracting officers and program personnel more specific guidance on the factual support needed to justify noncompetitive procurements.
- Require the services to establish percentage improvement goals and address contracting problems discussed in this report in their plans for improving competition.
- Establish a systematic approach for monitoring procurement office goals and reviewing selected contracts and documentation to assure they were appropriately awarded.
- Require the Defense Nuclear Agency to justify its use of early starts and unsolicited proposals as a way of contracting.[31]

The Department of Defense's reponse concurred with the first and fourth recommendations and took exception to the other two.[32] These recommendations dealt with establishing and monitoring percentage goals for improving competition in which DOD stated "Goals would be impracticable to establish and monitor in any meaningful way. Time spent by operating and management personnel on such a system could be better spent on productive work."[33]

Moreover, another GAO report in April 1982 enititled "Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting" found the

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[30]"DOD Loses Many Competitive Procurement Opportunities".

[31]"DOD Loses Many Competitive Procurement Opportunities".

[32]The Under Secretary of Defense, Research and Engineering, letter dated 15 April 1981.

[33]The Under Secretary of Defense, Research and Engineering.

competition problem not confined only to the DoD.[34] According to this report, the six civil agencies reviewed, which awarded new sole-source contracts totaling $538.1 million, failed to obtain competition on an estimated 40 percent of the contract awards.[35] Hearings held in the Senate Governmental Affairs Committee, Chaired by Senator William V. Roth (D-Delaware) during the 96th and 97th Congresses tended to confirm these findings by GAO. The Oversight of Government Management Subcommittee examined year-end spending during three days of hearings in 1979 and 1980 and found what they felt was a relationship between negotiating in the last minutes of the fiscal year and unnecessary noncompetitive contracting. In its July 1980 report, the Subcommittee recommended that additional restrictions were needed on sole-source procurements.[36] In October 1981, the Governmental Affairs Committee convened a series of hearings on the acquisition process in the Defense Department. Although the purpose of the hearings was to examine the range of problems in defense contracting (e.g. "gold-plating", inaccurate cost-estimating, sole source contracting, among others) much of the testimony focused on the lack of competition. The second day of hearings, October 27, 1981, concentrated on Deputy Secretary of Defense Frank Carlucci's recent initatives on improving the Department's procurement problems. Most disturbing to the Committee was the noticable absence from these 31 initiatives of any specific mention of competition. These same initatives were also hit hard in regard to the lack of any mention

[34]"Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting", General Accounting Office Report, April 1982.
[35]"Less Sole-Source, More Competition Needed in Federal Civil Agencies' Contracting".
[36]"Competition in Contracting Act of 1983," page 7.

of competition in the House of Representatives Committee on Government Operations the following year. As late as 1983 the Carlucci initiatives continued to be criticized when the Council of Economic Priorities stated:

> The Carlucci initiatives fail to correct the most persistent causes of cost growth: *lack of competition in contract awards* (emphasis added); contracting practices that reward cost maximization; simultaneous design and manufacture of "concurrency"; disorganized program management and decisionmaking; weak supervision and auditing of weapons contracts; and the establishment of extravagant weapons performance goals, otherwise known as "gold plating". Furthermore, the initiatives may accelerate rather than reduce future cost growth.[37]

In response to this Congressional concern, a 32nd initiative on competition was subsequently added, which simply recommended that the Services and Defense agencies be required to establish management programs to increase competition by setting objectives. The outgrowth of these hearings was the first legislation introduced specifically on competition on February 23, 1982 by Senators William S. Cohen, William V. Roth, Jr. and Carl Levin entitled appropriately the "Competition in Contracting Act of 1982", Senate Bill S. 2127.[38] The bill was referred to the Governmental Affairs Committee and subsequently to the Federal Expenditures, Research and Rules Subcommittee, which held a hearing on S. 2127 and the OFPP proposal for a Uniform Federal Procurement System on May 5, 1982. The Subcommittee voted unanimously on August 17, 1982 to report S. 2127 favorably, with amendments. The Governmental Affairs Committee held a hearing on June 29 and voted 12 to 0 to report the bill on

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[37]Adams, Gordon, "Controlling Weapons Costs: Can the Pentagon Reform Its Work?", Council of Economic Priorities paper, dated 1983.

[38]"Competition in Contracting Act of 1983," page 12.

October 1 to the full Senate. At the June 29, hearing then Deputy Under Secretary of Defense for Research and Engineering, Acquisition Management William A. Long testified that the Defense Department "could support S. 2127 with few modifications and a prelimary test program."[39] Despite the momentum that S. 2127 gathered, the Senate was unable to consider it before adjourning sine die on December 23, 1982. As S. 2127 is similar to the subsequent Competition in Contracting Act, S. 338, reintroduced in the next legislative session, its provisions will not be discussed.

C. THE COMPETITION IN CONTRACTING ACT TAKES ON ITS FINAL FORM

As it was enacted, the Competition in Contracting Act of 1984 was essentially a merger of two separate bills, the Senate version known as S. 338 and the House of Representatives bill H.R. 5184. Another bill sponsored by the House Armed Services Chairman Melvin Price (D.-Ill.), H.R. 2545 entiltled the "Defense Procurement Reform Act of 1983", introduced on April 13, 1983 could also be included as part of the merger. This bill, however, addressed only Department of Defense procurement and was considerably more lenient in permitting noncompetitive awards with 10 exceptions. It was eventually overcome by the events leading up to the final version of the Competition in Contracting Act. S.338 and H.R. 5184 will be reviewed separately and then it will be shown how they merged into the final version of the Competition in Contracting Act.

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[39] "Competition in the Federal Procurement Process," S. 2127, Hearing before the Senate Committee on Governmental Affairs, June 29, 1982, page 51.

1. Senate Bill S. 338

The final Senate version of the Competition in Contracting Act began in early 1983 as a bill sponsored by Senators William Cohen (R-Maine) and Carl Levin (D-Mich.).[40] Under the Senate bill federal procurement regualtions would be changed by eliminating the existing statutory preference for formal advertising over competitive negotiation, limiting circumstances under which noncompetitive procurement would be allowed from seventeen (for the Department of Defense) to six, and require more notice of proposed awards (generally recognized as notice in the Commerce Business Daily) to enable more firms to bid.

The elimination of the preference for formal advertising over competitive negotiation was generally welcomed in most professional procurement circles as long overdue. Most major Federal negotiated procurements had required the review of complicated and lengthy proposals using complex evaluation factors. Therefore the use of formal advertising, which was recognized as essentially a price competition tool only, no longer reflected the actual competition statistics of that statuatory preference for Formal Advertising. Proponents of S. 338 also noted that a procurement need not be formally advertised to be competitive and discusssions (both oral and written), specifically forbidden in formal advertising, had often proven to be advantageous to both parties in most cases.

By changing the rules for using the seventeen statutory exceptions, the writers of the Senate bill recognized that a written justification for not using formal advertising, commonly refered to in Department of Defense

[40] "The Competition in Contracting Bill," Federal Contracts Report, Vol. 41, No. 5, January 30, 1984, page 176.

procurements as Determination and Findings (D&F's), did not necessarily result in increased competition. In fact, according to the Senate Governmental Affairs Committee, "DoD sometimes used this exception procedure improperly to procure non-unique items, contrary to the Comptroller General's rulings in bid protest decisions."[41] The six exceptions to the use of competitive procurement proposed in S. 338 were:

1) When the property or services are available from only one source and no other type of property or service will satisfy the Government's needs.

2) When the Government's need is of such "unusual and compelling urgency" that it would be "seriously injured" by the delay associated with competitive procedures.

3) When award to a particular source or sources is necessary a) to maintain sources of supply in case of national emergency, b) to achieve industrial mobilization in case of a national emergency, or c) to establish or maintain an "essential research capability" in an educational institution, or other non-profit insititution, or Federally Funded Research and Development Center.

4) When a noncompetitive award is required by international agreement or treaty.

5) When a statute requires procurement through another agency or a specified source, or when the agency needs a brand name for authorized resale.

6) When disclosure of the agency's needs to more than one source would compromise national security.[42]

Changes in Formal Advertising, now described in S. 338 as Sealed Bid procedures, were relatively small, requiring four conditions to be met: 1) time permits, 2) award based on price or price related factors, 3) discussion with bidders was not necessary, and 4) a reasonable expectation of receiving more than one sealed bid. The other factors such as public bid

[41] "The Competition in Contracting Bill," Federal Contracts Report, Vol. 41, No. 5, 30 January 1984, p. 176.

[42] "The Competition in Contracting Bill".

opening, no discussions, specific time and place of bid opening, etc., remained the same as the rules for Formal Advertising.

To enable more firms to bid, S. 338 would have required agencies to publish pre-solicitation notices and awards of prospective contracts in the Commerce Business Daily with longer lead times. Specifically, it required pre-solicitation notices (synopsis) of prospective contracts in the Commerce Business Daily of at least 15 days before the solicitation is issued and contract awards over $10,000 where there is likely to be any subcontracts. The requirement would not apply to: 1) contracts under $10,000, 2) noncompetitive procurements, except where there is only one source (this was to be used to test the market for potential competitors), 3) cases where notice would compromise national security, and 4) unsolicited proposals, when notice would disclose proprietary data.

Other significant features of the Senate bill were that it:

- Permitted dual-source procurements for certain reasons.
- Required agencies to use advance procurement planning and market research.
- Required each head of an executive agency to designate one present officer or employee as an "advocate for competiton".
- Lowered the threshold for cost and pricing certification under the Truth and Negotiations Act from $500,000 in Department of Defense contracts to $100,000.
- Required an annual report from the head of each executive agency to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives.[43]

[43]"S. 338, The "Competition in Contracting Act," Passed by the Senate Nov. 11," Federal Contracts Report, Vol. 40, 21 November 1983, page 831.

From June to November 1983, the Senate Armed Forces Commitee reviewed Senators Cohen and Levin's S. 338 and finally issued its report (No. 98-297) proposing a number of changes, including the following[44]:

- Clarified language permitting noncompetitive contracts to be awarded in order to develop or maintain a second source. This would allow the agency head to exclude a particular source in exercising the dual sourcing authority and permit noncompetitive dual sourcing in establishing or maintaining an educational or other non-profit insititution research and deveiopment center.

- Included language permitting noncompetitive contracts for follow-on contracts involving technical or special property requiring a substantial intial investment.

- Added language concerning Unsolicited Proposals stipulating that the publication notice not apply to those situations concerning unique or innovative research concepts where it would disclose the originality of thought or proprietary data associated with it. According to the committee report, the exception "strikes an appropriate balance between the need to promote competition and the value of stimulating innovative thinking."[45]

Testimony of those called before the Committee in June was generally in favor of S. 338 with all of them suggesting some degree of change to S. 338. As could be expected, the Defense Department voiced the largest number of changes requested; 23 in all. Ms. Mary Ann Gilleece, Deputy Under Secretary of Defense (Acquisition Management) stated that the Department supported the "thrust" of the bill but believed certain changes were necessary. Those changes included, in part, that the sealed bid procedure and the competitive-negotiation procedure be on an equal par with no preference given for sealed bids, an additional four exceptions for use of noncompetitive procedures, no changes be made in the synopsizing of proposed contracts, eliminate the advocate for competition and allow the

[44] "Senate Due to Vote on S 338, OFPP Bill Still On Hold," Federal Contracts Report, Vol 40, No. 19, 14 November 1983, p. 759.

[45] "Senate Due to Vote"

regulatory system to handle this requirement and maintain the $500,000 threshold for cost and pricing data.[46]

Since Senator Cohen agreed to all of the changes made by the Armed Services Committee, there was no need to make floor amendments to the bill. It was passed by unanimous vote in the Senate on November 11, 1983.

In summarizing the Senate bill, the Federal Contracts Report editorialized what most Government procurement professionals were probably already thinking by saying, "Despite its good intentions, it is not clear that S. 338 would significantly increase competition "in the real world". A much safer bet is that it would add several new layers of paperwork to the procurement process."[47]

The overview of S. 338 omitted references to a number of specific rules and exceptions. For further research purposes, a complete text of S. 338 is included in Appendix A.

2. House of Representatives Bill H.R. 5184

On March 20, 1984, Representative Jack Brooks (D.-Texas), Chairman of the House Government Operations Committee, introduced the House of Representatives version of the Competition in Contracting Act. This bill, H.R. 5184, would have provided for three methods of procurement and given the General Accounting Office specific statutory authority for deciding bid protests.

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[46]Testimony by Ms Mary Ann Gilleece, Deputy Under Secretary of Defense (Acquisiton Management) during hearings on the Competition in Contracting Act of 1983 before the Committee on Armed Forces, United States Senate, 7 June 1983, pp. 47-55

[47]"The Competition in Contracting Bill," Federal Contracts Report, Vol. 41, No. 5, 30 January 1984, p. 177.

The three methods of procurement in H.R. 5184 would have included: 1) "Full and open competition", 2) "Less rigorous than full and open competition", and 3) "Noncompetitive". As in the Senate version the use of full and open competition essentially replaced the formerly preferred method of Formal Advertising and placed Sealed Bid procedures on the same level as competitive negotiation. Sealed Bid procedures were to be used when awards were on the basis of price or price related factors, discussions with suppliers were unnecessary and more than one bid was expected. When the use of Sealed Bid procedures was not required, the agency could elect to obtain competitive proposals. Less rigorous than full and open competition involved offers from a limited number of qualified sources, with award to be made after receipt of bids or proposals from two or more sources that were in the competitive range or which were elgible for selection. This method would have been limited to 1) cases of unusual and compelling urgency, 2) cases where it was necessary to establish or maintain alternate sources of supply, 3) to fulfill the goals of socially and economically disadvantaged or small business programs, or 4) disclosure of agency requirements to all qualified sources would compromise the national security.[48] The third method of procurement, noncompetitive, listed only four conditions for its use; 1) the property or services were available from only one source and no competitive alternatives could be made available. 2) it was necessary to maintain a facility, producer, manufacturer or supplier in the event of a national emergency or to maintain an essential research and development capibility provided by an educational or other nonprofit

[48]"Brooks To Press for His Competition Bill Despite Opposition From DoD, OFPP," Federal Contracts Report, Vol. 41, No. 14, April 2, 1984, page 585.

institution, 3) sole source is required by international agreement or treaty, and 4) a statute requiring procurement be made from a specified source.

The most controversial portion of H.R. 5184 authorized the GAO to decide protests "concerning alleged violations of the procurement laws and regulations" and required GAO to give such protests "priority consideration" (but generally no more than 45 days). Under the Brooks bill, all protests would go to the Comptroller General, who would in turn notify the agency involved within one day of the protest requiring a complete report within 25 working days from that agency. If the contract had not been awarded after receipt of the protest, action would be taken by the contracting officer to hold that award in abeyance until the protest was resolved. If the contract was already awarded, contract performance would be "ceased or the contract shall be suspended" until the protest was resolved. Only when an agency could prove in writing that the suspension of a contract, as a result of a protest, is such "compelling, exigent circumstances which significantly affect the vital interests of the United States" and the Comptroller General is advised of such a finding can the agency's senior procurement executive continue with the award or work. Should the Comptroller General determine that the solicitation, proposal or award did not comply with the law or regulation, he can recommend that the agency:

(a) refrain from exercising any of its options under the contract,

(b) recompete the contract immediately,

(c) issue a new solicitation,

(d) terminate the contract,

(e) award a contract consistent with the requirement of such law or regulation,

(f) comply with any combination of recommendations under clauses (a), (b), (c), (d), and (e) and with such additional recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement law and regulations.[49]

In addition, the Comptroller General could award protest costs (including attorney's fees) and bid and proposal preparation costs.

While H.R. 5184 had the support of the GAO (they were extensively consulted during the entire writing of the bill) and several other indusry groups, it had, as expected, significant criticism from the Office of Federal Procurement Policy, Department of Defense, the American Bar Association and the Small Business Administration. Only weeks after H.R. 5184 was introduced, OFPP Administrator Donald Sowle gave his opinion to Representative Brook's Sub-Committee. "H.R. 5184 mandates a complex and confusing system of reviews and approvals which we believe will unnecessarily impede the entire procurement process and therefore we must respectfully oppose the bill as currently drafted."[50] Deputy Under Secretary of Defense for Acquisition Management Mary Ann Gilleece indicated that the bill was "disjointed" and "will wipe out almost 40 years of legal precedent and business practices."[51] Ms. Gilleece also objected to the section of the bill giving GAO statutory authority to adjudicate bid protests. The American Bar Association's O.S. Hiestand told the same subcommittee that the bill "overstructures the authorized procurement methods and mandates reviews

[49]"HR 5184, The "Competition in Contracting Act," Introduced by Rep. Jack Brooks (D-TEX.)," Federal Contracts Report, Vol. 41, No. 13, 26 March 1984, p. 574.

[50]"Brooks To Press for His Competition Bill Despite Opposition From DOD, OFPP," Federal Contracts Report, Vol. 41, No. 14, 2 April 1984, p. 585.

[51]Statement on H.R. 5184 Competition in Contracting Act of 1984 by Ms. Mary Ann Gilleece, Deputy Under Secretary of Defense, Research and Engingeering (Acquisition Management) Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, United States House of Representatives, 98th Congress, Second Session, March 29, 1984.

and approvals which will unnecessarily impede effective competition. In addition, it proliferates the statutory framework for procurement rather than consolidates it."[52]

With or without criticism, the bill safely passed through the House Government Operations subcommittee in early April 1984 with only minor changes but ran into its first serious political opposition in full committee when the Small Business Administration charged that the bill would "destroy small business set-asides, the 8(a) program, and the Small Business Innovation Research (SBIR) program."[53] Only after adding provisions to exempt the 8(a) program from the bill, and reducing the number of agency approvals needed for conducting procurements under limited less rigorous competition did the bill pass the full committee on May 9,1984. H.R. 5184's next major hurdle was the House Armed Services Committee which was opposed, not to the competition section, but the bid protest procedures. In addition, committee chairman, Representative Melvin Price (D-ILL) had already introduced his own competition bill, H.R. 2545, that addressed only Department of Defense procurements and was considerably less stringent than the Brooks Bill.

As with the Senate bill, the overview of H.R. 5184 has left out references to a number of specific rules and exceptions, including those found to be repetitous in S. 338. A complete text of H.R. 5184 is found in Appendix B.

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[52]Statement on H.R. 5184 Competition in Contracting Act of 1984 by Mr. O.S. Hiestand, former chairman, public contract law section, American Bar Association Before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, March 29, 1984.

[53]"Brooks' Competition Bill Defered," Federal Contracts Report, Vol. 41, No. 16, 16 April 1984, page 679.

3. Compromise and Consolidation

At this point, Representative Brooks' bill would have probably been referred to other House committees for consideration and action except for the fact that Senator Cohen was successful in having his own version of the Competition in Contracting Act added to the Deficit Reduction Act of 1984 by amendment. When the Deficit Reduction Act was sent to conference in the House, Representative Brooks was appointed to the conference committee along with members of the House and Senate Armed Services Committees and Governmental Operations/Affairs Committees. Since the Senate version, S. 338, lacked any bid protest procedures, Representative Brooks was successful in narrowly getting enough votes to add that portion of his bill to the Competition in Contracting Act. To get those votes and to pacify the House Armed Services Committee members in the conference, a seventh exception to the requirement for competion was added to the Senate version of the Competition in Contracting Act to read in part: when the head of the executive agency "determines that it is necessary in the public interest to use procedures other than competitive procedures" and he "notifies each House of Congress in writing of such determination not less than 30 days before award of the contract". The Competition in Contracting Act was now in its final form, the Senate version for competition and the House version for bid protest procedures. Representative Brooks' comment after the Competition in Contracting Act left the conference was to wonder how anyone could now oppose the bill, "I wonder about the efficacy of the entire competition bill when it's so easy to get out of it."[54] He was right. The

[54]"Conferees Adopt Sweeping Language To Increase Competition In Contracts," Federal Contracts Report, Vol. 41, No. 25, 18 June 1984, page 1087.

Congress passed the Deficit Reduction Act, which included the Competition in Contracting Act, and it was signed into law on July 18, 1984 by President Reagan. In summary, the new law (found in its entirety in Appendix C) provided for the following major changes in procurement policy and regulations:[55]

- eliminates preference for Formal Advertising and puts Competitive Negotiation on the same level as Sealed Bid procedures.
- eliminates the seventeen exceptions to Formal Advertising and establishes seven exceptions under which "other than competitive procedures" may be used.
- requires Sealed Bid procedures when the four conditions noted in the Senate version were met, otherwise competitive proposals shall be requested.
- allows agency heads to exclude a particular source of supply in competitive procedures in order to establish or maintain an alternative source or sources of supply if the same factors of the Senate version are met.
- allows the head of an agency to limit competition to small business concerns only, so long as all firms within that category are allowed to compete (with the exception of the 8(a) program as discussed in the H.R. 5184 version).
- exempts Small Purchases (under $25,000) but states competition must be promoted to the maximum extent practicable.
- lowers the threshold for the Truth and Negotiations Act from $500,000 to $100,000.
- changed the required times for Commerce Business Daily notices for solicitations and awards.
- requires an "avocate for competition" in each executive agency.
- requires an annual report to Congress from each agency.
- incorporates the protest and dispute procedures discussed in the House version, H.R. 5184.

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[55] "Analysis of the Competition in Contracting Act of 1984," Memorandum from Lee Doud, Office of Federal Procurement Policy, 11 July 1984.

- requires implementation on April 1, 1985 for the competition portion of the act and January 15, 1985 for the protest and dispute procedures.

D. SUMMARY

This chapter has described the evolution of the concept of competition in the Federal procurement system. Starting with the Second Continental Congress through the formulation of the final version of the Competition in Contracting Act of 1984. It provided a perspective of the events that specifically lead up to both the House and Senate versions of the Act and finally the consolidation of the two bills to form CICA. The key provisions of both the House and Senate bills were discussed as well as the essential requirements included in the law signed by President Reagan on July 18, 1984. The next chapter will discuss the implementation of CICA within the Federal Government and specifically the Navy.

IV. IMPLEMENTATION OF THE COMPETION IN CONTRACTING ACT

A. CONTROVERSY

Given the sweeping changes the Competition in Contracting Act required of the Government in the way it did it's procurement business, no portion of the new law had as much attention from all facets of the procurement triad as the bid protest provisions. When President Reagan signed the Competition in Contracting Act into law as part of the Deficit Reduction Act of 1984 (H.R. 4170) he declared his belief that certain provisions of the act were unconstitutional and directed the Justice Department to inform executive branch agencies regarding how to comply with these provisions in a manner "consistent with the Constutution."[1] Specifically, the President stated:

> I am today signing H.R. 4170. In signing this important legisltion, I must vigorously object to certain provisions that would unconstitutionally attempt to delagate to the Comptroller General of the United States, an officer of the Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch. This administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the constitution.[2]

In the letter the President referred to, the Justice Department claimed that the Competition in Contracting Act, as it was then drafted in the form of

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[1] "The President's Suspention of the Competition in Contracting Act Is Unconstitutional", Seventh Report by the Committee on Government Operations, May 21, 1985, U.S. Government Printing Office, Washington, D.C. 1985, page 5.

[2] "The President's Suspention".

H.R. 5184, "may give rise to substantial constitutional problems in that it abridges the doctrine of separation of powers."[3] According to the Justice Department, the bill did so on three counts, all in the bid protest review provisions. First, the Department believed that the section which authorized the General Accounting Office to review certain procurement cases referred to the audit agency by Federal courts, would violate the separation of powers doctrine by allowing the Comptroller General to exercise a judicial function-specifically, the interpretation of laws. Second, the Department asserted that the section which provided an automatic stay of procurement award or contract performance while the Comptroller General reviewed procurement protests also violated the separation of powers doctrine. The Department indicated that this would amount to an exercise of power "effectively to block Executive action outside the legislative process" and that when the Comptroller General used his discretion to lift the stay, would permit an "action having legal effect on the rights and obligations of persons outside the Legislative Branch."[4] The third Department objection was on the section which authorized the Comptroller General, in his review of bid protests, to make a determination of the costs, including attorney's fees, to which the protester is entitled. Again, the Department claimed that this was a judicial function that could not be performed by a legislative officer under the doctrine of the separation of powers.

As directed by the President, the Justice Department subsequently prepared a memorandum that provided the Department's advice to the

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[3]McConnell, Robert A., Assistant Attorney General, letter to Honorable Jack Brooks, Chairman, Committee on Government Operations, House of Representatives, Washington, D.C. 20515 dated 20 April 1984

[4]McConnell.

executive agencies regarding implementation of the Act. In that lengthy memorandum from the Office of Counsel to the Attorney General dated 17 October 1984, the Justice Department outlined its case against the Competition in Contracting Act's bid protest provisions. In part the memorandum stated:

> In summary, we believe that the stay provisions. . .are unconstitutional and should be severed in their entirety from the remainder of the Act. In addition, the damages provision is similarly unconstitutional and should be severed from the rest of CICA. Because these provisions are unconstitutional, they can neither bind the Executive Branch nor provide authority for Executive actions. Thus, the Executive Branch should take no action, including the issuance of regulations, based upon these invalid provisions.
> We recommend that Executive Branch agencies implement these legal conclusions in the following manner. First, with respect to the stay provisions, all executive agencies should proceed with the procurement process as though no stay provision were contained in the CICA. . .
> With respect to the damages provision...executive agencies should under no circumstances comply with awards of costs including attorney's fees or bid preparation costs, made by the Comptroller General on the merits of any application for a damage award except to state that the Executive Branch regards the damages provisions as unconstitutional.[5]

The Attorney General himself, however, did not take a public position on the matter until November 21, 1984-over a month after the Simms memorandum was widely distributed within the Federal Government. At that time Attorney General Smith officially notified Congress in the form of letters to Vice President George Bush, President of the Senate and the Honorable Thomas P. O'Neill, Speaker of the House of Representatives that

[5]Simms, Larry L. "Implementation of the Bid Protest Provisions of the Competiton in Contracting Act." Memorandum For The Attorney General from the Acting Assistant Attorney General, Office of Legal Counsel, 17 October 1984.

these provisions of the act to be unconstitutional and that they would not be implemented. Armed with the Attorney General's opinion, Office of Management and Budget (OMB) Director David Stockman ordered Federal officials to violate the law. Under the Office of Federal Procurement Policy Act, Stockman had the ultimate directive authority over all Government procurement matters. On December 17, 1984, Stockman issued OMB Bulletin No. 85-8 which stated, among other things that the Executive Branch would not comply with the bid protest portions of the Act.

On February 28, and March 7, 1985, the Legislation and National Security Subcommittee conducted hearings on the constitutionality of the challenged provisions of the Competition in Contracting Act and on the refusal of the administration to enforce it. As stated by Chairman Brooks during the hearing, "The ultimate question which the subcommittee must address in this hearing is: Can the President of the United States unilateraly declare a portion of a public law to be unconstitutional and then refuse to enforce it?"[6] In addition to other testimony, the committee received unanimous testimony from several noted constitutional scholars that the executive branch action ordering the suspension of portions of the Competion in Contracting Act was unconstitutional, including Professors Eugene Gressman of the University of North Carolina, Mark Tushnet of Georgetown University, Sanford Levinson of the University of Texas and Professor Emeritus Arthur Miller of George Washington University.

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[6] "Contitutionality of GAO's Bid Protest Function", Hearings before a Subcommittee of the Committee On Government Operations, House of Representatives, Ninety-Ninth Congress, February 28 and March 7, 1985, U.S. Government Printing Office, Washington, D.C. 1985.

The legal community, however, was not entirely unanimous. In a paper discussing the industry perspective the law firm of Crowell and Moring found little merit with the Department of Justice's opinion that the stay provision was unconstitutional but had this to say about the mandatory payment procedures for bid and proposal costs, "Such adjudicatory power requires either judical or executive authority that is not possessed by officers of the legislative branch and therefore mandatory monetary awards by the GAO under the CICA may be unconstitutional."[7]

Despite the Justice Department's opinion, the Comptroller General published its new bid protest rules to implement the Act only days after Stockman's memorandum in the Federal Register on December 20, 1984. Those rules, effective on January 15, 1985, provided for the stay of contract award pending GAO's resolution of the protest and provided for the GAO to require an offeror to make the monetary awards stated in the Act. On 15 January 1985, the Director of the Federal Acquisition Regulation Secretariat published in the Federal Register Federal Aquisition Circular (FAC) 84-6, which contained the Competition in Contracting Act, including the bid-protest provisions. Concerning the disputed GAO bid-protest provisions, FAC 84-6 contained an introductory note which cited the Department of Justice position that the Act's provisions for staying awards and awarding damages are unconstitutional.

[7]Crowell, Eldon H. "An Industry Perspective on Procurement Under The Competition in Contracting Act of 1984." A paper done under the letterhead of Crowell and Moring, A Legal Firm, undated.

The next and most obvious level of this controversy was in the courts. Litigation that arose over the constitutionality of the disputed provisions of the Act. Specifically, those cases were:

Lear Siegler, Inc. v. United States, Civil Action No. 85-1125KN (C.D. Cal.)

Pitney-Bowes, Inc. v. United States, Civil Action No. 85-832 (D. D.C.)

Ameron, Inc. v. U.S. Army Corps of Engineers, Civil Action No. 85-1364A (D. N.J.)

While the exact nature of these cases is immaterial to the issues involved, their outcome was. In the first of these cases to be resolved, Judge Harold A. Ackerman of the U.S. District Court for the District of New Jersey stated on March 27, 1985 concerning the Ameron case "I find that the facts do not bear out (the Government's) attempt to label the Comptroller General a legislative officer and call his stay function a legislative veto."[8] Two months later on May 28, 1985 Judge Ackerman issued a permanent injuction requiring the Defense Department and the Office of Management and Budget to comply with the stay provisions of the Act essentially stating that the Government's arguments that the Comptroller General cannot constitutionally carry out the duties assigned under CICA to be as unpersuasive then as they were two months ago.[9]

While the courts were hearing the cases, the House Judiciary Committee took a new approach to force the Justice Department's hand. On May 8, 1985 the Committee approved a proposal to ban funding of the Attorney General's Office in the Fiscal Year 1986 Department of Justice Authorization bill until

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8-"New Jersey Court Upholds CICA Stay Provision; D.C. Court Hears Arguments", Federal Contracts Report, Vol. 43, No. 13, April 1, 1985, page534.

9-"Federal Judge Orders DOD, OMB To Comply With CICA," Federal Contracts Report, Vol. 43, No. 22, June 3, 1985, page 1005.

he ordered federal agencies to comply with the Competition in Contracting Act's stay provision. The amendment introduced by Representative Jack Brooks (D-Tex.) was passed by 21-12 margin read as follows:

> None of the sums authorized to be appropriated by this Act may be used for the Office of the Attorney General (including the personnel of such office) unless and until the Attorney General directs all federal agencies and departments to execute all provisions of the Competition in Contracting Act of 1984.[10]

On 3 June, 1985 Attorney Generl Edwin Meese announced that he would advise federal agencies to comply with the Competition in Contracting Act, pending an appellate court ruling on the statute's constitutionality. Not long after the Attorney General's announcement, Budget Director Stockman recinded his previous order, OMB No. 85-8. It wasn't until FAC 84-9 was issued on June 20, 1985 that full compliance with all provisions of the Act was formally directed to all federal agencies.

B. AMENDING THE FEDERAL ACQUISITION REGULATIONS (FAR)

As the Competion in Contracting Act required implementation in the FAR by March 31, 1985 the two procurement policy Councils, the Defense Acquisition Regulatory Council and the Civilian Agency Council, created a special task group consisting of five representatives from each Council. The task group had two co-chairmen, one from one of the Department of Defense and one from one of the civilian agencies. This task group would draft the amendments to the FAR which would implement the Act. By mid-July 1984,

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10-"House Panel Adopts Ban On Funds To Attorney General For Ignoring CICA," Federal Contracts Report, Vol. 43, No. 19, May 13, 1985, page 836.

the heads of the two Councils had developed a schedule for the drafting and promulgation of the FAR amendments. In effect it proceeded as follows:

- July 16, 1984: A master schedule was developed and approved for drafting and issuing the FAR amendments. Congress was notified of this schedule by August 1. One aspect of this plan was that the FAR amendments would occur in a single Federal Aquisition Circular (FAC).

- July 23, 1984: The task group was formed to draft the FAR amendments. The task group consisted of 10 persons, five from the Department of Defense and five from the civilian agencies. The task group reported to the two Councils.

- July 24, 1984: A notice was published in the Federal Register, asking for comments from any member of the public on the content of the Act itself and for suggestions on how the Councils and their task group should go about implementing the Act in the FAR. The deadline for receipt of such suggestions was August 24, 1984.

- July 24, 1984: By the time of the Federal Register notice specific instructions were given to the task group by the chairman of the two Councils. These instructions listed the major policy subjects which their drafting would have to confront. On this date the task group began work, with a request that they report back to the Councils on September 1, 1984, with a draft of all FAR revisions.

- September 1, 1984: The task group furnished its draft to the two Councils.

- September, 1984: Throughout the month of September the two Councils met to deliberate the postitions proposed by their task group. By the end of September the Councils had agreed to a final position.

- October 1, to October 9, 1984: The FAR amendments were published in the Federal Register, with a request for prompt public comment.

- October, 1984: Comments were received from approximately thirty organizations and a few individuals, accumulating to approximately two hundred separate matters. Most of the comments concerned matters of editing and typography. In response to certain comments the Councils were persuaded to place the subject of bid protests in Part 33 of the FAR, rather than leaving it in Part 14 as it had been since the first publication of the FAR.

- Mid-November, 1984: Although the Councils and the task group had planned upon making the amendments to the FAR in a single Federal Acquisiton Circular, it had begun to appear that a single FAC would not be possible because the final rules of the GAO and the General Services Board of Contract Appeals (GSBCA) on bid protests were not available.

As a result it was decided to issue two FAC's: 84-5 and 84-6. FAC 84-5 would implement most of the FAR amendments. FAC 84-6 covered bid protests.

- Late November, 1984: Final preparations were made for printing and publishing FAC 84-5.
- January 11, 1985: FAC 85-5 was published in the Federal Register. It is effective as published (on April 1, 1985) but nominally it is a tempory regulation, so that there will be an opportunity for public comment for 60 days. The notice stated that it may be amended before becoming effective and if so it will be published in final form in the Federal Register at the end of the 60-day period.
- January 15, 1985: FAC 84-6 was published in the Federal Register.
- April 1, 1985: The Competition in Contracting Act was impemented.

C. PROBLEMS WITH THE FEDERAL GOVERNMENT'S IMPLEMENTATION OF THE COMPETITION IN CONTRACTING ACT

Shortly after the Competition in Contracting Act was signed into law, the two sponsors, Senator Cohen and Representative Brooks sent a formal request to the General Accounting Office (GAO) on August 1, 1984 that requested GAO to establish an inter-divisional task force to review the impementation of, and subsequent compliance with the act by Federal agencies.[11] Subsequent to this request came a number of other requests in conjunction with GAO's study to look at other issues that arose before the April 1, 1985 implementation of the Act. A summary of these findings by GAO was published in their report dated August 21, 1985 titled "Federal

[11] Letter to The Honorable Charles A. Bowsher, Comptroller General of the United States from William S. Cohen, Chairman, Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs and Jack Brooks, Chairman, House Committee on Government Operations dated August 1, 1984.

Regulations Need To Be Revised To Fully Realize The Purposes Of The Competition in Contracting Act of 1984".[12]

In addition to testimony concerning the Administration's refusal to comply with the bid protest portion of the Act, Congress requested on March 19, 1985 that GAO perform a limited survey of the readiness of selected Federal organizations to begin implementing the competition act on solicitations issued after March 31, 1985 as required. The objectives of that survey were to learn whether and to what extent selected procuring organizations, mostly within the Department of Defense, might be experiencing or expecting problems in meeting the Act's implementation and to help determine whether extending the legislative implementation date was warranted. The results of this survey were submitted in a report dated April 8, 1985. In summary, officials at nine of the fifteen organizations contacted indicated that extending the Act's deadline was not warranted based on problems experienced or expected in their organizations. All three Army organizations contacted as well as the Defense Logistics Agency and the General Services Administration's Federal Supply Service declared they were ready to implement the Act. Four of the ten Navy and Air Force organizations contacted also indicated that extension of the implementation date was not warranted but the remaining six said it was.[13] In briefing Congress on March 20 1985, GAO stated that even if legislation could have been developed and enacted quickly, providing an across-the-board"

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[12]"Federal Regulations Need To Be Revised To Fully Realize The Purposes of The Competition in Contracting Act of 1984," Report By The Comptroller General of the United States, GAO/OGC-85-14, August 21, 1985.

[13]"Limited Survey of the Need to Delay Implementation of the Competion in Contracting Act of 1984," Letter to The Honorable Jack Brooks and The Honorable William S. Cohen from Charles A. Bowsher, Comptroller General of the United States dated April 8, 1985.

extension so close to the implementation date would have probably created more disruption and confusion for the organizations that were ready than it would have prevented for those that were not ready.

On April 26, 1985 Congress requested that GAO provide them with a report summarizing their review of the Federal agencies regulatory implementation of the competition act as of April 1, 1985. Within this review GAO analyzed FAR changes in comparison to the actual requirements of the Act and the House and Senate Conference Committee report (Report Number 98-861), which explains the Congressional intent of the Act. In its final report, the GAO provided fourteen specific changes needed in the FAR to be consistent with the statutory provisions as well as statements of Congressional intent. In addition, the GAO provided three other FAR revisions needed to better implement the objectives of the Act. Specifically they were:

- Provide discretion to agency heads to prescribe dollar thresholds of less than $100,000 relating to requirements for certified cost or pricing data on contract and sub-contract modifications.
- Give more discretion to contracting officers to obtain certified cost or pricing data when deemed necessary to ensure that prices are fair and reasonable on awards under $100,000.
- Strengthen the requirements relating to procurement planning.[14]

In response to the GAO report of the Federal Government's implementation of the Act's statutory provisions as well as the Congressional intent, the DAR Council addressed each of the issues raised in a letter to

[14]"Federal Regulations Need To Be Revised To Fully Realize The Purposes of The Competition in Contracting Act of 1984.", page 31.

Congress in August 1985.[15] The DAR Council maintained that the GAO commented on early draft versions of the FAR revisions before they received numerous public comments and had a chance to implement those necessary changes. The letter went on to say that a number of changes recommended in the GAO report were, in fact, already being made as a result of both the public comments and the report with some exceptions. The biggest issue was the FAR use of class justifications for sole-source contracts. FAR 6.303-1(c) permited justifications relating to the first six exceptions from the requirement for full and open competition to be made on a class basis. The GAO believed that such class justifications were inconsistent with Congressional intent. The DAR Council disagreed and stated the FAR would remain as written. By not commenting on those express disagreements between the GAO and the DAR Council, Congress indirectly agreed with the DAR Council and no futher comments were made. The final coverage of the Competition in Contracting Act was issued in February 1986 in Federal Acquisition Circular (FAC) 84-13.

D. THE NAVY'S IMPLEMENTATION OF THE COMPETITON IN CONTRACTING ACT

The Navy's intensive program for competition began several years before the passage of the Competition in Contracting Act. In February 1982 the Chief of Naval Material issued a letter that implemented a formal Navy-wide program to increase competition.[16] While this was primarily initiated

[15]Spector, Eleanor R., Allan W. Beres, S.J. Evans, Office of the Assistant Secretary of Defense letter to Honorable Jack Brooks, Chairman, Committee on Government Operations, House of Representatives, Washington, D.C. 20515 dated August 16, 1985.
[16]Chief of Naval Material Letter, Serial 00/0111 of 1 February 1982

as a result of the numerous spare parts "horror stories", the Navy was recognizing that competition was, in fact, a prudent business decision. This program called for the written appointment of a competition advocate and the establishment of competition goals for each Navy contracting activity having authority over $100,000. It also required the Naval Supply Systems Command, as head of contracting activity for the Navy Field Contracting System, to establish controls to ensure that all other field contracting activities obtain competition to the maximum extent possible. For the first time, competition was seriously considered a command responsibility. It was noted in the Chief of Naval Material letter that maximum practical competition could not be obtained without cooperative efforts of program, technical and contracting personnel and was made to be a management objective for all senior civilian and military personnel. In addition, it made each command's competition program a special interest item for all Contracting Management Reviews (CMR). In July of the following year the Secretary of the Navy established a flag officer position of Competition Advocate General. This officer's responsibilities include review of all noncompetitive procurements over $10,000,000 in value and review of acquisition plans for all major programs. In addition, he is to make recommendations regarding competition to the Assistant Secretary of the Navy for Shipbuilding and Logistics, who has the final authority in his role as the Navy senior procurement executive. This arrangement allows the Navy's civilian leadership to exercise control over the long-range business planning for major acquisition programs and to help ensure that competition is planned for early in each acquisition.

Between July 1984, when the Competition in Contracting Act was signed into law and October 1984 little was seen publicly from the Navy concerning its implementation. In fact, the Navy's Defense Acquisition Regulation (DAR) staff was putting together their input to the task group for the eventual Federal Acquisition Regulation (FAR) changes as well as the needed changes to the Navy Acquisition Regulation supplement to the FAR or the NARSUP. In a memorandum from the Navy's Director of Acquisition Regulations, Michael D. Stafford, on July 18, 1984 to the various Assistant Secretary of the Navy staff directors and the Naval Material Command the Act was summarized as follows, "In a nutshell, the Competition in Contracting Act of 1984 removes the statutory underpinnings that the Federal Procurement System has had for the past 35 years."[17]

Within the Navy itself, the implementation of the Act was essentially broken into three different areas; policy, training and the action office for carrying them out. The Assistant Secretary of the Navy for Shipbuiding and Logistics provided the first policies for implementation in a memorandum for the Chief of Naval Material on January 4, 1985. In this memorandum Secretary Everett Pyatt, as the Navy Senior Procurement Executive, outlined five broad areas which he required the Chief to carry out. Briefly, these areas were as follows:

1. Requests for Authority to Negotiate (RAN) and Determination and Findings for negotiated procurements (D&F) were no longer required after 31 March 1985. In addition the requirement for submission of R & D procurement requests to ASSTSECNAV (RE&S) was deleted effective 1 April 1985.

[17]"DAR Council Meetings," Memorandum from Michael D. Stafford, Director, Acquistion Regulations, Office of the Assistant Secretary of the Navy, 18 July 1984.

2. The acquisition plan (AP) required by the Federal Acquisition Regulations, implemented on 1 April the previous year, were now the new principal document for all program review and oversight.

3. The new requirement for a Justification and Approval (J&A) for other than full and open competition procurements was deliniated. The Secretary's office must approve those in excess of $10 million, the head of the procuring activity must approve those above $1 million threshold, and the competition advocate of the procuring activity must approve those above the $100,000 threshold. J&A approval was required prior to commencement of negotiations. The Secretary clearly made the point that the Acquisition Plan and the Justification and Approval were two distinct documents. The Acquisition Plan was required regardless of the competitive nature of the proposed procurement, whereas the Justification and Approval was required only for other than full and open competition.

4. The current requirements for approval of shipbuilding contracts and preaward notification of impending contracts in excess of $3 million was continued.

5. The Secretary's office was to be responsible for routing all Acquisition Plans and Justification and Approvals within the Secretariat.[18]

The overall responsibility for training remained in the Assistant Secretary's office, and specifically with the Navy's member of the Defense Acquisition Regulation (DAR) Council staff. Initally the DAR Council tried to establish a joint training program in conjunction with the civilian agencies but the idea never came to fruitation. The lack of interest by the civilian agencies and the different organizational structures made it logistically impossible. The next plan was to work with the General Services Administration (GSA) within their ten regions. Inquiries were made as to who would attend and how many to establish a schedule and training requirements. The lack of response to this idea also cancelled this plan. Eventually an hour and half briefing was given to representatives of all Navy

[18]"Policies For Implementation of the Competition in Contracting Act of 1984," Memorandum For the Chief of Naval Material from Everett Pyatt, Assistant Secretary of the Navy (Shipbuilding and Logistics), January 4, 1985.

Systems Commands by the Navy's member of the DAR Council. After that each System Command was to organize its own training plan. These plans ranged from putting together brief seminars to arranging an office to answer questions and handle problems.

Fortunately for most contracting activities, the National Contract Management Association (NCMA) sponsored what was probably the most comprehensive coverage of the competition act in a number of one day seminars around the country intitled "Competition-The Law of the Land". At these seminars, Government and industry procurement professionals were given an opportunity to listen to experts in the field of acquisition explain the unique provisions of the Act and how it applied to them. Questions and comments were encouraged giving everyone concerned a direct forum to get answers to the questions not addressed by their own agencies or organizations.

As the action office for carrying out the Secretary's policies, the Deputy Commander for Contracts in the Naval Material Command issued its first message on 10 November 1984 that briefly described what the Act was all about and its implications.[19] In a second message to all contracting activities on 18 January1985 the Material Command essentially expounded on Secretary Pyatt's memorandum of 4 January 1985.[20] Unlike the new Federal Acquisition Regulation (FAR) implementation on April 1, 1984, there was no Plan of Action and Milestones (POAM) designed for the new procedures and policies of the Competition in Contracting Act. While this did

19-"Implementation of the Competition in Contracting Act of 1984.", Chief of Naval Material Message 152209Z November 1984.

20-"Implementation of the Competition in Contracting Act of 1984.", Chief of Naval Material Message 182226Z January 1985.

not seriously impact those major programs at the Systems Command level, it left those contracting activities in the field to fend for themselves. It wasn't until February of 1985 that the Naval Supply Systems Command began putting on one day seminars sponsored primarily by the Navy Regional Contracting Commands. More often than not, these seminars left the participants with more questions than answers. The pending disestablishment of the Naval Material Command by the Secretary of the Navy only added to the problem of where to turn to for guidance and assistance. Of primary concern to the field level activities was not necessarily policy matters, but rather administrative ones. The late dissemenation of the forms required, the Navy Acquisition Regulation Supplement (NARSUP) to the FAR and new contract procedures caused considerable consternation. Interviews with System Command and field activities Contracting Officers indicated that once again it was perceived by the technical side of the house that "those contracting types" had a new way of doing business but couldn't tell them succinctly what it was or how it was going to impact on them. These interviews also showed that in most instances, the new policies required by the Competition in Contracting Act were not clearly defined to all of the program managers until after the actual implementation on 1 April 1985.

One of the distinct advantages the Navy did have when the Act was implemented, was the network of Competition Advocates at each command. Through these advocates the emphasis for competition was continually reinforced by the Navy's Office of the Competion Advocate General. Rear Admiral Stuart Platt, appointed as the first Competion Advocate General in

July 1983, maintained high visibility throughout the entire implementation process. Through RADM Platt's numerous speeches, correspondence, decisions and "Competition Communique's", Contracting Officers and Competition Advocates interviewed felt they were able to make the Competition in Contracting Act a positive step forward in the way the Navy conducts its business rather than another law imposed on an already overworked and over-legislated contracting system.

E. SUMMARY

This chapter provided a review of the implementation of the Competition in Contracting Act of 1984. It began with the controversy concerning the Executive Branch's contention that the bid protest provisions of CICA were unconstitutional and therefore should not be implemented. This controversy lead to both legislative and judical actions that finally convinced the Attorney General to comply with all provisions of CICA, almost six months after the inital implementation date. As the Act required an extensive rewriting of the Federal Acquisition Regulations, the events that lead up to and followed the April 1, 1985 implementation date were reviewed. Included in this review was the actions taken by Congress, the GAC and the Department of Defense concerning the various interpretations of the Act. Finally, the manner in which the Navy implemented CICA was discussed. The next chapter will examine the key issues precipitated by CICA.

V. KEY ISSUES

A. KEY ISSUES RELATIVE TO THE COMPETITIVE PROCESS

The full impact of the Competition in Contacting Act cannot readily be assessed after only one year. There are, however, some significant issues that should be addressed as a result of its implementation. These issues are provided as follows.

Buying-In. While it is generally perceived that the "full and open" competition required by the Act will provide the Government the lowest priced, highest quality goods and services, competition also has a downside to it. On occasion contractors, in order to insure contract award in a competitive situation, will submit below-cost bids or attempt to "buy-in" to Government programs. If the contractor feels that winning that contract is the best way to establish itself in the market and is willing to shift those losses to its commercial customers or absorb them, then that is often considered normal business practices. Everyone gains, the Government receives its goods or services at a lower price and the contractor is now able to compete in a new market. If, however, the contractor intends to shift the amount of the under-pricing back to the Government during contract performance through change orders, modifications or follow-on contracts then it is clearly improper. The FAR describes the practice of buying-in under the heading of "Improper Business Practices" as submitting an offer below anticipated costs expecting to a) increase the contract amount after

award or b) receive follow on contracts at artifically high prices to recover losses incurred on the buy in contract.[1]

The problem of buying-in often results in anything but "free and open" competition. Only multi-billion dollar firms can afford the luxury of competing in this market. Should their corporate strategy of buy in not work they are large enough to absorb the losses while the smaller companies risk everything.

Buying in also promotes cost growth in Government contracts. As noted by a former Deputy Secretary for Defense, "overemphasis on competition, per se, may undercut...efforts to reduce buy-ins...which only leads to cost growth."[2] Due to the nature of many Government programs, it is difficult to determine what portion of the cost growth is due to other causes such as miscalculating the rate of inflation or the inability to properly assess the technical risks.

In the major systems arena the Navy has made a number of significant policy decisions that should eliminate most instances of buying-in. The most effective is the policy of dual sourcing or split buys whenever possible, now authorized and promoted in the Act. Another is the practice of buying major systems with fixed-price contracts and finally minimum changes in the program. Once a program enters production, changes can only be made by Secretary Lehman unless the changes are ones that reduce costs.

Buying-in on contracts at other than the major systems level continues, however, to be a problem. Those activities within the Navy Field Contracting

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[1]Federal Acquisition Regulations, Part 3.5 Improper Business Practices.

[2]Testimony of Former Deputy Secretary of Defense Frank Carlucci, reported in Contract Management, November 1984, page 6.

System (NFCS) often do not have the same alternatives as their counterparts at the Systems Commands. Program managers in the field do not have the same oversight which often leads to contract cost growth through changes and modifications. Pressures from higher authority to achieve program success through schedules leave these activities the option of failing or acquiescing to contractor demands for more money. The issue of poor quality also plays a bigger role at the field level when buying-in is discussed. A congressional aide who is normally a supporter of competition said this fear is not ungrounded, especially in the area of spare parts, where the sheer volume of items makes quality control difficult. "The Government is getting burned in some instances on spare parts," said the aide. "They are getting parts that aren't near the quality they need."[3] The use of more shoud cost estimates, better technical planning and stronger action by investigating Defense Contract Administative Service (DCAS) agencies doing pre-award surveys is required if the issue of buying in at the field level is to be solved.

Competitive Range Determinations. The increase in the number of competitive negotiated procurements due to the Competition in Contracting Act and the emphasis on competition makes the issue of competitive range determinations by the Contracting Officer even more important. The term "competitive range" is undefined in the statutes, and the regulations, FAR 15.609, only broadly covers the subject. The FAR, simply stated, says the Contracting Officer is not required to enter into discussions with all offerors who submit proposals, only with those offerors whose proposals are within the competitive range; that they have a reasonable chance for award.

[3]Keller, Bill, "Competition: A Pentagon Battlefield," New York Times, May 25, 1985.

Offerors whose proposals do not win the award or who are dropped from the competitive range have a chance to protest these actions immediately and hold up all contract action. Under the new bid protest rules of the Act, Contracting Officers must be even more careful when making these subjective judgements. The evaluation criteria put together with the assistance of the requirements, technical, legal and other staff personnel who normally assist the Contracting Officer take on even more meaning. As a consequence of this careful approach it is likely that the lead time and staff work in putting together a contract will become even more burdensome.

Winner-take-all competition. In this type of competition the winner of an intially competed system can create a future sole source. The aircraft procurement environment has historically used this approach in its system buys. The new emphasis on competition and the availability of split awards legislated by the competition Act should, in the future, resolve the problem of winner-take-all competition.

Dual Sourcing. The emphasis on dual sourcing the Navy has put on the aircraft and shipbuilding industry has been extremely successful. There have been numerous papers and studies on the different methods of dual sourcing but all have essentially the same result. As Admiral Platt put it, "Those competitions that we sustain over the long run are the ones that bring on contractor investment in plant and facilities. It gets them to continue to do for you what they did in the year they wanted to marry you."[4] Dual sourcing, intially opposed by the shipbuilding industry, has strengthened the industrial base from what was once a depressed industry.

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[4]Keller.

In the words of William E. Haggard, president of the Shipbuilders Council of America, "The emphasis the Navy has put on competition has been healthy for the shipbuilding industry. It forces management to take a very hard look at every aspect of overhead."[5] In one of the Navy's only remaining sole source major shipbuilding areas, the Trident submarine made by Electric Boat, efforts are underway to establish Newport News Shipbuilding as a qualified second source.

There is, however, a downside to dual sourcing. In some cases the costs are prohibitive to both the Government and industry. In the case of the Trident and aircraft industry, the decision regarding who is to pay for the capital investment to enter these markets is being debated. If industry is to foot the bill, then what guarantees should they be given for their investment? As the Defense budget continues to be scrutinized in light of growing deficits and Gramm-Rudman type legislation and programs are stretched out or eliminated, what is the cost of this Government or contractor investment and subsequent loss? In addition, low quantities of hardware items often make it economically inefficient to compete with the additional costs of tooling up. At the field level, the resources in time and money for dual sourcing is even more consuming. Those managers of smaller programs do not have big dollar budgets or proven companies to turn to for dual sourcing.

Technical Data Packages. To create new sources or to dual source programs, there is a need for more complete and validated technical data packages. While this may not be a significant factor in the major systems

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[5]Keller.

programs, it is becoming an increasingly predominent problem in the spare or component parts area. Frequently vast amounts of data are bought, either separately or within the contract, but it is often not coordinated so competition can be given a chance. Constantly changing configurations and subsequent revisions to the data packages make it essential that some definitive system be established or the momentum of this competition wave will be checked.

Life Cycle Management. This term has frequently connotated a variety of factors, including training, personnel costs, deployment costs, logistics, excetera, but often a slant towards competition or future competition has been avoided. Efforts need to be addressed that provide up front funding to cover the costs of data rights, tooling, capital equipment, and test equipment. Weapon systems should be designed on the basis of form, fit and function in order to allow "plug-in" type components to be competed in program out years. Validated data packages, standardization and component break out plans need to be included in all Acquisition Plans. This can and is being done through the review of the Acquisition Plans submitted to the Secretary of the Navy's office.

Procurement Action Lead Time (PALT). The time it is taking for contracts to be awarded has been increasing over the past three years. Figure 3 reflects PALT times developed by the Naval Supply Systems Command. They show an alarming growth rate.

PROCUREMENT ADMINISTRATIVE LEADTIME (PALT)

* LARGE PURCHASE PALT
(ENTIRE NAVY DATA)

FISCAL YEAR	PALT (DAYS)
1983	88
1984	83.4
1985	112

SMALL PURCHASE PALT
(NAVSUP BIG 13 CLAIMANT ACTIVITIES ONLY)
(NSC's, NRCC's, ICP's)

FISCAL YEAR	PALT	AVERAGE PALT	NSC'S	NRCC'S	ICP'S
1983	24	1983	15	13	33
1984	30.6	1984	18.5	14.3	56.2
1985 (THRU SEP)	34.8	1985	19.6	16.9	101.5

LARGE PURCHASE PALT
(NAVSUP BIG 13 CLAIMANT ACTIVITIES ONLY)
(NSC's, NRCC's, ICP's)

FISCAL YEAR	PALT	AVERAGE PALT	NSC'S	NRCC'S	ICP'S
1983	96.2	1983	74.9	43.6	111
1984	119.2	1984	75.3	60.8	134
1985 (THRU SEP)	137.7	1985	77.6	83.8	130

Figure 2

Certainly the implementation and subsequent learning curves of the Federal Acquisition Regulations (FAR) on April 1, 1984 followed by the Competition in Contracting Act a year later on April 1, 1985 account for the lion's share of this increase. The increase in volume of contract actions due to the breakout program and more dual/split awards has increased the PALT at most activities. In the Small Purchase PALT, the requirement of the competition Act to synopsize those actions from $10,000 to 25,000 has slowed down the process. No conclusions or recommendations can be made concerening the

Act's affect on PALT until more statistics are available over a longer period of time.

Professional Work Force. As was previously mentioned, the addition of new sources, dual or split awards and the component breakout program is flooding the procurement system with more work. The need for additional trained contract specialists, administrators and engineering professionals was apparent before this emphasis on competition and is now an even more significant problem. The Government needs to attract professionals to the acquisition work force, recognize their importance and retain them. This can only be done with an extensive revamping of the current grade structure, upgraded working environments and increased training opportunities. Test programs are being established that set minimum standards and training for contract specialists but they need to be put in place in an expeditous manner.

Competition for Competition's Sake. Competition should never be substituted for good business decisions. With the advent of imposed competition goals comes the natural tendency to succeed, sometimes at the expense of good common sense. Low required quantities of hardware and short term/expiring programs should not always be evaluated on the same terms as other programs. The message of "full and open" competition is clear to all; now it is time to ensure that program managers and contracting officers at all levels be held strictly accountable for good business practices. In a handbook for Program Managers written by the Defense Systems Management College, the use of competition is succinctly explained as "Competition is not advocated merely for the sake of competition but rather

it is advocated as a means to enhance the overall value of weapon systems procurement to the Government, considering the economic, technical, schedule, and logistics effects."[6] Imposed competition goals and system reviews by the Secretary's office are pushing more and more noncompetitive modifications and contracts to the field activities so they won't be accountable at the System's command level. Refusal to accept these actions goes against the grain of good military bearing and training, and if done could mean the end of a promising career. This practice is most likely to continue regardless of what policy is made until the system is purged of those individuals who abuse their authority through normal attrition and retirement.

Bid Protests. The full effect of the new bid protest procedures has yet to be seen since they were not fully implemented until June 1985 when Attorney General Meese lifted the moratorium. From a "first look" it appears that the new General Services Board of Contract Appeals (GSBCA) is taking a critical view towards the Government indicating that, for now, the Government is losing more cases than it is winning. The bid protests to the General Accounting Office (GAO) show no conclusive evidence.[7] The inital concern that contractors would hold Government contracting officers to some sort of "procurement blackmail" has, for the most part, gone unfounded. A look at one major buying command, the Naval Regional Contracting Center in Long Beach, California shows that the number of protests processed has actually gone down from 39 in 1984 to a projected 28 in 1986.

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[6]Establishing Competitive Production Sources, A Handbook for Program Managers, Defense Systems Management College, Fort Belvoir, Virginia, August 1984, page 1-1.

[7]Stafford,, Micheal D., Director, Acquisition Regulations, Office of the Assistant Secretary of the Navy, telephone interview of 5 May 1986.

Legislated Management. While Congress has at least 150 procurement related bills pending in 1986 alone, none appear to have the pervasive changes that the Competition in Contracting Act did. There is, however, still the attitude by Congress that they can manage the Executive Branch, specifically the Defense Department, procurement functions by legislation. In testimony before the Senate Defense Procurement Policy Subcommittee on October 17, 1985, Assistant Secretary of Defense for Acquisition and Logistics, James P. Wade, stated "I would strongly recommend to the committee that it resist further procurement reform legislation until we have had a year or two to assess the impact, improvements, and deficiencies of the legislation already enacted."[8] The frustration of Congress to do something when they hear or read of another mistake or poor judgement being made continuously is understandable. However, with the Defense Department doing almost 15 million procurement transactions a year even a 99.9 percent near perfect record still leaves 15,000 actions being made improperly. Given the political climate of Defense spending and the publicity that Congressmen can reap from it, management by legislation is likely to continue. In response to those critics of Congressional interference, House Armed Services Committee Counsel, Colleen Preston, had this to say about the Competition in Contracting Act,

[8]Testimony of James P. Wade, Assistant Secretary of Defense for Acquisition and Logistics Before the Senate Defense Procurement Policy Subcommittee on October 17, 1985.

> Other than to decry this legislation as congressional micromanagement-an allegedly unwarranted intrusion into the management of the executive agencies-how many people have actually examined the provisions of the final bill to determine what Congress actually directed? . . . Congress has done no more than set policies and provide direction on the manner in which it believes the government procurement process should operate.[9]

Most evident during interviews with both Congressional staff members and managers within the Department of Defense was the antagonistic attitude towards each other. Staff members continued to relate stories of how difficult it is to get answers from the Department and what they did get was often not what they asked for or was too late to make a difference. Within the Department of Defense was the general attitude that "staffers" often did not know or care to learn the complex procurement system and were only after their piece of the publicity pie. While both sides have their points, it is evident that the Department of Defense still has no real mechanism to deal with procurement legislation. Within the Navy, for instance, there is only one acquisition qualified Naval Officer on the House side of the Office of Legislative Affairs who, among other duties, handles inquires concerning procurement legislation.

Competition Lead Time. Competition, done properly, takes time. Putting together a solicitation, establishing source selection criteria, synopsizing, evaluating proposals, best and final offers, acquisition plans, approvals, pre and post-award business clearances and negotiations is a time intensive chain of events. Proper planning is essential to successful competition. Too

[9]Preston, Colleen A., "Competition and the 98th Congress," Contract Management, March 1985, page 8.

often this extensive planning is jeopardized as a result of Congress' lack of action on Defense Appropriations. Senator Cohen made this point during hearings on the Senate version of the Competition in Contracting Act in June 1983 when he stated, "We in Congress contribute a great deal to the delays in spending of dollars during the course of the year since many times you do not have an appropriation bill, if ever, during the course of the year and many times not until September."[10] The solution to this problem proposed by DOD officials that were interviewed is the enactment of a two year Defense Budget or at a minimum more use of multi-year funding.

B. SUMMARY

This chapter has discussed a number of the key issues that the Competition in Contracting Act and competition in general has brought about. They are by no means all encompassing but are those that were identified from the research. The next chapter provides the conclusions and recommendations to that research.

[10]Statement of Senator William S. Cohen during Hearings on the Competition in Contracting Act of 1983 Before the Senate Committee on Armed Services, June 7,9, 1983, U.S. Printing Office, Washington, D.C., page132.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. OVERVIEW

So, has the Competition in Contracting Act of 1984 accomplished what it set out to do? Or in the words of Colleen Preston, Council to the House Committee on Armed Services, "have all potential contractors been afforded a fair and equal opportunity to compete?"[1] Within the Department of Defense there has been an across the board increase in competition.[2] The Navy's progress in the area of competition has been not only a dramatic rise in competition statistics but a change in philosophy. In testimony before a House Acquisition and Procurement Policy panel on April 9, 1986 Secretary of the Navy John F. Lehman said competition and tough negotiating have reduced the price of an Aegis cruiser from $1.2 billion to $900 million and that the price of an F/A-18 fighter aircraft has dropped from $22.5 million each to $18.7 million.[3] He went on to say that the Navy has sought true competition, not merely the appearance of competition through source selection followed by decades of monopoly production. Secretary Lehman stated, "We have pursued a policy of establishing second sources in every appropriate program. We have raised the percentage of competition in our shipbuilding program from 15.7 percent in 1980 to 85.6 percent in 1986, producing an average of $1 billion in cost underruns for each of the last four

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[1]Preston, Colleen A., "Competition and the 98th Congress," Contract Management, Issue 3, Volume 25, March 1985, page 8.

[2]Kellen, Bill, "Competition: A Pentagon Battlefield," New York Times, May 25, 1985.

[3]Testimony of The Honorable John F. Lehman, Jr., Secretary of the Navy Before the House Acquisition and Procurement Policy Panel on 9 April 1986.

years."[4] In Rear Admiral Platt's first annual Competion Report to Congress, required by the competition Act, he stated,

> There has been a dramatic turnabout in Navy competition performance since FY 82. The institutional bias favoring sole-source contracting has been, for the most part, overcome. The remaining bias is not a major obstacle to increasing competition, although it is a barrier which must continue to be addressed. Impressive cost savings have resulted from our competition, while readiness remains high.[5]

To illustrate his point, the following graphs were prepared by the Competition Advocate's office.

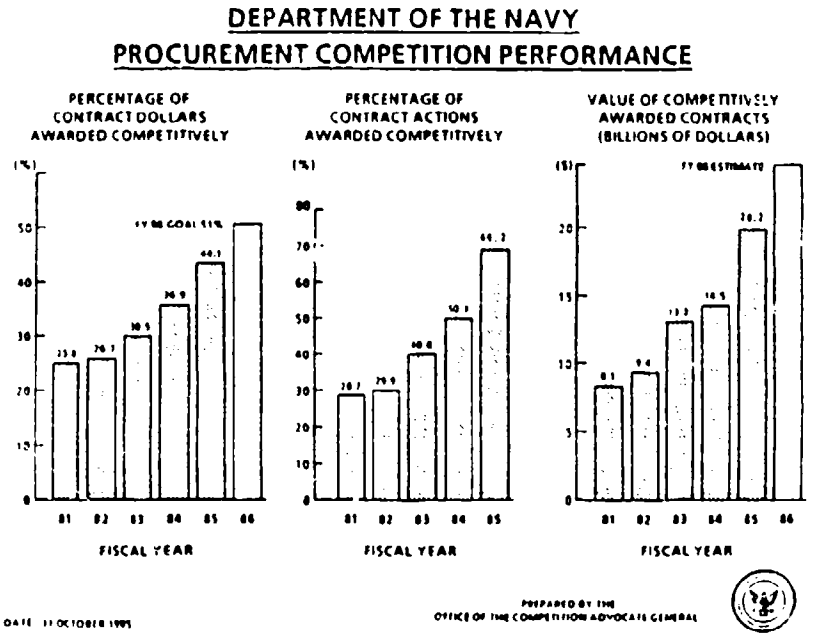

Figure 3

[4]Testimony of The Honorable John F. Lehman, Jr.

[5]Fiscal Year 1985 Annual Report on Procurement Competition in the Department of the Navy. Prepared by the Office of the Competition Advocate General of the Navy. Washington, D.C., December 1985.

How has the Navy turned around such a perceived bias towards non-competitive procurements? The first and foremost cause is Secretary Lehman's continued strong support and policy toward competition. He has emphasized competition not for competition's sake but rather for the lower prices, higher quality, and stronger industrial base which it provides. While it is politically wise to have such a philosophy during these times of political and legislative oversight, it also provides a basis from which he can achieve the 600 ship Navy. He has put together a staff within the Navy that supports his objectives. The Navy's acquisition executive, Assistant Secretary of the Navy for Shipbuilding and Logistics, Everett Pyatt summed up his feelings concerning the future of improvement in the acquisition process in a May 1, 1985 memorandum to Secretary Lehman as follows: "The Competition in Contracting Act is good and will reinforce our competition objectives."[6]

B. CONCLUSIONS

This research has led to a number of conclusions regarding the effect of the Competition in Contracting Act and the increased emphasis on competition in general.

Conclusion 1. The Competition in Contracting Act will be, in the long term, a positive influence on the acquisition process. Competition has been made easier. By putting competitive negotiation on par with sealed bid procedures contracting officers now have the option themselves how to

[6]Pyatt, Everett, Assistant Secretary of the Navy (Shipbuilding and Logistics), "Improvement of the Procurement Process," Memorandum For The Secretary of the Navy, 1 May 1985.

proceed with an acquisition without having to get approval to negotiate. Clearing up the definitions of what competition is and requiring approval only for noncompetitive actions has given the contracting officer the clout to enforce good business decisions.

Conclusion 2. There has been an increase in competition within the Department of Defense and specifically within the Navy. It was shown in the overview that there has been a real increase in competition across the board within the Department of Defense. In the Navy, competition figures have risen dramatically from 25 percent in 1981 to almost 45 percent in 1985 with a projected goal of 51 percent in 1986. There is no conclusive evidence that this increase is as a direct result of the CICA. Discussions with Navy managers indicate that their competition program was well underway before the implementation of the CICA and would not put CICA as a major contributing factor. Members of Congress and their staffs, however, feel that without the statutory requirements laid down by the CICA the Defense Department would not have gained the results they have achieved. In fact, those Congressional staff members interviewed feel that the Department of Defense still has a long way to go before the full impact of the CICA is felt. They view, as an example, the Navy's goal of 51 percent in 1986 as a glass half empty rather than half full.

Conclusion 3. The Competition in Contracting Act does not provide for full and open competition as it was originally intended. By exempting the Small Business interests and 8(a) firms as a compromise during conference the Act is considerably watered down from its original intent. While

compromise and the need for socioeconomic programs is a well recognized facet to our democracy, true unrestricted competition will never be achieved.

Conclusion 4. The Competition in Contracting Act did not alter the acquisition process to the extent originally considered. The general opinion of those people involved in the acquisition process has been that the CICA required some procedural changes (e.g. thresholds for the review of sole source contracts has changed, Determination and Findings (D & F's) were eliminated but Justification and Approvals (J & A's) are now required, etc.) but overall the actual business of putting a contract on paper has not changed significantly.

Conclusion 5. The impact of the bid protest provisions of the Competition in Contracting Act has yet to be analyzed. Due to the controversy over the constitutionality of the bid protest provisions of the CICA, they were not implemented until June 1985. From that time until now the initial impact of those provisions have been inconclusive. Discussions with senior Navy acquisition officials have indicated that the initial concern over frivolous protests and contract delays is unfounded.

Conclusion 6. The legal issues involved in the change in regulations and policy have yet to be fully realized. Contract law is built upon precedent. Legal decisions were made based upon the judical system's interpretation of various sections of the regulations. With the changes that the CICA involved it will take years to see how they will effect that body of law.

Conclusion 7. Implementation procedures of the Competition in Contracting Act within the Navy was, for the most part, too little too late. It was discussed during the chapter on implementation that there was no

definitive Plan of Action and Milestones or something similar to implement this significant change in regulations and policy. There appeared to be no one designated office for the Navy from which contracting offices could draw guidance. Overall, each System command was left to their own devices to implement the CICA. Due to the late publication and distribution of the revised FAR and appropriate supplements, many contracting activities had little or no time to properly instruct and train their personnel in the new procedures.

Conclusion 8. Training for the implementation of the Competition in Contracting Act was haphazard. The principal outgrowth of the lack of proper coordination for the CICA implementation was that program managers and contract specialists did not receive proper training either before or after the 1 April 1985 implementation date. The rush to conform to the new regulations and policy often left activities with more questions than anwers resulting in the CICA not giving people the proper attitude it should have.

Conclusion 9. The Department of Defense's mechanism for handling acquisition legislation needs reform. The antagonistic attitude between Congressional staffs and DOD managers concerning acquisition reform is counter-productive. Congress and their staffs cannot appreciate how or why DOD's acquisition sytem works and the DOD, conversely, cannot appreciate the motivation behind legislative reform when there is no definitive mechanism to work together to accomplish common goals. Legislative staffs complain that the DOD bureaucracy is too time consuming and formal while

the DOD personnel indicate that often Congressional staffs don't know what they are asking for or they are asking for too much too soon.

Conclusion 10. Congress and their staffs do not understand the acquisition process. While there are a number of extremely well-qualified and educated individuals on Capital Hill, they simply do not have the time or experience to fully understand the acquisition process. As a result there is often legislation or proposed legislation that does not do justice to the issue involved or does not address all of the facts.

Conclusion 11. Congress and their staffs often do not appreciate the impact on the acquisition process of continuous legislative reform. The implementation of the FAR and the CICA, as well as other legislative reform measures, within a year of each other placed a heavy administrative burden on both the Government and contractor community. Government Contracting Officers felt they were overwhelmed by this change in regulation and policy at a time when their workload was already at a maximum. Contractors had to adjust not only to the FAR and all its various supplements but also to the new emphasis on competition in all phases of the acquisition process. Those Congressional staffs interviewed indicated that, although they knew it would create some new administrative burden, they felt the intent and purpose of the legislation far out-weighed any "inconvience" of those involved in the acquisition process.

Conclusion 12. Procurement reform legislation will continue to dominate the acquisition process. Congress currently has approximately 150 bills pertaining to procurement reform pending. There are a number of reasons for this. The most apparent is the political impact members of Congress can

receive from this type of legislation. Voters can identify with paying exaggerated prices for common items like toilet seats and stool caps. When the reporters leave and the television cameras are off, however, there remains a feeling in Congress that they have a responsibility to ensure that any money granted to a Government agency is spent wisely. It is their inherent right as a member of Congress to exercise that oversight responsibility.

Conclusion 13. The Procurement Administrative Lead Time (PALT) has increased since the implementation of the Competition in Contracting Act. The figures shown earlier speak for themselves. What is not clear, however, is the long range impact of the CICA on PALT. Some believe that the increased PALT is merely the administrative lag time that comes with any new procedure or regulation. Others, however, indicate that this increased PALT is a direct result of CICA and will continue. They believe that the increased number of bidders or offerors, the increased time frames for synopsis and the increased requirement for documentation will keep PALT at an unacceptable level for some time.

Conclusion 15. The long term effects of increased competition and dual sourcing have yet to be analyzed. There is a concern on both sides, Government and contractor, that increased competition may have some dramatic effects in the future. Buying from a dependable and proven source, despite being in a sole source situation, often resulted in better quality and lower administrative costs. Developing long term sources with proven contractors allows for dependable quality and deliveries. Contractors could plan for a continuous flow of business and act accordingly (e.g. capital

equipment investments, EOQ for raw materials, etc.). There are tradeoffs in the cost savings of competition versus the increased cost of administering more contracts, having more quality assurance reviews, maintaining inventories of different manufacturer's parts, schedule delays, developing or buying technical data packages and maintaining them.

Conclusion 16. Personal services contracts are now subject to more competition since the implementation of the Competition in Contracting Act. In every instance, those Contracting Officers interviewed indicated that the increased emphasis in the competition of personal services contracts has been the most emotional and vocal issue of their customers. They, the customers, argue that you can compete nuts and bolts but how can individuals who have the experience in dealing with their issues and programs be competed. Prior to the CICA, Contracting Officers said they could easily justify sole source contracts for those personal services but they are now subject to the same, if not more, reviews than the hardware requires.

Conclusion 17. Productivity of contract specialists has fallen since the implementation of the Competition in Contracting Act. At the Naval Regional Contracting Center, Long Beach, for instance, productivity has gone from .0396 units completed per manhour in large purchase in 1984 to .0254 through March of 1986. As with the increased PALT, some argue that the decrease in productivity is only as a result of the learning curve involved with the CICA and will increase again over time. Others, however, say that the requirement for more contract documentation as a result of new bid

protest procedures, longer synopsis requirements and more offerors, that productivity will remain lower than pre-CICA.

Conclusion 18. Competitive range determinations have been made even more difficult as a result of the Competition in Contracting Act. Discussed earlier in Chapter V, the CICA has made this subjective judgement by the Contracting Officer more complex and difficult. Contracting Officers have to now determine the point at which to do they establish the competitive range knowing that an unsuccessful offeror can easily hold up contract award as a result of the new bid protest procedures. This determination requires more documentation and review than ever before and will continue to be a dominant factor in the acquisition process.

Conclusion 19. Department of Defense field contracting activities are often the most affected with procurement reform legislation. Field activities deal with volume contracting. They generally are understaffed and overworked. Developing and training for new procedures takes time away from their desks resulting in an increased backlog. This increased backlog can cause dissatified customers, decreased morale and pressure to get contracts awarded. These factors lead to mistakes and poor judgement.

C. RECOMMENDATIONS

Recommendation 1. The Navy should develop a comprehensive training program for its contracting activities. All too often the only time a contracting activity receives any outside assistance is when they get a Contract Management Review (CMR). The Navy needs to establish a mobile team that can visit an activity for at least one week a year and do a

comprehensive review of their program. This review would provide the latest information on new and proposed legislation, changes in regulations, review contract procedures, manning requirements, management practices, training programs and special interest items. This program should be established on a completely informal basis with no written reports outside the command. It would provide contracting activities a sounding board for their problems and disseminate those good practices or procedures found at other contracting shops. The new Acquisition Training Office established in Norfolk by the Naval Supply Systems Command in October 1985 could be expanded to facilitate this program or a new office could be created. If personnel restraints made this infeasible a consulting or personal services type contract could be let as a test program over a period of one to two years.

Recommendation 2. A legislative action group within the Department of Defense should be established to deal with proposed legislation. Both Congressional staffs and the Department of Defense officials agree that the current procedures for dealing with proposed legislation are inadequate. A committee of four to eight experienced contract specialists could be established within DOD to deal and meet with Congressional staffs over proposed legislation before it becomes a bill. The committee members selected from each of the Services would serve a one year fellowship in Washington, D.C.. This could serve as recognition of those in the contracting profession who are consistantly outstanding performers. If successful, the committee could be expanded to include those individuals from industry who also represent the best of their community. This committee or working

group would have no policy authority and not officially represent any DOD position, but only provide Congress and their staffs an opportunity to have an at least representative group that knows and understands the Government contracting process.

Recommendation 3. The Annual Competition Report to Congress should be expanded. The first annual report submitted to Congress by the Navy's Competition Advocate General's office is an excellent reference to the progress the Navy has made over the past several years. In its second report, however, the Navy should address the issue of what competition has done for the business community as a whole. During the hearings in the House of Representatives for the Competition in Contracting Act it was reported that only 25 large contractors held about 50 percent of the value of all DOD contracts, and only eight firms conducted 45 percent of all research for DOD in 1981. As a result of competition can the Navy show that these figures have changed significantly? How many more firms were awarded contracts as a result of competition? Has the geographical picture of Defense/Navy contracts grown considerably since competition became a major policy? Has competition helped the Small Business community, and if so where and to what extent? These questions have a direct political impact on Congress. If the Navy can show that competition has helped put new money into Congressional districts, created new jobs and strengthened the tax base of communities, Congress and the Navy can show the public that their tax money is being used to help national Defense as well as directly benefiting them.

Recommendation 4 Implementation procedures need to be established for future significant legislatitive or regulation/policy reform. The implementation plan for the CICA was ad hoc at best. There needs to be one central office or activity identified that coordinates the entire implementation process from begining to end. This includes dissemenation of policy from the Secretary's office, training, and administrative actions.

D. ANSWERS TO RESEARCH QUESTIONS

Responses to the subsidiary research questions will be summarized culminating with the principal research question.

Subsidiary Research Question 1. What are the major provisions of the Competition in Contracting Act of 1984? The CICA formally recognized competitive negotiation as an equally acceptable method of procurement as the sealed bid procedures. It eliminated the perception that anything other than formal advertising (now sealed bid) was not competitive in nature. It placed the resolution of bid protests within the statutory limits of GAO and required specific response times for the resolution of protests from both the GAO and Contracting Officer. The seventeen exceptions to negotiate were replaced with seven exceptions to other than full and open competition. It lowered the cost and pricing threshold from $500,000 to $100,000 and inserted a statutory requirement for Competition Advocates.

Subsidiary Research Question 2. How did the Competition in Contracting Act come about and why? The CICA came about not as a result of the much publicized spare parts "horror" stories but rather was a culmination of efforts that began with the Commission on Government Procurement in

1972. After a number of previous bills in the Senate failed, the Senate Governmental Affairs Committee succeeded in having S. 338, the Competition in Contracting Act, adopted as an amendment to the Deficit Reduction Act. The bill was modified during the three week long period of the House-Senate conference, with the major change being the inclusion of the new bid protest procedures, adopted from the House bill H.R. 5184.

Subsidiary Research Question 3. What were the major issues surrounding the implementation of the Competition in Contracting Act? There were two major issues surrounding the implementation of the CICA. The first was the controversy in which the Executive Branch initally refused to implement the bid protest procedures of the CICA. This action was initiated by the Attorney General's office stating that giving the GAO, a legislative agency, judiciary power was a violation of the separation of power doctrine and therefore unconstitutional. The controversy was eventually resolved after the Government lost one of the test cases in court as well as a legislative threat to not appropriate any monies to the Attorney General's office until all Federal agencies implemented all provisions of the CICA. The second major issue was the disagreement by the DOD and GAO concerning the intent of certain provisions of the CICA. Congress directed GAO to do a study on the Government's implementation of the CICA and review their subsequent revisions to the FAR. The issue was resolved in August, 1985 when DOD issued its reply to the GAO report.

Subsidiary Research Question 4. What were the major policy decisions that led to the implementation of the Competition in Contracting Act within the Navy and industry and what have been the implications of those policy

decisions? There were no major policy decisions made by the Navy concerning the implementation to the CICA after the bid protest and FAR controversies. The Navy did not develop any type of Plan of Action and Milestones for the CICA implementation and training was minimal. Industry, on the other hand, was forced to develop more comprehensive bidding strategies that caused a significant reduction in overhead and production costs to maintain a competitive edge over their conterparts.

Subsidiary Research Question 5. How can the initial implementation of the Competiton in Contracting Act be utilized to refine and improve competition? The inital implementation of the CICA showed that the Navy needs some mechanism to set into motion those actions necessary for a smooth transition from one regulation to another. In the future, significant legislative procurement reform laws should have one principal office that will oversee the entire process from policy to the administrative details. In those areas in that competition was refined and improved, the debate lingers whether it was a result of the CICA or of those intiatives already underway within the Navy. Regardless of which way the finger is pointing, it is apparent that competition has improved in the Navy after the implementation of the CICA.

Principal Research Question. What impact has the Competition in Contracting Act had on the procurement process of the Department of the Navy? The impact of the CICA has been significant. Competitive negotiation is now recognized as an equal to the sealed bid procedures. This flexibility to the Government allows the Contracting Officer to either compete a procurement in a sealed bid or negotiated environment depending on the

merits of each buy. There is no longer a requirement to justify negotiation through the Determination and Finding (D & F) process only to receive approval for anything other than full and open competition. Overall, the managers involved in the procurement process within the Navy have been forced to redefine their thinking and priorities. The statutory requirement for competition and the approval process for other than full and open competion has made those managers consider the long term effects of the procurement very early on in the acquisition process. Definitive goals for future competition must be given consideration in all Acquisition Plans. This, in turn, has caused program managers to think in terms of second or dual sourcing, standardization, component breakout, technical data package management and a variety of other issues. The CICA has had a positive influence on the Navy. The problems directly or indirectly attributable to the CICA are all workable ones and should be resolved over time.

E. AREAS FOR FURTHER RESEARCH

In researching this project there were a number of areas that could be identified for further research. The following are some of the more predominant ones.

A study of the CICA two to three years from now to see how many of the issues raised by the law have been resolved.

How has increased competition affected the total life cycle costs of major weapon systems?

Has increased competition helped or hurt the industrial base of this country? What effect has it had on the surge and mobilization capability of the industrial base?

Has the increased workload of competition (e.g.; more contracts, more contract adminstration, breakout programs, increased inventory management, etc.) continued to keep PALT high and productivity low? If so what measures are being taken to improve it?

Is the mobile training team concept in Recommendation 1 feasible?

Is the legislative action group proposed in Recommendation 2 feasible?

A cost/benifit analysis of increased competition versus the long term life cycle costs.

APPENDIX A

SENATE VERSION OF THE COMPETITION IN CONTRACTING ACT, S. 338

S. 338

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Competition in Contracting Act of 1983".

TITLE I—AMENDMENTS TO FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 101. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) by striking out section 303 (41 U.S.C. 253) and the heading of such section and inserting in lieu thereof the following:

"COMPETITION REQUIREMENTS

"SEC. 303. (a) Except as provided in subsection (e) or otherwise authorized by law, executive agencies shall use competitive procedures in making contracts for property or services. Executive agencies shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competition with due regard to the nature of the property or services to be acquired. Executive agencies shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify its needs and solicit bids or proposals in a manner designed to achieve effective competition for the contract.

"(b) An executive agency may provide for the procurement of property or services in order to establish or maintain any alternative source or sources of supply under this title using competitive procedures but excluding a particular source for that property or services if the executive agency determines that to do so would (1) increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services, (2) be in the interest of industrial mobilization in case of a national emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, an executive agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submissions, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other price-related factors;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is a reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals when sealed bids are not required under clause (1) of this subsection.

"(e) An executive agency may use noncompetitive procedures only when—

"(1) the property or services needed by the Government are available from only one source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

"(4) the terms of any international agreement or treaty between the United States Government and a foreign government, or international organization, or the directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of noncompetitive procedures;

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

"(6) the disclosure of the executive agency's needs to more than one source would compromise the national security.

"(f) For the purposes of applying subsection (e)(1)—

"(1) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule; and

"(2) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period of preparation for manufacture, and where it is likely that production by a source other than the original source would result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property, the property may be deemed to be available only from the initial source and maybe procured through noncompetitive procedures.

"(g) An executive agency may not award a contract using noncompetitive procedures unless—

"(1) the use of such procedures has been justified in writing; and

"(2) a notice has been published with respect to such contract pursuant to section 313 and all bids or proposals received in response to such notice have been considered by such executive agency.

"(h) For the purposes of the following laws, purchases or contracts made under this title using 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).".

(2) by adding at the end of section 309 (41 U.S.C. 259) the following new subsections:

"(b) The term 'executive agency' has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)), except that such term does not include the departments or establishments specified in section 2303(a) of title 10, United States Code.

"(c) The term 'competitive procedures' means procedures under which an executive agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the executive agency.

"(d) The term 'noncompetitive procedures' means procedures other than competitive procedures.

"(e) The term 'small purchase' means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase procedures."; and

(3) by adding at the end thereof the following new sections:

"SOLICITATION REQUIREMENTS

"SEC. 311. (a)(1) Each solicitation under this title shall include specifications which—

"(A) consistent with the needs of the executive agency, permit effective competition; and

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy such needs or as authorized by law.

"(2) For the purposes of paragraph (1), the type of specification included in any solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

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

APPENDIX A

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the executive agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), was inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the head of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

"(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.".

CONFORMING AMENDMENTS

SEC. 103. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c), (d), and (e) and inserting in lieu thereof the following:

"(c)(1) This title does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using other than sealed bid procedures under section 303(d)(1), if the conditions set forth in section 303 (d)(1) apply or the contract is to be performed outside the United States.

"(2) section 303 (d)(1) does not require the use of sealed bid procedures in cases in which section 204 (e) of title 23, United States Code, applies."; and

(C) by redesignating subsection (f) as subsection (d);

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"CONTRACT REQUIREMENTS";

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded using other than sealed bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11)-(13), or (14) of section 302(c)," in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 and inserting in lieu thereof "made or awarded after using other than sealed bid procedures"; and

(6) by striking out "section 302(c)(1)(F) of this title without regard to the advertising requirements of sections 302(c) and 303," in section 310 and inserting in lieu thereof "the provisions of this title relating to other than sealed bid procedures.".

(b) The table of contents of such Act is amended by striking out the lieu relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements.".

TITLE II—AMENDMENTS TO TITLE 10, *UNITED STATES CODE*

COMPETITIVE AND NONCOMPETITIVE PROCEDURES

SEC. 201. (a) Chapter 137 of title 10, United States Code, is amended—

(1) in section 2302—

(A) by inserting "the Secretary, any Deputy Secretary, any Under Secretary, or any Assistant Secretary of Defense;" after "means" in clause (1);

(B) by striking out clauses (2) and (3) of section 2302 and inserting in lieu thereof the following:

"(2) 'Agency' means any department or establishment specified in section 2303(a) of this title.

"(3) 'Competitive procedures' means procedures under which the head of an agency enters into a contract after soliciting sealed bids or competitive proposals from more than one source that is capable of satisfying the needs of the agency.

"(4) 'Noncompetitive procedures' means procedures other than competitive procedures.

"(5) 'Small purchase' means any purchase or contract which does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using small purchase procedures.";

(2) in section 2303(a)—

(A) by redesignating clauses (1), (2), (3), (4), and (5) as clauses (2), (3), (4), (5), and (6), respectively; and

(B) by inserting before clause (2) (as redesignated by subclause (A)) the following:

"(1) The Department of Defense.";

(3) by striking out sections 2304 and 2305 and inserting in lieu thereof the following:

"§ 2304. Competition requirements

"(a) Except as provided in subsection (e) of this section or otherwise authorized by law, the head of an agency shall use competitive procedures in making contracts for property or services. The head of an agency shall use advance procurement planning and market research and shall prepare specifications in such a manner as is necessary to obtain effective competitive with due regard to the nature of the property or services to be acquired. The head of an agency shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action and shall specify the needs of the agency and solicit bids or proposals in a manner designed to achieve effective competition for the contract.

"(b) The head of an agency may provide for the procurement of property or services in order to establish or maintain any alternative source or sources of supply under this title using competitive procedures but excluding a particular source for that property or services if such head of an agency determines that to do so would (1) increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services, (2) be in the interest of industrial mobilization in case of a national emergency, or (3) be in the interest of national defense in establishing or maintaining an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States.

"(c) Procurement regulations shall include special simplified procedures and forms for small purchases to facilitate making small purchases efficiently and economically.

"(d) For other than small purchases, the head of an agency, when using competitive procedures—

"(1) shall solicit sealed bids when—

"(A) time permits the solicitation, submission, and evaluation of sealed bids;

"(B) the award will be made on the basis of price and other price-related factors;

"(C) it is not necessary to conduct discussions with the responding sources about their bids; and

"(D) there is reasonable expectation of receiving more than one sealed bid;

"(2) shall request competitive proposals from responding sources when sealed bids are not required under clause (1) of this subsection.

"(e) The head of an agency may use noncompetitive procedures only when—

"(1) the property or services needed by the Government are available from only one source 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 unusual and compelling urgency that the Government would be seriously injured by the delay associated with using competitive procedures;

"(3) it is necessary to award the contract to a particular source or sources in order to (A) maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency, (B) achieve industrial mobilization in the case of such an emergency, or (C) establish or maintain an essential research capability to be provided by an educational or other nonprofit institution or a research and development center funded by the United States;

"(4) the terms of any international agreement or treaty between the United States Government and a foreign government or international organization, or the directions of any 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 noncompetitive procedures;

"(5) a statute authorizes or requires that the procurement be made through another agency or from a specified source, or the

APPENDIX A

agency's need is for a brand-name commercial item for authorized resale; or

"(B) the disclosure of the agency's needs to more than one source would compromise the national security.

"(f) For the purposes of applying section 2304(e)(1) hereof: (A) property or services shall be considered to be available from a source if such source has the capability to produce the property or deliver the service in accordance with the Government's specifications and delivery schedule, and (B) in the case of the procurement of technical or special property which has required a substantial initial investment or an extended period or preparation for manufacture, and where it is likely that production by a source other than the original source would result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property, the property may be deemed to be available only from the initial source and may be procured through noncompetitive procedures.

"(g) The head of an agency may not award a contract using noncompetitive procedures unless—

"(1) the use of such procedures has been justified in writing; and

"(2) a notice has been published with respect to such contract pursuant to section 2305(e) of this title and all bids or proposals received in response to such notice have been considered by such head of an agency.

"(h) For the purposes of the following laws, purchases or contracts made under this chapter using 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).

"§ 2305. Solicitation, evaluation, and award procedures; notice requirements

"(a)(1)(A) Each solicitation under this title shall include specifications which—

"(i) consistent with the needs of the agency, permit effective competition; and

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

"(B) For the purposes of subparagraph (A) of this paragraph, the type of specification included in any 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) Each solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in paragraph (1) of this subsection—

"(A) a statement of—

"(i) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

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

"(B) 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; and

"(C) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals 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 an 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 an agency shall evaluate the bids without discussions with the bidders and shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, solely considering the price and the other factors included in the solicitation under subsection (a)(2)(A) of this section. 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 and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification where it can be clearly demonstrated from the existence of effective competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in fair and reasonable prices.

"(B) In the case of award of a contract under subparagraph (A)(i) of this paragraph, the head of an agency shall conduct, before such award, written or oral discussions with all responsible offerors who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii) of this paragraph, the head of an agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of an agency shall, except as provided in paragraph (2) of this subsection, award a contract with reasonable promptness to the responsible offeror whose proposal is most advantageous to the United States, solely considering price and other factors included in the solicitation under subsection (a)(2)(A) of this section. The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

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

"(c)(1)(A) Except as provided in paragraph (2) of this subsection—

"(i) the head of an agency intending to solicit bids or proposals for a contract for property or services at a price expected to exceed $10,000 shall furnish for publication by the Secretary of Commerce a notice described in paragraph (2) of this subsection; and

"(ii) the head of an agency awarding a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(B) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by subparagraph (A) of this paragraph.

"(C) Whenever a head of an agency is required by subparagraph (A)(i) of this paragraph to furnish a notice of a solicitation to the Secretary of Commerce, such head of an agency may not—

"(i) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(ii) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(2) Each notice required by paragraph (1)(A)(i) of this subsection shall include—

"(A) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(B) the name and address of the officer or employee of the agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(C) a statement that any person may submit a bid or proposal which shall be considered by the agency; and

"(D) in the case of a procurement using noncompetitive procedures, a statement of the reason justifying the use of noncompetitive procedures and the identity of the intended source.

"(3)(A) A notice is not required under paragraph (1)(A) of this subsection if—

"(i) the notice would disclose the agency's needs and the disclosure of such needs would compromise the national security; or

"(ii) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

"(B) The requirements of paragraph (1)(A)(i) of this subsection do not apply—

"(i) to any procurement under conditions described in clause (2), (3), (4), or (5) of section 2304(e) of this title; and

"(ii) in the case of any procurement for which the head of the agency carrying out such procurement makes a determination in writing, with the concurrence of the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation."; and

APPENDIX A

(4) by adding at the end thereof the following new section:

"§ 2316. Record requirements

"(a) Each head of an agency shall establish and maintain for a period of five years a record, by fiscal year, of the procurements, other than small purchases, in such fiscal year in which—

"(1) noncompetitive procedures were used; and

"(2) only one bid or proposal was received after competitive procedures were used.

"(b) The record established under subsection (a) of this section shall include, with respect to each procurement—

"(1) information identifying the source to whom the contract was awarded;

"(2) the property or services obtained by the Government under the procurement;

"(3) the total cost of the procurement;

"(4) the reason under section 2304(e) of this title for the use of noncompetitive procedures; and

"(5) the position of the officers or employees of the agency who required and approved the use of noncompetitive procedures in such procurement.

"(c) The information included in the record established and maintained under subsection (a) shall be transmitted to the Federal Procurement Data Center referred to in section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(d)(5)).".

(b) The table of sections at the beginning of such chapter is amended—

(1) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.
"2305. Solicitation, evaluation, and award procedures; notice requirements.",

and

(2) by adding at the end thereof the following new item:

"2316. Record requirements.".

CONFORMING AMENDMENTS

SEC. 202. Chapter 137 of title 10, United States Code, is amended—

(1) in section 2306—

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)(1)—

(i) by striking out clause (A) and inserting in lieu thereof the following:

"(1) prior to the award of any prime contract under this title after using other than sealed bid procedures where the contract price is expected to exceed $100,000;";

(ii) by striking out "negotiated" each place it appears in the second paragraph;

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title,"; and

(iv) by striking out "$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu thereof "$100,000; and

(E) by adding at the end thereof the following new subsection:

"(i) Except in a case in which the Secretary of Defense determines that military requirements necessitate the specification of container sizes, no contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.";

(2) by striking out subsection (b) of section 2310 and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) 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 (1) clearly indicate why the type of contract selected under section 2306(c) 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), (3) clearly indicate why advance payments under section 2307(e) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) 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.";

(3) by striking out section 2311 and inserting in lieu thereof the following: "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."; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

TITLE III—ADVOCATE FOR COMPETITION; ANNUAL REPORT ON COMPETITION

DEFINITION

SEC. 301. For the purposes of this title, the term "executive agency" has the same meaning as provided in section 4(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(a)).

ADVOCATE FOR COMPETITION

SEC. 302. (a)(1) There is established in each executive agency an advocate for competition.

(2) Each head of an executive agency shall—

(A) designate for each executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition;

(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

(b)(1) The advocate for competition shall promote competition in the procurement of property and services.

(2) The advocate for competition in an executive agency shall—

(A) review the purchasing and contracting activities of the executive agency;

(B) identify and report to the head of the executive agency—

(i) opportunities to achieve competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

(ii) solicitations and proposed solicitations which include unnecessarily detailed specifications or unnecessarily restrictive statements of need which may reduce competition in the procurement activities of the executive agency; and

(iii) any other condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

(C) prepare and transmit to the head of the executive agency an annual report describing his activities under this section.

ANNUAL REPORT

SEC. 303. (a) Not later than September 30 of each of 1983, 1984, 1985, and 1986, each head of an executive agency shall transmit to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives and annual report including the information specified in subsection (b).

(b) Each report transmitted under subsection (a) shall include—

(1) a specific description of all actions that the head of the executive agency intends to take during the next fiscal year to—

(A) increase competition for contracts with the executive agency on the basis of price and other significant factors; and

(B) reduce the numbers and dollar value of contracts entered into by the executive agency after soliciting bids or proposals from, or evaluating bids or proposals with discussions with, only one source; and

(2) a summary of the activities and accomplishments of the advocates for competition of the executive agency during the fiscal year in which the report is transmitted.

TITLE IV—APPLICABILITY

SEC. 401. The amendments made by this Act shall apply with respect to any solicitations for bids or proposals issued on or after the date (two hundred and seventy days after the date of the enactment of this Act

APPENDIX B

HOUSE OF REPRESENTATIVE VERSION OF THE COMPETITION IN CONTRACTING ACT, H.R. 5184

H.R. 5184

IN THE HOUSE OF REPRESENTATIVES
March 20, 1984

Mr. Brooks and Mr. Horton introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts using full and open competition, and for other purposes.

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

That this Act may be cited as the "Competition in Contracting Act of 1984".

SEC. 2. (a) The Office of Federal Procurement Policy Act is amended by adding at the end thereof the following new title:

"TITLE II—FEDERAL PROCUREMENT COMPETITION REQUIREMENTS

"GENERAL PROHIBITION

"SEC. 201. Notwithstanding any other provision of law, no executive agency is authorized to engage in any procurement unless such procurement is conducted in accordance with this title and with the Government-wide regulations prescribed under section 105(b) as modified pursuant to section 205 of this title.

"COMPETITION REQUIREMENTS

"SEC. 202. (a)(1) Except as provided in subsections (b) and (c), each executive agency—

"(A) shall use full and open competition in making contracts for property or services;

"(B) shall use advance procurement planning and market research in all procurements;

"(C) shall use the competitive practices or combinations thereof that is best suited to the circumstances of the procurement; and

"(D) shall state its requirements, prepare specifications, and solicit bids or proposals in a manner designed to achieve full and open competition for the contract.

"(2) For other than small purchases, an executive agency, when using competitive practices—

"(A) shall solicit sealed bids when—

"(i) the award will be made on the basis of price and other price-related factors;

"(ii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iii) there is a reasonable expectation of receiving more than one sealed bid; and

"(B) shall request competitive proposals when sealed bids are not required under clause (A) of this paragraph.

"(b)(1) An executive agency is authorized to conduct a procurement using practices that are less rigorous than full and open competition only when—

"(A) the executive agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured by soliciting bids or proposals from all qualified sources;

"(B) the executive agency determines that exclusion of a current source from the competition is necessary to establish or maintain alternative sources of supply and that to do so would increase competition;

"(C) it is necessary to fulfill the goals of socially and economically disadvantaged or small business programs and all such businesses that are qualified are allowed to compete; or

"(D) the disclosure of the executive agency's requirements to all qualified sources would compromise the national security.

"(2) An executive agency may not award a contract using practices that are less rigorous than full and open competition unless —

"(A) the use of such practices is fully justified in writing by the contracting officer and the contracting officer certifies that such justification is accurate and complete;

"(B) the contracting officer's justification and certification statements have been reviewed and approved in writing by a higher level official involved in the awarding of the contract concerned; and

"(C) a notice has been published with respect to such contract pursuant to section 20(a)(1)(A) and all bids or proposals received in response to such notice have been fully considered by such executive agency.

"(c)(1) An executive agency is authorized to conduct a procurement using practices that are noncompetitive only when —

"(A) the property or services required by the Government are available from only one source and no competitive alternative can be made available that will satisfy the requirements of the executive agency;

"(B) it is necessary (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in the event of a national emergency, (ii) to achieve industrial mobilization in the event of such an emergency, or (iii) to maintain an essential research capability provided by an educational or other nonprofit institution or federally funded research and development center;

"(C) the terms of any international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of any foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of practices that are noncompetitive; or

"(D) a statute requires that the procurement be made from a specified source.

"(2) An executive agency may not award a contract using procurement practices that are noncompetitive unless —

"(A) the use of such practices is fully justified in writing by the contracting officer and the contracting officer certifies that such justification is accurate and complete;

"(B) the contracting officer's certification and justification statements have been reviewed and approved in writing by the head of the procurement activity;

"(C) a notice has been published with respect to such contract pursuant to section 20(a)(1)(A) and all bids or

APPENDIX B

proposals received in response to such notice have been fully considered by such executive agency; and

"(D) the justification statement prepared pursuant to clause (A) includes at a minimum the following:

"(i) an identification of the agency's requirements;

"(ii) a description of the facts supporting the use of noncompetitive practices under paragraph (1) of this subsection;

"(iii) a demonstration, based on the proposed contractor's qualifications, that such contractor is the only source able to meet the agency's requirement;

"(iv) a description of the market survey conducted, or the reasons a market survey could not be conducted, to locate other sources;

"(v) a listing of all potential sources who had expressed an interest in the procurement and the reason why they should be excluded; and

"(vi) a statement of the actions the agency plans to take to remove or overcome any barrier to competition prior to any subsequent procurement for such requirements.

"(3) The authority to review and approve certifications and justifications under paragraph (2)(B) may in the case of procurements involving a total expenditure by the Government of less than $250,000, be delegated to another senior official within the office or unit responsible for the procurement activity concerned.

"(4) In no case shall an executive agency be authorized to engage in noncompetitive procurement on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions.

"(5) For purposes of paragraph (1)(A) of this subsection, alternative sources shall be considered to be available for the production or assembly of spare parts if such sources have the capability to produce the same or like parts in accordance with the government's requirements and delivery schedule, unless another party has a legitimate proprietary interest in the parts or their manufacture and the agency would be legally liable to such party if it purchases the same or like parts from another party.

"(d) Any justification, certification, or written approval under subsection (b) or (c), and any related account, document, or other record shall be made available for inspection by the public upon request except to the extent that it contains information authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy.

"(e) The executive agency's senior procurement executive (designated pursuant to section 115(a)(3)) shall approve or disapprove each procurement conducted under subsection (b) or (c) and shall establish practices for reviewing such procurements prior to such approval or disapproval. This authority may be delegated only to the extent that such procurement involves a total expenditure by the Government of less than $500,000.

"(f) Simplified practices and forms shall be used to facilitate making small purchases and to promote competition in such purchases to the maximum extent practicable.

"(g) No executive agency may procure goods or services from another executive agency unless such other executive agency complies fully with the requirements of this title in its procurement of those goods or services. The restrictions contained in this subsection are in addition to, and not in lieu of, any other restrictions provided by law.

"(h)(1) An executive agency may not refuse to include a product of a responsible source or group of responsible sources on a 'qualified products' or similar list without referring the matter for final disposition to the advocate for competition established pursuant to section 115(b) of this Act.

"(2) If —

"(A) there is only one product on a 'qualified products' or similar list,

"(B) competitive procurement would lead to a significant savings for the Federal Government, and

"(C) a responsible small business would not otherwise have the resources to qualify a product of its manufacture for such list,

then the procuring agency may reimburse the reasonable costs incurred by a small business in qualifying a product of its manufacture for such list.

"(i) During the planning for contracts for the procurement of the production or assembly of spare parts, the head of each executive agency shall take such steps as are necessary to develop its requirements so as —

"(1) to maximize competition for those components or services where competition is available, and

"(2) to insure that, to the maximum extent practicable, small and socially and economically disadvantaged businesses are not precluded from performing as prime contractors and subcontractors on such contracts.

"(j) As used in this section —

"(1)(A) The term 'full and open competition' means that —

"(i) all qualified sources are allowed and encouraged to submit sealed bids or competitive proposals on the procurement;

"(ii) no procurement specification or other description of the agency's requirements unnecessarily restricts competition for the procurement;

"(iii) each such sealed bid or competitive proposal is fully evaluated by the executive agency in the selection of a contract recipient; and

"(iv) the contract is entered into only after the executive agency has received, from qualified sources, a sufficient number of sealed bids or competitive proposals to ensure that the Government's requirements are filled at the lowest possible price given the nature of the product or service being acquired.

"(B) Such term includes 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. 451 et seq.).

"(2) The term 'practices that are less rigorous than full and open competition' means practices that permit a limited number of qualified sources to submit offers on the procurement and the executive agency enters into a contract after receiving sealed bids or competitive proposals from two or more sources whom the agency determines to be (A) within the competitive range or (B) eligible for selection.

"(3) The term 'noncompetitive' means any procurement practice that results in the award of a contract by an executive agency after receiving only one bid or proposal.

"(4) The term 'qualified source' means any responsible source that has the capability to produce the property or deliver the service in accordance with the Government's requirements and delivery schedule.

"(5) The term 'small purchase' means any purchase or contract that does not exceed $25,000. A proposed procurement shall not be divided into several procurements primarily for the purpose of using the small purchase practices

APPENDIX B

"PROCUREMENT NOTICE

"SEC. 203. (a)(1) Except as provided in subsection (c) —

"(A) an executive agency intending to solicit bids or proposals for a contract for property or services at a price expected to exceed $10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services at a price exceeding $10,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(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 of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than fifteen days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than thirty days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include—

"(1) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name, business address and phone number, and title of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) a statement that all qualified sources may submit a bid or proposal which shall be considered by the executive agency; and

"(4) in the case of a procurement using noncompetitive practices, a justification for using noncompetitive practices 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 requirements and the disclosure of such requirements would compromise the national security; or

"(B) the proposed noncompetitive procurement would result from acceptance of an unsolicited research proposal that demonstrates a unique or innovative research concept and the publication of any notice of such unsolicited research proposal cannot avoid the disclosure of the originality of thought or innovativeness of the proposed research or proprietary data associated with the proposal.

"(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in section 202(b)(1)(A).

"PROCUREMENT PROTEST SYSTEM

"SEC. 204. (a) Subject to subsection (f), protests concerning alleged violations of the procurement laws and regulations shall be decided in the General Accounting Office if filed with that Office in accordance with this section. Any such protests which concern alleged violations of this title shall be given priority consideration by the General Accounting Office. Nothing contained in this section shall be construed to give the General Accounting Office exclusive jurisdiction over protests.

"(b)(1) In accordance with the procedures issued pursuant to subsection (d), the Comptroller General shall have authority to decide any protest submitted by an interested party or referred by any executive agency or any court of the United States.

"(2)(A) The Comptroller General shall notify the executive agency within one working day of the receipt of a protest and the executive agency shall submit a complete report (including all relevant documents) on the protested procurement to the Comptroller General within 25 working days from the agency's receipt of the notice of such protest. In any case determined by the Comptroller General to be suitable for the express option under subsection (c)(1), such report and documents shall be submitted within 10 working days from such receipt.

"(B) No contract shall be awarded on the basis of the protested procurement after the contracting officer has received notice of a protest to the Comptroller General and while the protest is pending.

"(C) If the contract has been awarded prior to the receipt of notice of protest, contract performance shall be ceased or the contract shall be suspended upon receipt of notice and while the protest is pending. This subparagraph shall not apply when the protest is filed more than 30 days after the award of the contract.

"(D) The head of an executive agency or the agency's senior procurement executive (designated pursuant to section 115(a)(3)) may authorize the award or performance of a contract notwithstanding a protest of which the agency has notice under subparagraph (B) or (C) —

"(i) upon a written finding that compelling, exigent circumstances which significantly affect vital interests of the United States will not permit awaiting the decision of the Comptroller General; and

"(ii) after the Comptroller General is advised of such finding.

"(E) Prior to the award of the contract, no finding may be made under subparagraph (D)(i) unless the award of the contract is otherwise likely to occur within 30 days of notification of the protest.

"(3) With respect to any solicitation, proposed award, or award of a contract protested in accordance with this section, the Comptroller General is authorized to determine whether such solicitation, proposed award, or award complies with law and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with law or regulation, or both, the Comptroller General shall recommend that the agency—

"(A) refrain from exercising any of its options under the contract;

"(B) recompete the contract immediately;

"(C) issue a new solicitation;

"(D) terminate the contract;

"(E) award a contract consistent with the requirements of such law and regulation; or

"(F) comply with any combination of recommendations under clauses (A), (B), (C), (D), and (E) and with such additional recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement law and regulation.

"(c)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this section. The Comptroller General shall establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 45 days from the date of

APPENDIX B

protest. Within such deadlines as the Comptroller General shall prescribe, each executive agency shall provide to any interested party—

"(A) any nonprivileged documents relevant to the protested procurement action (including the report required by subsection (b)(2)(A)) that would not give such party a competitive advantage, if the protest is submitted prior to the award of the contract; or

"(B) any nonprivileged documents relevant to the protested procurement action (including the report required by subsection (b)(2)(A)) if the protest is submitted after the award of the contract.

"(2) Each decision of the Comptroller General shall be signed by the Comptroller General, or a designee for such purpose. A copy of the decision shall be furnished to the interested parties and the executive agency or agencies involved.

"(3) The Comptroller General is authorized to dismiss any protest determined to be frivolous or which, on its face, does not state a valid basis for protest.

"(4)(A) If the Comptroller General has determined that a solicitation, proposed award, or award of a contract does not comply with law or regulation, or both, the Comptroller General may further declare the entitlement of an appropriate party to the costs of—

"(i) filing and pursuing the protest, including reasonable attorney's fees; and

"(ii) bid and proposal preparation.

"(B) Declarations of entitlement to monetary awards shall be paid promptly by the executive agency concerned out of funds available for the purpose of the procurement concerned.

"(d)(1) The Comptroller General shall, within 90 days after the date of enactment of this title, establish such procedures, not inconsistent with this section, as may be necessary to the expeditious execution of the protest decision function, including procedures for accelerated resolution of the protest under the express option authorized by subsection (c)(1). Such procedures shall provide that the protest process shall not be delayed by the failure of any party to make any filing within the time provided therefore, and that such failure may be taken as an admission of the contentions made by an opposing party.

"(2) The Comptroller General may use any authority available under chapters 7 and 35 of title 31, United States Code, to verify contentions made by parties in protests under this section.

"(e) Any interested party adversely affected or aggrieved by the action, or the failure to act, of a Government agency in respect of a solicitation or award may obtain judicial review thereof to the extent provided by sections 702 through 706 of title 5, United States Code, including determinations necessary to resolve disputed material facts or when otherwise appropriate.

"(f)(1) Upon request of any interested party in connection with any procurement conducted under authority provided by section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759), including procurements conducted under blanket delegations of procurement authority, the General Services Administration Board of Contract Appeals (the Board"), shall review any determination by a contracting officer alleged to violate law or regulation, or both, under the standard applicable to review of contracting officer final decisions by boards of contract appeals.

"(2) When an action under this section is filed before award of the challenged procurement, the Board, at the request of any interested party, shall promptly hold a hearing to determine whether it should suspend the delegation of procurement authority for the challenged procurement on an interim basis until the Board can decide the action. The delegation of procurement authority shall be suspended unless the agency establishes that—

"(A) absent action by the Board, contract award is likely to occur within 30 days of the hearing; and

"(B) compelling, exigent circumstances which significantly affect vital interests of the United States will not permit awaiting the decision of the Board.

"(3) At the request of any interested party, when an action is filed within 10 working days of publication of award by the Secretary of Commerce or receipt of written notice of award by the party challenging the award, whichever comes first, the Board shall promptly hold a hearing to determine whether it should suspend the delegation of procurement authority for the challenged procurement on an interim basis until the Board can decide the action. The Board shall suspend the agency's authority to acquire any goods or services under the contract which are previously delivered and accepted unless the agency establishes that compelling exigent circumstances which significantly affect vital interests of the United States will not permit awaiting the decision of the Board.

"(4) The Board shall conduct such proceedings and allow such discovery as may be required for the expeditious, fair and reasonable resolution of the action. The Board shall endeavor to give priority to actions filed under this section. However, nothing contained herein shall conflict with any deadlines imposed by section 9(a) of the Contract Disputes Act. In making a decision on the merits of actions brought under this section, the Board shall accord due weight to the policies of this Act, and the goals of economic and efficient procurement set forth in section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759). When the Board determines that challenged agency action violates procurement law or regulation or the conditions of any delegation of procurement authority issued pursuant to such section, the Board may suspend, revoke or revise the delegation of procurement authority applicable to the challenged procurement. The final decision of the Board may be appealed by any interested party, including interested parties who intervene in any action filed under this section, as set forth in the Contract Disputes Act. If the Board revokes or suspends a delegation of procurement authority after contract award, the affected contract shall not be considered void ab initio but shall be presumed valid as to all goods or services delivered and accepted thereunder prior to the suspension, revocation or revision of the delegation of procurement authority. Nothing contained herein 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 the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759). In addition, nothing contained herein shall affect the right of any person to file protests with the General Accounting Office or contracting agency or to file actions in the district court or the Court of Claims of the United States.

"(5) When two or more actions involving the same procurement are filed before the Board and one or more courts, then the action first filed shall proceed and all other actions relating to the procurement shall be stayed. Except as otherwise provided by law, the filing of a protest with the General Accounting Office shall not affect an interested party's rights to file and pursue actions involving Federal

APPENDIX B

procurements in the courts, and before the Board as authorized in this subsection.

"(g) For purposes of this section—

"(1) the term 'protest' means a challenge to a solicitation, or to the award or proposed award of any procurement contract; and

"(2) the term 'interested party' means a person whose direct economic interest would be affected as contractor or subcontractor by the award or nonaward of the contract.

"MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

"SEC. 205. The Administrator shall promulgate, within 90 days after the date of enactment of this title, such modifications as may be necessary to the Government-wide regulations prescribed under section 105(b) to conform such regulations to the requirements of this title."

(b) The Office of Federal Procurement Policy Act is further amended—

(1) by inserting after the first section the following:

"TITLE I—GENERAL PROVISIONS FOR THE IMPROVEMENT OF FEDERAL PROCUREMENT";

(2) by striking out "this Act" each place it appears in sections 3 through 17 and inserting in lieu thereof "this title";

(3) by striking out "section 2" in section 6(f) and inserting in lieu thereof "section 101";

(4) by striking out "section 6(a)" in section 8(b) and inserting in lieu thereof "section 105(a)";

(5) by striking out "section 6" in section 9 and inserting in lieu thereof "section 105";

(6) by striking out "section 2" in section 15 and inserting in lieu thereof "section 101";

(7) by striking out "section 2" in section 15 and inserting in lieu thereof "section 101";

(8) by striking out the first section 15 (relating to repeals and amendments); and

(9) by redesignating the remaining sections 2 through 17 as sections 101 through 116, respectively.

SEC. 3. Section 115 of the Office of Federal Procurement Policy Act (as redesignated by section 2(8) of this Act) is amended—

(1) by inserting "(a)" after "SEC. 115.";

(2) by striking out "effective competition" in clause (1) and inserting in lieu thereof "full and open competition"; and

(3) by adding at the end thereof the following new subsections:

"(b)(1) There is established in each executive agency an advocate for competition.

"(2) Each head of an executive agency shall —

"(A) designate for each executive agency one senior officer or employee (other than the senior procurement executive designated pursuant to subsection (a)(3)) serving in a position authorized for such executive agency on the date of enactment of this Act to serve as the advocate for competition.

"(B) relieve such officer or employee of all duties and responsibilities that are inconsistent with the duties and responsibilities of the advocate for competition; and

"(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition.

"(c) The advocate for competition designated under subsection (b)(2)(A) shall be responsible for removing barriers to and promoting full and open competition in the procurement of property and services and shall —

"(1) review the purchasing and contracting activities of the executive agency;

"(2) identify and report to the head of the executive agency —

"(A) opportunities and actions taken to achieve full and open competition on the basis of price and other significant factors in the purchases and contracts of the executive agency;

"(B) solicitations and proposed solicitations that include unnecessarily detailed specifications or unnecessarily restrictive statements of need that may reduce competition in the procurement activities of the executive agency; and

"(C) any other condition or action that has the effect of unnecessarily restricting competition in the procurement actions of the executive agency;

"(3) review all proposals which have been submitted to the senior executive for approval under section 202(e) and provide such executive a written determination on the validity of the proposal;

"(4) prepare and transmit to the head of the executive agency an annual report describing —

"(A) such advocate's activities under this section;

"(B) new initiatives required to increase competition; and

"(C) barriers to full and open competition that the advocate was unable to remove;

"(5) set goals and develop plans for increasing competition on a fiscal year basis;

"(6) develop a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs (which will be implemented by the agency's senior procurement executive); and

"(7) emphasize competition in programs for procurement training and research.

"(D)(1) Each head of an executive agency shall establish and maintain for a period of five years a computerized file by fiscal year containing records of all procurements other than small purchases in such fiscal year. Each record shall include—

"(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 any procurement in which practices were used which were less rigorous than full and open competition or which were noncompetitive, the procurement record shall include, in addition to the information required by paragraph (1)—

"(A) information identifying the procurement practices used and the reason for the use of such practice; and

"(B) the name and position of the officers or employees of the agency who, as required by this Act, approved the procurement practices used, and the date of such approval.

"(3) The information included in the record established and maintained under this subsection shall be transmitted to and included in, the Federal Procurement Data System referred to in section 105(d)(4) of this Act.

APPENDIX C

THE COMPETITION IN CONTRACTING ACT OF 1984

TITLE VII—COMPETITION IN CONTRACTING

Short Title

Sec. 2701. This title may be cited as the "Competition in Contracting Act of 1984".

SUBTITLE A—AMENDMENTS TO THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

Competitive Procedures

Sec. 2711. (a)(1) Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended to read as follows:

"**Competition Requirements**

"Sec. 303. (a)(1) Except as provided in subsections (b) and (c) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency—

"(A) shall comply with the full and open competition requirements set out in this title and in the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

"(B) shall use, in entering into a contract for property or services, the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action.

"(2) The head of an executive agency, when using competitive procedures—

"(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) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the head of the executive 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 such 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) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

"(c) An executive agency may use procedures other than competitive procedures only when—

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

"(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government 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 to (A) 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) establish 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 treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive 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 executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

"(6) the unrestricted disclosure of the executive 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 executive 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 each House of the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d) For the purposes of applying subsection (c)(1), —

APPENDIX C

"(1) 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 unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

"(2) in the case of follow-on contracts for the continued development or production of major systems or highly specialized equipment when it is likely that award to a source other than the original source would result in (A) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

"(e) An executive 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), an executive agency may not award a contract using procedures other than competitive procedures unless —

"(A) the use of such procedures is justified in writing and the accuracy and completeness of the justification are certified by the contracting officer for the contract;

"(B) in the case of a contract for an amount exceeding $100,000, such justification is approved by the competition advocate for the procuring activity;

"(C) in the case of a contract for an amount exceeding $1,000,000, such justification is approved by the head of the procuring activity or a delegate who if a member of the armed forces, is a flag or general officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule or in a comparable or higher position under another schedule; or

"(D) in the case of contract for an amount exceeding $10,000,000, such justification is approved 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)); and

"(E) a notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to such notice have been considered by such executive agency.

"(2) In the case of procurements permitted by subsection (c)(2), the justification and approvals required by paragraph (1) may be made after the procurement has occurred. The justification and approvals required by paragraph (1) shall not be required in the case of procurements permitted by subsection (c)(7) or in the case of procurements conducted pursuant to the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The statement of 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 such exception;

"(C) a determination that the anticipated cost is fair and reasonable;

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

"(E) a listing of the responsible 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 a barrier to competition before a subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related account, document, or other record shall be made available for inspection by the public consistent with the provisions of section 552 of title 5, United States Code.

"(5) In no case may an executive 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 executive agency unless such other executive agency complies fully with the requirements of this title in its procurement of such property or services.

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

"(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, regulations shall provide for special simplified procedures for small purchases of property and services.

"(2) A small purchase is a purchase or contract which does not exceed $25,000.

"(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use small purchase procedures.

"(4) The head of an agency, in using small purchase procedures, shall promote competition under such procedures to the maximum extent practicable.".

"(2) Title III of such Act is further amended by inserting after section 303 the following new sections:

"**Planning and Solicitation Requirements**

"Sec. 303A. "(a)(1) In planning for the procurement of property or services, an executive agency shall —

"(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the contract;

"(B) use advance procurement planning and market research; and

"(C) prepare 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.

"(2) Each solicitation under this title shall include specifications which —

"(A) consistent with the provisions of this title, permit full and open competition;

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

"(3) For the purposes of paragraph (1), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available

APPENDIX C

to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function so that a variety of products or services may qualify;

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

"(C) design requirements.

"(b) Each solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in subsection (a)—

"(1) a statement of—

"(A) all significant factors, including price, which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(B) the relative importance assigned to each of those factors; and

"(2)(A) 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

"(B) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"Evaluation and Award

Sec. 303B. (a) An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

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

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), 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 the price and the other price-related factors included in the solicitation under section 303A(b)(1). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and prior to the award of the contract; or

"(B) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within a competitive range, price and other evaluation factors considered.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received and as clarified, if necessary, in discussions conducted for the purpose of minor clarification.

"(4) The executive agency shall, except as otherwise provided in subsection (b), award a contract with reasonable promptness to the responsible sources whose proposal is most advantageous to the United States, considering price and the factors included in the solicitation under section 303A(b)(1). The executive agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the head of an executive agency considers that any bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.

"(f) Section 309 of such Act (41 U.S.C. 259) is amended by adding at the end thereof the following new subsections:

"(b) The term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

"(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

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

"(3) the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration if—

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

"(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

"(c) The terms 'full and open competition' and 'responsible source' have the same meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).

"(b) The table of contents of such Act is amended by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.

"Sec. 303A. Planning and Solicitation requirements.

"Sec. 303B. Evaluation of bids; awards.

"(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

Cost or Pricing Data

Sec. 2212. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractor's knowledge and belief, the cost or pricing data submitted were accurate, complete, and current—

"(A) prior to the award of any prime contract under this title using other than sealed bid procedures if the contract price is expected to exceed $100,000;

APPENDIX C

"(B) prior to the pricing of any contract change or modification if the price adjustment is expected to exceed $100,000 or such lesser amount as may be prescribed by the head of the agency;

"(C) prior to the award of a subcontract at any tier where the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

"(D) prior to the pricing of any contract change or modification to a subcontract covered by clause (C), if the price adjustment is expected to exceed $100,000 or such lesser amount as may be prescribed by the head of the agency.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the executive agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), were inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal under this chapter, pricing, or performance of the contract or subcontract.

"(4) The requirements of this subsection need not be applied to contracts or subcontracts where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or in exceptional cases where the head of the executive agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination.

"(5) When cost or pricing data are not required to be submitted by this subsection, such data may nevertheless be required by the agency if 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."

Automated Data Processing Dispute Resolution

Sec. 2713. (a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is amended by adding at the end thereof the following new subsection:

"(h)(1) Upon request of any interested party in connection with any procurement conducted under the authority of this section, including procurements conducted under blanket delegations 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 statute or regulation or both under the standard applicable to review of contracting officer final decisions by boards of contract appeals. An interested party who has filed a protest action under section 3551 of title 31, United States Code, with respect to any procurement may not file a protest action with respect to such procurement under this subsection.

"(2) When a protest action under this subsection is filed before award of the challenged procurement, the board, at the request of any interested party and within 10 days of the filing of the protest action, shall hold a hearing to determine whether it 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 action. The delegation of procurement authority shall be suspended only if the agency establishes that—

"(A) absent action by the board, contract award is likely to occur within 30 days of the hearing; and

"(B) urgent and compelling circumstances which significantly affect interests of the United States will not permit awaiting the decision of the board.

"(3) At the request of any interested party, when a protest action is filed within 10 days after the date of publication of award by the Secretary of Commerce or the date of receipt of written notice of award by the party challenging the award, whichever comes first, the board shall, within 10 days after the date of the filing of the protest action, hold a hearing to determine whether it should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis. The board shall suspend the agency's authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the agency establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit awaiting the decision of the board.

"(4) The board shall conduct such proceedings and allow such discovery as may be required for the expeditious fair and reasonable resolution of the protest action. The board shall give priority to protest actions filed under this subsection and shall issue its final decision within 45 working days after the date of protest unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period. However, nothing contained in this subsection shall conflict with any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)). In making a decision on the merits of protest actions 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. When the board determines that challenged agency action violates a procurement 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 delegation of procurement authority applicable to the challenged procurement. Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare the entitlement of an appropriate party to the costs of (A) filing and pursuing the protest, including reasonable attorney's fees, and (B) bid and proposal preparation. The final decision of the board may be appealed by the head of the agency involved and by any interested party, including interested parties who intervene in any protest action filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). If the board revokes or suspends the procurement authority of the Administrator or the Administrator's delegation of procurement authority after contract

award the affected contract shall be presumed valid as to all goods or services delivered and accepted thereunder prior to the suspension, revocation, or revision of the delegation of procurement authority. 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 person to file protests with the contracting agency or to file actions in the district court or the United States Claims Court.

"(5) The board is authorized to dismiss any protest action determined to be frivolous or which, on its face, does not state a valid basis for protest.

"(6) The board shall, within 180 days after the date of enactment of this subsection, adopt and issue such rules and procedures, not inconsistent with this section, as may be necessary to the expeditious disposition of protest actions filed under authority of this subsection.

"(7) For purposes of this subsection—

"(A) the term 'protest' means a challenge to a solicitation or to the award or proposed award of any procurement contract; and

"(B) the term 'interested party' means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or non-award of the contract.".

(b) The amendment made by this section shall cease to be effective three years after such amendment first takes effect in accordance with section 2751.

Conforming Amendments

Sec. 2714. (a) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(1) in section 302 (41 U.S.C. 252)—

(A) by striking out the second sentence in subsection (b);

(B) by striking out subsections (c), (d), and (e) and inserting in lieu thereof the following:

"(c)(1) This title does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using other than sealed bid procedures under section 303(a)(2)(A), if the conditions set forth in section 303(a)(2)(A) apply or the contract is to be performed outside the United States.

"(2) Section 303(a)(2)(A) does not require the use of sealed bid procedures in cases in which section 2304(e) of title 23, United States Code, applies."; and

(C) by redesignating subsection (f) as subsection (d);

(2) by striking out the heading of section 304 and inserting in lieu thereof the following:

"Contract Requirements".

(3) in section 304 (41 U.S.C. 254)—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using other than sealed bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(4) in section 307 (41 U.S.C. 257)—

(A) by striking out "Except as provided in subsection (b), and except" in the second sentence of subsection (a) and inserting in lieu thereof "Except";

(B) by striking out subsection (b);

(C) by striking out "by paragraphs (11)-(13), or (14) of section 302(c)" in subsection (c);

(D) by redesignating subsection (c) as subsection (b); and

(E) by striking out subsection (d);

(5) by striking out "entered into pursuant to section 302(c) without advertising," in section 308 (41 U.S.C. 258); and inserting in lieu thereof "made or awarded after using other than sealed bid procedures"; and

(6) by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303" in section 310 (41 U.S.C. 260) and inserting in lieu thereof "the provisions of this title relating to other than sealed bid procedures".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements.".

Subtitle B—Amendments to Title 10, United States Code; Defense Procurement; Declaration of Policy

Sec. 2721. Section 2301 of title 10, United States Code, is amended to read as follows:

"§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, 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. 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) services and property (including weapon systems and associated items) for the Department of Defense 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;

"(3) contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology;

"(4) 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;

"(5) the head of an agency use advance procurement planning and market research and prepare contract specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired; and

"(6) the head of an agency encourage the development and maintenance of a procurement career management

APPENDIX C

program to ensure a professional procurement work force.

"(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 chapter—

"(1) promote full and open competition;

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

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

"(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

"(7) require 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.

Clarification of Applicability of Chapter 137 of Title 10 to the Secretary of Defense; Definition of Competitive Procedures

Sec. 2722. (a) Section 2302 of title 10, United States Code, is amended to read as follows:

"§2302. Definitions

"In this chapter:

"(1) 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) 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 (41 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; and

"(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.

"(3) The terms 'full and open competition' and 'responsible source' have the meanings given such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)."

(b) Section 2303 of such title is amended—

(1) in subsection (a)—

"(A) by striking out 'purchase,' and inserting in lieu thereof 'procurement';

"(B) by striking out 'named in subsection (b), and all services,' and inserting in lieu thereof 'other than land) and all services';

"(C) by redesignating clauses (1) through (5) as clauses (2) through (6), respectively; and

"(D) by inserting before clause (2) (as so redesignated) the following new clause:

"(1) The Department of Defense.";

(2) by striking out subsection (b); and

(3) by redesignating subsection (c) as subsection (b).

Competitive Procedures

Sec. 2723. (a) Sections 2304 and 2305 of title 10, United States Code, are amended to read as follows:

"§2304. Competition requirements

"(a)(1) Except as provided in subsections (b) and (c) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency—

"(A) shall comply with the full and open competition requirements set out in this chapter and in the modifications to regulations promulgated pursuant to section 2572 of the Competition in Contracting Act of 1984; and

"(B) shall use in entering into a contract for property or services the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement action.

"(2) The head of an agency, when using competitive procedures—

"(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 from responding sources 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 any alternative source or sources of supply for that property or service if the head of the agency determines that to do so would—

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

"(2) 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) 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) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, the head of an agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

APPENDIX C

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

"(1) the property or services needed by the United States are available from only one responsible source 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 to (A) 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) establish 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 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 unrestricted 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 an executive 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 each House of the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d) For the purposes of applying subsection (c)(1)—

"(1) 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 unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

"(2) in the case of follow-on contracts for the continued development or production of major systems or highly specialized equipment when it is likely that award to a source other than the original source would result in (A) substantial duplication of cost to the United States which is not expected to be recovered through competition, or (B) unacceptable delays in fulfilling the agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

"(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 use of such procedures is justified in writing and the accuracy and completeness of the justification are certified by the contracting officer for the contract;

"(B) the justification is approved—

"(i) in the case of a contract for an amount exceeding $100,000, by the competition advocate for the procuring activity;

"(ii) in the case of a contract for an amount exceeding $1,000,000, by an officer or official who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule or in a comparable or higher position under another schedule; or

"(iii) in the case of a contract for an amount exceeding $10,000,000, 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)); and

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

"(2) In the case of procurements permitted by subsection (c)(2), the justification and approvals required by paragraph (1) may be made after the procurement has occurred. The justification and approvals required by paragraph (1) shall not be required in the case of procurements permitted by subsection (c)(7), or in the case of procurements conducted pursuant to the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The statement of 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 such exception;

"(C) a determination that the anticipated cost is 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 responsible 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 any subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related account, document, or other record 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.

APPENDIX C

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

"(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary for agencies and contractors, regulations shall provide for special simplified procedures for small purchases of property and services.

"(2) A small purchase is a purchase or contract which does not exceed $25,000.

"(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use small purchase procedures.

"(4) The head of an agency, in using small purchase procedures, shall promote competition under such procedures to the maximum extent practicable.

"2305. Planning, solicitation, evaluation, and award procedures.

"(a)(1)(A) In planning 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 contract;

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

"(iii) prepare 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 title 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.

"(C) For the purposes of subparagraph (A), 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) A solicitation for sealed bids or competitive proposals other than for small purchases shall at a minimum include, in addition to the specifications described in paragraph (1)—

"(A) a statement of—

"(i) all significant factors, including price, which the head of the agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to each of those factors; 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 awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

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

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals 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 without discussions with the bidders and shall, except as provided in paragraph (2), 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 the price and other price-related factors included in the solicitation, under subsection (a)(2)(A). 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 and may award a contract—

"(i) after discussions conducted with the offerors at anytime after receipt of the proposals and before the award of the contract; or

"(ii) without discussions with the offerors beyond discussions conducted for the purpose of minor clarification, when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall to the United States.

"(B) In the case of award of a contract under subparagraph (A)(i), the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within a competitive range, price and other evaluation factors considered.

"(C) In the case of award of a contract under subparagraph (A)(ii), the head of the agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) The head of the agency shall, except as provided in paragraph (2), award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, solely considering price and other factors included in the solicitation under subsection (a)(2)(A). The head of the agency shall award the contract by transmitting written notice of the award to such offeror and shall promptly notify all other offerors of the rejection of their proposals.

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

"(b) The table of section at the beginning of such chapter is amended—

"(1) by striking out the item pertaining to section 2301, and inserting in lieu thereof the following:

"2301. Congressional defense procurement policy."; and

"(2) by striking out the items relating to sections 2304 and 2305 and inserting in lieu thereof the following:

"2304. Competition requirements.

"2305. Planning, solicitation, evaluation, and award procedures.".

"(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

APPENDIX C

Conforming Amendments

Sec. 2724. Chapter 137 of title 10, United States Code, is amended —

(1) in section 2306 —

(A) by striking out "may, in negotiating contracts under section 2304," in the second sentence of subsection (a) and inserting in lieu thereof "may in awarding contracts after using other than sealed bid procedures";

(B) by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded after using other than sealed bid procedures";

(C) by striking out "section 2304 of this title," in subsection (c) and inserting in lieu thereof "this chapter";

(D) in subsection (f)(1) —

(i) by striking out clause (A) and inserting in lieu thereof the following:

"(A) prior to the award of any prime contract under this title after using other than sealed bid procedures where the contract price is expected to exceed $100,000;";

(ii) by striking out "negotiated" each place it appears in the second paragraph;

(iii) by striking out "negotiation," in the third paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal under this title,";

(iv) by striking out "$500,000" each place it appears in clauses (B), (C), and (D) and inserting in lieu "$100,000"; and

(v) by inserting after paragraph (3) the following new paragraph:

"(4) When cost or pricing data are not required to be submitted by this subsection, such data may nevertheless be required by the agency if 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.";

(2) by striking out subsection (h) and inserting in lieu thereof the following:

"(h) Each determination or decision under section 2306(c), section 2306(g)(1), section 2307(c), or section 2313(c) 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 (1) clearly indicate why the type of contract selected under section 2306(c) 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), (3) clearly indicate why advance payments under section 2307(c) would be in the public interest, or (4) clearly indicate why the application of section 2313(b) 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.";

(3) by striking out section 2311; and

(4) by striking out "negotiated" in the second sentence of section 2313(b) and inserting in lieu thereof "awarded after using other than sealed bid procedures".

SUBTITLE C — AMENDMENTS TO THE OFFICE OF FEDERAL PROCUREMENT POLICY ACT

Definitions

Sec. 2731. The section of the Office of Federal Procurement Policy Act relating to definitions (41 U.S.C. 403) is redesignated as section 4 and is amended —

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraphs:

"(6) the term 'competitive procedures' means procedures under which an agency enters into a contract pursuant to full and open competition;

"(7) the term 'full and open competition' when used with respect to a procurement, means that all reasonable sources are permitted to submit sealed bids or competitive proposals on the procurement; and

"(8) the term 'responsible source' means a prospective contractor who —

"(A) has adequate financial resources to perform the contract, or the ability to obtain such resources;

"(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

"(C) has a satisfactory performance record;

"(D) has a satisfactory record of integrity and business ethics;

"(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

"(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

"(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.".

Procurement Notice and Records; Advocate for Competition

Sec. 2732. (a) The Office of Federal Procurement Policy Act is further amended by adding at the end thereof the following new sections:

"Procurement Notice

"Sec. 18. (a)(1) Except as provided in subsection (c) —

"(A) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services for a price exceeding $25,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(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 of a solicitation to the Secretary of Commerce, such executive agency may not —

APPENDIX C

"(A) issue such solicitation earlier than 15 days after the date on which such notice is published by the Secretary of Commerce, or

"(B) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than 30 days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include —

"(1) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name, business address, and telephone number of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(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 which shall be considered by the executive 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 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;

"(C) the procurement is made against an order placed under a requirement contract; or

"(D) the procurement is made for perishable subsistence supplies.

"(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in clause (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 clause (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, with the concurrence of the Administrator, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

"Record Requirements

"Sec. 19. (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 small purchases, in such fiscal year.

"(b) The record established under subsection (a) shall include —

"(1) with respect to each procurement carried out using competitive procedures —

"(A) the date of 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 section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or section 2304(c) of title 10, United States Code, 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) The information that is included in such record pursuant to subsection (b)(1) 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) The information included in the record established and maintained under subsection (a) shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 6(d)(4).

"Advocates for Competition

Sec. 20. (a)(1) There is established in each executive agency an advocate for competition.

"(2) The head of each executive agency shall —

"(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of the Competition in Contracting Act of 1984 (other than the senior procurement executive designated pursuant to section 16(3)) to serve as the advocate for competition;

"(B) not assign such officer or employee any duty or responsibility that is inconsistent with the duties and responsibilities of the advocate for competition; and

"(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

"(b) The advocate for competition of an executive agency shall —

"(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

"(2) review the procurement activities of the executive agency;

"(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 16(3) —

"(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

"(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

"(4) prepare and transmit to such senior procurement executive an annual report describing —

APPENDIX C

"(A) such advocate's activities under this section;

"(B) new initiatives required to increase competition; and

"(C) barriers to full and open competition that remain;

"(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

"(6) recommend to the senior procurement executive of the executive agency a system of personnel and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

"(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

"(c) The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity (including unnecessarily detailed specifications and unnecessarily restrictive statements of need).

"Annual Report on Competition

Sec. 21. (a) Not later than January 31 of each of 1986, 1987, 1988, 1989, and 1990, the head of each executive agency shall transmit to each House of Congress a report including the information specified in subsection (b).

"(b) Each report under subsection (a) shall include—

"(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; and

"(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.

"(c)(1) Section 3(e) of such Act (41 U.S.C. 405(e)) is amended by striking out '(subsection (c)' and inserting in lieu thereof '(subsection (d)'.

"(2) Section 16(1) of such Act (41 U.S.C. 415(1)) is amended to read as follows:

"(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or services procured."

SUBTITLE D—PROCUREMENT PROTEST SYSTEM

Procurement Protest System

Sec. 2741. (a) Chapter 35 of title 31, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

"§ 3551. Protests by interested parties concerning procurement actions

"(a) Protests concerning alleged violations of the procurement statutes and regulations shall be decided by the Comptroller General if filed in accordance with this section. Nothing contained in this section shall be construed to give the Comptroller General exclusive jurisdiction over protests. An interested party who has filed a protest action under section 111(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 759(h)) with respect to a procurement action may not file a protest action with respect to such procurement under this section.

"(b)(1) In accordance with the procedures issued pursuant to subsection (d), the Comptroller General shall have authority to decide a protest submitted by an interested party or referred by an executive agency or a court of the United States.

"(2) Except as provided in subsection (c)(1), the Comptroller General shall issue a final protest decision within 90 working days after the date of a protest unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period.

"(3) The Comptroller General shall notify the executive agency within one working day after the date of the receipt of a protest and the executive agency shall submit a complete report (including all relevant documents) on the protested procurement to the Comptroller General within 25 working days after the agency's receipt of the notice of such protest, unless notified that the protest has been dismissed pursuant to subsection (c)(4), or unless the Comptroller General upon a showing by such agency, determines and states in writing the reasons that the specific circumstances of the protest require a longer period. In a case determined by the Comptroller General to be suitable for the express option under subsection (c)(1), such report and documents shall be submitted within 10 working days after such receipt.

"(4)(A) A contract may not be awarded on the basis of the protested procurement after the contracting officer has received notice of a protest to the Comptroller General and while the protest is pending.

"(B) The head of the procurement activity responsible for award of the contract may authorize the award of a contract notwithstanding a protest of which the agency has notice under this paragraph —

"(i) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit awaiting the decision of the Comptroller General, and

"(ii) after the Comptroller General is advised of such finding.

"(C) Before the award of a contract, a finding may not be made under subparagraph (B)(ii) unless the award of the contract is otherwise likely to occur within 30 days.

"(5)(A) If the contract has been awarded before the receipt of notice of a protest, contract performance shall be ceased or the contract shall be suspended upon receipt of such notice and while the protest is pending. This paragraph shall not apply when the protest is filed more than 10 days after award of the contract.

"(B) The head of the procurement activity responsible for award of the contract may, after notifying the Comptroller General of his findings, authorize the performance of a contract notwithstanding a protest of which the agency has notice under this paragraph —

"(i) upon a written finding that contract performance will be in the Government's best interests (except that if the head of the procurement activity makes such a find-

APPENDIX C

ing, the Comptroller General shall make his determination of the appropriate recommended relief (if the protest is sustained) without regard to any costs or disruption from terminating, recompeting, or reawarding the contract; or

"(ii) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit awaiting the decision of the Comptroller General.

"(6) The authority of the head of the procuring activity to make findings and authorize award and performance of contracts under paragraphs (4) and (5) may not be delegated.

"(7) The Comptroller General is authorized to determine whether a solicitation, proposed award, or award protested under this section complies with procurement statutes and regulations. If the comptroller General determines that the solicitation, proposed award, or award does not comply with a procurement statute or regulation, or both, the Comptroller General shall recommend that the agency —

"(A) refrain from exercising any of its options under the contract;

"(B) recompete the contract immediately;

"(C) issue a new solicitation;

"(D) terminate the contract;

"(E) award a contract consistent with the requirements of such statutes and regulations;

"(F) comply with any combination of recommendations under clauses (A), (B), (C), (D), and (E); or

"(G) comply with such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

"(c)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this section. The Comptroller General shall establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 65 days from the date of protest. Within such deadlines as the Comptroller General prescribes, each executive agency shall provide to an interested party any document relevant to the protested procurement action (including the report required by subsection (b)(3)) that would not give such party a competitive advantage and that such party is otherwise authorized by law to receive.

"(2) Each decision of the Comptroller General under this section shall be signed by the Comptroller General or a designee for such purpose. A copy of the decision shall be made available to the interested parties and the senior procurement executive of the executive agency or agencies involved.

"(3) The head of the procurement activity responsible for award of the contract shall report to the Comptroller General, within 60 days of receipt of the Comptroller General's recommendations, if the agency has not fully complied with such recommendations. Not later than January 31 of each year, the Comptroller General shall transmit to each House of the Congress a report describing each instance of an agency failure to comply with the Comptroller General's recommendations during the preceding fiscal year.

"(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.

"(5)(A) If the Comptroller General determines that a solicitation, proposed award, or award of a contract does not comply with a procurement statute or regulation, the Comptroller General may further declare an appropriate party to be entitled to the costs of —

"(i) filing and pursuing the protest, including reasonable attorneys' fees; and

"(ii) bid and proposal preparation.

"(B) Monetary awards to which a party is declared to be entitled under subparagraph (A) shall be paid promptly by the executive agency concerned out of funds available to or for the use of such executive agency for the purpose of the procurement of property and services.

"(d)(1) Within 180 days after the date of enactment of this subchapter, the Comptroller General shall establish such procedures, not inconsistent with this section, as may be necessary to the expeditious execution of the protest decision function, including procedures for accelerated resolution of the protest under the express option authorized by subsection (c)(1). Such procedures shall provide that the protest process shall not be delayed by the failure of a party to make a filing within the time provided for such filing.

"(2) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify contentions made by parties in protests under this section.

"(e) An interested party adversely affected or aggrieved by the action, or the failure to act, of a Government agency with respect to a solicitation or award may obtain judicial review thereof to the extent provided by sections 702 through 706 of title 5, including determinations necessary to resolve disputed material facts or when otherwise appropriate.

"(f) For purposes of this section —

"(1) the term 'protest' means a challenge to a solicitation or to the award or proposed award of a procurement contract; and

"(2) the term 'interested party', with respect to a contract, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of or failure to award the contract.". (b) The analysis for chapter 35 of title 31, United States Code, is amended by adding at the end thereof the following:

"SUBCHAPTER V — PROCUREMENT PROTEST SYSTEM

"3551. Protests by interested parties concerning procurement actions.".

SUBTITLE E — EFFECTIVE DATE; REGULATIONS; STUDY; Effective Date

Sec. 2751. (a) Except as provided in subsection (b), the amendments made by this title shall apply with respect to any solicitations for bids or proposals issued on or after the date 270 days after the date of the enactment of this Act.

(b) The amendments made by section 2713 and subtitle D shall apply with respect to protests filed after 180 days after the date of enactment of this Act.

Modification of Federal Acquisition Regulations

Sec. 2752. Not later than 270 days after the date of enactment of this Act, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title and the amendments made by this title and to the policies

APPENDIX C

contained in section 2 of the Office of Federal Procurement Policy Act (41 U.S.C. 401).

Study of Alternatives

Sec. 2753. Not later than January 31, 1985, the Administrator of the Office of Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of the General Services Administration and the Administrator of the National Aeronautics and Space Administration, shall complete a study of alternatives and recommend a plan (1) to increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services. The Administrator shall report to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a plan for testing the recommended alternative, in accordance with section 9 of the Office of Federal Procurement Policy Act (41 U.S.C. 405 et seq.), and shall ensure such plan is consistent with the policies set forth in section 2 of such Act.

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