

# FEDERAL ACQUISITION REFORM ACT OF 1995

AUGUST 1, 1995.—Ordered to be printed

Mr. CLINGER, from the Committee on Government Reform and Oversight, submitted the following

## R E P O R T

together with

## MINORITY AND ADDITIONAL VIEWS

[To accompany H.R. 1670]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform and Oversight, to whom was referred the bill (H.R. 1670) to revise and streamline the acquisition laws of the Federal Government, to reorganize the mechanisms for resolving Federal procurement disputes, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Federal Acquisition Reform Act of 1995”.

**SEC. 2. TABLE OF CONTENTS.**

The table of contents for this Act is as follows:

Sec. 1. Short title.  
Sec. 2. Table of contents.

**TITLE I—COMPETITION**

Sec. 101. Improvement of competition requirements.  
Sec. 102. Definitions relating to competition requirements.  
Sec. 103. Contract solicitation amendments.  
Sec. 104. Preaward debriefings.  
Sec. 105. Contract types.  
Sec. 106. Contractor performance.

**TITLE II—COMMERCIAL ITEMS**

Sec. 201. Commercial item exception to requirement for cost or pricing data and information limitations.  
Sec. 202. Application of simplified procedures to commercial items.  
Sec. 203. Amendment to definition of commercial items.  
Sec. 204. Inapplicability of cost accounting standards to contracts and subcontracts for commercial items.

**TITLE III—ADDITIONAL REFORM PROVISIONS**

Sec. 301. Government reliance on the private sector.  
Sec. 302. Elimination of certain certification requirements.  
Sec. 303. Amendment to commencement and expiration of authority to conduct certain tests of procurement procedures.  
Sec. 304. International competitiveness.  
Sec. 305. Procurement integrity.  
Sec. 306. Further acquisition streamlining provisions.  
Sec. 307. Justification of major defense acquisition programs not meeting goals.  
Sec. 308. Enhanced performance incentives for acquisition workforce.  
Sec. 309. Results oriented acquisition program cycle.  
Sec. 310. Rapid contracting goal.  
Sec. 311. Encouragement of multiyear contracting.  
Sec. 312. Contractor share of gains and losses from cost, schedule, and performance experience.  
Sec. 313. Phase funding of defense acquisition programs.  
Sec. 314. Improved Department of Defense contract payment procedures.  
Sec. 315. Consideration of past performance in assignment to acquisition positions.  
Sec. 316. Additional Department of Defense pilot programs.  
Sec. 317. Value engineering for Federal agencies.  
Sec. 318. Acquisition workforce.

**TITLE IV—STREAMLINING OF DISPUTE RESOLUTION**

**Subtitle A—General Provisions**

Sec. 401. Definitions.

**Subtitle B—Establishment of Civilian and Defense Boards of Contract Appeals**

Sec. 411. Establishment.  
Sec. 412. Membership.  
Sec. 413. Chairman.  
Sec. 414. Rulemaking authority.  
Sec. 415. Authorization of appropriations.

**Subtitle C—Functions of Defense and Civilian Boards of Contract Appeals**

Sec. 421. Alternative dispute resolution services.  
Sec. 422. Alternative dispute resolution of disputes and protests submitted to boards.  
Sec. 423. Contract disputes.  
Sec. 424. Protests.  
Sec. 425. Applicability to certain contracts.

**Subtitle D—Repeal of Other Statutes Authorizing Administrative Protests**

Sec. 431. Repeals.

**Subtitle E—Transfers and Transitional, Savings, and Conforming Provisions**

Sec. 441. Transfer and allocation of appropriations and personnel.  
Sec. 442. Terminations and savings provisions.  
Sec. 443. Contract disputes authority of boards.  
Sec. 444. References to agency boards of contract appeals.  
Sec. 445. Conforming amendments.

**Subtitle F—Effective Date; Interim Appointment and Rules**

Sec. 451. Effective date.  
Sec. 452. Interim appointment.  
Sec. 453. Interim rules.

## TITLE V—EFFECTIVE DATES AND IMPLEMENTATION

Sec. 501. Effective date and applicability.  
 Sec. 502. Implementing regulations.

## TITLE I—COMPETITION

## SEC. 101. IMPROVEMENT OF COMPETITION REQUIREMENTS.

(a) ARMED SERVICES ACQUISITIONS.—(1) Section 2304 of title 10, United States Code, is amended to read as follows:

**“§ 2304. Contracts: competition requirements**

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

“(A) shall obtain full and open competition—

“(i) that provides open access, and

“(ii) that is consistent with the need to efficiently fulfill the Government’s requirements,

through the use of competitive procedures in accordance with this chapter and the Federal Acquisition Regulation; and

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

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

“(A) shall solicit sealed bids if—

“(i) time permits the solicitation, submission, and evaluation of sealed bids;

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

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

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

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

“(b) EXCLUSION OF PARTICULAR SOURCE.—The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

“(c) EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.—The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 2323 of this title.

“(d) PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—(1) Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Standards for determining when the use of competitive procedures is not feasible or appropriate shall be set forth in the Federal Acquisition Regulation. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items using simplified procedures or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.

“(2) In the case of a procurement using procedures that preclude all but one source from responding (hereinafter in this subsection referred to as a ‘sole source procurement’), the Federal Acquisition Regulation shall provide for justification and approval under paragraph (1) of such procurement under standards that set forth limited circumstances for such sole source procurements, including circumstances when—

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

“(B) 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 award the contract for the property or services to a particular source;

“(C) it is necessary to award the contract to a particular source in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other non-profit institution or a federally funded research and development center, or (iii) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

“(D) 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 award of the contract for the property or services to a particular source;

“(E) subject to section 2304f, a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency’s need is for a brand-name commercial item for authorized resale;

“(F) the disclosure of the agency’s needs would compromise the national security unless the agency is permitted to award the contract for the property or services needed by the agency to a particular source; or

“(G) the head of the agency—

“(i) determines that it is necessary in the public interest to award the contract for the property or services needed by the agency to a particular source in the particular procurement concerned, and

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

“(3) The authority of the head of an agency under paragraph (2)(G) may not be delegated.

“(e) SIMPLIFIED PROCEDURES.—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

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

“(3) In using simplified procedures, the head of an agency shall ensure that competition is obtained to the maximum extent practicable consistent with the particular Government requirement.

“(f) CERTAIN CONTRACTS.—For the purposes of the following laws, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

“(1) The 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) Chapter 137 of title 10, United States Code, is amended by inserting before section 2305 a new section—

(A) the designation and heading for which is as follows:

**“§ 2304f. Merit-based selection”;** and

(B) the text of which consists of subsection (j) of section 2304 of such title, as in effect on the day before the date of the enactment of this Act, modified—

(i) by striking out the subsection designation;

(ii) in paragraphs (2)(A), (3), and (4), by striking out “subsection” and inserting in lieu thereof “section” each place it appears;

(iii) in paragraph (2)(C), by striking out “paragraph (1)” and inserting in lieu thereof “subsection (a)”;

- (iv) by redesignating paragraphs (1), (2), (3), and (4) as subsections (a), (b), (c), and (d), respectively; and
  - (v) in subsection (b) (as so redesignated), by redesignating subparagraphs (A), (B), and (C) as paragraphs (1), (2), and (3), respectively.
- (3) The table of sections at the beginning of such chapter is amended by inserting before the item relating section 2305 the following new item:

"2304f. Merit-based selection."

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended to read as follows:

**"SEC. 303. CONTRACTS: COMPETITION REQUIREMENTS.**

"(a) COMPETITION.—(1) Except as provided in subsections (b), (c), and (e) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

"(A) shall obtain full and open competition—

"(i) that provides open access, and

"(ii) that is consistent with the need to efficiently fulfill the Government's requirements,

through the use of competitive procedures in accordance with this chapter and the Federal Acquisition Regulation; and

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

"(2) In determining the competitive procedure appropriate under the circumstances, an executive agency—

"(A) shall solicit sealed bids if—

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

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

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

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

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

"(b) EXCLUSION OF PARTICULAR SOURCE.—An executive agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

"(c) EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.—An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 7102 of the Federal Acquisition Streamlining Act of 1994 (15 U.S.C. 644 note).

"(d) PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—(1) Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Standards for determining when the use of competitive procedures is not feasible or appropriate shall be set forth in the Federal Acquisition Regulation. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items using simplified procedures or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.

"(2) In the case of a procurement using procedures that preclude all but one source from responding (hereinafter in this subsection referred to as a 'sole source procurement'), the Federal Acquisition Regulation shall provide for justification and approval under paragraph (1) of such procurement under standards that set forth limited circumstances for such sole source procurements, including circumstances when—

"(A) 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;

“(B) the executive 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 executive agency is permitted to award the contract for the property or services to a particular source;

“(C) it is necessary to award the contract to a particular source in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (ii) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other non-profit institution or a federally funded research and development center, or (iii) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

“(D) 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 award of the contract for the property or services to a particular source;

“(E) subject to section 303M, 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;

“(F) the disclosure of the executive agency’s needs would compromise the national security unless the agency is permitted to award the contract for the property or services needed by the agency to a particular source; or

“(G) the head of the executive agency—

“(i) determines that it is necessary in the public interest to award the contract for the property or services needed by the agency to a particular source in the particular procurement concerned, and

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

“(3) The authority of the head of an executive agency under paragraph (2)(G) may not be delegated.

“(e) SIMPLIFIED PROCEDURES.—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

“(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

“(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

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

“(4) In using simplified procedures, an executive agency shall ensure that competition is obtained to the maximum extent practicable consistent with the particular Government requirement.”.

(2) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 303L a new section—

(A) the designation and heading for which is as follows:

“SEC. 303M. MERIT-BASED SELECTION.”; and

(B) the text of which consists of subsection (h) of section 303 of such Act, as in effect on the day before the date of the enactment of this Act, modified—

(i) by striking out the subsection designation;

(ii) in paragraphs (2)(A), (3), and (4), by striking out “subsection” and inserting in lieu thereof “section” each place it appears;

(iii) in paragraph (2)(C), by striking out “paragraph (1)” and inserting in lieu thereof “subsection (a)”;

(iv) by redesignating paragraphs (1), (2), (3), and (4) as subsections (a), (b), (c), and (d), respectively; and

- (v) in subsection (b) (as so redesignated), by redesignating subparagraphs (A), (B), and (C) as paragraphs (1), (2), and (3), respectively.
- (3) The table of contents for the Federal Property and Administrative Services Act of 1949 (contained in section 1(b)) is amended—

- (A) by striking out the item relating to section 303 and inserting in lieu thereof the following:

“Sec. 303. Contracts: competition requirements.”; and

- (B) by inserting after the item relating to section 303L the following new item:

“Sec. 303M. Merit-based selection.”.

(c) REVISIONS TO PROCUREMENT NOTICE PROVISIONS.—Section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) is amended—

- (1) in subsection (a)—

- (A) in subparagraph (B) of paragraph (1)—

- (i) by striking out “subsection (f)—” and all that follows through the end of the subparagraph and inserting in lieu thereof “subsection (b); and”; and

- (ii) by inserting after “property or services” the following: “for a price expected to exceed \$10,000 but not to exceed \$25,000”;

- (B) by striking out paragraph (4); and

- (C) by redesignating paragraphs (5) and (6) as paragraphs (4) and (5), respectively; and

- (2) in subsection (b)—

- (A) by amending subparagraph (B) of paragraph (2) to read as follows:

- “(B) state whether the acquisition is to be conducted pursuant to a contractor verification system (as provided pursuant to section 35) or whether the offeror, its product, or its service otherwise must meet a qualification requirement in order to be eligible for award and, if so, identify the criteria to be used in determining such eligibility;”;

- (B) by amending paragraph (4) to read as follows:

- “(4) a statement that all responsible sources may submit for consideration a bid, proposal, or quotation;”.

(d) EXECUTIVE AGENCY RESPONSIBILITIES.—(1) Section 16 of the Office of Federal Procurement Policy Act (41 U.S.C. 414) is amended—

- (A) by striking out “achieve” in the matter preceding paragraph (1) and inserting in lieu thereof “promote”; and

- (B) by amending paragraph (1) to read as follows:

- “(1) to implement competition that provides open access for responsible sources in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that are consistent with the need to efficiently fulfill the Government’s requirements.”.

(2) Section 20 of such Act (41 U.S.C. 418) is amended in subsection (a)(2)(A) by striking out “serving in a position authorized for such executive agency on the date of enactment of the Competition in Contracting Act of 1984”.

#### SEC. 102. DEFINITIONS RELATING TO COMPETITION REQUIREMENTS.

(a) DEFINITION.—Paragraphs (5) and (6) of section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) are amended to read as follows:

- “(5) The term ‘competitive procedures’ means procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements.

- “(6) The term ‘open access’, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.”.

(b) CONFORMING AMENDMENTS.—

- (1) OFFICE OF FEDERAL PROCUREMENT POLICY ACT.—Section 20 of the Office of Federal Procurement Policy Act is amended—

- (A) in subsection (b)(1), subsection (b)(3)(A), and subsection (c), by inserting after “full and open competition” the following: “that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements” each place it appears; and

- (B) in subsection (b)(4)(C), by striking out “to full and open competition that remain” and inserting in lieu thereof “that remain to achieving full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements”.

- (2) TITLE 10.—Title 10, United States Code, is amended—

(A) in section 2302(2), by striking out the first sentence and inserting in lieu thereof the following: “The term ‘competitive procedures’ means procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements.”;

(B) in section 2302(3)(D), by striking out “full and open competition” and inserting in lieu thereof “open access”;

(C) in section 2323(e)(3), by striking out “less than full and open” and inserting in lieu thereof “procedures other than”; and

(D) in section 2323(i)(3)(A), by striking out “full and open”.

(3) FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT.—Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended—

(A) in section 309(b), by striking out the first sentence and inserting in lieu thereof the following: “The term ‘competitive procedures’ means procedures under which an executive agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements.”;

(B) in section 309(c)(4), by striking out “full and open competition” and inserting in lieu thereof “open access”; and

(C) in section 304B(a)(2)(B), by striking out “encouraging full and open competition or”.

(4) OTHER LAWS.—Section 7102 of the Federal Acquisition Streamlining Act of 1994 (108 Stat. 3367; 15 U.S.C. 644 note) is amended in subsection (a)(1)(A) by striking out “less than full and open competition” and inserting in lieu thereof “procedures other than competitive procedures”.

#### **SEC. 103. CONTRACT SOLICITATION AMENDMENTS.**

(a) ARMED SERVICES ACQUISITIONS.—Section 2305 of title 10, United States Code, is amended—

(1) in subsection (a)(1)—

(A) by striking out subparagraph (A) and inserting in lieu thereof the following: “(A) In preparing for the procurement of property or services, the head of an agency shall use advance procurement planning and market research.”;

(B) by striking out subparagraph (B); and

(C) by redesignating subparagraph (C) as subparagraph (B) and in that subparagraph by striking out “For the purposes of subparagraphs (A) and (B), the” and inserting in lieu thereof “Each solicitation under this chapter shall include specifications that include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law. The”;

(2) in subsection (a)(2), by inserting after “(other than for” the following: “a procurement for commercial items using simplified procedures or”; and

(3) in subsection (b)(4)(A)(i), by striking out “all” and inserting in lieu thereof “the”.

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 303A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253a) is amended—

(A) in subsection (a)—

(i) by striking out paragraph (1) and inserting in lieu thereof the following: “(1) In preparing for the procurement of property or services, an executive agency shall use advance procurement planning and market research.”;

(ii) by striking out paragraph (2); and

(iii) by redesignating paragraph (3) as paragraph (2) and in that paragraph by striking out “For the purposes of paragraphs (1) and (2), the” and inserting in lieu thereof “Each solicitation under this title shall include specifications that include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law. The”; and

(B) in subsection (b), by inserting after “(other than for” the following: “a procurement for commercial items using simplified procedures or”.

(2) Section 303B(d)(1)(A) of such Act (41 U.S.C. 253b) is amended by striking out “all” and inserting in lieu thereof “the”.

#### **SEC. 104. PREAWARD DEBRIEFINGS.**

(a) ARMED SERVICES ACQUISITIONS.—Section 2305(b) of title 10, United States Code, is amended—

(1) by striking out subparagraph (F) of paragraph (5);

(2) by redesignating paragraph (6) as paragraph (8); and



(3) by inserting after paragraph (5) the following new paragraphs:

“(6)(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

“(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) of this section only if that offeror requested and was refused a preaward debriefing under subparagraph (A) of this paragraph.

“(C) The debriefing conducted under this subsection shall include—

“(i) the executive agency’s evaluation of the significant elements in the offeror’s offer;

“(ii) a summary of the rationale for the offeror’s exclusion; and

“(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

“(D) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors’ proposals.

“(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.”.

(b) CIVILIAN AGENCY ACQUISITIONS.—Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended—

(1) by striking out paragraph (6) of subsection (e);

(2) by redesignating subsections (f), (g), (h), and (i) as subsections (h), (i), (j), and (k), respectively; and

(3) by inserting after subsection (e) the following new subsections:

“(f)(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

“(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

“(3) The debriefing conducted under this subsection shall include—

“(A) the executive agency’s evaluation of the significant elements in the offeror’s offer;

“(B) a summary of the rationale for the offeror’s exclusion; and

“(C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

“(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors’ proposals.

“(g) The contracting officer shall include a summary of the any debriefing conducted under subsection (e) or (f) in the contract file.”.

#### SEC. 105. CONTRACT TYPES.

(a) ARMED SERVICES ACQUISITIONS.—(1) Section 2306 of title 10, United States Code, is amended—

(A) by inserting before the period at the end of subsection (a) the following: “, based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment”;

(B) by striking out subsections (b), (d), (e), (f), and (h); and

(C) by redesignating subsection (g) as subsection (b).

(2) The heading of such section is amended to read as follows:

**“§ 2306. Contract types”.**

(3) The item relating to section 2306 in the table of sections at the beginning of chapter 137 of such title is amended to read as follows:

“2306. Contract types.”.

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended—

(A) by inserting before the period at the end of the first sentence of subsection (a) the following: “, based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment”;

(B) by striking out “Every contract awarded” in the second sentence of subsection (a) and all that follows through the end of the subsection; and

(C) in subsection (b), by striking out “used,” in the first sentence and all that follows through the end of the subsection and inserting in lieu thereof “used.”.

(2) The heading of such section is amended to read as follows:

**“SEC. 304. CONTRACT TYPES.”.**

(3) The item relating to section 304 in the table of contents for such Act (contained in section 1(b)) is amended to read as follows:

“Sec. 304. Contract types.”.

(c) CONFORMING REPEALS.—(1) Sections 4540, 7212, and 9540 of title 10, United States Code, are repealed.

(2) The table of sections at the beginning of chapter 433 of such title is amended by striking out the item relating to section 4540.

(3) The table of sections at the beginning of chapter 631 of such title is amended by striking out the item relating to section 7212.

(4) The table of sections at the beginning of chapter 933 of such title is amended by striking out the item relating to section 9540.

(d) CIVIL WORKS AUTHORITY.—(1) Part IV of subtitle A of title 10, United States Code, is amended—

(A) by transferring section 2855 to the end of chapter 137; and

(B) by striking out the section heading and subsection (a) of such section and inserting in lieu thereof the following:

**“§ 2332. Contracts for architectural and engineering services**

“(a) The Secretary of Defense and the Secretaries of the military departments may enter into contracts for architectural and engineering services in connection with a military construction or family housing project or for other Department of Defense or military department purposes. Such contracts shall be awarded in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).”.

(2) The table of sections at the beginning of chapter 137 of such title is amended by adding at the end the following new item:

“2332. Contracts for architectural and engineering services.”.

(3) The table of sections at the beginning of chapter 169 of such title is amended by striking out the item relating to section 2855.

**SEC. 106. CONTRACTOR PERFORMANCE.**

(a) REQUIREMENT FOR SYSTEM.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end the following new section:

**“SEC. 35. CONTRACTOR PERFORMANCE.**

“(a) VERIFICATION SYSTEM.—

“(1) REQUIREMENT.—The Federal Acquisition Regulation shall provide for a contractor verification system in accordance with this section.

“(2) PROCEDURES.—The Federal Acquisition Regulation shall provide procedures for the head of an executive agency to follow in order to verify a contractor as eligible to compete for contracts to furnish property or services that are procured by the executive agency on a recurring basis.

“(3) NOTIFICATION.—The procedures shall include a requirement that the head of an executive agency provide for the publication of appropriate notification about the verification system in the Commerce Business Daily.

“(b) EVALUATION.—(1) Under the procedures referred to in subsection (a)(2), the head of an executive agency in granting a verification to a contractor shall use the following factors as the basis of the evaluation:

“(A) The efficiency and effectiveness of its business practices.

“(B) The level of quality of its product or service.

- “(C) Past performance of the contractor with regard to the particular property or service.
- “(2)(A) The evaluation of past performance may include performance under—
- “(i) a contract with an executive agency of the Federal Government;
  - “(ii) a contract with an agency of a State or local government; or
  - “(iii) a contract with an entity in the private sector.
- “(B) The procedures shall include a requirement that, in the case of a contractor with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the contractor may not be evaluated favorably or unfavorably on the factor of past performance.
- “(c) OPPORTUNITY FOR ALL INTERESTED SOURCES.—The Federal Acquisition Regulation shall provide procedures for ensuring that all interested sources, including small businesses, have a fair opportunity to be considered for verification under the verification system.
- “(d) PROCUREMENT FROM VERIFIED CONTRACTORS.—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency may enter into a contract for the procurement of property or services referred to in subsection (a)(2) on the basis of a competition in accordance with section 2304 of title 10, United States Code, or section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) for contractors verified with respect to such property or services pursuant to the contractor verification system.
- “(e) TERMINATION OF VERIFICATION.—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency—
- “(1) may provide for the termination of a verification granted a contractor under this section upon the expiration of a period specified by the head of an executive agency;
  - “(2) may revoke a verification granted a contractor under this section upon a determination that the quality of performance of the contractor does not meet standards applied by the head of the executive agency as of the time of the revocation decision; and
  - “(3) may provide that a contractor whose verification is terminated or revoked will have a fair opportunity to be considered for reentry into the verification system.
- “(f) SPECIAL APPLICABILITY RULE.—Notwithstanding section 34, the verification system shall apply to the procurement of commercial items.”.
- (b) REPEALS.—Section 2319 of title 10, United States Code, is repealed. Section 303C of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253c) is repealed.
- (c) CLERICAL AMENDMENTS.—(1) The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by adding at the end the following new item:
- “Sec. 35. Contractor performance.”.
- (2) The table of sections at the beginning of chapter 137 of title 10, United States Code, is amended by striking out the item relating to section 2319.
- (3) The table of contents for the Federal Property and Administrative Services Act of 1949 (contained in section 1(b)) is amended by striking out the item relating to section 303C.

## TITLE II—COMMERCIAL ITEMS

### SEC. 201. COMMERCIAL ITEM EXCEPTION TO REQUIREMENT FOR COST OR PRICING DATA AND INFORMATION LIMITATIONS.

(a) ARMED SERVICES ACQUISITIONS.—(1) Subsections (b), (c), and (d) of section 2306a of title 10, United States Code, are amended to read as follows:

“(b) EXCEPTIONS.—

“(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

“(A) for which the price agreed upon is based on—

- “(i) adequate price competition; or
- “(ii) prices set by law or regulation;

“(B) for the acquisition of a commercial item; or

“(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

“(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—

“(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

“(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

“(c) AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—(1) Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

“(2) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

“(3) The head of a procuring activity may not delegate functions under this paragraph.

“(d) LIMITATIONS ON OTHER INFORMATION.—The Federal Acquisition Regulation shall include the following:

“(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.

“(2) Reasonable limitations on requests for sales data relating to commercial items.

“(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

“(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.”.

(2) Section 2306a of such title is further amended—

(A) by striking out subsection (h); and

(B) by redesignating subsection (i) as subsection (h).

(3) Section 2375 of title 10, United States Code, is amended by striking out subsection (c).

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Subsections (b), (c) and (d) of section 304A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b) are amended to read as follows:

“(b) EXCEPTIONS.—

“(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or a modification of a contract or subcontract—

“(A) for which the price agreed upon is based on—

“(i) adequate price competition; or

“(ii) prices set by law or regulation;

“(B) for the acquisition of a commercial item; or

“(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

“(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing

ing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—

“(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

“(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

“(c) **AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.**—(1) Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

“(2) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

“(3) The head of a procuring activity may not delegate the functions under this paragraph.

“(d) **LIMITATIONS ON OTHER INFORMATION.**—The Federal Acquisition Regulation shall include the following:

“(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.

“(2) Reasonable limitations on requests for sales data relating to commercial items.

“(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.

“(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.”.

(2) Section 304A of such Act is further amended—

(A) by striking out subsection (h); and

(B) by redesignating subsection (i) as subsection (h).

#### **SEC. 202. APPLICATION OF SIMPLIFIED PROCEDURES TO COMMERCIAL ITEMS.**

(a) **ARMED SERVICES ACQUISITIONS.**—Section 2304(e) of title 10, United States Code, as amended by section 101(a), is further amended—

(1) in paragraph (1), by inserting after “special simplified procedures” the following: “for purchases of commercial items and”; and

(2) by adding at the end the following new paragraph:

“(4) The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items in an amount greater than the simplified acquisition threshold, the head of an agency—

“(A) may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with the Federal Acquisition Regulation; and

“(B) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.”.

(b) **CIVILIAN AGENCY ACQUISITIONS.**—Section 303(e) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253), as amended by section 101(b), is further amended—

(1) in paragraph (1), by inserting after “special simplified procedures” the following: “for purchases of commercial items and”; and

(2) by adding at the end the following new paragraph:

“(5) The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items in an amount greater than the simplified acquisition threshold, an executive agency—

“(A) may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with the Federal Acquisition Regulation; and

“(B) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.”.

(c) SIMPLIFIED NOTICE.—Section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) is amended—

(1) in subsection (a)(5) (as redesignated by section 101(c))—

(A) by striking out “limited”; and

(B) by inserting before “submission” the following: “issuance of solicitations and the”; and

(2) in subsection (b)(6), by striking out “threshold—” and inserting in lieu thereof “threshold, or a contract for the procurement of commercial items using simplified procedures—”.

#### SEC. 203. AMENDMENT TO DEFINITION OF COMMERCIAL ITEMS.

Section 4(12)(F) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(F)) is amended by striking out “catalog”.

#### SEC. 204. INAPPLICABILITY OF COST ACCOUNTING STANDARDS TO CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.

Subparagraph (B) of section 26(f)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)(2)) is amended—

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

“(i) Contracts or subcontracts for the acquisition of commercial items.”; and

(2) by striking out clause (iii).

## TITLE III—ADDITIONAL REFORM PROVISIONS

#### SEC. 301. GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.

(a) GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by inserting after section 16 the following new section:

##### “SEC. 17. GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.

“It is the policy of the Federal Government to rely on the private sector to supply the products and services the Federal Government needs.”.

(b) CLERICAL AMENDMENT.—The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by inserting after the item relating to section 16 the following new item:

“Sec. 17. Government reliance on the private sector.”.

#### SEC. 302. ELIMINATION OF CERTAIN CERTIFICATION REQUIREMENTS.

(a) ELIMINATION OF CERTAIN STATUTORY CERTIFICATION REQUIREMENTS.—(1)(A) Section 2410 of title 10, United States Code, is amended—

(i) in the heading, by striking out “: **certification**”; and

(ii) in subsection (a)—

(I) in the heading, by striking out “CERTIFICATION”;

(II) by striking out “unless” and all that follows through “that—” and inserting in lieu thereof “unless—”; and

(III) in paragraph (2), by striking out “to the best of that person’s knowledge and belief”.

(B) The item relating to section 2410 in the table of sections at the beginning of chapter 141 of such title is amended to read as follows:

“Sec. 2410. Requests for equitable adjustment or other relief.”.

(2) Section 2410b of title 10, United States Code, is amended in paragraph (2) by striking out “certification and”.

(3) Section 1352(b)(2) of title 31, United States Code, is amended—

(A) by striking out subparagraph (C); and

(B) by inserting “and” after the semicolon at the end of subparagraph (A).

(4) Section 5152 of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701) is amended—

(A) in subsection (a)(1), by striking out “has certified to the contracting agency that it will” and inserting in lieu thereof “agrees to”;

(B) in subsection (a)(2), by striking out “contract includes a certification by the individual” and inserting in lieu thereof “individual agrees”; and

(C) in subsection (b)(1)—

(i) by striking out subparagraph (A);

(ii) by redesignating subparagraph (B) as subparagraph (A) and in that subparagraph by striking out “such certification by failing to carry out”; and

(iii) by redesignating subparagraph (C) as subparagraph (B).

(b) ELIMINATION OF CERTAIN REGULATORY CERTIFICATION REQUIREMENTS.—

(1) CURRENT CERTIFICATION REQUIREMENTS.—(A) Not later than 210 days after the date of the enactment of this Act, any certification required of contractors or offerors by the Federal Acquisition Regulation that is not specifically imposed by statute shall be removed by the Administrator for Federal Procurement Policy from the Federal Acquisition Regulation unless—

(i) written justification for such certification is provided to the Administrator by the Federal Acquisition Regulatory Council; and

(ii) the Administrator approves in writing the retention of such certification.

(B)(i) Not later than 210 days after the date of the enactment of this Act, any certification required of contractors or offerors by a procurement regulation of an executive agency that is not specifically imposed by statute shall be removed by the head of the executive agency from such regulation unless—

(I) written justification for such certification is provided to the head of the executive agency by the senior procurement executive; and

(II) the head of the executive agency approves in writing the retention of such certification.

(ii) For purposes of clause (i), the term “head of the executive agency” with respect to a military department means the Secretary of Defense.

(iii) The Secretary of Defense may delegate his duties under this subparagraph only to the Under Secretary of Defense for Acquisition and Technology.

(2) FUTURE CERTIFICATION REQUIREMENTS.—(A) Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425) is amended—

(i) by amending the heading to read as follows:

“SEC. 29. CONTRACT CLAUSES AND CERTIFICATIONS.”;

(ii) by inserting “(a) NONSTANDARD CONTRACT CLAUSES.—” before “The Federal Acquisition”; and

(iii) by adding at the end the following new subsection:

“(b) PROHIBITION ON CERTIFICATION REQUIREMENTS.—(1) A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless—

“(A) the certification is specifically imposed by statute; or

“(B) written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification.

“(2)(A) A requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless—

“(i) the certification is specifically imposed by statute; or

“(ii) written justification for such certification is provided to the head of the executive agency by the senior procurement executive of the agency, and the head of the executive agency approves in writing the inclusion of such certification.

“(B) For purposes of subparagraph (A), the term ‘head of the executive agency’ with respect to a military department means the Secretary of Defense.

“(C) The Secretary of Defense may delegate his duties under this paragraph only to the Under Secretary of Defense for Acquisition and Technology.”.

(B) The item relating to section 29 in the table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) (41 U.S.C. 401 note) is amended to read as follows:

“Sec. 29. Contract clauses and certifications.”.

**SEC. 303. AMENDMENT TO COMMENCEMENT AND EXPIRATION OF AUTHORITY TO CONDUCT CERTAIN TESTS OF PROCUREMENT PROCEDURES.**

Subsection (j) of section 5061 of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 413 note) is amended to read as follows:

“(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test

shall take effect on August 1, 1995, and shall expire on August 1, 2000. Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of the authority to conduct the test under this section.”.

**SEC. 304. INTERNATIONAL COMPETITIVENESS.**

(a) REPEAL OF PROVISION RELATING TO RESEARCH, DEVELOPMENT, AND PRODUCTION COSTS.—

(1) Subject to paragraph (2), section 21(e) of the Arms Export Control Act (22 U.S.C. 2761(e)) is amended—

- (A) by inserting “and” after the semicolon at the end of paragraph (1)(A);
- (B) by striking out subparagraph (B) of paragraph (1);
- (C) by redesignating subparagraph (C) of paragraph (1) as subparagraph (B);
- (D) by striking out paragraph (2); and
- (E) by redesignating paragraph (3) as paragraph (2).

(2) Paragraph (1) shall be effective only if—

- (A) the President, in the budget of the President for fiscal year 1997, proposes legislation that if enacted would be qualifying offsetting legislation; and
  - (B) there is enacted by October 1, 1996, qualifying offsetting legislation.
- (3) If the conditions in paragraph (2) are met, then the amendments made by paragraph (1) shall take effect on October 1, 1996.

(4) For purposes of this subsection:

- (A) The term “qualifying offsetting legislation” means legislation that includes provisions that—
  - (i) offset fully the estimated revenues lost as a result of the amendments made by paragraph (1) for each of the fiscal years 1997 through 2000;
  - (ii) expressly state that they are enacted for the purpose of the offset described in clause (i); and
  - (iii) are included in full on the PayGo scorecard.
- (B) The term “PayGo scorecard” means the estimates that are made with respect to fiscal years through fiscal year 2000 by the Director of the Congressional Budget Office and the Director of the Office of Management and Budget under section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985.

(b) EFFECTIVE DATES.—The amendments made by subsection (a) shall be effective with respect to sales agreements pursuant to sections 21 and 22 of the Arms Export Control Act (22 U.S.C. 2761 and 2762) entered into during the period beginning on October 1, 1996, and ending on September 30, 2000.

**SEC. 305. PROCUREMENT INTEGRITY.**

(a) AMENDMENT OF PROCUREMENT INTEGRITY PROVISION.—Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is amended to read as follows:

“SEC. 27. RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION.

“(a) PROHIBITION ON DISCLOSING PROCUREMENT INFORMATION.—(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

“(2) Paragraph (1) applies to any person who—

- “(A) is a present or former officer or employee of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and
- “(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

“(b) PROHIBITION ON OBTAINING PROCUREMENT INFORMATION.—A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

“(c) PROHIBITION ON DISCLOSING OR OBTAINING PROCUREMENT INFORMATION IN CONNECTION WITH A PROTEST.—(1) A person shall not, other than as provided by law, knowingly violate the terms of a protective order described in paragraph (2) by disclosing or obtaining contractor bid or proposal information or source selection information related to the procurement contract concerned.



“(2) Paragraph (1) applies to any protective order issued by the Defense Board or the Civilian Board in connection with a protest against the award or proposed award of a Federal agency procurement contract.

“(d) PENALTIES AND ADMINISTRATIVE ACTIONS.—

“(1) CRIMINAL PENALTIES.—

“(A) Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) shall be imprisoned for not more than one year or fined as provided under title 18, United States Code, or both.

“(B) Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) for the purpose of either—

“(i) exchanging the information covered by such subsection for anything of value, or

“(ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,

shall be imprisoned for not more than 15 years or fined as provided under title 18, United States Code, or both.

“(2) CIVIL PENALTIES.—The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under subsection (a), (b), or (c). Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

“(3) ADMINISTRATIVE ACTIONS.—(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting an offense under subsection (a), (b), or (c), the Federal agency shall consider taking one or more of the following actions, as appropriate:

“(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

“(ii) Rescission of a contract with respect to which—

“(I) the contractor or someone acting for the contractor has been convicted for an offense under subsection (a), (b), or (c), or

“(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

“(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

“(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5, United States Code, or other applicable law or regulation.

“(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

“(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), or (c) affects the present responsibility of a Government contractor or subcontractor.

“(e) DEFINITIONS.—As used in this section:

“(1) The term ‘contractor bid or proposal information’ means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

“(A) Cost or pricing data (as defined by section 2306a(h) of title 10, United States Code, with respect to procurements subject to that section, and section 304A(h) of Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h), with respect to procurements subject to that section).

“(B) Indirect costs and direct labor rates.

“(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

“(D) Information marked by the contractor as ‘contractor bid or proposal information’, in accordance with applicable law or regulation.

“(2) The term ‘source selection information’ means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

“(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.

“(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.

“(C) Source selection plans.

“(D) Technical evaluation plans.

“(E) Technical evaluations of proposals.

“(F) Cost or price evaluations of proposals.

“(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.

“(H) Rankings of bids, proposals, or competitors.

“(I) The reports and evaluations of source selection panels, boards, or advisory councils.

“(J) Other information marked as ‘source selection information’ based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.

“(3) The term ‘Federal agency’ has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

“(4) The term ‘Federal agency procurement’ means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.

“(5) The term ‘contracting officer’ means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.

“(6) The term ‘protest’ means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to title IV of the Federal Acquisition Reform Act of 1995.

“(f) LIMITATION ON PROTESTS.—No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging an offense under subsection (a), (b), or (c), of this section, nor may the Defense Board or the Civilian Board consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement information that the person believed constituted evidence of the offense no later than 14 days after the person first discovered the possible offense.

“(g) SAVINGS PROVISIONS.—This section does not—

“(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

“(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

“(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

“(4) prohibit individual meetings between a Federal agency employee and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;

“(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

“(6) authorize the withholding of information from, nor restrict its receipt by, the Defense Board or the Civilian Board in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

“(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.”.

(b) REPEALS.—The following provisions of law are repealed:

(1) Sections 2397, 2397a, 2397b, and 2397c of title 10, United States Code.

(2) Section 33 of the Federal Energy Administration Act of 1974 (15 U.S.C. 789).

(3) Section 281 of title 18, United States Code.

(4) Subsection (c) of section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428).

(5) The first section 19 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5918).

(c) CLERICAL AMENDMENTS.—

(1) The table of sections at the beginning of chapter 141 of title 10, United States Code, is amended by striking out the items relating to sections 2397, 2397a, 2397b, and 2397c.

(2) The table of sections at the beginning of chapter 15 of title 18, United States Code, is amended by striking out the item relating to section 281.

(3) Section 32 of the Office of Federal Procurement Policy Act (41 U.S.C. 428) is amended by redesignating subsections (d), (e), (f), and (g) as subsections (c), (d), (e), and (f), respectively.

#### **SEC. 306. FURTHER ACQUISITION STREAMLINING PROVISIONS.**

(a) PURPOSE OF OFFICE OF FEDERAL PROCUREMENT POLICY.—(1) Section 5(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 404) is amended to read as follows:

“(a) To promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government, there shall be an Office of Federal Procurement Policy (hereinafter referred to as the ‘Office’) in the Office of Management and Budget to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies.”.

(2) Sections 2 and 3 of such Act (41 U.S.C. 401 and 402) are repealed.

(b) REPEAL OF REPORT REQUIREMENT.—Section 8 of the Office of Federal Procurement Policy Act (41 U.S.C. 407) is repealed.

(c) REPEAL OF OBSOLETE PROVISIONS.—(1) Sections 10 and 11 of the Office of Federal Procurement Policy Act (41 U.S.C. 409 and 410) are repealed.

(d) CLERICAL AMENDMENTS.—The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended by striking out the items relating to sections 2, 3, 8, 10, and 11.

#### **SEC. 307. JUSTIFICATION OF MAJOR DEFENSE ACQUISITION PROGRAMS NOT MEETING GOALS.**

Section 2220(b) of title 10, United States Code, is amended by adding at the end the following: “In addition, the Secretary shall include in such annual report a justification for the continuation of any program that—

“(1) is more than 50 percent over the cost goal established for the development, procurement, or operational phase of the program;

“(2) fails to achieve at least 50 percent of the performance capability goals established for the development, procurement, or operational phase of the program; or

“(3) is more than 50 percent behind schedule, as determined in accordance with the schedule goal established for the development, procurement, or operational phase of the program.”.

#### **SEC. 308. ENHANCED PERFORMANCE INCENTIVES FOR ACQUISITION WORKFORCE.**

(a) ARMED SERVICES ACQUISITIONS.—Subsection (b) of section 5001 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3350; 10 U.S.C. 2220 note) is amended—

(1) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(2) by designating the second sentence as paragraph (2);

(3) by inserting “(1)” after “(b) ENHANCED SYSTEM OF PERFORMANCE INCENTIVES.—”; and

(4) by adding at the end the following:

“(3) The Secretary shall include in the enhanced system of incentives the following:

“(A) Pay bands.

“(B) Significant and material pay and promotion incentives to be awarded, and significant and material unfavorable personnel actions to be imposed, under the system exclusively, or primarily, on the basis of the contributions of person-

nel to the performance of the acquisition program in relation to cost goals, performance goals, and schedule goals.

“(C) Provisions for pay incentives and promotion incentives to be awarded under the system.”.

(b) CIVILIAN AGENCY ACQUISITIONS.—Subsection (c) of section 5051 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3351; 41 U.S.C. 263 note) is amended—

(1) by redesignating subparagraphs (A) and (B) of paragraph (2) as clauses (i) and (ii), respectively;

(2) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively;

(3) by inserting “(1)” after “(c) ENHANCED SYSTEM OF PERFORMANCE INCENTIVES.—”; and

(4) by adding at the end the following:

“(2) The Deputy Director shall include in the enhanced system of incentives under paragraph (1)(B) the following:

“(A) Pay bands.

“(B) Significant and material pay and promotion incentives to be awarded, and significant and material unfavorable personnel actions to be imposed, under the system exclusively, or primarily, on the basis of the contributions of personnel to the performance of the acquisition program in relation to cost goals, performance goals, and schedule goals.

“(C) Provisions for pay incentives and promotion incentives to be awarded under the system.”.

#### **SEC. 309. RESULTS ORIENTED ACQUISITION PROGRAM CYCLE.**

Section 5002(a) of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3350) is amended—

(1) by inserting “(1)” before “to ensure”; and

(2) by striking out the period at the end and inserting in lieu thereof the following: “; (2) to ensure that the regulations compress the time periods associated with developing, procuring, and making operational new systems; and (3) to ensure that Department of Defense directives relating to development and procurement of information systems (numbered in the 8000 series) and the Department of Defense directives numbered in the 5000 series are consolidated into one series of directives that is consistent with such compressed time periods.”.

#### **SEC. 310. RAPID CONTRACTING GOAL.**

(a) GOAL.—The Office of Federal Procurement Policy Act, as amended by section 106, is further amended by adding at the end the following new section:

##### **“SEC. 36. RAPID CONTRACTING GOAL.**

“The Administrator for Federal Procurement Policy shall establish a goal of reducing by 50 percent the time necessary for executive agencies to acquire an item for the user of that item.”.

(b) CLERICAL AMENDMENT.—The table of contents for such Act, contained in section 1(b), is amended by adding at the end the following new item:

“Sec. 36. Rapid contracting goal.”.

#### **SEC. 311. ENCOURAGEMENT OF MULTIYEAR CONTRACTING.**

(a) ARMED SERVICES ACQUISITIONS.—Section 2306b(a) of title 10, United States Code, is amended in the matter preceding paragraph (1) by striking out “may” and inserting in lieu thereof “shall, to the maximum extent possible,”.

(b) CIVILIAN AGENCY ACQUISITIONS.—Section 304B(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254c(a)) is amended in the matter preceding paragraph (1) by striking out “may” and inserting in lieu thereof “shall, to the maximum extent possible,”.

#### **SEC. 312. CONTRACTOR SHARE OF GAINS AND LOSSES FROM COST, SCHEDULE, AND PERFORMANCE EXPERIENCE.**

(a) ARMED SERVICES ACQUISITIONS.—(1) Chapter 137 of title 10, United States Code, is amended by inserting after section 2306b the following new section:

##### **“§ 2306c. Contractor share of gains and losses from cost, schedule, and performance experience**

“The Federal Acquisition Regulation shall contain provisions to ensure that, for any cost-type contract or incentive-type contract, the contractor may be rewarded for contract performance exceeding the contract cost, schedule, or performance parameters to the benefit of the United States and may be penalized for failing to adhere to cost, schedule, or performance parameters to the detriment of the United States.”.

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2306b the following new item:

"2306c. Contractor share of gains and losses from cost, schedule, and performance experience."

(b) CIVILIAN AGENCY ACQUISITIONS.—(1) Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 304C the following new section:

**"SEC. 304D. CONTRACTOR SHARE OF GAINS AND LOSSES FROM COST, SCHEDULE, AND PERFORMANCE EXPERIENCE.**

"The Federal Acquisition Regulation shall contain provisions to ensure that, for any cost-type contract or incentive-type contract, the contractor may be rewarded for contract performance exceeding the contract cost, schedule, or performance parameters to the benefit of the United States and may be penalized for failing to adhere to cost, schedule, or performance parameters to the detriment of the United States."

(2) The table of contents for such Act, contained in section 1(b), is amended by inserting after the item relating to section 304C the following new item:

"Sec. 304D. Contractor share of gains and losses from cost, schedule, and performance experience."

**SEC. 313. PHASE FUNDING OF DEFENSE ACQUISITION PROGRAMS.**

Chapter 131 of title 10, United States Code, is amended by adding at the end the following new section:

**"§ 2221. Funding for results oriented acquisition program cycle**

"Before initial funding is made available for the development, procurement, or operational phase of an acquisition program for which an authorization of appropriations is required by section 114 of this title, the Secretary of Defense shall submit to Congress information about the objectives and plans for the conduct of that phase and the funding requirements for the entire phase. The information shall identify the intended user of the system to be acquired under the program and shall include objective, quantifiable criteria for assessing the extent to which the objectives and goals determined pursuant to section 2435 of this title are achieved."

(2) The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

"2221. Funding for results oriented acquisition program cycle."

**SEC. 314. IMPROVED DEPARTMENT OF DEFENSE CONTRACT PAYMENT PROCEDURES.**

(a) REVIEW AND IMPROVEMENT OF PROCEDURES.—The Comptroller General of the United States shall review commercial practices regarding accounts payable and, considering the results of the review, develop standards for the Secretary of Defense to consider using for improving the contract payment procedures and financial management systems of the Department of Defense.

(b) GAO REPORT.—Not later than September 30, 1996, the Comptroller General shall submit to Congress a report containing the following matters:

(1) The weaknesses in the financial management processes of the Department of Defense.

(2) Deviations of the Department of Defense payment procedures and financial management systems from the standards developed pursuant to subsection (a), expressed quantitatively.

(3) The officials of the Department of Defense who are responsible for resolving the deviations.

**SEC. 315. CONSIDERATION OF PAST PERFORMANCE IN ASSIGNMENT TO ACQUISITION POSITIONS.**

(a) REQUIREMENT.—Section 1701(a) of title 10, United States Code, is amended by adding at the end the following: "The policies and procedures shall provide that education and training in acquisition matters, and past performance of acquisition responsibilities, are major factors in the selection of personnel for assignment to acquisition positions in the Department of Defense."

(b) PERFORMANCE REQUIREMENTS FOR ASSIGNMENT.—(1) Section 1723(a) of title 10, United States Code, is amended by inserting ", including requirements relating to demonstrated past performance of acquisition duties," in the first sentence after "experience requirements".

(2) Section 1724(a)(2) of such title is amended by inserting before the semicolon at the end the following: "and have demonstrated proficiency in the performance of acquisition duties in the contracting position or positions previously held".

(3) Section 1735 of such title is amended—

(A) in subsection (b)—

(i) by striking out "and" at the end of paragraph (2);

- (ii) by striking out the period at the end of paragraph (3) and inserting in lieu thereof “; and”; and
- (iii) by adding at the end the following:
  - “(4) must have demonstrated proficiency in the performance of acquisition duties.”;
- (B) in subsection (c)—
  - (i) by striking out “and” at the end of paragraph (2);
  - (ii) by striking out the period at the end of paragraph (3) and inserting in lieu thereof “; and”; and
  - (iii) by adding at the end the following:
    - “(4) must have demonstrated proficiency in the performance of acquisition duties.”;
- (C) in subsection (d), by inserting before the period at the end the following:
  - “, and have demonstrated proficiency in the performance of acquisition duties”;
- and
- (D) in subsection (e), by inserting before the period at the end the following:
  - “, and have demonstrated proficiency in the performance of acquisition duties”.

**SEC. 316. ADDITIONAL DEPARTMENT OF DEFENSE PILOT PROGRAMS.**

(a) **ADDITIONAL PROGRAM AUTHORIZED FOR PARTICIPATION IN DEFENSE ACQUISITION PILOT PROGRAM.**—Section 5064 of the Federal Acquisition Streamlining Act of 1994 (P.L. 103–355; 108 Stat. 3359) is amended as follows:

(1) Subsection (a) is amended by adding at the end the following new paragraph:

“(6) **JOINT STANDOFF WEAPON UNITARY VARIANT (JSOW-UV).**—The Joint Standoff Weapon Unitary Variant program with respect to all contracts directly related to the development and procurement of an air-delivered, standoff weapon that incorporates a global positioning system-aided inertial navigation system, a data link capability, and a unitary warhead.”.

(2) Subsection (c) is amended—

- (A) by striking out “and” at the end of paragraph (1);
- (B) by striking out the period at the end of paragraph (2) and inserting in lieu thereof “; and”; and
- (C) by adding at the end the following new paragraph:

“(3) with respect to the program described in subsection (a)(6)—

“(A) to apply any amendment or repeal of a provision of law made in the Federal Acquisition Reform Act of 1995 to the pilot program before the effective date of such amendment or repeal; and

“(B) to apply to a procurement of items other than commercial items under such program any waiver or exception applicable under the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) or the Federal Acquisition Reform Act of 1995 (or an amendment made by a provision of either Act) in the case of commercial items before the effective date of such provision (or amendment), to the extent that the Secretary determines necessary to test the application of such waiver or exception to procurements of items other than commercial items.”.

(b) **DEFENSE ACQUISITION FACILITY-WIDE PILOT PROGRAM.**—

(1) **AUTHORITY TO CONDUCT FACILITY-WIDE PILOT PROGRAM.**—The Secretary of Defense may conduct a pilot program, to be known as the “defense facility-wide pilot program”, for the purpose of determining the potential for increasing the efficiency and effectiveness of the acquisition process in facilities.

(2) **SCOPE OF PROGRAM.**—At a facility designated as a participant in the pilot program, the pilot program shall consist of the following:

(A) All contracts and subcontracts for defense supplies and services that are performed at the facility.

(B) All contracts and subcontracts performed elsewhere that the Secretary determines are directly and substantially related to the production of defense supplies and services at the facility and are necessary for the pilot program.

(3) **DESIGNATION OF PARTICIPATING FACILITIES.**—(A) The Secretary may designate up to three facilities as participants in the defense facility-wide pilot program.

(B) Subject to paragraph (7), the Secretary may determine the scope and duration of a designation made under this paragraph.

(4) **CRITERIA FOR DESIGNATION.**—The Secretary may designate a facility under paragraph (3) only if the Secretary determines that all or substantially all of the contracts to be awarded and performed at the facility after the designation,

and all or substantially all of the subcontracts to be awarded under those contracts and performed at the facility after the designation, will be—

(A) for the production of supplies or services on a firm-fixed price basis;  
(B) awarded without requiring the contractors or subcontractors to provide certified cost or pricing data pursuant to section 2306a of title 10, United States Code; and

(C) awarded and administered without the application of cost accounting standards under section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)).

(5) EXEMPTION FROM CERTAIN REQUIREMENTS.—In the case of a contract or subcontract that is to be performed at a facility designated for participation in the defense facility-wide pilot program and that is subject to section 2306a of title 10, United States Code, or section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)), the Secretary of Defense may exempt such contract or subcontract from the requirement to obtain certified cost or pricing data under such section 2306a or the requirement to apply mandatory cost accounting standards under such section 26(f) if the Secretary determines that the contract or subcontract—

(A) is within the scope of the pilot program (as described in paragraph (2)); and

(B) is fairly and reasonably priced based on information other than certified cost and pricing data.

(6) SPECIAL AUTHORITY.—The authority provided under paragraph (1) may include authority for the Secretary of Defense—

(A) to apply any amendment or repeal of a provision of law made in this Act to the pilot program before the effective date of such amendment or repeal; and

(B) to apply to a procurement of items other than commercial items under such program—

(i) any authority provided in the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) (or in an amendment made by a provision of that Act) to waive a provision of law in the case of commercial items, and

(ii) any exception applicable under this Act or the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) (or an amendment made by a provision of either Act) in the case of commercial items, before the effective date of such provision (or amendment) to the extent that the Secretary determines necessary to test the application of such waiver or exception to procurements of items other than commercial items.

(7) APPLICABILITY.—(A) Paragraphs (5) and (6) apply with respect to—

(i) a contract that is awarded or modified during the period described in subparagraph (B); and

(ii) a contract that is awarded before the beginning of such period and is to be performed (or may be performed), in whole or in part, during such period.

(B) The period referred to in subparagraph (A) is the period that begins 45 days after the date of the enactment of this Act and ends on September 30, 1998.

(8) COMMERCIAL PRACTICES ENCOURAGED.—With respect to contracts and subcontracts within the scope of the defense facility-wide pilot program, the Secretary of Defense may, to the extent the Secretary determines appropriate and in accordance with the law, adopt commercial practices in the administration of contracts and subcontracts. Such commercial practices may include elimination of Government audit and access to records provisions; incorporation of commercial oversight, inspection, and acceptance procedures; use of alternative dispute resolution techniques (including arbitration); and elimination of contract provisions authorizing the Government to make unilateral changes to contracts.

#### **SEC. 317. VALUE ENGINEERING FOR FEDERAL AGENCIES.**

(a) USE OF VALUE ENGINEERING.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 310, is further amended by adding at the end the following new section:

##### **“SEC. 37. VALUE ENGINEERING.**

“(a) IN GENERAL.—Each executive agency shall establish and maintain effective value engineering procedures and processes.

“(b) THRESHOLD.—The procedures and processes established pursuant to subsection (a) shall be applied to those programs, projects, systems, and products of an executive agency that, in a ranking of all programs, projects, systems, and products

of the agency according to greatest dollar value, are within the highest 20th percentile.

“(c) DEFINITION.—As used in this section, the term ‘value engineering’ means a team effort, performed by qualified agency or contractor personnel, directed at analyzing the functions of a program, project, system, product, item of equipment, building, facility, service, or supply for the purpose of achieving the essential functions at the lowest life-cycle cost that is consistent with required or improved performance, reliability, quality, and safety.”.

(b) CLERICAL AMENDMENT.—The table of contents for such Act, contained in section 1(b), is amended by adding at the end the following new item:

“Sec. 37. Value engineering.”.

**SEC. 318. ACQUISITION WORKFORCE.**

(a) ACQUISITION WORKFORCE.—(1) The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 317, is further amended by adding at the end the following new section:

**“SEC. 38. ACQUISITION WORKFORCE.**

“(a) APPLICABILITY.—This section does not apply to an executive agency that is subject to chapter 87 of title 10, United States Code.

“(b) MANAGEMENT POLICIES.—

“(1) POLICIES AND PROCEDURES.—The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be carried out consistent with the merit system principles set forth in paragraphs (1) and (2) of section 2301(b) of title 5, United States Code.

“(2) UNIFORM IMPLEMENTATION.—The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

“(3) GOVERNMENT-WIDE POLICIES AND EVALUATION.—The Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

“(c) SENIOR PROCUREMENT EXECUTIVE AUTHORITIES AND RESPONSIBILITIES.—Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

“(d) MANAGEMENT INFORMATION SYSTEMS.—The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

“(e) ACQUISITION WORKFORCE.—The programs established by this section shall apply to all employees in the General Schedule Contracting series (GS–1102) and the General Schedule Purchasing series (GS–1105), and to any employees regardless of series who have been appointed as contracting officers whose authority exceeds the micro-purchase threshold, as that term is defined in section 32(g). The head of each executive agency may include employees in other series who perform acquisition or acquisition-related functions.

“(f) CAREER DEVELOPMENT.—

“(1) CAREER PATHS.—The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The



head of each executive agency shall make information available on such career paths.

“(2) CRITICAL DUTIES AND TASKS.—For each career path, the head of each executive agency shall identify the critical acquisition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

“(3) MANDATORY TRAINING AND EDUCATION.—For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

“(4) PERFORMANCE INCENTIVES.—The head of each executive agency, acting through the senior procurement executive for the agency, shall provide for an enhanced system of incentives for the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that—

“(A) relate pay to performance;

“(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel contributed to achieving the agency's performance goals; and

“(C) provide pay and promotion incentives to be awarded, and unfavorable personnel actions to be imposed, under the system on the basis of the contributions of personnel to achieving the agency's performance goals.

“(g) QUALIFICATION REQUIREMENTS.—

“(1) GENERAL SCHEDULE CONTRACTING SERIES (GS-1102).—

“(A) ENTRY LEVEL QUALIFICATIONS.—The Director of the Office of Personnel Management shall require that, after October 1, 1996, a person may not be appointed to a position in the GS-1102 occupational series unless the person—

“(i) has received a baccalaureate degree from an accredited educational institution authorized to grant baccalaureate degrees,

“(ii) has completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management, or

“(iii) has passed a written test determined by the Administrator for Federal Procurement Policy, after consultation with the Director of the Office of Personnel Management, to demonstrate the judgmental skills necessary for positions in this series.

“(B) QUALIFICATIONS FOR SENIOR CONTRACTING POSITIONS.—The Director of the Office of Personnel Management shall require that, after October 1, 1996, persons may be appointed to positions at and above full performance grade levels in the GS-1102 occupational series only if those persons—

“(i) have satisfied the educational requirement either of subparagraph (A)(i) or (A)(ii),

“(ii) have successfully completed all training required for the position under subsection (f)(3), and

“(iii) have satisfied experience and other requirements established by the Director for such positions.

However, this requirement shall apply to persons employed on October 1, 1996, in GS-1102 positions at those grade levels only as a prerequisite for promotion to a GS-1102 position at a higher grade.

“(2) GENERAL SCHEDULE PURCHASING SERIES (GS-1105).—The Director of the Office of Personnel Management shall require that, after October 1, 1996, a person may not be appointed to a position in the GS-1105 occupational series unless the person—

“(A) has successfully completed 2 years of course work from an accredited educational institution authorized to grant degrees, or

“(B) has passed a written test determined by the Administrator for Federal Procurement Policy, after consultation with the Director of the Office of Personnel Management, to demonstrate the judgmental skills necessary for positions in this series.

“(3) CONTRACTING OFFICERS.—The head of each executive agency shall require that, beginning after October 1, 1996, a person may be appointed as a contracting officer with authority to award or administer contracts for amounts above the micro-purchase threshold, as that term is defined in section 32(g), only if the person—

“(A) has successfully completed all mandatory training required of an employee in an equivalent GS-1102 or 1105 position under subsection (f)(3); and

“(B) meets experience and other requirements established by the head of the agency, based on the dollar value and complexity of the contracts that the employee will be authorized to award or administer under the appointment as a contracting officer.

“(4) EXCEPTIONS.—(A) The requirements set forth in paragraphs (1) and (2), as applicable, shall not apply to any person employed in the GS-1102 or GS-1105 series on October 1, 1996.

“(B) Employees of an executive agency who do not satisfy the full qualification requirements for appointment as a contracting officer under paragraph (3) may be appointed as a contracting officer for a temporary period of time under procedures established by the agency head. The procedures shall—

“(i) require that the person have completed a significant portion of the required training,

“(ii) require a plan be established for the balance of the required training,

“(iii) specify a period of time for completion of the training, and

“(iv) include provisions for withdrawing or terminating the appointment prior to the scheduled expiration date, where appropriate.

“(5) WAIVER.—The senior procurement executive for an executive agency may waive any or all of the qualification requirements of paragraphs (1) and (2) for a person if the person possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated job performance and qualifying experience. This authority may not be redelegated by the senior procurement executive. With respect to each waiver granted under this subsection, the senior procurement executive shall set forth in writing the rationale for the decision to waive such requirements.

“(h) PROGRAM ESTABLISHMENT AND IMPLEMENTATION.—

“(1) FUNDING LEVELS.—(A) The head of an executive agency shall request in the budget for a fiscal year for the agency—

“(i) for education and training under this section, an amount equal to no less than 2.5 percent of the base aggregate salary cost of the acquisition workforce subject to this section for that fiscal year; and

“(ii) for salaries of the acquisition workforce, an amount equal to no more than 97.5 percent of such base aggregate salary cost.

“(B) The head of the executive agency shall set forth separately the funding levels requested in the budget justification documents submitted in support of the President’s budget submitted to Congress under section 1105 of title 31, United States Code.

“(C) Funds appropriated for education and training under this section may not be obligated or used for any other purpose.

“(2) INTERAGENCY AGREEMENTS.—The head of an executive agency may enter into a written agreement with another agency to participate in programs established under this section on a reimbursable basis.

“(3) TUITION ASSISTANCE.—Notwithstanding the prohibition in section 4107(b) of title 5, United States Code, the head of each executive agency may provide for tuition reimbursement and education (including a full-time course of study leading to a degree) for acquisition personnel in the agency related to the purposes of this section.

“(4) INTERN PROGRAMS.—The head of each executive agency may establish intern programs in order to recruit highly qualified and talented individuals and provide them with opportunities for accelerated promotions, career broadening assignments, and specified training for advancement to senior acquisition positions. For such programs, the head of an executive agency, without regard to the provisions of title 5, United States Code, may appoint individuals to competitive GS-5, GS-7, or GS-9 positions in the General Schedule Contracting series (GS-1102) who have graduated from baccalaureate or master’s programs in purchasing or contracting from accredited educational institutions authorized to grant baccalaureate and master’s degrees.

“(5) COOPERATIVE EDUCATION PROGRAM.—The head of each executive agency may establish an agencywide cooperative education credit program for acquisition positions. Under the program, the head of the executive agency may enter

into cooperative arrangements with one or more accredited institutions of higher education which provide for such institutions to grant undergraduate credit for work performed in such position.

“(6) SCHOLARSHIP PROGRAM.—

“(A) ESTABLISHMENT.—Where deemed appropriate, the head of each executive agency may establish a scholarship program for the purpose of qualifying individuals for acquisition positions in the agency.

“(B) ELIGIBILITY.—To be eligible to participate in a scholarship program established under this paragraph by an executive agency, an individual must—

“(i) be accepted for enrollment or be currently enrolled as a full-time student at an accredited educational institution authorized to grant baccalaureate or graduate degrees (as appropriate);

“(ii) be pursuing a course of education that leads toward completion of a bachelor’s, master’s, or doctor’s degree (as appropriate) in a qualifying field of study, as determined by the head of the agency;

“(iii) sign an agreement described in subparagraph (C) under which the participant agrees to serve a period of obligated service in the agency in an acquisition position in return for payment of educational assistance as provided in the agreement; and

“(iv) meet such other requirements as the head of the agency prescribes.

“(C) AGREEMENT.—An agreement between the head of an executive agency and a participant in a scholarship program established under this paragraph shall be in writing, shall be signed by the participant, and shall include the following provisions:

“(i) The agreement of the head of the agency to provide the participant with educational assistance for a specified number of school years, not to exceed 4, during which the participant is pursuing a course of education in a qualifying field of study. The assistance may include payment of tuition, fees, books, laboratory expenses, and a stipend.

“(ii) The participant’s agreement—

“(I) to accept such educational assistance,

“(II) to maintain enrollment and attendance in the course of education until completed,

“(III) while enrolled in such course, to maintain an acceptable level of academic standing (as prescribed by the head of the agency), and

“(IV) after completion of the course of education, to serve as a full-time employee in an acquisition position in the agency for a period of time of one calendar year for each school year or part thereof for which the participant was provided a scholarship under the program.

“(D) REPAYMENT.—(i) Any person participating in a program established under this paragraph shall agree to pay to the United States the total amount of educational assistance provided to the person under the program if the person is voluntarily separated from the agency or involuntarily separated for cause from the agency before the end of the period for which the person has agreed to continue in the service of the agency in an acquisition position.

“(ii) If an employee fails to fulfill the agreement to pay to the Government the total amount of educational assistance provided to the person under the program, a sum equal to the amount of the educational assistance may be recovered by the Government from the employee (or the estate of the employee) by setoff against accrued pay, compensation, amount of retirement credit, or other amount due the employee from the Government; and by such other method as is provided by law for the recovery of amounts owing to the Government.

“(iii) The head of an executive agency may waive in whole or in part a repayment required under this paragraph if the head of the agency determines the recovery would be against equity and good conscience or would be contrary to the best interests of the United States.

“(E) TERMINATION OF AGREEMENT.—There shall be no requirement that a position be offered to a person after such person successfully completes a course of education required by an agreement under this paragraph. If no position is offered, the agreement shall be considered terminated.”.

(2) The table of contents for such Act, contained in section 1(b), is amended by adding at the end the following new item:

“Sec. 38. Acquisition workforce.”.

(b) ADDITIONAL AMENDMENTS.—Section 6(d)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 405), is amended—

(1) in subparagraph (A), by striking out “Government-wide career management programs for a professional procurement work force” and inserting in lieu thereof “the development of a professional acquisition workforce Government-wide”;

(2) in subparagraph (B)—

(A) by striking out “procurement by the” and inserting in lieu thereof “acquisition by the”; and

(B) by striking out “and” at the end of the subparagraph; and

(3) by striking out subparagraph (C) and inserting in lieu thereof the following:

“(C) administer the provisions of section 38;

“(D) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;

“(E) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;

“(F) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;

“(G) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;

“(H) evaluate the effectiveness of training and career development programs for acquisition personnel;

“(I) promote the establishment and utilization of academic programs by colleges and universities in acquisition fields;

“(J) facilitate, to the extent requested by agencies, interagency intern and training programs; and

“(K) perform other career management or research functions as directed by the Administrator.”.

## **TITLE IV—STREAMLINING OF DISPUTE RESOLUTION**

### **Subtitle A—General Provisions**

#### **SEC. 401. DEFINITIONS.**

(a) IN GENERAL.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end the following:

### **“TITLE II—DISPUTE RESOLUTION**

#### **“Subtitle A—General Provisions**

#### **“SEC. 201. DEFINITIONS.**

“In this title:

“(1) The term ‘Defense Board’ means the Department of Defense Board of Contract Appeals established pursuant to section 8(a) of the Contract Disputes Act of 1978 (41 U.S.C. 607).

“(2) The term ‘Civilian Board’ means the Civilian Board of Contract Appeals established pursuant to section 8(b) of the Contract Disputes Act of 1978 (41 U.S.C. 607).

“(3) The term ‘Board judge’ means a member of the Defense Board or the Civilian Board, as the case may be.

“(4) The term ‘Chairman’ means the Chairman of the Defense Board or the Civilian Board, as the case may be.

“(5) The term ‘Board concerned’ means—

- “(A) the Defense Board with respect to matters within its jurisdiction; and  
 “(B) the Civilian Board with respect to matters within its jurisdiction.”
- “(6) The term ‘executive agency’—  
 “(A) for purposes of contract disputes under section 213—  
 “(i) with respect to contract disputes under the jurisdiction of the Defense Board, means the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force; and  
 “(ii) with respect to contract disputes under the jurisdiction of the Civilian Board, has the meaning given by section 2(2) of the Contract Disputes Act of 1978 (41 U.S.C. 601(2)) except that the term does not include the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force; and  
 “(B) for purposes of protests under section 214—  
 “(i) with respect to protests under the jurisdiction of the Defense Board, means the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force; and  
 “(ii) with respect to protests under the jurisdiction of the Civilian Board, has the meaning given by section 4(1) of this Act except that the term does not include the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force.”
- “(7) The term ‘alternative means of dispute resolution’ has the meaning given by section 571(3) of title 5, United States Code.
- “(8) The term ‘protest’ means a written objection by an interested party to any of the following:  
 “(A) A solicitation or other request by an executive agency for offers for a contract for the procurement of property or services.  
 “(B) The cancellation of such a solicitation or other request.  
 “(C) An award or proposed award of such a contract.  
 “(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.”
- “(9) The term ‘interested party’, with respect to a contract or a solicitation or other request for offers, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.
- “(10) The term ‘prevailing party’, with respect to a determination of the Board under section 214(h)(2) that a decision of a contracting officer violates a statute or regulation, means a party that demonstrated such violation.”.
- (b) CONFORMING AMENDMENTS.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is further amended—  
 (1) by inserting the following before section 1:

## **“TITLE I—FEDERAL PROCUREMENT POLICY GENERALLY”;**

and

(2) in section 4, by striking out “As used in this Act:” and inserting in lieu thereof “Except as otherwise specifically provided, as used in this Act:”.

## **Subtitle B—Establishment of Civilian and Defense Boards of Contract Appeals**

### **SEC. 411. ESTABLISHMENT.**

Subsections (a) and (b) of section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) are amended to read as follows:

“(a) There is established in the Department of Defense a board of contract appeals to be known as the Department of Defense Board of Contract Appeals.

“(b) There is established in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals.”.

**SEC. 412. MEMBERSHIP.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 401, is further amended by adding at the end the following:

**“SEC. 202. MEMBERSHIP.**

“(a) APPOINTMENT.—(1)(A) The Defense Board shall consist of judges appointed by the Chairman, without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Defense Board judge, from a register of applicants maintained by the Defense Board.

“(B) The Civilian Board shall consist of judges appointed by the Chairman, without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board judge, from a register of applicants maintained by the Civilian Board.

“(2) The members of the Defense Board and the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, United States Code, with an additional requirement that such members shall have had not fewer than five years of experience in public contract law.

“(3) Notwithstanding paragraph (2) and subject to subsection (b), the following persons shall serve as Board judges:

“(A) For the Defense Board, any full-time member of the Armed Services Board of Contract Appeals serving as such on the day before the effective date of this title.

“(B) For the Civilian Board, any full-time member of any agency board of contract appeals other than the Armed Services Board of Contract Appeals serving as such on the day before the effective date of this title.

“(C) For either the Defense Board or the Civilian Board, any person serving on the day before the date of the enactment of this title in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code.

“(b) REMOVAL.—Members of the Defense Board and the Civilian Board shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5, United States Code.

“(c) COMPENSATION.—Compensation for the Chairman of the Defense Board and the Chairman of the Civilian Board and all other members of each Board shall be determined under section 5372a of title 5, United States Code.”.

**SEC. 413. CHAIRMAN.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 412, is further amended by adding at the end the following:

**“SEC. 203. CHAIRMAN.**

“(a) DESIGNATION.—(1)(A) The Chairman of the Defense Board shall be designated by the Secretary of Defense to serve for a term of five years. The Secretary shall select the Chairman from among sitting judges each of whom has had at least five years of service—

“(i) as a member of the Armed Services Board of Contract Appeals; or

“(ii) in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this title).

“(B) The Chairman of the Civilian Board shall be designated by the Administrator of General Services to serve for a term of five years. The Administrator shall select the Chairman from among sitting judges each of whom has had at least five years of service—

“(i) as a member of an agency board of contract appeals other than the Armed Services Board of Contract Appeals; or

“(ii) in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this title).

“(2) A Chairman of a Board may continue to serve after the expiration of the Chairman's term until a successor has taken office. A Chairman may be reappointed any number of times.

“(b) RESPONSIBILITIES.—The Chairman of the Defense Board or the Civilian Board, as the case may be, shall be responsible on behalf of the Board for the execu-

tive and administrative operation of the Board, including functions of the Board with respect to the following:

“(1) The selection, appointment, and fixing of the compensation of such personnel, pursuant to part III of title 5, United States Code, as the Chairman considers necessary or appropriate, including a Clerk of the Board, a General Counsel, and clerical and legal assistance for Board judges.

“(2) The supervision of personnel employed by or assigned to the Board, and the distribution of work among such personnel.

“(3) The operation of an Office of the Clerk of the Board, including the receipt of all filings made with the Board, the assignment of cases, and the maintenance of all records of the Board.

“(4) The prescription of such rules and regulations as the Chairman considers necessary or appropriate for the administration and management of the Board.

“(c) VICE CHAIRMEN.—The Chairman of the Defense Board or the Civilian Board, as the case may be, may designate up to four other Board judges as Vice Chairmen. The Chairman may divide the Board into two divisions, one for handling contract disputes and one for handling protests, and, if such division is made, shall assign a Vice Chairman to head each division. The Vice Chairmen, in the order designated by the Chairman, shall act in the place and stead of the Chairman during the absence of the Chairman.”.

**SEC. 414. RULEMAKING AUTHORITY.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 413, is further amended by adding at the end the following:

**“SEC. 204. RULEMAKING AUTHORITY.**

“The Chairman of the Defense Board and the Chairman of the Civilian Board shall jointly issue and maintain—

“(1) such procedural rules and regulations as are necessary to the exercise of the functions of the Boards under sections 213 and 214; and

“(2) statements of policy of general applicability with respect to such functions.”.

**SEC. 415. AUTHORIZATION OF APPROPRIATIONS.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 414, is further amended by adding at the end the following:

**“SEC. 205. AUTHORIZATION OF APPROPRIATIONS.**

“There are authorized to be appropriated for fiscal year 1997 and each succeeding fiscal year such sums as may be necessary to carry out the provisions of this title. Funds for the activities of each Board shall be separately appropriated for such purpose. Funds appropriate pursuant to this section shall remain available until expended.”.

## **Subtitle C—Functions of Defense and Civilian Boards of Contract Appeals**

**SEC. 421. ALTERNATIVE DISPUTE RESOLUTION SERVICES.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 415, is further amended by adding at the end the following:

## **“Subtitle B—Functions of the Defense and Civilian Boards of Contract Appeals**

**“SEC. 211. ALTERNATIVE DISPUTE RESOLUTION SERVICES.**

“(a) REQUIREMENT TO PROVIDE SERVICES UPON REQUEST.—The Defense Board and the Civilian Board shall each provide alternative means of dispute resolution for any disagreement regarding a contract or prospective contract of an executive agency upon the request of all parties to the disagreement.

“(b) PERSONNEL QUALIFIED TO ACT.—Each Board judge and each attorney employed by the Board concerned shall be considered to be qualified to act for the purpose of conducting alternative means of dispute resolution under this section.

“(c) SERVICES TO BE PROVIDED WITHOUT CHARGE.—Any services provided by the Board concerned or any Board judge or employee pursuant to this section shall be provided without charge.

“(d) RECUSAL OF CERTAIN PERSONNEL UPON REQUEST.—In the event that a matter which is presented to the Board concerned for alternative means of dispute resolution, pursuant to this section, later becomes the subject of formal proceedings before such Board, any Board judge or employee who was involved in the alternative means of dispute resolution shall, if requested by any party to the formal proceeding, take no part in that proceeding.”.

**SEC. 422. ALTERNATIVE DISPUTE RESOLUTION OF DISPUTES AND PROTESTS SUBMITTED TO BOARDS.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 421, is further amended by adding at the end the following:

**“SEC. 212. ALTERNATIVE DISPUTE RESOLUTION OF DISPUTES AND PROTESTS SUBMITTED TO BOARDS.**

“With reasonable promptness after the submission to the Defense Board or the Civilian Board of a contract dispute under section 213 or a bid protest under section 214, a Board judge to whom the contract dispute or protest is assigned shall request the parties to meet with a Board judge, or an attorney employed by the Board concerned, for the purpose of attempting to resolve the dispute or protest through alternative means of dispute resolution. Formal proceedings in the appeal shall then be suspended until such time as any party or a Board judge to whom the dispute or protest is assigned determines that alternative means of dispute resolution are not appropriate for resolution of the dispute or protest.”.

**SEC. 423. CONTRACT DISPUTES.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 422, is further amended by adding at the end the following:

**“SEC. 213. CONTRACT DISPUTES.**

“The Defense Board shall have jurisdiction as provided by section 8(a) of the Contract Disputes Act of 1978 (41 U.S.C. 601–613). The Civilian Board shall have jurisdiction as provided by section 8(b) of such Act.”.

**SEC. 424. PROTESTS.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 423, is further amended by adding at the end the following:

**“SEC. 214. PROTESTS.**

“(a) REVIEW REQUIRED UPON REQUEST.—Upon request of an interested party in connection with any procurement conducted by an executive agency, the Defense Board or the Civilian Board, as the case may be, shall review, as provided in this section, any decision by the head of the executive agency alleged to violate a statute or regulation. A decision or order of the Board concerned pursuant to this section shall not be subject to interlocutory appeal or review.

“(b) STANDARD OF REVIEW.—In deciding a protest, the Board concerned may consider all evidence that is relevant to the decision under protest. It shall accord a presumption of correctness to the decision under protest. The protester may rebut such presumption by showing, by a preponderance of the evidence, that the decision was arbitrary or capricious or violated a statute or regulation.

“(c) NOTIFICATION.—Within one day after the receipt of a protest, the Board concerned shall notify the executive agency involved of the protest.

“(d) SUSPENSION OF CONTRACT AWARD.—(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the executive agency has received notice of a protest with respect to such procurement from the Board concerned and while the protest is pending.

“(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the executive agency has notice under this section)—

“(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board concerned under this section; and

“(B) after the Board concerned is advised of that finding.

“(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days after the making of such finding.

“(4) The suspension of the award under paragraph (1) shall not preclude the executive agency concerned from continuing the procurement process up to but not including the award of the contract.

“(e) SUSPENSION OF CONTRACT PERFORMANCE.—(1) A contractor awarded an executive agency contract may, during the period described in paragraph (4), begin per-



formance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.

“(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that—

“(A) a protest is likely to be filed; and

“(B) the immediate performance of the contract is not in the best interests of the United States.

“(3)(A) If the executive agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)—

“(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

“(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

“(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

“(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the executive agency has notice under this section)—

“(i) upon a written finding that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision concerning the protest by the Board concerned; and

“(ii) after the Board concerned is notified of that finding.

“(4) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of—

“(A) the date that is 10 days after the date of the contract award; or

“(B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

“(f) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (d) and (e) of this section may not be delegated.

“(g) PROCEDURES.—

“(1) PROCEEDINGS AND DISCOVERY.—The Board concerned shall conduct proceedings and allow such discovery to the minimum extent necessary for the expeditious, fair, and cost-effective resolution of the protest. The Board concerned shall limit discovery to material which is relevant to the grounds of protest or to such affirmative defenses as the executive agency involved, or any intervenor supporting the agency, may raise.

“(2) PRIORITY.—The Board concerned shall give priority to protests filed under this section over contract disputes and alternative dispute services. Except as provided in paragraph (3), the Board concerned shall issue its final decision within 65 days after the date of the filing of the protest, unless the Chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the Board concerned shall issue such decision within the longer period determined by the Chairman. An amendment that adds a new ground of protest should be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest.

“(3) THRESHOLD.—(A) Except as provided in subparagraph (B), any protest in which the anticipated value of the contract award that will result from the protested procurement, as estimated by the executive agency involved, is less than \$20,000,000 shall be considered under simplified rules of procedure. Such simplified rules shall provide that discovery in such protests shall be in writing only. Such protests shall be decided by a single Board judge. The Board concerned shall issue its final decision in each such protest within 40 days after the date of the filing of the protest, unless the Chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the Board concerned shall issue such decision within the longer period determined by the Chairman.

“(B) If the Chairman of the Board concerned determines that special and unique circumstances of a protest that would otherwise qualify for the simplified rules described in subparagraph (A), including the complexity of a protest, requires the use of full procedures as described in paragraphs (1) and (2),

the Chairman shall use such procedures in lieu of the simplified rules described in subparagraph (A).

“(4) CALCULATION OF TIME FOR ADR.—In calculating time for purposes of paragraph (2) or (3) of this subsection, any days during which proceedings are suspended for the purpose of attempting to resolve the protest by alternative means of dispute resolution, up to a maximum of 20 days, shall not be counted.

“(5) DISMISSAL OF FRIVOLOUS PROTESTS.—The Board concerned may dismiss a protest that the Board concerned determines—

“(A) is frivolous,

“(B) has been brought or pursued in bad faith; or

“(C) does not state on its face a valid basis for protest.

“(6) PAYMENT OF COSTS FOR FRIVOLOUS PROTESTS.—(A) If the Board concerned expressly finds that a protest or a portion of a protest is frivolous or has been brought or pursued in bad faith, the Board concerned shall declare that the protester or other interested party who joins the protest is liable to the United States for payment of the costs described in subparagraph (B) unless—

“(i) special circumstances would make such payment unjust; or

“(ii) the protester obtains documents or other information after the protest is filed with the Board concerned that establishes that the protest or a portion of the protest is frivolous or has been brought or pursued in bad faith, and the protester then promptly withdraws the protest or portion of the protest.

“(B) The costs referred to in subparagraph (A) are all of the costs incurred by the United States of reviewing the protest, or of reviewing that portion of the protest for which the finding is made, including the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28, United States Code) incurred by the United States in defending the protest.

“(h) DECISIONS AND CORRECTIVE ACTIONS ON PROTESTS.—(1) In making a decision on protests filed under this section, the Board concerned shall accord due weight to the goals of economic and efficient procurement, and shall take due account of the rule of prejudicial error.

“(2) If the Board concerned determines that a decision of the head of the executive agency violates a statute or regulation, the Board concerned may order the agency (or its head) to take such corrective action as the Board concerned considers appropriate. Corrective action includes requiring that the executive agency—

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

“(B) recompute the contract immediately;

“(C) issue a new solicitation;

“(D) terminate the contract;

“(E) award a contract consistent with the requirements of such statute and regulation;

“(F) implement any combination of requirements under subparagraphs (A), (B), (C), (D), and (E); or

“(G) implement such other actions as the Board concerned determines necessary.

“(3) If the Board concerned orders corrective action after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the corrective action was ordered.

“(4) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be submitted to the Board concerned and shall be made a part of the public record (subject to any protective order considered appropriate by the Board concerned) before dismissal of the protest.

“(i) AUTHORITY TO DECLARE ENTITLEMENT TO COSTS.—(1)(A) Whenever the Board concerned determines that a decision of a contracting officer violates a statute or regulation, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate prevailing party to be entitled to the costs of—

“(i) filing and pursuing the protest, including reasonable attorneys’ fees and consultant and expert witness fees, and

“(ii) bid and proposal preparation.

“(B) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled under this paragraph to costs for—

“(i) consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government, or

“(ii) attorneys’ fees that exceed \$150 per hour unless the Board concerned, on a case by case basis, determines that an increase in the cost of living or a spe-

cial factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

“(2) Payment of amounts due from an agency under paragraph (1) or under the terms of a settlement agreement under subsection (h)(4) shall be made from the appropriation made by section 1304 of title 31, United States Code, for the payment of judgments. The executive agency concerned shall reimburse that appropriation account out of funds available for the procurement.

“(j) APPEALS.—A final decision of the Board concerned may be appealed as set forth in section 8(g)(1) of the Contract Disputes Act of 1978 by the head of the executive agency concerned and by any interested party, including interested parties who intervene in any protest filed under this section.

“(k) ADDITIONAL RELIEF.—Nothing contained in this section shall affect the power of the Board concerned to order any additional relief which it is authorized to provide under any statute or regulation.

“(l) NONEXCLUSIVITY OF REMEDIES.—Nothing contained in this section shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims or in a United States district court.”.

#### **SEC. 425. APPLICABILITY TO CERTAIN CONTRACTS.**

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), as amended by section 424, is further amended by adding at the end the following:

#### **“SEC. 215. APPLICABILITY TO CERTAIN CONTRACTS.**

“(a) CONTRACTS AT OR BELOW THE SIMPLIFIED ACQUISITION THRESHOLD.—Notwithstanding section 33 of this Act, the authority conferred on the Defense Board and the Civilian Board by this title is applicable to contracts in amounts not greater than the simplified acquisition threshold.

“(b) CONTRACTS FOR COMMERCIAL ITEMS.—Notwithstanding section 34 of this Act, the authority conferred on the Defense Board and the Civilian Board by this title is applicable to contracts for the procurement of commercial items.”.

## **Subtitle D—Repeal of Other Statutes Authorizing Administrative Protests**

#### **SEC. 431. REPEALS.**

(a) GSBCA PROVISIONS.—Subsection (f) of the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949; 40 U.S.C. 759) is repealed.

(b) GAO PROVISIONS.—(1) Subchapter V of chapter 35 of title 31, United States Code (31 U.S.C. 3551–3556) is repealed.

(2) The analysis for chapter 35 of such title is amended by striking out the items relating to sections 3551 through 3556 and the heading for subchapter V.

## **Subtitle E—Transfers and Transitional, Savings, and Conforming Provisions**

#### **SEC. 441. TRANSFER AND ALLOCATION OF APPROPRIATIONS AND PERSONNEL.**

##### **(a) TRANSFERS.—**

(1) ARMED SERVICES BOARD OF CONTRACT APPEALS.—The personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the Armed Services Board of Contract Appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before the effective date of this Act), shall be transferred to the Department of Defense Board of Contract Appeals for appropriate allocation by the Chairman of that Board.

(2) OTHER BOARDS OF CONTRACTS APPEALS.—The personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C.

607) other than the Armed Services Board of Contract Appeals (as in effect on the day before the effective date of this Act), shall be transferred to the Civilian Board of Contract Appeals for appropriate allocation by the Chairman of that Board.

(3) COMPTROLLER GENERAL.—(A) One-third (as determined by the Comptroller General) of the personnel employed in connection with, and one-third (as determined by the Comptroller General) of the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the Comptroller General pursuant to subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this Act), shall be transferred to the Civilian Board of Contract Appeals for appropriate allocation by the Chairman of that Board.

(B) Two-thirds (as determined by the Comptroller General) of the personnel employed in connection with, and two-thirds (as determined by the Comptroller General) of the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions vested by law in the Comptroller General pursuant to subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this Act), shall be transferred to the Department of Defense Board of Contract Appeals for appropriate allocation by the Chairman of that Board.

(b) EFFECT ON PERSONNEL.—Personnel transferred pursuant to this title shall not be separated or reduced in compensation for one year after such transfer, except for cause.

(c) REGULATIONS.—(1) The Department of Defense Board of Contract Appeals and the Civilian Board of Contract Appeals shall each prescribe regulations for the release of competing employees in a reduction in force that gives due effect to—

- (A) efficiency or performance ratings;
- (B) military preference; and
- (C) tenure of employment.

(2) In prescribing the regulations, the Board concerned shall provide for military preference in the same manner as set forth in subchapter I of chapter 35 of title 5, United States Code.

#### SEC. 442. TERMINATIONS AND SAVINGS PROVISIONS.

(a) TERMINATION OF BOARDS OF CONTRACT APPEALS.—On the effective date of this title, the boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607) (as in effect on the day before the effective date of this Act) shall terminate.

(b) SAVINGS PROVISION FOR CONTRACT DISPUTE MATTERS PENDING BEFORE BOARDS.—(1) The provisions of this title shall not affect any proceedings (other than bid protests pending before the board of contract appeals of the General Services Administration) pending on the effective date of this Act before any board of contract appeals described in subsection (a).

(2) In the case of any such proceedings pending before the Armed Services Board of Contract Appeals, the proceedings shall be continued by the Department of Defense Board of Contract Appeals, and orders which were issued in any such proceeding by the Armed Services Board of Contract Appeals shall continue in effect until modified, terminated, superseded, or revoked by the Department of Defense Board of Contract Appeals, by a court of competent jurisdiction, or by operation of law.

(3) In the case of any such proceedings pending before an agency board of contract appeals other than the Armed Services Board of Contract Appeals, the proceedings shall be continued by the Civilian Board of Contract Appeals, and orders which were issued in any such proceeding by the agency board shall continue in effect until modified, terminated, superseded, or revoked by the Civilian Board of Contract Appeals, by a court of competent jurisdiction, or by operation of law.

(c) BID PROTEST TRANSITION PROVISIONS.—(1) No protest may be submitted to the Comptroller General pursuant to section 3553(a) of title 31, United States Code, or to the board of contract appeals for the General Services Administration pursuant to the Brooks Automatic Data Processing Act (40 U.S.C. 759) on or after the effective date of this Act.

(2) In the case of bid protest proceedings pending before the board of contract appeals of the General Services Administration on the effective date of this Act, the proceedings shall be continued by the Civilian Board of Contract Appeals. The provisions repealed by section 431(a) shall continue to apply to such proceedings until

the Civilian Board of Contract Appeals determines such proceedings have been completed.

(3) The provisions repealed by section 431(b) shall continue to apply to proceedings pending on the effective date of this title before the Comptroller General pursuant to those provisions, until the Comptroller General determines such proceedings have been completed.

**SEC. 443. CONTRACT DISPUTES AUTHORITY OF BOARDS.**

(a) Section 2 of the Contract Disputes Act of 1978 (41 U.S.C. 601) is amended—

(1) by amending paragraph (6) to read as follows:

“(6) the term ‘Defense Board’ means the Department of Defense Board of Contract Appeals established under section 8(a) of this Act;”;

(2) by redesignating paragraph (7) as paragraph (8); and

(3) by inserting after paragraph (6) the following new paragraph (7):

“(7) the term ‘Civilian Board’ means the Civilian Board of Contract Appeals established under section 8(b) of this Act; and”.

(b) Section 6(c)(6) of the Contract Disputes Act of 1978 (41 U.S.C. 605(c)(6)) is amended—

(1) by striking out “court or an agency board of contract appeals” and inserting in lieu thereof “court, the Defense Board, or the Civilian Board”;

(2) by striking out “an agency board of contract appeals” in the third sentence and inserting in lieu thereof “the Defense Board or the Civilian Board”; and

(3) by striking out “agency board” and inserting in lieu thereof “the Board concerned”.

(c) Section 7 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by striking out “an agency board of contract appeals” and inserting in lieu thereof “the Defense Board or the Civilian Board”.

(d) Section 8 of the Contract Disputes Act of 1978 (41 U.S.C. 607), as amended by section 411, is further amended—

(1) by amending the heading to read as follows:

“DEFENSE AND CIVILIAN BOARDS OF CONTRACT APPEALS”;

(2) by striking out subsection (c);

(3) in subsection (d)—

(A) by striking out the first sentence and inserting in lieu thereof the following:

“The Defense Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force relative to a contract made by that department. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense or the Department of the Army, the Navy, or the Air Force) relative to a contract made by that agency.”; and

(B) in the second sentence, by striking out “the agency board” and inserting in lieu thereof “the Board concerned”;

(4) in subsection (e), by striking out “An agency board shall provide” and inserting in lieu thereof “The Defense Board and the Civilian Board shall each provide.”;

(5) in subsection (f), by striking out “each agency board” and inserting in lieu thereof “the Defense Board and the Civilian Board”;

(6) in subsection (g)—

(A) in the first sentence of paragraph (1), by striking out “an agency board of contract appeals” and inserting in lieu thereof “the Defense Board or the Civilian Board, as the case may be.”;

(B) by striking out paragraph (2); and

(C) by redesignating paragraph (3) as paragraph (2); and

(7) by striking out subsections (h) and (i).

(e) Section 9 of the Contract Disputes Act of 1978 (41 U.S.C. 608) is amended—

(1) in subsection (a), by striking out “each agency board” and inserting in lieu thereof “the Defense Board and the Civilian Board”; and

(2) in subsection (b), by striking out “the agency board” and inserting in lieu thereof “the Board concerned”.

(f) Section 10 of the Contract Disputes Act of 1978 (41 U.S.C. 609) is amended—

(1) in subsection (a)—

(A) in the first sentence of paragraph (1)—

(i) by striking out “Except as provided in paragraph (2), and in” and inserting in lieu thereof “In”; and

- (ii) by striking out “an agency board” and inserting in lieu thereof “the Defense Board or the Civilian Board”;
- (B) by striking out paragraph (2); and
- (C) by redesignating paragraph (3) as paragraph (2), and in that paragraph by striking out “or (2)”;
  - (2) in subsection (b)—
    - (A) by striking out “any agency board” and inserting in lieu thereof “the Defense Board or the Civilian Board”; and
    - (B) by striking out “the agency board” and inserting in lieu thereof “the Board concerned”; and
  - (3) in subsection (c)—
    - (A) by striking out “an agency board” and inserting in lieu of each “the Defense Board or the Civilian Board”; and
    - (B) by striking out “the agency board” and inserting in lieu thereof “the Board concerned”; and
  - (4) in subsection (d)—
    - (A) by striking out “one or more agency boards” and inserting in lieu thereof “the Defense Board or the Civilian Board (or both)”; and
    - (B) by striking out “or among the agency boards involved” and inserting in lieu thereof “one or both of the Boards”.
- (g) Section 11 of the Contract Disputes Act of 1978 (41 U.S.C. 610) is amended—
  - (1) in the first sentence, by striking out “an agency board of contract appeals” and inserting in lieu thereof “the Defense Board or the Civilian Board”; and
  - (2) in the second sentence, by striking out “the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority” and inserting in lieu thereof “the Defense Board or the Civilian Board”.
- (h) Section 13 of the Contract Disputes Act of 1978 (41 U.S.C. 612) is amended—
  - (1) in subsection (b), by striking out “an agency board of contract appeals” and inserting in lieu thereof “the Defense Board or the Civilian Board”; and
  - (2) in subsection (d)(2), by striking out “by the board of contract appeals for” and inserting in lieu thereof “by the Defense Board or the Civilian Board from”.

**SEC. 444. REFERENCES TO AGENCY BOARDS OF CONTRACT APPEALS.**

(a) **DEFENSE BOARD.**—Any reference to the Armed Services Board of Contract Appeals in any provision of law or in any rule, regulation, or other paper of the United States shall be treated as referring to the Department of Defense Board of Contract Appeals.

(b) **CIVILIAN BOARD.**—Any reference to an agency board of contract appeals other than the Armed Services Board of Contract Appeals in any provision of law or in any rule, regulation, or other paper of the United States shall be treated as referring to the Civilian Board of Contract Appeals.

**SEC. 445. CONFORMING AMENDMENTS.**

- (a) **TITLE 5.**—Section 5372a of title 5, United States Code, is amended—
  - (1) in subsection (a)(1), by striking out “an agency board of contract appeals appointed under section 8 of the Contract Disputes Act of 1978” and inserting in lieu thereof “the Department of Defense Board of Contract Appeals or the Civilian Board of Contract Appeals appointed under section 202 of the Office of Federal Procurement Policy Act”; and
  - (2) in subsection (a)(2), by striking out “an agency board of contract appeals” and inserting in lieu thereof “the Department of Defense Board of Contract Appeals or the Civilian Board of Contract Appeals”.
- (b) **TITLE 10.**—(1) Section 2305(e) of title 10, United States Code, is amended—
  - (A) in paragraph (1), by striking out “subchapter V of chapter 35 of title 31” and inserting in lieu thereof “title II of the Office of Federal Procurement Policy Act”; and
  - (B) by striking out paragraph (3).
- (2) Section 2305(f) of such title is amended—
  - (A) in paragraph (1), by striking out “subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31” and inserting in lieu thereof “section 214(h)(2) of the Office of Federal Procurement Policy Act”; and
  - (B) in paragraph (2), by striking out “paragraph (1) of section 3554(c) of title 31 within the limits referred to in paragraph (2)” and inserting in lieu thereof “subparagraph (A) of section 214(i)(1) of the Office of Federal Procurement Policy Act within the limits referred to in subparagraph (B)”.
- (c) **FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949.**—(1) Section 303B(j) (as redesignated by section 104(b)(2)) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b(h)) is amended—

- (A) in paragraph (1), by striking out “subchapter V of chapter 35 of title 31, United States Code” and inserting in lieu thereof “title II of the Office of Federal Procurement Policy Act”; and
- (B) by striking out paragraph (3).
- (2) Section 303B(k) (as redesignated by section 104(b)(2)) of such Act (41 U.S.C. 253b(i)) is amended—
- (A) in paragraph (1), by striking out “in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31, United States Code” and inserting in lieu thereof “section 214(h)(2) of the Office of Federal Procurement Policy Act”; and
- (B) in paragraph (2), by striking out “paragraph (1) of section 3554(c) of such title within the limits referred to in paragraph (2)” and inserting in lieu thereof “subparagraph (A) of section 214(i)(1) of the Office of Federal Procurement Policy Act within the limits referred to in subparagraph (B)”.
- (d) OFFICE OF FEDERAL PROCUREMENT POLICY ACT.—The table of contents for the Office of Federal Procurement Policy Act (contained in section 1(b)) is amended—
- (1) by inserting the following before the item relating to section 1:

“TITLE I—FEDERAL PROCUREMENT POLICY GENERALLY”; and

(2) by adding at the end the following:

“TITLE II—DISPUTE RESOLUTION

“SUBTITLE A—GENERAL PROVISIONS

“Sec. 201. Definitions.  
 “Sec. 202. Membership.  
 “Sec. 203. Chairman.  
 “Sec. 204. Rulemaking authority.  
 “Sec. 205. Authorization of appropriations.

“SUBTITLE B—FUNCTIONS OF THE DEFENSE AND CIVILIAN BOARDS OF CONTRACT APPEALS

“Sec. 211. Alternative dispute resolution services.  
 “Sec. 212. Alternative dispute resolution of disputes and protests submitted to Boards.  
 “Sec. 213. Contract disputes.  
 “Sec. 214. Protests.  
 “Sec. 215. Applicability to certain contracts.”.

## **Subtitle F—Effective Date; Interim Appointment and Rules**

### **SEC. 451. EFFECTIVE DATE.**

This title and the amendments made by this title shall take effect on October 1, 1996.

### **SEC. 452. INTERIM APPOINTMENT.**

(a) DEFENSE BOARD.—The judge serving as chairman of the Armed Services Board of Contract Appeals on the date of the enactment of this Act shall serve as Chairman of the Department of Defense Board of Contract Appeals during the two-year period beginning on the effective date of this title, unless such individual resigns such position or the position otherwise becomes vacant before the expiration of such period. The authority vested in the Secretary of Defense by section 203(a) of the Office of Federal Procurement Policy Act (as added by section 413) shall take effect upon the expiration of such two-year period or on the date such position is vacated, whichever occurs earlier.

(b) CIVILIAN BOARD.—The judge serving as chairman of the board of contract appeals of the General Services Administration on the date of the enactment of this Act shall serve as Chairman of the Civilian Board of Contract Appeals during the two-year period beginning on the effective date of this title, unless such individual resigns such position or the position otherwise becomes vacant before the expiration of such period. The authority vested in the Administrator of General Services by section 203(a) of the Office of Federal Procurement Policy Act (as added by section 413) shall take effect upon the expiration of such two-year period or on the date such position is vacated, whichever occurs earlier.

### **SEC. 453. INTERIM RULES.**

(a) RULES OF PROCEDURE.—Until such date as rules of procedure are promulgated pursuant to section 204 of the Office of Federal Procurement Policy Act (as added by section 414)—

(1) for protests, the rules of procedure of the board of contract appeals of the General Services Administration, as in effect on the day before the effective date of this Act, shall be the rules of procedure for both the Department of Defense Board of Contract Appeals and the Civilian Board of Contract Appeals; and

(2) for contract disputes—

(A) the rules of procedure of the board of contract appeals of the General Services Administration, as in effect on the day before the effective date of this Act, shall be the rules of procedure for the Civilian Board of Contract Appeals; and

(B) the rules of procedure of the Armed Services Board of Contract Appeals, as in effect on the day before the effective date of this Act, shall be the rules of procedure for the Department of Defense Board of Contract Appeals.

(b) RULES REGARDING BOARD JUDGES.—(1) Until such date as the Department of Defense Board of Contract Appeals (in this paragraph referred to as the “Defense Board”) promulgates rules governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, the rules of the Armed Services Board of Contract Appeals governing the establishment and maintenance of a register of eligible applicants and the selection of board members (as in effect on the day before the effective date of this Act) shall be the rules of the Defense Board governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, except that any provisions of the rules of the Armed Services Board of Contract Appeals that authorize any individual other than the chairman of such board to select a Defense Board judge shall have no effect.

(2) Until such date as the Civilian Board of Contract Appeals (in this paragraph referred to as the “Civilian Board”) promulgates rules governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, the rules of the board of contract appeals of the General Services Administration governing the establishment and maintenance of a register of eligible applicants and the selection of board members (as in effect on the day before the effective date of this Act) shall be the rules of the Civilian Board governing the establishment and maintenance of a register of eligible applicants and the selection of Board judges, except that any provisions of the rules of the board of contract appeals of the General Services Administration that authorize any individual other than the chairman of such board to select a Civilian Board judge shall have no effect.

## **TITLE V—EFFECTIVE DATES AND IMPLEMENTATION**

### **SEC. 501. EFFECTIVE DATE AND APPLICABILITY.**

(a) EFFECTIVE DATE.—Except as otherwise provided in this title, this title and the amendments made by this title shall take effect on the date of the enactment of this Act.

(b) APPLICABILITY OF AMENDMENTS.—(1) An amendment made by this title shall apply, in the manner prescribed in the final regulations promulgated pursuant to section 502 to implement such amendment, with respect to any solicitation that is issued, any unsolicited proposal that is received, and any contract entered into pursuant to such a solicitation or proposal, on or after the date described in paragraph (3).

(2) An amendment made by this title shall also apply, to the extent and in the manner prescribed in the final regulations promulgated pursuant to section 502 to implement such amendment, with respect to any matter related to—

(A) a contract that is in effect on the date described in paragraph (3);

(B) an offer under consideration on the date described in paragraph (3); or

(C) any other proceeding or action that is ongoing on the date described in paragraph (3).

(3) The date referred to in paragraphs (1) and (2) is the date specified in such final regulations. The date so specified shall be October 1, 1996, or any earlier date that is not within 30 days after the date on which such final regulations are published.

### **SEC. 502. IMPLEMENTING REGULATIONS.**

(a) PROPOSED REVISIONS.—Proposed revisions to the Federal Acquisition Regulation and such other proposed regulations (or revisions to existing regulations) as



may be necessary to implement this title shall be published in the Federal Register not later than 210 days after the date of the enactment of this Act.

(b) PUBLIC COMMENT.—The proposed regulations described in subsection (a) shall be made available for public comment for a period of not less than 60 days.

(c) FINAL REGULATIONS.—Final regulations shall be published in the Federal Register not later than 330 days after the date of enactment of this Act.

(d) MODIFICATIONS.—Final regulations promulgated pursuant to this section to implement an amendment made by this title may provide for modification of an existing contract without consideration upon the request of the contractor.

(e) SAVINGS PROVISIONS.—(1) Nothing in this title shall be construed to affect the validity of any action taken or any contract entered into before the date specified in the regulations pursuant to section 501(b)(3) except to the extent and in the manner prescribed in such regulations.

(2) Except as specifically provided in this title, nothing in this title shall be construed to require the renegotiation or modification of contracts in existence on the date of the enactment of this Act.

(3) Except as otherwise provided in this title, a law amended by this title shall continue to be applied according to the provisions thereof as such law was in effect on the day before the date of the enactment of this Act until—

(A) the date specified in final regulations implementing the amendment of that law (as promulgated pursuant to this section); or

(B) if no such date is specified in regulations, October 1, 1996.

## SHORT SUMMARY OF LEGISLATION

### TITLE I

H.R. 1670 at title I amends Federal procurement law to establish a new standard of full and open competition for the government's purchase of goods and services. The standard requires that the government provide "open access" to its market for all firms through the use of competitive procedures, while permitting the government to focus the competition it receives on the need to efficiently fulfill its requirements. This creates a balanced system which permits all firms to submit offers to meet government requirements. At the same time, the government is allowed to establish its requirements and specifications based solely on its minimum needs and to efficiently select the most advantageous offer from those submitted based upon clearly stated evaluation factors.

The change from current law will decrease costs for both government and industry by permitting the efficient and timely removal from the competition of firms that are not qualified or whose products are not reasonably priced. While all firms would be permitted to bid, the new standard allows the government's procurement professionals to focus their attention on all qualified offerors who can meet the government's requirements at a reasonable cost.

Title I makes a number of other changes to accommodate the new competition standard and to streamline and modernize the procurement statutes.

### TITLE II

Title II of the legislation strengthens the improvements in the acquisition of commercial items made by the Federal Acquisition Streamlining Act of 1994 (FASA). FASA provided the foundation for establishing "commercial-like" procedures within the Federal procurement system. H.R. 1670 builds upon what FASA created by establishing simplified procedures for the purchase of commercial items and exempting commercial item purchases from burdensome

government-unique requirements such as the Truth in Negotiations Act and Cost Accounting Standards.

### TITLE III

H.R. 1670 at title III repeals current provisions of law known as “Procurement Integrity” and replaces those provisions with simple prohibitions and clearer administrative standards. The provisions more squarely address the same basic concern as current law—the unauthorized disclosure and receipt of procurement-sensitive information—but does it by focusing on the information to be protected. While the remedies are similar to those under current law, H.R. 1670 repeals the complex system of certifications and eliminates the remaining agency-specific post-employment restrictions which were made unnecessary when Congress passed the Ethics Reform Act of 1989.

Title III also repeals a current provision of law which requires the payment of a fee or tax to the U.S. government on foreign sales of products or technologies developed under government contracts. The repeal is contingent on the President and Congress providing budget offsets for any receipts lost as a result of the repeal.

Further, title III adds a new provision setting forth in statute for the first time a policy that, since 1955, has been the underpinning of the government’s acquisition system: that the government is to rely on the private sector to supply its needs.

Title III also eliminates certain non-value added certifications while retaining the underlying prohibitions. In addition, title III requires elimination of all administratively-imposed certifications unless they can be justified as necessary.

Also, title III adopts a Department of Defense proposal to amend FASA to add the Joint Standoff Weapon Unitary Variant (JSOW-UV) as a defense acquisition pilot program to the current five pilot programs in FASA.

Finally, title III further streamlines and simplifies the procurement process by repealing certain duplicative or unneeded provisions of law, including a provision that would inhibit the authority of the executive branch from testing innovative procurement procedures.

### TITLE IV

Title IV of the bill consolidates the current two bid protest forums and the 11 administrative tribunals located within different government agencies for the resolution of government contract disputes into two boards—one at the Department of Defense (DoD) to handle DoD bid protests and contract disputes and one at the General Services Administration to handle civilian agency bid protests and contract disputes. A single set of new procedures and processes will govern both boards.

### I. BACKGROUND AND NEED FOR LEGISLATION

Each year the government spends about \$200 billion on goods and services, ranging from weapons systems to computer systems to everyday commodities. The current system costs too much, involves too much red tape, and ill-serves the taxpayer and industry.

In December 1994, a report prepared for the Secretary of Defense found that, on average, the government pays an additional 18 percent on what it buys solely because of requirements it imposes on its contractors. That confirmed the average estimate by major contractors surveyed by the General Accounting Office that the additional costs incurred in selling to the government are about 19 percent. While some of the government's unique requirements certainly are needed, we clearly are paying an enormous premium for them—billions of dollars annually.

And that is only part of the government's inflated cost of doing business—for it includes only what is paid to contractors, not the cost of the government's own administrative system. The government's contracting officials are confronted with a daunting array of mandates of their own, often amounting to step-by-step prescriptions that increase staff and equipment needs. This rigid, rule-based process leaves little room for the exercise of business judgment, initiative, and creativity and often forces the professional staff to assume the role of box-checking robots.

These requirements are well-intentioned. From the time the Second Continental Congress established a Commissary General in 1775, the procurement system commanded the attention of both public officials and the American public. Unfortunately and all too often, the attention has focused on individual abuses rather than the operations of the system as a whole. In response, Congress and the executive branch have maintained a constant effort to correct wrongs or add particular initiatives. Inevitably, after a while, often-uncoordinated incremental efforts will tilt any system out of balance, until the cost of requirements outweigh benefits. That is the current state of our procurement system. It has become an unbalanced mass of requirements that lead, simply, to too much money for too little product. Mr. Philip K. Howard in a recent editorial on the government's procurement process in the *Wall Street Journal* aptly described the state of the current process as follows:

The rigid procedures designed to prevent squandering of public money, as it turns out, function almost perfectly to guarantee that the money gets squandered.

It is critical in these times of declining budgets to bring the government's procurement system into balance.

## II. LEGISLATIVE HISTORY/COMMITTEE CONSIDERATION

Last year, a significant step was taken toward establishing a more commercial-like Federal contracting system. Congress took that step with the passage of the Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355). FASA established a preference for commercial items and simplified procedures for contracts under \$100,000, as well as addressing a wide spectrum of issues regarding the administrative burden—on all sides—associated with the government's specialized requirements. These ranged from socio-economic laws to the government's oversight tools, which over the years have resulted in major differences between the government and commercial marketplaces.

But FASA went only part of the way, and as important as that effort was, more must be done to move the Federal procurement system closer to a commercial-type process. It is imperative that industry sellers and government buyers are allowed to offer and acquire, respectively, maximum value for the taxpayer.

On February 24, 1995, Chairman William F. Clinger, Jr. of the Committee on Government Reform and Oversight and Chairman Floyd D. Spence of the Committee on National Security and Chairman Benjamin A. Gilman of the Committee on International Relations introduced H.R. 1038 to revise and streamline the acquisition laws of the Federal Government. The bill addressed two issues: repeal of the recoupment of research and development costs and a rewrite of the Procurement Integrity law.

The bill was referred to the Subcommittee on Government Management, Information and Technology, which met pursuant to notice on February 28, 1995 to solicit proposals for further simplifying and streamlining the Federal procurement process.

At the hearing, testimony was received from various procurement specialists in the contracting community including: the Honorable Steven Kelman, Administrator for Federal Procurement Policy, Office of Management and Budget; Mrs. Colleen Preston, Deputy Under Secretary for Acquisition Reform, Department of Defense; Mr. Robert P. Murphy, General Counsel, General Accounting Office; Mr. Ron Turner, Computing Devices, Inc. for the Acquisition Reform Working Group (ARWG); Mr. John C. Custer, Mason & Hangar, Mason-Silas, Inc. for ARWG; Mr. Paul Schwiezer, Schwiezer Aircraft Corporation; Mr. Carl Guerrerri, Electronic Warfare Associates, for ARWG; Mr. Bernard F. McKay, AT&T, for the Computer and Communications Information Association; Mr. Randall I. Cole, HFSI, for the Information Technology Association of America; Mr. Bruce E. Leinster, IBM Corporation, for the Information Technology Industry Council; Mr. Dennis Cossey, Innotek Corporation; Mr. Robert F. Trimble, Procurement Round Table; Mr. John B. Miller, Gadsby & Hannah, for the Section of Public Contract Law, American Bar Association; Mr. William J. Mielke, Ruekert Mielke Consultants, for the Council on Federal Procurement of Architectural/Engineering Services.

Generally, the comments of the witnesses were as follows: those representing the government expressed the need for less congressional micro-management and greater flexibility and authority for agency contracting officers; those representing businesses, both large and small, reiterated their long held views about reducing government rules and regulations so they could sell to government agencies like they do to private sector buyers; and those representing other groups complained that existing laws are too complicated and too confusing.

The various proposals for reform which were brought forward by the witnesses ranged from minor technical corrections to a complete overhaul of the system. This wealth of ideas contributed to the effort which resulted in the introduction of H.R. 1670 on May 18, 1995, by Chairman Clinger for himself, Mr. Spence, Mr. Horn, Mr. Zeff, Mr. Blute, Mr. Davis, Mr. Scarborough, Mr. Lewis of Kentucky, Mr. Tate, Mr. Tiahrt, Mr. Flanagan, Mr. Bass, Mr. Chambliss, Mr. Fox, Mr. Watts, Mr. Moran, and Mr. McKeon.

A joint hearing by the Government Reform and Oversight and National Security Committees was then held on May 25, 1995 to solicit views on the bill as introduced on May 18, 1995. Chairman Clinger noted at the beginning of the hearing that, "some may say we should rest on our laurels, and let the system absorb the changes made last year by the Federal Acquisition Streamlining Act. But clearly the system still cries out for fundamental change \* \* \*. From the time the Second Continental Congress established a Commissary General in 1775, the Federal procurement system has commanded the attention of both public officials and the American taxpayer. In many respects, we still are guided today by the same considerations the Commissary General faced in 1775: how to provide meaningful competition, obtain quality goods at reasonable prices, and ensure accountability of public officials for public transactions. And too, as in 1775, we are under great budgetary constraints that drive us to look at ways to meet our goals, yet do so in a way that is affordable and uses common sense."

Procurement experts from government and industry provided comment. Those witnesses included: Mr. James Leto, Chairman and Chief Executive Officer, PRC, Inc. for the Acquisition Reform Working Group (ARWG); Mr. Stanley Ebner, Vice President, Washington Operations, McDonnell Douglas, for ARWG; Mr. Milton Cooper, President, Systems Group, Computer Sciences Corporation, for the Information Technology Association of America; Mr. Edward Cybert, Vice President, Operations, Space & Electronics Group, TRW, Inc., for ARWG; Mr. Edward Black, President, Computer and Communications Information Association; Mr. Dan Young, President, Federal Data Corporation; Mr. Sterling Phillips, Executive Vice President & Chief Operating Officer, Tri-Cor Industries, Inc.; Ms. Elizabeth Salih, Contracting Officer, General Services Administration, Fort Worth, TX; Colonel John M. Case (USAF), Program Director, Maxwell Air Force Base, Montgomery, AL; the Honorable Steven Kelman, Administrator for Federal Procurement Policy, Office of Management and Budget; Captain Barry Cohen (USN), Deputy to the Deputy Under Secretary for Acquisition Reform, Department of Defense; Mr. John Miller, Gadsby & Hannah, for the Section of Public Contract Law, American Bar Association; Mr. Stephen Daniels, Chairman, General Services Board of Contract Appeals, General Services Administration; Mr. Robert Murphy, General Counsel, General Accounting Office, accompanied by Mr. Frank Conahan, Senior Defense and International Affairs Advisor to the Comptroller General.

Statements presented by representatives of ARWG emphasized that H.R. 1670 has the potential to shift presumptions of private and public-sector business interactions from negative ones to positive ones, and carries with it the potential to do things cheaper, faster and better than currently is done today. These representatives identified H.R. 1670 as clearly making a long-term mark on the acquisition system to prepare it for the 21st century.

A representative of the Computer and Communications Industry Association, Mr. Edward Black, strongly recommended that any new reforms only be considered after careful evaluation of reforms passed last Congress under the FASA. Mr. Dan Young of Federal Data Corporation, a small business, stated that he believed the

bill's new standard of competition would not deter his company's participation in future government procurements. And finally, Mr. Sterling Phillips, Chief Executive Operating Officer, Tri-Cor Industries, a small minority-owned firm that predominantly participates in the Federal marketplace shared the Committee's sense of urgency to streamline the cumbersome and costly acquisition process, noting that this is an issue every bit as important to industry as it is to government.

As a representative of the Administration, Ms. Elizabeth Salih, a government contracting officer with the General Services Administration in Fort Worth, Texas, stated that the current statutory and regulatory framework leaves no room to exercise the training and knowledge she has gained, and that by the time she adheres to all the requirements, "the taxpayer has paid a tremendous price for this unnecessary oversight." She went on to ask for the Committee's help in removing the obstacles that hinder her so she "can make a difference in the way the public views the government and its lawmakers in terms of expenditure of funds."

Other witnesses who represented the American Bar Association and General Services Board of Contract Appeals raised concerns about the current forums for bid protests and made suggestions for change to streamline current government procedures.

Subsequent to the hearing, Chairman Clinger, Chairman Spence and other members of their committees held several meetings with interested parties from the government contracting community. As a result, an amendment in the nature of a substitute to H.R. 1670 was developed to reflect the views of other members of Congress (both Republican and Democrat), industry associations, senior industry executives, the Administration, government contracting officials, representatives of both large and small business, and from other interested individuals.

The Committee on Government Reform and Oversight met on July 27, 1995, to consider H.R. 1670. Chairman Clinger presented the amendment in the nature of a substitute, reflecting the revisions made subsequent to the hearing. The bill, as amended, was favorably reported to the House by voice vote and without further amendment by the full Committee.

### III. EXPLANATION OF THE BILL

#### A. OVERVIEW

##### *Title I*

Competition is the driving force of our free enterprise system, and consequently must remain the driver behind the Committee's efforts to reform the current Federal procurement system. H.R. 1670 creates an open system which permits all firms to submit offers to meet government requirements. At the same time, the government is allowed to establish its requirements and specifications based solely on its minimum needs and to efficiently select the most advantageous offer from those submitted based upon clearly stated evaluation factors. This provides the necessary balance to a procurement system that has become overly burdened with step-by-step prescriptions leaving little room for the exercise of judgement, initiative, and creativity. However, the increased discretion given

to contracting officials is to be accompanied by a robust and easily-accessed protest process established in title IV of H.R. 1670 to ensure that a contracting official's decision that results in the elimination of a firm from the competition at any point in the process has a rational basis.

The provisions of law which currently comprise the competition requirements have proven to be overly complex and cumbersome. H.R. 1670 attempts to streamline these provisions to provide clear statutory standards and policy guidance, but to remove from statute the congressional micro-management complained about by both industry and the executive agencies. For example, H.R. 1670 (in section 101) eliminates from statute the long list of circumstances under which an agency may exclude a particular firm in order to maintain an alternate source and places the requirement for setting forth those circumstances in the Federal Acquisition Regulation (FAR). The Committee expects that the regulation writers will include in the FAR the current statutory reasons for exercising this authority listed as subparagraphs (A) through (F) under 10 U.S.C. 2304(b)(1) and 41 U.S.C. 253(b)(1). There is no intent on the part of the Committee to change these existing exceptions.

The Committee intends that the provisions in title I authorize the use of innovative procedures involving the issuance of solicitations containing multi-phase, quality-based evaluation processes. These procedures could include the use of preliminary selection factors based primarily upon the qualifications that an offeror must have in order to meet the government's requirements. Those firms successfully meeting the government's stated qualification requirements would then submit detailed price and technical proposals. The final selection of the most advantageous offer would be made from among those firms in accordance with evaluation factors set forth in the solicitation.

Further, through changes made in this title and also in title III (Procurement Integrity), the Committee hopes to encourage more open communication between government and industry in the early stages of program requirements development. It is important that industry have early access to government spending information in order to make decisions on how to spend valuable research and development and bid and proposal funds. The Committee believes that the availability of such information, if not in conflict with the Office of Management and Budget (OMB) Circular A-10 (which restricts release of detailed budget information related to the President's planned budget), would be appropriate in order to increase the quality and timeliness of contractor bids and result in the overall streamlining of the procurement process.

Another streamlining effort of H.R. 1670 is to eliminate the current pre-qualification process and replace it with one which is simpler and provides clear statutory standards on which the executive agency bases its pre-qualification (or "verification"). It is intended to be a system open to all firms and once in the system, these firms would compete with each other in procurements conducted within the system. In order to be considered "verified," firms would be assessed based upon various criteria, among them "past performance." H.R. 1670 provides that past performance includes a firm's performance under contracts with state and local governments and

with private sector entities as well as those with the Federal government. This list of elements of past performance is not intended to be exclusive. For example, the Committee believes that it would be appropriate to consider a firm's performance under contracts with foreign entities.

### *Title II*

FASA set an important precedent when it established a preference for the acquisition of commercial items and provided for an expanded exemption for such items from the requirement for certified cost or pricing data contained in the Truth in Negotiations Act (TINA). To complete the initiative began in FASA, the bill exempts all commercial items, as defined by the Office of Federal Procurement Policy (OFPP) Act at 41 U.S.C. 403, from the certified data and audit requirements of TINA and from the corresponding requirements of the Cost Accounting Standards. The impact of the commercial market on the price of the item should be sufficient.

Further, the expanded use of simplified procedures also was conceived in FASA by increasing the threshold for simplified purchases. H.R. 1670 takes the next step and provides for the use of simplified procedures when purchasing a commercial item. The purchase of a commercial item logically lends itself to simplified procedures because there exists a yardstick in the commercial marketplace against which to measure price and product quality and to serve as a surrogate for government-unique procedures. While the Committee is aware that some have expressed a concern that there is no dollar threshold, the Committee believes that any dollar threshold would be inconsistent with the commercial-type process established by H.R. 1670. Since there is no requirement in H.R. 1670 that simplified procedures be used, procurement officials would have the discretion to use standard procedures where the circumstances dictated. Circumstances such as the complexity of the purchase, past experience with the particular item, whether it is a commonplace item, and the availability of the item should be taken into account when determining which procedures to use for the purchase of a particular commercial item. It is not the Committee's intent that simplified procedures be used for every purchase of commercial items.

### *Title III*

Title III sets forth for the first time in statute the policy which has been the underpinning of the government's acquisition system since 1955: that the government rely on the private sector for its needed goods and services. While this policy statement currently is included in OMB Circular A-76, a statutory statement expresses Congress' commitment to the policy. Other issues surrounding OMB Circular A-76 are not addressed in H.R. 1670. However, the Committee believes that industry and the executive branch could make a valuable contribution to improving the acquisition system if together they study issues such as the cost comparison process as it now exists and make recommendations as to how the process can be streamlined and made less costly and more effective.

Also, title III eliminates certain statutory certification requirements, requires the removal of current regulatory certifications un-



less retention is supported by a written justification, and prohibits new regulatory certification requirements unless mandated by statute or justified in writing. Most certifications are established merely to certify performance or compliance already required by contract clauses or provisions of law or regulation. By signing a proposal or contract, contractors accept responsibility for performance of all the terms of the contract and all applicable law. Certifications do not result in improved compliance with the law or even improved ethical behavior. However, certifications do increase the administrative costs of both the government and industry and deter participation in the government market. The provision would retain the underlying prohibitions but eliminate what, in many cases, are non-value added certification requirements which often do more to deter participation in the government market rather than the prohibited conduct. Further, although the provisions refer to agency procurement regulations, the Committee intends this to mean procurement regulations at all levels within an agency.

Title III repeals a current provision of law which disadvantages U.S. companies when selling American products in international markets. The repeal would be contingent on the President and the Congress providing budget offsets for any receipts to the government lost as a result of the repeal. Current law requires that a fee or tax be paid to the U.S. government on foreign sales of products and technologies developed under government contracts. It may have been an appropriate policy when it was originally adopted in the early 1960's as a way of sharing development costs with U.S. allies. But today, our allies are our competition, and this policy threatens the future of American workers by making it more difficult for their employers to compete for business in the world marketplace. The Bush Administration recommended repeal of this provision, and the Clinton Administration currently is recommending its repeal.

Title III repeals current provisions of law known as "Procurement Integrity" and replaces these provisions with simple prohibitions and clearer administrative standards. This proposal was developed originally by the Bush Administration and is supported by the Clinton Administration. The provisions more squarely address the same basic concern as current law—the unauthorized disclosure and receipt of procurement-sensitive information—but do it by focusing on the information to be protected. With respect to information to be protected,—specifically, the category of source selection information referred to as "other information"—the Committee cautions agencies to use the authority to designate non-standard material as "source selection information" only in truly unique situations as authorized by senior agency officials. While it is imperative that source selection information be protected, the ability to designate non-standard material should be used carefully. Further, while title III provides remedies similar to those available under current law, it repeals the complex system of certifications demanded by current law to ensure compliance. Non-value added certification requirements do more to deter participation in the government market than to deter the prohibited conduct.

#### *Title IV*

Recently, the current bid protest system has come under attack as being too complex, too intrusive, and too procedurally intensive.

The Committee strongly believes that there is a critical role for a meaningful and robust protest process in order to ensure that the discretion granted the government's procurement officials is exercised responsibly and within the statutorily designated parameters. Even more important is the role of the protest process in ensuring the perception of fairness in the government's acquisition system. However, the Committee recognizes that the current system, based primarily on the two administrative forums—one in the General Accounting Office (GAO) and the General Services Board of Contract Appeals (GSBCA)—presents contractors with a bewildering array of procedural rules and features and seemingly incomprehensible jurisdictional differences.

The provisions of title VI will create a new protest resolution system and consolidate the current contract disputes process, which is currently spread out among 11 different administrative boards. These functions will be handled by two consolidated boards with more efficient procedures and an increased use of alternate dispute resolution. The new Department of Defense Board of Contract Appeals will resolve protests and disputes involving Department of Defense Acquisitions, while the new Civilian Agency Board of Contract Appeals will do the same for executive agencies other than the Department of Defense. The Committee's intent in creating the new dispute and protest resolution process is to achieve a better balance between the need to ensure the fundamental fairness of the government's acquisition system and the need to acquire the goods and services needed by the government in a efficient manner.

The new Boards will be governed by a single set of streamlined and simplified procedures which are based upon the best features of both of the current bid protest forums. In developing the outlines of these procedures in the legislation, the Committee was mindful of the need to curb the use of intrusive discovery procedures such as depositions and interrogatories in the protest process. For this reason, the Committee has specified a \$20,000,000 threshold (including options) below which only written discovery is to be used. While formal hearings would not be held in such below threshold protests, the Committee contemplates that informal conferences for the discussion of the protest issues could be held at the discretion of the Board judge. Further, in order to add needed flexibility to handle complex cases below \$20,000,000, the legislation provides that below threshold cases may be accorded full procedural treatment if the Chairman determines that the unique circumstances of the case so dictate.

In addition, the Administration proposed statutory language to make unallowable the costs of pursuing a bid protest. The Committee rejected this proposal which would add further prescriptions to the procurement process as inconsistent with the streamlining goals of this bill. The Committee takes no position on the merits of this issue. Further, the Committee would not object to the Administration addressing cost reimbursement issues in regulations.

Additionally, the Committee intends that the use of interrogatories and depositions be limited for protests of contract actions

above the threshold. The Committee further intends that hearings should be held only if the protest can not be resolved on the written record and that hearings should be held sparingly in appropriate cases. The Committee intends that, in developing the procedural rules and standards, both Chairman will adhere strictly to the clear statutory direction that discovery is to be limited to the minimum necessary for the expeditious, fair, and cost-effective resolution of protests. Finally, the Committee expects that all Board judges will be mindful of the adverse impact of overly intrusive discovery upon the procurement system as a whole and also will adhere to the “minimum necessary” standard in approving the use of discovery in cases before them.

#### B. SECTION BY SECTION ANALYSIS

#### TITLE I—COMPETITION

##### *Section 101—Improvement of competition requirements*

Subsection (a) would amend 10 U.S.C. 2304(a) governing armed services acquisitions to establish a new standard of full and open competition for the acquisition of goods and services that would provide “open access” to the government market for all responsible sources through the use of competitive procedures. To provide balance, the new standard would incorporate the principle that the government would be permitted to focus competition it receives on the need to efficiently fulfill its requirements. This would result in a system which permits all responsible firms to submit offers in response to government requirements while at the same time granting contracting officials the discretion they need to efficiently select the most advantageous offeror. In order to parallel the new competition standard, the subsection would also amend 10 U.S.C. 2304(g)(3) which sets forth the standard for the use of competition in simplified procedures for acquisitions under the simplified acquisition threshold to provide that agencies obtain competition to the maximum extent practicable consistent with the particular requirement solicited.

The subsection would further streamline and modernize the current competition requirements by amending 10 U.S.C. 2304(b)(1) to eliminate from statute the long list of circumstances under which an agency may exclude a particular firm in order to maintain an alternate source for goods or services and would place the discretion for the use of this authority in the contracting agencies under circumstances to be set forth in the Federal Acquisition Regulation (FAR).

Similarly, the subsection would eliminate the maze of rules, paperwork-generating approval requirements, and detailed instructions in 10 U.S.C. 2304 (c), (d), (e) and (f) that currently govern the use of “other than competitive procedures” and substitute a simple provision stating that competitive procedures must be used unless such procedures are determined to be not feasible or appropriate in accordance with standards set forth in the FAR. In addition, the subsection would provide that the FAR set forth strict standards for sole-source awards based upon the seven exceptions to the use of competitive procedures set forth in current law. The use of “other than competitive procedures,” which includes limited com-

petition and sole-source awards, must be justified and approved in accordance with simplified standards to be set forth in the FAR.

Subsection (b) would replicate the above changes in title 41, the Federal Property and Administrative Services Act of 1949 (Federal Property Act), governing the acquisitions of civilian agencies.

Subsection (c) would amend the Office of Federal Procurement Policy Act (OFPP Act) at section 18 (41 U.S.C. 416) to establish a uniform notice requirement for acquisitions between \$10,000 and \$25,000, provide for the inclusion of additional information regarding qualification requirements in published notices of acquisitions above \$25,000 and make other conforming changes.

Subsection (d) would amend the OFPP Act at 41 U.S.C. 414 to integrate the new competition standard into the enumerated executive agency procurement responsibilities and at 41 U.S.C. 418 to remove obsolete language regarding competition advocates.

#### *Section 102—Definitions relating to competition requirements*

The section would amend the OFPP Act at 41 U.S.C. 403 to remove the definition of “full and open competition” and to define the terms “open access” and “competitive procedures” as the operative elements of the new competition standard. According to the new definition, “open access” would be achieved when all responsible sources are permitted to submit offers under “competitive procedures.” “Competitive procedures” would be defined as those under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the government’s needs to efficiently fulfill its requirements. The section also would provide for other amendments to the OFPP Act, title 10, the Federal Property Act, and other laws to conform them to the new competition standard.

#### *Section 103—Contract solicitation amendments*

The section would amend 10 U.S.C. 2305 (a) and (b) governing armed services acquisitions to revise a provision concerning solicitation specifications to make it consistent with the new competition standard and to further conform the provision regarding the competitive range. The section would amend the Federal Property Act at 41 U.S.C. 253a and 253b in the same manner.

#### *Section 104—Preaward debriefings*

The section would amend 10 U.S.C. 2305(b) and the Federal Property Act at 41 U.S.C. 253b to augment the new debriefing requirements added by FASA to permit a firm removed from the competitive range to request a debriefing after receiving notice of the removal, but before award. The agency may deny the request for a debriefing to be held at that time if it is not in the government’s best interest to do so in accordance with procedures set forth in the FAR. Such a refusal would not result in a firm’s loss of its right to a debriefing as long as the request is made when the firm is notified of its removal from the competition. The debriefing would then be held after award in accordance with current law.

*Section 105—Contract types*

The section would amend 10 U.S.C. 2306 and 41 U.S.C. 254 to provide that the selection of contract type is to be governed by market conditions, established commercial practice and sound business judgement. To further the commercialization of the government's acquisition process, existing fee limits on specified contract types are to be eliminated. The section also would eliminate from title 10 service-specific provisions that set forth a six percent fee limit on architect-engineering services contracts. It would add a new section 2332 to title 10 to provide the authority to procure such services for civil works.

*Section 106—Contractor performance*

The section would add a new provision to the OFPP Act to establish in the FAR an alternative quality-based pre-qualification system for meeting the government's recurring needs. The system would be open to all sources, including small businesses. Firms would be included as "verified" contractors after passing scrutiny based on an assessment of the firm's business practices, level of quality of its product or service, and relevant past contract performance. Past performance would include the consideration of a firm's performance under contracts with State and local governments, contracts with private sector entities, as well as those with the Federal government.

Once in the system, firms would become eligible to compete with other "verified" firms in acquisitions conducted within the system. The "verification" could be revoked based upon the expiration of a specified time period or for a firm's failure to maintain the requisite performance quality. In the case of a revocation, the firm would be provided a fair opportunity to reenter the system. The existing pre-qualification requirements in 10 U.S.C. 2319 and 41 U.S.C. 253c would be repealed.

## TITLE II—COMMERCIAL ITEMS

*Section 201—Commercial item exception to requirement for cost or pricing data and information limitations*

The section would amend 10 U.S.C. 2306a and 41 U.S.C. 254b—the "Truth in Negotiations Act" (TINA) provisions—to exempt all acquisitions for commercial products and services which fit within the definition of commercial item in the OFPP Act at 41 U.S.C. 403 from the requirement to submit certified cost or pricing data.

The section also would eliminate the data and audit requirements applicable to some commercial items under the current TINA provisions. The section would conform the TINA provisions regarding the submission of information to be considered in determining price reasonableness when certified cost and pricing data are not required either because a TINA exemption applies or the acquisition is not expected to exceed the \$500,000 TINA threshold. The amended provisions would state that the FAR shall provide appropriate limitations on information that should be considered in determining price reasonableness, including specific limits on information requests relating to commercial items. Finally, the section

would strike subsections (h) in titles 10 and 41 as no longer needed.

*Section 202—Application of simplified procedures to commercial items*

The section would amend 10 U.S.C. 2304(e), as amended by section 101(a) and 41 U.S.C. 253, as amended by section 101(b), to provide that all acquisitions for commercial items, no matter what their dollar value, can be conducted pursuant to special simplified commercial-type procedures that currently are authorized for acquisitions below the simplified acquisition threshold. The section would provide that such purchases may not be made on a sole-source basis unless first justified in writing and approved in accordance with the FAR. Further, it would provide for the documentation in the contract file of the procedures used for the purchase and of the number of offers received. The section would also amend the OFPP Act to conform the notice provisions for commercial items to the use of simplified procedures.

*Section 203—Amendment to definition of commercial items*

The section would amend the OFPP Act at 41 U.S.C. 403(12)(F) to remove the requirement in the definition of commercial services added by FASA that they be sold based on established “catalog” prices. To be considered “commercial” services under this section they would have to be offered and sold at “established prices” rather than at established “catalog” prices. Since commercial services are often offered at prices that may not fit the strict definition of a catalog (e.g., commercial price lists, advertisements, etc.), the section is intended to more accurately reflect the commercial market, yet ensure that the services are clearly defined and actually available commercially.

*Section 204—Inapplicability of cost accounting standards to contracts and subcontracts for commercial items*

The section would amend the OFPP Act at 41 U.S.C. 422(f)(2) to make it clear that all contracts for commercial items are exempt from the burdens of the cost accounting standards. This provision would complement section 201 which exempts all acquisitions for commercial items from the requirement to submit certified cost or pricing data as well as from the accompanying audit requirements.

### TITLE III—ADDITIONAL REFORM PROVISIONS

*Section 301—Government reliance on the private sector*

The section would amend the OFPP Act by adding a new section 17 providing that it is the policy of the government to rely on private sector sources to supply its needs. The policy that would be set forth in this section has been the policy underpinning the government’s acquisition system since 1955 and reflects the language currently in Office of Management and Budget Circular A-76.

*Section 302—Elimination of certain certification requirements*

The section would provide for the elimination of specified certification requirements currently in statute and would require the re-

removal of current regulatory certifications unless retention is supported by a written justification. The section also would amend the OFPP Act to prohibit the inclusion in the FAR or agency procurement regulations of new certification requirements unless mandated by statute or justified in writing.

*Section 303—Amendment to commencement and expiration of authority to conduct certain tests of procurement procedures*

The section would amend section 5061 of FASA, 41 U.S.C. 413 note, to permit the OFPP Administrator to exercise the authority granted in FASA to test “innovative” procurement procedures without having to wait for the implementation of other FASA provisions.

*Section 304—International competitiveness*

The section would amend 22 U.S.C. 2761(e) to eliminate the requirement for recoupment of non-recurring research and development charges for products sold through the foreign military sales program. It would require the President and Congress to include budgetary offsets beginning in FY 1997.

*Section 305—Procurement integrity*

The section would amend the OFPP Act at 41 U.S.C. 423 to repeal the current “Procurement Integrity” provisions and its complex system of certifications and substitute a direct prohibition against the unauthorized disclosure and receipt of procurement-sensitive information. One who would violate the prohibitions of the section would be subject to criminal and civil penalties and appropriate administrative actions. The section would contain prohibitions and remedies which would be similar to those regarding the disclosure of procurement-sensitive information contained in the current “Procurement Integrity” provisions. Finally, the section would eliminate the remaining agency-specific post-employment restrictions which became redundant with the passage of the Ethics Reform Act of 1989.

*Section 306—Further acquisition streamlining provisions*

The section would amend several provisions of the OFPP Act to update and clarify the statement in 41 U.S.C. 404 of OFPP’s purpose and to repeal unneeded or obsolete provisions at 41 U.S.C. 401, 402, 407, 409 and 410.

*Section 307—Justification of major defense acquisition programs not meeting goals*

This section would amend 10 U.S.C. 2220(b) to provide that the Secretary of Defense shall justify to Congress continuation of any program that is more than 50 percent over its cost goals, fails to achieve at least 50 percent of its performance capability goals, or is more than 50 percent behind schedule.

*Section 308—Enhanced performance incentives for acquisition workforce*

This section would require, for both Defense and civilian agencies, enhanced performance incentives for the acquisition

workforce. These incentives would include pay bands, significant pay and promotion incentives and unfavorable personnel actions to be based on contributions of personnel to the performance of the acquisition program.

*Section 309—Results oriented acquisition program cycle*

The section would require the Secretary of Defense to ensure that regulations regarding acquisition program cycle procedures compress time periods associated with developing, procuring and making operational new systems and that the Department of Defense directives are consolidated and made consistent with such compressed time periods.

*Section 310—Rapid contracting goal*

This section would amend the OFPP Act to require the establishment of a government-wide goal of reducing by 50 percent the time necessary for executive agencies to acquire an item for the user.

*Section 311—Encouragement of multiyear contracting*

The section would amend both titles 10 and 41 to provide that executive agencies shall, to the maximum extent possible, use multiyear contracting.

*Section 312—Contractor share of gains and losses from cost, schedule, and performance experience*

The section would require that the FAR include provisions on rewarding contractors for performance which exceeds cost, schedule or performance parameters and penalizing them for failing to meet such parameters.

*Section 313—Phase funding of defense acquisition programs*

The section would require the Secretary of Defense to submit to Congress information concerning the phase of an acquisition program identifying the intended user of the system and the objective criteria for assessing the extent to which the objectives and goals pursuant to 10 U.S.C. 2345 are achieved.

*Section 314—Improved Department of Defense contract payment procedures*

The section would require the Comptroller General to review commercial practices regarding accounts payable and develop standards for the Secretary of Defense to consider for improving DOD's contract payment procedures and financial systems.

*Section 315—Consideration of past performance in assignment to acquisition positions*

The section would require that the Secretary of Defense's policies and procedures provide that education and training in acquisition and past performance of acquisition responsibilities are major factors in the selection of personnel for acquisition positions.

*Section 316—Additional Department of Defense pilot programs*

The section would add to the current pilot programs set forth in section 5064 of FASA a new program, the Joint Standoff Weapon



Unitary Variant (JSOW–UV). In addition, the section would permit the Secretary of Defense to conduct a new pilot program to be called the “defense facility-wide pilot program.” This pilot would apply enumerated statutory exemptions and authorities to all contracts performed at designated facilities.

*Section 317—Value engineering for Federal agencies*

The section would add a new section to the OFPP Act to provide that each executive agency establish and maintain effective value engineering procedures and processes.

*Section 318—Workforce*

The section would amend the OFPP Act to establish policies and procedures for the effective management, including accession, education, training, career development, and performance incentives of the civilian agencies’ acquisition workforce.

## TITLE IV—STREAMLINING OF DISPUTE RESOLUTION

### SUBTITLE A—GENERAL PROVISIONS

*Section 401—Definitions*

The section would amend the OFPP Act to set forth definitions of the terms needed to create and operate two new consolidated boards for the resolution of the government’s contract disputes and review of bid protests. The new Department of Defense Board of Contract Appeals (Defense Board) would resolve disputes and protests involving Department of Defense acquisitions. The new Civilian Agency Board of Contract Appeals (Civilian Board) would resolve disputes and protests involving acquisitions of executive agencies other than the Department of Defense. The Defense Board and the Civilian Board would replace the current agency boards of contract appeals and the General Accounting Office (GAO) bid protest section. The definitions of “protest,” “interested party,” and “prevailing party” would be similar to those set forth in FASA.

### SUBTITLE B—ESTABLISHMENT OF CIVILIAN AND DEFENSE BOARDS OF CONTRACT APPEALS

*Section 411—Establishment*

The section would amend the Contract Disputes Act of 1978 (41 U.S.C. 607) to establish the Defense Board in the Department of Defense and the Civilian Board in the General Services Administration.

*Section 412—Membership*

The section would amend the OFPP Act to provide that the Defense Board and the Civilian Board consist of judges appointed by the respective chairman. New judges would be selected and appointed in the same manner as administrative law judges pursuant to 5 U.S.C. 3105, with the additional requirement that they have at least 5 years public contract law experience. The judges would be subject to removal as administrative law judges pursuant to 5 U.S.C. 7521 and compensated pursuant to 5 U.S.C. 5372a. Current

board judges and certain GAO employees would serve as Board judges.

*Section 413—Chairman*

The section would amend the OFPP Act to provide for the designation of the Chairman of the Defense Board by the Secretary of Defense and for the designation of the Chairman of the Civilian Board by the Administrator of General Services. The section also would provide for the respective Chairmen's executive and administrative responsibilities as well as for the designation of Vice Chairmen by the Chairmen. Finally, the section would provide for the division of each of the board into two sections. One section would be responsible for contract disputes and the other for protests.

*Section 414—Rulemaking authority*

The section would amend the OFPP Act to provide that the Chairman of the Defense Board and the Chairman of the Civilian Board shall jointly issue and maintain procedural rules and regulations necessary to resolve disputes and protests in both Boards.

*Section 415—Authorization of appropriations*

The section would amend the OFPP Act to provide for the authorization of sums to be appropriated for FY 1997 and beyond. It would provide that the funds for the activities of each Board shall be separately appropriated.

SUBTITLE C—FUNCTIONS OF DEFENSE AND CIVILIAN BOARDS OF  
CONTRACT APPEALS

*Section 421—Alternate dispute resolution services*

The section would amend the OFPP Act to provide that each Board offer alternate dispute resolution services for any contract-related disagreement.

*Section 422—Alternative dispute resolution of disputes and protests submitted to boards*

The section would amend the OFPP Act to provide that a judge or attorney of the respective Board shall meet with the parties to the protest or dispute to attempt to resolve the matter through use of an alternate method of dispute resolution. Section 424(g)(4) of this Act would permit this process to take up to 20 days without impacting the time limits for issuing decisions.

*Section 423—Contract disputes*

The section would amend the OFPP Act to provide that the Defense Board would have jurisdiction over contract disputes as provided by section 8(a) of the Contract Disputes Act. The section would further provide that the Civilian Board would have jurisdiction over contract disputes as provided by section 8(b) of the Contract Disputes Act.

*Section 424—Protests*

The section would amend the OFPP Act to provide that the Defense Board or the Civilian Board, as the case may be, shall review

decisions by the head of an executive agency alleged by an interested party to violate statute or regulation and that in deciding protests the Board concerned may consider all evidence relevant to the decision under protest. The section also would provide that decisions protested be presumed correct and that the protester may rebut such presumption by showing by a preponderance of the evidence that the decision was arbitrary or capricious or violated a statute or regulation.

Further, the section would provide procedures for the suspension of contract award in protests filed before award and for the suspension of contract performance in protests filed after award. Such suspensions could be lifted by the head of the procuring activity upon a written finding that urgent and compelling circumstances would not permit waiting for the decision. The section would provide that the Board concerned conduct proceedings and permit such discovery of relevant material to the minimum extent necessary for the expeditious, fair and cost-effective resolution of protests.

The section also would provide for simplified procedures, including written discovery, for the resolution of most protests of procurements below \$20,000,000. The use of these simplified procedures could be waived if the Board Chairman concerned determines that special and unique circumstances would require the use of full procedures. The section would further provide for the dismissal and payment of costs for frivolous protests.

Finally, among other things, the section would provide that decisions be issued within 65 days, or within 40 days, if simplified procedures are used, for the appeal of Board decisions in accordance with section 8(g)(1) of the Contract Disputes Act, for the corrective actions to be ordered by the Boards and for the Boards' authority to declare the entitlement of a prevailing party to its protest costs.

#### *Section 425—Applicability to contracts for commercial items*

The section would amend the OFPP Act to provide that the authority conferred on the Defense Board and the Civilian Board is applicable to procurements for commercial items and to procurements at or below the simplified acquisition threshold.

### SUBTITLE D—REPEAL OF OTHER STATUTES AUTHORIZING ADMINISTRATIVE PROTESTS

#### *Section 431—Repeals*

The section would repeal the current statutory authority for the GSBICA and for the GAO bid protest function.

### SUBTITLE E—TRANSFERS AND TRANSITIONAL, SAVINGS, AND CONFORMING PROVISIONS

#### *Section 441—Transfer and allocation of appropriations and personnel*

The section would provide for the transfer of the personnel and assets, etc. of the Armed Services Board of Contract Appeals (ASBCA) to the Defense Board and for the transfer of the personnel and assets, etc. of the agency boards of contract appeals, other than the ASBCA, to the Civilian Board. Further, the section would provide for the transfer of one third of the relevant GAO personnel

and assets to the Civilian Board and two thirds to the Military Board. Finally, the section would provide that the personnel transferred could not be separated or reduced in compensation for one year after the transfer and would set forth the standards to be followed by the Boards for possible later reductions in force.

*Section 442—Terminations and savings provisions*

The section would provide the rules for affect on pending proceedings before the agency boards and GAO.

*Section 443—Contract disputes authority of board*

The section would provide conforming amendments to the Contract Disputes Act of 1978 needed by the establishment of the Defense and Civilian Boards regarding contract disputes.

*Section 444—References to agency boards of contract appeals*

The section would provide that any reference to the ASBCA be treated as referring to the Defense Board and that any reference to an agency board of contract appeals other than the ASBCA be treated as referring to the Civilian Board.

*Section 445—Conforming amendments*

The section would provide for the necessary conforming amendments to title 5, title 10, the Federal Property Act, and the OFPP Act.

SUBTITLE F—EFFECTIVE DATE; INTERIM APPOINTMENT AND RULES

*Section 451—Effective date*

The section would provide for an effective date of October 1, 1996.

*Section 452—Interim appointment*

The section would provide for the current Chairman of the GSBICA to serve as the Chairman of the Civilian Board for two years and for the current Chairman of the ASBCA to serve as Chairman of the Department of Defense Board for two years.

*Section 453—Interim rules*

The section would provide for the rules of procedure of the GSBICA to apply to protests before both the Defense and Civilian Boards until the Boards promulgate their procedural rules. The section also would provide that for contract disputes the rules of the ASBCA would be applied by the Defense Board and that the rules of the GSBICA would be applied by the Civilian Board until the new rules are promulgated. Finally, the rules of the ASBCA regarding Board judges would apply to the Defense Board judges while the rules of the GSBICA would apply to the Civilian Board judges until relevant Board rules are promulgated.

TITLE V—EFFECTIVE DATES AND IMPLEMENTATION

*Section 501—Effective date and applicability*

The section would provide that the Act would take effect on the date of enactment, except as otherwise provided in the Act and that

the amendments made by the Act would apply in the manner prescribed in the final regulations and on the date provided in the implementing regulations or on October 1, 1996, whichever is earlier.

*Section 502—Implementing regulations*

The section would provide a schedule for the promulgation of the implementing regulations.

#### IV. COMPLIANCE WITH RULE XI

Pursuant to rule XI, 2(l)(3)(A), of the Rules of the House of Representatives, under the authority of rule X, clause 2(b)(1) and clause 3(f), the results and findings from those oversight activities are incorporated in the recommendations found in the bill and in the report.

#### V. BUDGET ANALYSIS AND PROJECTIONS

This Act provides for no new authorization or budget authority or tax expenditures. Consequently, the provisions of section 308(a)(1) of the Congressional Budget Act are not applicable.

#### VI. COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, August 1, 1995.*

Hon. WILLIAM F. CLINGER, Jr.,  
*Chairman, Committee on Government Reform and Oversight, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1670, the Federal Acquisition Reform Act of 1995 as ordered reported by the House Committee on Government Reform and Oversight on July 27, 1995. The bill would make several changes to the federal procurement system, including:

- encouraging the substitution of commercial items for goods developed according to unique government specifications;
- relaxing requirements that result in contractors collecting and supplying data specific to the federal government;
- centralizing the boards of contract appeals in individual agencies into a defense board and a civilian board;
- requiring agencies to establish policies and procedures for recruiting and managing procurement personnel; and
- amending the Arms Export Control Act to eliminate the requirement that non-recurring charges be recouped in foreign military sales.

Overall, H.R. 1670 is likely to reduce costs that the federal government would incur for goods and services it would purchase from the private sector. Any such savings would allow agencies to make more efficient use of their appropriated funds, but would affect total spending only if overall appropriations were reduced accordingly. CBO has no basis for estimating the amounts of potential federal savings that could be achieved by implementing the procurement reforms contained in H.R. 1670. The bill would have no effect on the budgets of state and local governments.

H.R. 1670 would facilitate procurement of commercial items instead of goods developed to unique government specifications. The government often bears added costs when it specifies in unusual detail what a contractor must provide. The literature on government procurement suggests that the government frequently sets standards for its purchases that make them more costly, but not substantially more useful than other products available through normal commercial channels. Extra development costs and forgone economies of scale increase the cost of products produced uniquely for the federal government. Increasing reliance on commercially available products would lower costs.

In addition, the bill could lead to budgetary savings by relaxing policies that require government contractors to supply data that they do not have to collect or provide in ordinary business dealings. Firms that bid on federal contracts often have to maintain a separate, government-specific accounting system for information that its other customers do not require. Much of the data requirements aim at assuring the government that it is getting the most for its money, but some of this data is used to verify that certain socioeconomic and domestic production goals are met. By easing many of the existing requirements for data, the bill may encourage more firms to bid on government contracts, which might lower prices through increased competition. Reducing the information burden also may lower bids from all firms if bidders can dispense with separate accounting systems for federal and commercial contracts.

Furthermore, H.R. 1670 would establish boards of contract appeals within the Department of Defense (DoD) and within the General Services Administration to replace 11 existing agency boards and would encourage the use of alternative means of dispute resolution. After some small administrative costs to form the two boards, it is possible that savings could be achieved from such a centralization. In addition, increased use of alternative dispute resolution could result in a more efficient contract appeals process. Also, the bill would enable these boards to require compensation to the United States in protest cases found to be frivolous or pursued in bad faith.

The bill also would affect how agencies recruit and manage personnel who carry out procurement functions, by establishing stricter qualifications for employment, strengthening the incentives and penalties related to performance, and encouraging funding for the training and education of such personnel. The bill would require relevant agencies to request an amount greater than or equal to 2.5 percent of the base aggregate salary cost of their procurement personnel. To offset this cost, the bill also would require that the agencies reduce their base aggregate salary cost by an equal amount. While these measures could yield increased efficiencies to agencies by providing a more competent and productive workforce, it is also possible that they could lead to greater net costs if the efficiency gains and relatively unenforceable constraints on aggregate salaries save less than the costs of the new training programs.

H.R. 1670 also would amend the Arms Export Control Act to eliminate—contingent on future legislation—the requirement that non-recurring research and development charges related to products sold through the foreign military sales program be recouped

by the federal government. This provision would result in a loss of receipts, except that additional legislation must first be enacted for the express purpose of fully offsetting the loss of receipts estimated to occur for each of fiscal years 1998 through 2000. Further, the additional legislation must be certified as fully offsetting by CBO and the Office of Management and Budget.

This bill contains several other provisions that could result in budgetary savings. CBO, however, does not have sufficient information to estimate either the extent to which the changes in law would translate into changes in standard procurement practices, or the savings that would result. In sum, CBO estimates that savings from new procurement practices would equal or exceed minor costs from other provisions of H.R. 1670. Because H.R. 1670 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are John R. Righter, who can be reached at 226-2860, and for defense provisions, Kent Christensen, who can be reached at 226-2840.

Sincerely,

JAMES J. BLUM  
(For June E. O'Neill, *Director*).

#### VII. INFLATIONARY IMPACT STATEMENT

In accordance with rule XI, clause 2(l)(4) of the Rules of the House of Representatives, this legislation is assessed to have no inflationary effect on prices and costs in the operation of the national economy.

#### VIII. CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### **TITLE 10, UNITED STATES CODE**

\* \* \* \* \*

### **Subtitle A—General Military Law**

\* \* \* \* \*

### **PART II—PERSONNEL**

\* \* \* \* \*

### **CHAPTER 87—DEFENSE ACQUISITION WORKFORCE**

\* \* \* \* \*

## SUBCHAPTER I—GENERAL AUTHORITIES AND RESPONSIBILITIES

\* \* \* \* \*

### § 1701. Management policies

(a) **POLICIES AND PROCEDURES.**—The Secretary of Defense shall establish policies and procedures for the effective management (including accession, education, training, and career development) of persons serving in acquisition positions in the Department of Defense. *The policies and procedures shall provide that education and training in acquisition matters, and past performance of acquisition responsibilities, are major factors in the selection of personnel for assignment to acquisition positions in the Department of Defense.*

\* \* \* \* \*

## SUBCHAPTER II—DEFENSE ACQUISITION POSITIONS

\* \* \* \* \*

### § 1723. General education, training, and experience requirements

(a) **QUALIFICATION REQUIREMENTS.**—The Secretary of Defense shall establish education, training, and experience requirements, *including requirements relating to demonstrated past performance of acquisition duties*, for each acquisition position, based on the level of complexity of duties carried out in the position. Unless otherwise provided in this chapter, such requirements shall take effect not later than October 1, 1993. In establishing such requirements for positions other than critical acquisition positions designated pursuant to section 1733 of this title, the Secretary may state the requirements by categories of positions.

\* \* \* \* \*

### § 1724. Contracting positions: qualification requirements

(a) **CONTRACTING OFFICERS.**—The Secretary of Defense shall require that, beginning on October 1, 1993, in order to qualify to serve in an acquisition position as a contracting officer with authority to award or administer contracts for amounts above the small purchase threshold referred to in section 2304(g) of this title, a person must (except as provided in subsections (c) and (d))—

- (1) have completed all mandatory contracting courses required for a contracting officer at the grade level, or in the position within the grade of the General Schedule (in the case of an employee), that the person is serving in;
- (2) have at least two years of experience in a contracting position *and have demonstrated proficiency in the performance of acquisition duties in the contracting position or positions previously held;*

\* \* \* \* \*

## SUBCHAPTER III—ACQUISITION CORPS

\* \* \* \* \*



**§ 1735. Education, training, and experience requirements for critical acquisition positions**

(a) **QUALIFICATION REQUIREMENTS.**—In establishing the education, training, and experience requirements under section 1723 of this title for critical acquisition positions, the Secretary of Defense shall, at a minimum, include the requirements set forth in subsections (b) through (e).

(b) **PROGRAM MANAGERS AND DEPUTY PROGRAM MANAGERS.**—Before being assigned to a position as a program manager or deputy program manager of a major defense acquisition program or a significant nonmajor defense acquisition program, a person—

(1) must have completed the program management course at the Defense Systems Management College or a management program at an accredited educational institution determined to be comparable by the Secretary of Defense;

(2) must have executed a written agreement as required in section 1734(b)(2); **[and]**

(3) in the case of—

(A) \* \* \*

\* \* \* \* \*

(D) a deputy program manager of a significant nonmajor defense acquisition program, must have at least four years of experience in acquisition~~...~~; **and**

(4) *must have demonstrated proficiency in the performance of acquisition duties.*

(c) **PROGRAM EXECUTIVE OFFICERS.**—Before being assigned to a position as a program executive officer, a person—

(1) must have completed the program management course at the Defense Systems Management College or a management program at an accredited educational institution in the private sector determined to be comparable by the Secretary of Defense, acting through the Under Secretary of Defense for Acquisition and Technology;

(2) must have at least 10 years experience in an acquisition position, at least four years of which were performed while assigned to a critical acquisition position; **[and]**

(3) must have held a position as a program manager or a deputy program manager~~...~~; **and**

(4) *must have demonstrated proficiency in the performance of acquisition duties.*

(d) **GENERAL AND FLAG OFFICERS AND CIVILIANS IN EQUIVALENT POSITIONS.**—Before a general or flag officer, or a civilian serving in a position equivalent in grade to the grade of such an officer, may be assigned to a critical acquisition position, the person must have at least 10 years experience in an acquisition position, at least four years of which were performed while assigned to a critical acquisition position, *and have demonstrated proficiency in the performance of acquisition duties.*

(e) **SENIOR CONTRACTING OFFICIALS.**—Before a person may be assigned to a critical acquisition position as a senior contracting official, the person must have at least four years experience in con-

tracting, and have demonstrated proficiency in the performance of acquisition duties.

\* \* \* \* \*

## PART IV—SERVICE, SUPPLY, AND PROCUREMENT

\* \* \* \* \*

### CHAPTER 131—PLANNING AND COORDINATION

Sec.

2201. Apportionment of funds: authority for exemption; excepted expenses.

\* \* \* \* \*

2221. *Funding for results oriented acquisition program cycle.*

\* \* \* \* \*

#### **§2220. Performance based management: acquisition programs**

(a) \* \* \*

(b) ANNUAL REPORTING REQUIREMENT.—The Secretary of Defense shall include in the annual report submitted to Congress pursuant to section 113(c) of this title an assessment of whether major and nonmajor acquisition programs of the Department of Defense are achieving, on average, 90 percent of cost, performance, and schedule goals established pursuant to subsection (a) and whether the average period for converting emerging technology into operational capability has decreased by 50 percent or more from the average period required for such conversion as of the date of the enactment of the Federal Acquisition Streamlining Act of 1994. The Secretary shall use data from existing management systems in making the assessment. *In addition, the Secretary shall include in such annual report a justification for the continuation of any program that—*

*(1) is more than 50 percent over the cost goal established for the development, procurement, or operational phase of the program;*

*(2) fails to achieve at least 50 percent of the performance capability goals established for the development, procurement, or operational phase of the program; or*

*(3) is more than 50 percent behind schedule, as determined in accordance with the schedule goal established for the development, procurement, or operational phase of the program.*

\* \* \* \* \*

#### **§2221. Funding for results oriented acquisition program cycle**

*Before initial funding is made available for the development, procurement, or operational phase of an acquisition program for which an authorization of appropriations is required by section 114 of this title, the Secretary of Defense shall submit to Congress information about the objectives and plans for the conduct of that phase and the funding requirements for the entire phase. The information shall identify the intended user of the system to be acquired under the*

*program and shall include objective, quantifiable criteria for assessing the extent to which the objectives and goals determined pursuant to section 2435 of this title are achieved.*

\* \* \* \* \*

## CHAPTER 137—PROCUREMENT GENERALLY

Sec.

\* \* \* \* \*

2304. Contracts: competition requirements.

\* \* \* \* \*

2304f. *Merit-based selection.*

\* \* \* \* \*

**[2306. Kinds of contracts.]**

2306. *Contract types*

\* \* \* \* \*

2306c. *Contractor share of gains and losses from cost, schedule, and performance experience.*

\* \* \* \* \*

**[2319. Encouragement of new competitors.]**

\* \* \* \* \*

2332. *Contracts for architectural and engineering services.*

\* \* \* \* \*

### § 2302. Definitions

In this chapter:

\* \* \* \* \*

(2) **[The term “competitive procedures” means procedures under which the head of an agency enters into a contract pursuant to full and open competition.]** *The term “competitive procedures” means procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government’s requirements.* Such term also includes—

(A) \* \* \*

\* \* \* \* \*

(3) The following terms have the meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403):

(A) The term “procurement”.

(B) The term “procurement system”.

(C) The term “standards”.

(D) The term **[“full and open competition”]** *open access*.

\* \* \* \* \*

### § 2304. Contracts: competition requirements

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

**[(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation; and**

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

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

[(A) shall solicit sealed bids if—

[(i) time permits the solicitation, submission, and evaluation of sealed bids;

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

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

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

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

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

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

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

[(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;

[(D) would ensure the continuous availability of a reliable source of supply of such property or service;

[(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

[(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

[(2) The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 2323 of this title.

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

[(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

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

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

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

[(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to 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, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

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

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

[(7) the head of the agency—

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

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

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

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

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

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

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

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

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

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

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

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

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

[(B) the justification is approved—

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

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

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

[(iv) in the case of a contract for an amount exceeding \$50,000,000, by the senior procurement executive of the

agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation) or in the case of the Under Secretary of Defense for Acquisition and Technology, acting in his capacity as the senior procurement executive for the Department of Defense, the Under Secretary's delegate designated pursuant to paragraph (6)(C); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[(i) an Assistant Secretary of Defense; or

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

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

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

[(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

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



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

[(h) For the purposes of the following laws, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:

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

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

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

[(2) The regulations required by paragraph (1) shall—

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

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

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

[(j)(1) It is the policy of Congress that an agency named in section 2303(a) of this title should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

[(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

[(A) specifically refers to this subsection;

[(B) specifically identifies the particular non-Federal Government entity involved; and

[(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

[(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

[(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an agency named in section 2303(a) of this title and to re-

port on such matters to the Congress or any agency of the Federal Government.】

**§2304. Contracts: competition requirements**

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

(A) shall obtain full and open competition—

(i) that provides open access, and

(ii) that is consistent with the need to efficiently fulfill the Government's requirements, through the use of competitive procedures in accordance with this chapter and the Federal Acquisition Regulation; and

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

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

(A) shall solicit sealed bids if—

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

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

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

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

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

(b) *EXCLUSION OF PARTICULAR SOURCE.*—The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

(c) *EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.*—The head of an agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 2323 of this title.

(d) *PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.*—(1) Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Standards for determining when the use of competitive procedures is not feasible or appropriate shall be set forth in the Federal Acquisition Regulation. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items using simplified proce-

dures or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.

(2) In the case of a procurement using procedures that preclude all but one source from responding (hereinafter in this subsection referred to as a "sole source procurement"), the Federal Acquisition Regulation shall provide for justification and approval under paragraph (1) of such procurement under standards that set forth limited circumstances for such sole source procurements, including circumstances when—

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

(B) 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 award the contract for the property or services to a particular source;

(C) it is necessary to award the contract to a particular source in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (ii) to 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, or (iii) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

(D) 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 award of the contract for the property or services to a particular source;

(E) subject to section 2304f, a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

(F) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to award the contract for the property or services needed by the agency to a particular source; or

(G) the head of the agency—

(i) determines that it is necessary in the public interest to award the contract for the property or services needed by the agency to a particular source in the particular procurement concerned, and

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

(3) *The authority of the head of an agency under paragraph (2)(G) may not be delegated.*

(e) *SIMPLIFIED PROCEDURES.—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of commercial items and for purchases of property and services for amounts not greater than the simplified acquisition threshold.*

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

(3) *In using simplified procedures, the head of an agency shall ensure that competition is obtained to the maximum extent practicable consistent with the particular Government requirement.*

(4) *The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items in an amount greater than the simplified acquisition threshold, the head of an agency—*

*(A) may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with the Federal Acquisition Regulation; and*

*(B) shall include in the contract file a written description of the procedures used in awarding the contract and the number of offers received.*

(f) *CERTAIN CONTRACTS.—For the purposes of the following laws, purchases or contracts awarded after using procedures other than sealed-bid procedures shall be treated as if they were made with sealed-bid procedures:*

*(1) The 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).*

\* \* \* \* \*

#### **§2304f. Merit-based selection**

[(j)(1)] (a) It is the policy of Congress that an agency named in section 2303(a) of this title should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

[(2)] (b) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

[(A)] (1) specifically refers to this [subsection] section;

[(B)] (2) specifically identifies the particular non-Federal Government entity involved; and

[(C)] (3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in [paragraph (1)] subsection (a).

[(3)] (c) For purposes of this [subsection] *section*, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

[(4)] (d) This [subsection] *section* shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an agency named in section 2303(a) of this title and to report on such matters to the Congress or any agency of the Federal Government.

**§2305. Contracts: planning, solicitation, evaluation, and award procedures**

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

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

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

[(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.] (A) *In preparing for the procurement of property or services, the head of an agency shall use advance procurement planning and market research.*

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

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

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

[(C) For the purposes of subparagraphs (A) and (B), the] (B) *Each solicitation under this chapter shall include specifications that include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law. 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) \* \* \*

\* \* \* \* \*

(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(A) \* \* \*

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

(5)(A) When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The head of the agency shall debrief the offeror within, to the maximum extent practicable, five days after receipt of the request by the agency.

\* \* \* \* \*

**[(F) The contracting officer shall include a summary of the debriefing in the contract file.]**

*(6) (A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.*

*(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) of this section only if that offeror requested and was refused a preaward debriefing under subparagraph (A) of this paragraph.*

*(C) The debriefing conducted under this subsection shall include—*

*(i) the executive agency's evaluation of the significant elements in the offeror's offer;*

*(ii) a summary of the rationale for the offeror's exclusion; and*  
*(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.*

*(D) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.*

*(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.*

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

\* \* \* \* \*

(e) PROTEST FILE.—(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an agency, a protest is filed pursuant to the procedures in [subchapter V of chapter 35 of title 31] *title II of the Office of Federal Procurement Policy Act* and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

[(3) Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency's protest file (the so-called "rule 4 file") for protests to the General Services Board of Contract Appeals under section 111 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 759).]

(f) AGENCY ACTIONS ON PROTESTS.—If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency—

(1) may take any action set out in [subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31] *section 214(h)(2) of the Office of Federal Procurement Policy Act*; and

(2) may pay costs described in [paragraph (1) of section 3554(c) of title 31 within the limits referred to in paragraph (2)] *subparagraph (A) of section 214(i)(1) of the Office of Federal Procurement Policy Act within the limits referred to in subparagraph (B) of such section*.

## **[§ 2306. Kinds of contracts]**

### **§ 2306. Contract types**

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States, *based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment*.

[(b) Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency

maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration. This subsection does not apply to a contract that is for an amount not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

[(d) The fee for performing a cost-plus-a-fixed-fee contract for experimental, developmental, or research work may not be more than 15 percent of the estimated cost of the contract, not including the fee. The fee for performing a cost-plus-a-fixed-fee contract for architectural or engineering services for a public work or utility plus the cost of those services to the contractor may not be more than 6 percent of the estimated cost of that work or project, not including fees. The fee for performing any other cost-plus-a-fixed-fee contract may not be more than 10 percent of the estimated cost of the contract, not including the fee. Determinations under this subsection of the estimated costs of a contract or project shall be made by the head of the agency at the time the contract is made.

[(e) Each cost contract and each cost-plus-a-fixed-fee contract shall provide for notice to the agency by the contractor before the making, under the prime contract, of—

[(1) a cost-plus-a-fixed-fee subcontract; or

[(2) a fixed-price subcontract or purchase order involving more than the greater of (A) the simplified acquisition threshold, or (B) 5 percent of the estimated cost of the prime contract.

[(f) So-called "truth-in-negotiations" provisions relating to cost or pricing data to be submitted by certain contractors and subcontractors are provided in section 2306a of this title.]

[(g)] (b)(1) The head of an agency may enter into contracts for periods of not more than five years for the following types of services (and items of supply related to such services) for which funds would otherwise be available for obligation only within the fiscal year for which appropriated—

(A) operation, maintenance, and support of facilities and installations;

(B) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment;

(C) specialized training necessitating high quality instructor skills (for example, pilot and aircrew members; foreign language training); and

(D) base services (for example, ground maintenance; in-plane refueling; bus transportation; refuse collection and disposal);

whenever he finds that—

(i) there will be a continuing requirement for the services consonant with current plans for the proposed contract period;

(ii) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) the use of such a contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation.



(2) In entering into such contracts, the head of the agency shall be guided by the following principles:

(A) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of such plant or equipment. Useful commercial life, for this purpose, means the commercial utility of the facilities rather than the physical life thereof, with due consideration given to such factors as location of facilities, specialized nature thereof, and obsolescence.

(B) Consideration shall be given to the desirability of obtaining an option to renew the contract for a reasonable period not to exceed three years, at prices not to include charges for plant, equipment and other nonrecurring costs, already amortized.

(C) Consideration shall be given to the desirability of reserving in the agency the right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from—

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

[(h) Multiyear contracting authority is provided in section 2306b of this title.]

#### **§ 2306a. Cost or pricing data: truth in negotiations**

(a) \* \* \*

[(b) EXCEPTIONS.—

[(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—

[(A) for which the price agreed upon is based on—

[(i) adequate price competition;

[(ii) established catalog or market prices of commercial items that are sold in substantial quantities to the general public; or

[(iii) prices set by law or regulation; or

[(B) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

[(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the prohibition on the submission of cost or pricing data in paragraph (1)(A), submission of cost or pricing data shall not be required under subsection (a) if—

[(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing

data may not be required by reason of paragraph (1)(A); and

[(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

[(3) FAR STANDARDS.—The Federal Acquisition Regulation shall provide clear standards for determining whether the exceptions provided in paragraph (1)(A) apply. In the case of the exception provided in paragraph (1)(A)(i), the regulations shall specify the criteria to be used to determine whether adequate price competition exists. In the case of the exception provided in paragraph (1)(A)(ii), the regulations shall provide that the exception applies to items that are sold in substantial quantities to the general public, without regard to the quantity of items that may be sold to the Federal Government.

[(c) RESTRICTIONS ON ADDITIONAL AUTHORITY TO REQUIRE COST OR PRICING DATA OR OTHER INFORMATION.—

[(1) AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—(A) Subject to subparagraph (B), when cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

[(B) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subsection (b)(1)(A).

[(C) The head of a procuring activity may not delegate functions under this paragraph.

[(2) AUTHORITY TO REQUIRE INFORMATION OTHER THAN CERTIFIED COST OR PRICING DATA.—When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the head of the procuring activity may require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract.

[(d) ADDITIONAL EXCEPTION PROVISIONS REGARDING COMMERCIAL ITEMS.—

[(1) PROCUREMENTS BASED ON ADEQUATE PRICE COMPETITION.—To the maximum extent practicable, the head of an agency shall conduct procurements of commercial items on a competitive basis. In any procurement of a commercial item conducted on a competitive basis and based upon adequate

price competition, the head of the agency conducting the procurement shall not require cost or pricing data to be submitted under subsection (a) for the contract, subcontract, or modification of the contract or subcontract under the procurement. If additional information is necessary to determine the reasonableness of the price of the contract, subcontract, or modification, the head of the agency shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror.

【(2) PROCUREMENTS NOT BASED ON ADEQUATE PRICE COMPETITION.—(A)(i) In any case in which it is not practicable to conduct a procurement of a commercial item covered by subsection (a) on a competitive basis, and the procurement is not covered by an exception in subsection (b), the contracting officer shall seek to obtain from the offeror or contractor information described in clause (ii). When such information is not available from that source, the contracting officer shall seek to obtain such information from another source or sources.

【(ii) The information referred in clause (i) is information on prices at which the same item or similar items have been sold in the commercial market that is adequate for evaluating, through price analysis, the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract under the procurement.

【(B) The contracting officer shall exempt a contract, subcontract, or modification of a contract or subcontract under the procurement from the requirements of subsection (a) if the contracting officer obtains the information described in subparagraph (A)(ii) in accordance with standards and procedures set forth in the Federal Acquisition Regulation.

【(C) A contracting officer may require submission of cost or pricing data under subsection (a) only if the contracting officer makes a written determination that the agency is unable to obtain the information described in subparagraph (A)(ii).

【(3) AUTHORITY TO AUDIT.—(A) In accordance with procedures prescribed in the Federal Acquisition Regulation, the head of an agency is authorized to examine all information provided by an offeror, contractor, or subcontractor pursuant to paragraph (2)(A) and all books and records of such offeror, contractor, or subcontractor that directly relate to such information in order to determine whether the agency is receiving accurate information required under this subsection.

【(B) The right under subparagraph (A) shall expire 2 years after the date of award of the contract, or 2 years after the date of the modification of the contract, with respect to which the information was provided.

【(4) LIMITATIONS ON REQUESTS FOR DATA.—The Federal Acquisition Regulation shall include reasonable limitations on requests under this section for sales data relating to commercial items.

【(5) FORM OF INFORMATION.—In requesting information from an offeror under this subsection, a contracting officer shall, to the maximum extent practicable, limit the scope of the request

to include only information that is in the form regularly maintained by the offeror in commercial operations.

[(6) CONFIDENTIALITY.—Any information received under this subsection that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.]

(b) *EXCEPTIONS.*—

(1) *IN GENERAL.*—*Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or modification of a contract or subcontract—*

(A) *for which the price agreed upon is based on—*

(i) *adequate price competition; or*

(ii) *prices set by law or regulation;*

(B) *for the acquisition of a commercial item; or*

(C) *in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.*

(2) *MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.*—*In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—*

(A) *the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and*

(B) *the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.*

(c) *AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.*—(1) *Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.*

(2) *The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).*

(3) *The head of a procuring activity may not delegate functions under this paragraph.*

(d) *LIMITATIONS ON OTHER INFORMATION.*—*The Federal Acquisition Regulation shall include the following:*

*(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.*

*(2) Reasonable limitations on requests for sales data relating to commercial items.*

*(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.*

*(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.*

\* \* \* \* \*

**[(h) REQUIRED REGULATIONS.—The Federal Acquisition Regulation shall contain provisions concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.]**

**[(i) (h) DEFINITIONS.—In this section:**

**(1) COST OR PRICING DATA.—**The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

**(2) SUBCONTRACT.—**The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

**(3) COMMERCIAL ITEM.—**The term “commercial item” has the meaning provided such term in section 4(12) of the Office of Federal Procurement Policy Act.

### **§ 2306b. Multiyear contracts**

(a) IN GENERAL.—To the extent that funds are otherwise available for obligation, the head of an agency [may] *shall, to the maximum extent possible*, enter into multiyear contracts for the purchase of property whenever the head of that agency finds—

(1) \* \* \*

\* \* \* \* \*

### **§ 2306c. Contractor share of gains and losses from cost, schedule, and performance experience**

*The Federal Acquisition Regulation shall contain provisions to ensure that, for any cost-type contract or incentive-type contract, the contractor may be rewarded for contract performance exceeding the contract cost, schedule, or performance parameters to the benefit of the United States and may be penalized for failing to adhere to cost, schedule, or performance parameters to the detriment of the United States.*

\* \* \* \* \*

### **§ 2319. Encouragement of new competitors**

[(a) In this section, the term “qualification requirement” means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

[(b) Except as provided in subsection (c), the head of the agency shall, before establishing a qualification requirement—

[(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

[(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

[(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

[(4) ensure that a potential offeror is provided, upon request and on a reimbursable basis, a prompt opportunity to demonstrate its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

[(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

[(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

[(c)(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute or administrative action before October 19, 1984, unless such requirement is a qualified products list.

[(2)(A) Except as provided in subparagraph (B), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the purchasing office may waive the requirements of clauses (2) through (6) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.

[(B) The waiver authority provided in this paragraph does not apply with respect to a qualified products list.

[(3) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offer (A) is not on a qualified bidders list, qualified manufacturers list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

[(4) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act (15 U.S.C. 637(b)(7)), if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

[(5) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

[(6) The requirements of subsection (b) also apply before enforcement of any qualified products list, qualified manufacturers list, or qualified bidders list.

[(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

[(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

[(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the

item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to amortize the costs incurred by the agency within a reasonable period of time considering the duration and dollar value of anticipated future requirements.

[(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act (15 U.S.C. 632).

[(e) Within seven years after the establishment of a qualification requirement under subsection (b) or within seven years following an agency's enforcement of a qualified products list, qualified manufacturers list, or qualified bidders list, any such qualification requirement shall be examined and revalidated in accordance with the requirements of subsection (b). The preceding sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

[(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).]

\* \* \* \* \*

### **§ 2323. Contract goal for small disadvantaged businesses and certain institutions of higher education**

(a) \* \* \*

\* \* \* \* \*

(e) COMPETITIVE PROCEDURES AND ADVANCE PAYMENTS.—To attain the goal of subsection (a):

(1) \* \* \*

\* \* \* \* \*

(3) To the extent practicable and when necessary to facilitate achievement of the 5 percent goal described in subsection (a), the head of an agency may enter into contracts using [less than full and open] *procedures other than* competitive procedures (including awards under section 8(a) of the Small Business Act) and partial set asides for entities described in subsection (a)(1), but shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors described in subsection (a). The head of an agency shall adjust the percentage specified in the preceding sentence for any industry category if available information clearly indicates that nondisadvantaged small business



concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph.

\* \* \* \* \*

(i) ANNUAL REPORT.—(1) \* \* \*

\* \* \* \* \*

(3) The report required under paragraph (1) shall also include the following:

(A) The aggregate differential between the fair market price of all contracts awarded pursuant to subsection (e)(3) and the estimated fair market price of all such contracts had such contracts been entered into using [full and open] competitive procedures.

\* \* \* \* \*

#### **[§2855. Law applicable to contracts for architectural and engineering services and construction design**

[(a) Contracts for architectural and engineering services and construction design in connection with a military construction project or a military family housing project shall be awarded in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.).]

#### **§2332. Contracts for architectural and engineering services**

(a) *The Secretary of Defense and the Secretaries of the military departments may enter into contracts for architectural and engineering services in connection with a military construction or family housing project or for other Department of Defense or military department purposes. Such contracts shall be awarded in accordance with the Brooks Architect-Engineers Act (40 U.S.C. 541 et seq.).*

(b)(1) In the case of a contract referred to in subsection (a)—

(A) if the Secretary concerned estimates that the initial award of the contract will be in an amount greater than or equal to the threshold amount determined under paragraph (2), the contract may not be set aside exclusively for award to small business concerns; and

(B) if the Secretary concerned estimates that the initial award of the contract will be in an amount less than the threshold amount determined under paragraph (2), the contract shall be awarded in accordance with the set aside provisions of the Small Business Act (15 U.S.C. 631 et seq.).

(2) The initial threshold amount under paragraph (1) is \$85,000. The Secretary of Defense may revise that amount in order to ensure that small business concerns receive a reasonable share of contracts referred to in subsection (a).

(3) This subsection does not restrict the award of contracts to small business concerns under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

\* \* \* \* \*

### **CHAPTER 140—PROCUREMENT OF COMMERCIAL ITEMS**

\* \* \* \* \*

**§ 2375. Relationship of commercial item provisions to other provisions of law**

(a) \* \* \*

\* \* \* \* \*

[(c) CROSS REFERENCE TO EXCEPTION TO COST OR PRICING DATA REQUIREMENTS FOR COMMERCIAL ITEMS.—For provisions relating to exceptions for requirements for cost or pricing data for contracts for the procurement of commercial items, see section 2306a(d) of this title.]

\* \* \* \* \*

**CHAPTER 141—MISCELLANEOUS PROCUREMENT PROVISIONS**

Sec.

2381. Contracts: regulations for bids.

\* \* \* \* \*

[2397. Employees or former employees of defense contractors: reports.

[2397a. Requirements relating to private employment contacts between certain Department of Defense procurement officials and defense contractors.

[2397b. Certain former Department of Defense procurement officials: limitations on employment by contractors.

[2397c. Defense contractors: requirements concerning former Department of Defense officials.]

\* \* \* \* \*

[2410. Requests for equitable adjustment or other relief: certification.]

2410. *Requests for equitable adjustment or other relief.*

\* \* \* \* \*

**[§ 2397. Employees or former employees of defense contractors: reports**

[(a) In this section:

[(1) The term “contract” means a contract (including the net amount of modifications to, and the exercise of options under, the contract) that is in an amount in excess of the simplified acquisition threshold, as in effect at the time that the contract is awarded. The term does not include a contract for the purchase of commercial items (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

[(2) The term “defense contractor” means a person that provides services, supplies, or both (including construction) to the Department of Defense under a contract directly with the Department.

[(3) The term “served”, when used with “otherwise”, includes the representation of a defense contractor—

[(A) at a hearing, trial, appeal, or other action in which the United States was a party and that involved services, supplies, or both (including construction) that were provided to, or to be provided to, the Department by the contractor; and

[(B) in a transaction with the Department that involved services, supplies, or both (including construction) that were provided to, or to be provided to, the Department by the contractor.

[(b)(1) This subsection applies to—

[(A) a former or retired officer of the Army, Navy, Air Force, or Marine Corps who (i) has at least 10 years of active service, and (ii) held for any period during that service a grade above captain or, if the Navy, above lieutenant; and

[(B) a former civilian official or employee (including a consultant or part-time employee) of the Department of Defense whose pay rate (at any time during the three-year period before the end of the last service of the person with the Department) was at least equal to the minimum rate at the time for GS-13.

[(2)(A) If a person to whom this subsection applies (i) was employed by, or served as a consultant or otherwise to, a defense contractor at any time during a year at an annual pay rate of at least \$25,000 and the defense contractor was awarded contracts by the Department of Defense during the preceding year that totaled at least \$10,000,000, and (ii) within the two-year period ending on the day before the person began the employment or consulting relationship, the person served on active duty or was a civilian employee for the Department, the person shall file a report with the Secretary of Defense in such manner and form as the Secretary may prescribe. The person shall file the report not later than 90-days after the date on which the person began the employment or consulting relationship.

[(B) The person shall file an additional report each time, during the two-year period beginning on the date the active duty or civilian employment with the Department terminated, that the person's job with the defense contractor significantly changes or the person commences an employment or consulting relationship with another defense contractor under the conditions described in the first sentence. A person required to file an additional report under this subparagraph shall file the report within 30 days after the date of the change or the date the employment or consulting relationship commences, as the case may be.

[(3) The report shall contain the following information:

[(A) The name and address of the person reporting.

[(B) The name and address of the defense contractor that employed the person or for whom the person served as a consultant or otherwise.

[(C) The title of the position of the person when serving the defense contractor.

[(D) A description of the duties and work performed or to be performed by the person for the defense contractor, and a description of any similar duties or work performed for which the person had at least partial responsibility as a civilian official or employee of the Department of Defense or a member of the armed forces during the two-year period referred to in paragraph (2)(A)(ii).

[(E) The military grade of the person while on active duty or the gross pay rate while performing civilian service for the Department.

[(F) A description of the duties and the work performed by the person while on active duty or performing civilian service for the Department during the two-year period referred to in paragraph (2)(A)(ii) and a description of the type of work per-

formed and the extent to which such work was performed by the person for the defense contractor that has employed the person or has retained the person as a consultant.

[(G) The date the active duty or civilian service by the person for the Department ended and the date the service with the defense contractor began and, if applicable, ended.

[(H) Other pertinent information the Secretary requires.

[(I) A statement describing any disqualification action taken by the person during the two-year period referred to in paragraph (2)(A)(ii) with respect to any involvement in a matter concerning the defense contractor.

[(c)(1) A person who (A) holds civilian office or employment (including employment as a consultant or part-time employee) in the Department at any time during a year at a pay rate at least equal to the minimum rate for GS-13, and (B) within the two-year period before the effective date of employment with the Department was employed by, or served as a consultant or otherwise to, a defense contractor at any time during a year at an annual pay rate of at least \$25,000 and the contractor was awarded contracts by the Department during that year that total at least \$10,000,000, shall file a report with the Secretary in the way and at the time prescribed by the Secretary.

[(2) The report shall contain the following information:

[(A) The name and address of the person reporting.

[(B) The title of the position of the person with the Department.

[(C) A description of the duties and work performed by the person with the Department and a description of any similar duties or work for which the person had at least partial responsibility as an employee or consultant of the defense contractor during the two-year period referred to in paragraph (1)(B).

[(D) The name and address of the defense contractor that employed the person or for whom the person served as a consultant or otherwise.

[(E) The title of the position of the person when serving the defense contractor.

[(F) A description of the duties and the work performed by the person for the defense contractor and a description of the type of work and the extent to which such work was performed by the person in connection with contracts of the defense contractor with the Department during the two-year period referred to in paragraph (1)(B).

[(G) The date the service of the person with the defense contractor ended and the date the service with the Department began.

[(H) Other pertinent information the Secretary requires.

[(d) The Secretary shall maintain a file containing the information filed under this section. The file may be inspected by members of the public at any time during regular work hours.

[(e) Before April 1 of each year, the Secretary shall report to Congress the names of persons who have filed reports for the preceding year under this section. The names shall be listed, by groups, under the names of the appropriate defense contractors.

The Secretary may include for each name appropriate additional information.

[(f)(1) A person who fails to comply with the filing requirements of this section shall be liable to the United States for an administrative penalty in the amount of \$10,000, or in such lesser amount as may be determined by the Secretary of Defense, considering all the relevant circumstances.

[(2) The Secretary shall determine whether a person has failed to file a report required by this section and shall determine the amount of the penalty under paragraph (1). The Secretary shall make the determinations on the record after opportunity for an agency hearing as provided in subchapter II of chapter 5 of title 5. The determinations of the Secretary shall be subject to judicial review under chapter 7 of such title.

**[§ 2397a. Requirements relating to private employment contacts between certain Department of Defense procurement officials and defense contractors**

[(a) In this section:

[(1) The term “contract” has the same meaning as provided in section 2397(a)(1) of this title.

[(2) The term “covered defense official” means any individual who is serving—

[(A) as a civilian officer or employee of the Department of Defense in a position for which the rate of pay is equal to or greater than the minimum rate of pay payable for grade GS-11 under the General Schedule; or

[(B) on active duty in the armed forces in a pay grade of O-4 or higher.

[(3) The term “defense contractor” has the same meaning as provided in section 2397(a)(2) of this title.

[(4) The term “designated agency ethics official” has the same meaning as the term “designated agency official” in section 109(3) of the Ethics in Government Act of 1978 (92 Stat. 1850; 5 U.S.C. App.).

[(5) The term “employment” means a relationship under which an individual furnishes services in return for any payment or other compensation paid directly or indirectly to the individual for the services.

[(6) The term “procurement function” includes, with respect to a contract, any function relating to—

[(A) the negotiation, award, administration, or approval of the contract;

[(B) the selection of a contractor;

[(C) the approval of changes in the contract;

[(D) quality assurance, operation and developmental testing, the approval of payment, or auditing under the contract; or

[(E) the management of the procurement program.

[(b)(1) If a covered defense official who has participated in the performance of a procurement function in connection with a contract awarded by the Department of Defense contacts, or is contacted by, the defense contractor to whom the contract was awarded (or an agent of such contractor) regarding future employment

opportunities for the official with the defense contractor, the official (except as provided in paragraph (2)) shall—

[(A) promptly report the contact to the official's supervisor and to the designated agency ethics official (or his designee) of the agency in which the covered defense official is employed; and

[(B) for any period for which future employment opportunities for the covered defense official have not been rejected by either the covered defense official or the defense contractor, disqualify himself from all participation in the performance of procurement functions relating to contracts of the defense contractor.

[(2) A covered defense official is not required to report the first contact with a defense contractor under paragraph (1)(A) or to disqualify himself under paragraph (1)(B) if the defense official terminates the contact immediately. However, if an additional contact of the same or a similar nature is made by or with the defense contractor, the covered defense official shall report (as provided in paragraph (1)) the contact and all contacts of the same or a similar nature made by or with the defense contractor during the 90-day period ending on the date the additional contact is made.

[(c) A report required by subsection (b)(1) shall include—

[(1) the date of each contact covered by the report; and

[(2) a brief description of the substance of the contact.

[(d)(1)(A) If the Secretary of Defense determines under paragraph (2) that a person has failed promptly to make a report required by subsection (b)(1)(A) or (b)(2) or has failed to disqualify himself in any case in which he is required to do so under subsection (b)(1)(B)—

[(i) the person may not accept or continue employment with the defense contractor during the 10-year period beginning with the date of separation from Government service; and

[(ii) the Secretary may impose on the person an administrative penalty in the amount of \$10,000, or in such lesser amount as may be prescribed by the Secretary, taking into consideration all the circumstances.

[(B) An individual who accepts or continues employment prohibited by subparagraph (A)(i) shall be liable to the United States for an administrative penalty as provided in subparagraph (A)(ii). Such penalty may be in addition to any penalty previously imposed on the individual under subparagraph (A)(ii) for failure promptly to make a report relating to the defense contractor by whom the individual is employed as required by subsection (b)(1)(A) or (b)(2).

[(C) The Secretary of Defense may take action against an individual under this paragraph before, on, or after the date on which the individual's employment with the Government is terminated.

[(2)(A) The Secretary of Defense shall determine—

[(i) whether an individual has failed promptly to make a report required by subsection (b)(1)(A) or (b)(2) or has failed to disqualify himself in any case in which he is required to do so under subsection (b)(1)(B) and whether to impose a penalty under paragraph (1)(A)(ii) and the amount of such penalty; and

[(ii) whether an individual is liable to the United States for an administrative penalty under paragraph (1)(B) and the amount of such penalty.

There shall be a rebuttable presumption in favor of a covered defense official that failure to report a contact with a defense contractor or failure to disqualify himself from participation in the performance of certain procurement functions is not a violation of subsection (b)(1)(A) or (b)(2) or subsection (b)(1)(B), as the case may be, if the defense official has received an opinion in writing from the designated agency ethics official under subsection (e) stating that a report or disqualification by the official was not necessary.

[(B) Determinations of the Secretary under subparagraph (A) shall be made on the record after opportunity for an agency hearing as provided in subchapter II of chapter 5 of title 5. The determinations of the Secretary shall be subject to judicial review under chapter 7 of such title.

[(e) If a designated agency ethics official or his designee receives a report required by subsection (b) or a request for advice from a covered defense official relating to a contact described in such subsection, the designated agency ethics official or his designee may issue a written opinion regarding the necessity of a covered defense official to file a report or disqualify himself from participation in certain procurement functions, as the case may be.

[(f) A covered defense official should request the advice of his supervisor and the appropriate designated agency ethics official (or his designee) on matters to which this section applies.

**[\S 2397b. Certain former Department of Defense procurement officials: limitations on employment by contractors**

[(a)(1) Subject to subsections (c) and (d), a person who is a former officer or employee of the Department of Defense or a former or retired member of the armed forces may not accept compensation from a contractor during the two-year period beginning on the date of such person's separation from service in the Department of Defense if—

[(A) on a majority of the person's working days during the two-year period ending on the date of such person's separation from service in the Department of Defense, the person performed a procurement function (relating to a contract of the Department of Defense) at a site or plant that is owned or operated by the contractor and that was the principal location of such person's performance of that procurement function;

[(B) the person performed, on a majority of the person's working days during such two-year period, procurement functions relating to a major defense system and, in the performance of such functions, participated personally and substantially, and in a manner involving decisionmaking responsibilities, with respect to a contract for that system through contact with the contractor; or

[(C) during such two-year period the person acted as one of the primary representatives of the United States—

[(i) in the negotiation of a Department of Defense contract in an amount in excess of \$10,000,000 with the contractor; or

[(ii) in the negotiation of a settlement of an unresolved claim of the contractor in an amount in excess of \$10,000,000 under a Department of Defense contract.

[(2) In the application of paragraph (1) to a former officer or employee of the Department of Defense or a former or retired member of the armed forces, a person's status as a contractor shall be determined as of the date of the separation from service in the Department of Defense of the officer or employee or member or former member involved.

[(b)(1) Any person who knowingly violates subsection (a)(1) shall be subject to a civil fine, in an amount not to exceed \$250,000, in a civil action brought by the United States in the appropriate district court of the United States.

[(2) Any person who knowingly offers or provides any compensation to another person, and who knew or should have known that the acceptance of such compensation is or would be in violation of subsection (a)(1), shall be subject to a civil fine, in an amount not to exceed \$500,000, in a civil action brought by the United States in the appropriate district court of the United States.

[(c) This section does not apply to any person with respect to—

[(1) duties described in clause (A) or (B) of subsection (a)(1) which were performed while such person was serving—

[(A) in a civilian position for which the rate of pay is less than the minimum rate of pay payable for grade GS-13 of the General Schedule; or

[(B) as a member of the armed forces in a pay grade below pay grade O-4; or

[(2) duties described in clause (C) of subsection (a)(1) which were performed while such person was serving—

[(A) in a civilian position for which the rate of pay is less than the minimum rate of pay payable for a Senior Executive Service position; or

[(B) as a member of the armed forces in a pay grade below pay grade O-7.

[(d) This section does not prohibit any person from accepting compensation from any contractor that, during the fiscal year preceding the fiscal year in which such compensation is accepted, was not a Department of Defense contractor or was a contractor under Department of Defense contracts in a total amount less than \$10,000,000.

[(e)(1) Any person may, before accepting any compensation, request the appropriate designated agency ethics official to advise such person on the applicability of this section to the acceptance of such compensation. For purposes of the preceding sentence, the appropriate designated agency ethics official is the designated agency ethics official of the agency in which such person was serving at the time such person separated from service in the Department of Defense.

[(2) A request for advice under paragraph (1) shall contain all information that is relevant to a determination by the designated agency ethics official on such request.



[(3) Not later than 30 days after the date on which a designated agency ethics official receives a request for advice under paragraph (1), such official shall issue a written opinion on the applicability of this section to the acceptance of compensation covered by the request.

[(4) If a designated agency ethics official, on the basis of a complete disclosure as required by paragraph (2), states in a written opinion furnished to any person under this subsection that this section is inapplicable to the acceptance of compensation by such person from a contractor in a particular case, there shall be a conclusive presumption in favor of such person, for the purposes of this section, that the person's acceptance of such compensation in such case is not a violation of subsection (a)(1).

[(f) In this section:

[(1) The term "compensation" includes any payment, gift, benefit, reward, favor, or gratuity—

[(A) which is provided, directly or indirectly, for services rendered by the person accepting such payment, gift, benefit, reward, favor, or gratuity; and

[(B) which is valued in excess of \$250 at the prevailing market price.

[(2)(A) The term "contractor" means a person—

[(i) that contracts to supply the Department of Defense with goods or services;

[(ii) that controls or is controlled by a person described in clause (i); or

[(iii) that is under common control with a person described in clause (i).

[(B) Such term does not include—

[(i) an affiliate or subsidiary of a person described in subparagraph (A) that is clearly not engaged in the performance of a Department of Defense contract;

[(ii) a State or local government; or

[(iii) any person who contracts to supply the Department of Defense only commercial items (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)))

[(3) The term "procurement function" includes, with respect to a contract, any function relating to—

[(A) the negotiation, award, administration, or approval of the contract;

[(B) the selection of a contractor;

[(C) the approval of changes in the contract;

[(D) quality assurance, operational and developmental testing, the approval of payment, or auditing under the contract; or

[(E) the management of the procurement program.

[(4) The term "armed forces" does not include the Coast Guard.

[(5) The term "major defense system" has the meaning given the term "major system" in section 2302(5) of this title.

[(g) For the purposes of this section, a person who is a retired member or a former member of the armed forces shall be considered to have been separated from service in the Department of De-

fense upon the date of the person's discharge or release from active duty.

**[§ 2397c. Defense contractors: requirements concerning former Department of Defense officials]**

[(a)(1) Each contract for the procurement of goods or services in excess of \$100,000 entered into by the Department of Defense shall include a provision under which the contractor agrees not to provide compensation to a person if the acceptance of such compensation by such person would violate section 2397b(a)(1) of this title.

[(2) Such a contract shall also provide that if the contractor knowingly violates a contract provision required by paragraph (1) the contractor shall pay to the United States, as liquidated damages under the contract, an amount equal to the greater of—

[(A) \$100,000; or

[(B) three times the amount of the compensation paid by the contractor to the person in violation of such contract provision.

[(b)(1)(A) Any contractor that was awarded one or more contracts by the Department of Defense during the preceding fiscal year in an aggregate amount of at least \$10,000,000 that is subject during a calendar year to a contract provision described in subsection (a) shall submit to the Secretary of Defense, not later than April 1 of the next year, a written report covering the preceding calendar year. Each such report shall list the name of each person (together with other information adequate for the Government to identify the person) who—

[(i) is a former officer or employee of the Department of Defense or a former or retired member of the armed forces; and

[(ii) during the preceding calendar year was provided compensation by that contractor, if such compensation was provided within two years after such officer, employee, or member left service in the Department of Defense.

[(B) In the case of each person named in a report submitted under subparagraph (A), the report shall—

[(i) identify the agency in which the person was employed or served on active duty during the last two years of the person's service with the Department of Defense;

[(ii) state the person's job title and identify each major defense system, if any, on which the person performed any work with the Department of Defense during the last two years of the person's service with the Department;

[(iii) contain a complete description of any work that the person is performing on behalf of the contractor; and

[(iv) identify each major defense system on which the person has performed any work on behalf of the contractor.

[(2) A person who knowingly fails to file a report required by paragraph (1) shall be subject to an administrative penalty, not to exceed \$10,000, imposed by the Secretary of Defense after an opportunity for an agency hearing on the record pursuant to regulations prescribed by the Secretary of Defense. The determinations of the Secretary shall be included in such record. The determinations of the Secretary shall be subject to judicial review under chapter 7 of title 5.

[(3) The Secretary of Defense shall review each report under paragraph (1) for the purposes of (A) assessing the accuracy and completeness of the report, and (B) identifying possible violations of section 2397b(a)(1) of this title or of a contract provision required by subsection (a). The Secretary shall report any such possible violation to the Attorney General.

[(4) The Secretary shall make reports submitted under this subsection available to any Member of Congress upon request.

[(d) Subsection (g) of section 2397b of this title, and the definitions prescribed in subsection (f) of such section, apply to this section.

[(e) This section does not apply to contracts for the purchase of commercial items (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).]

\* \* \* \* \*

#### **§2410. Requests for equitable adjustment or other relief[: certification]**

(a) [CERTIFICATION] REQUIREMENT.—A request for equitable adjustment to contract terms or request for relief under Public Law 85–804 (50 U.S.C. 1431 et seq.) that exceeds the simplified acquisition threshold may not be paid [unless a person authorized to certify the request on behalf of the contractor certifies, at the time the request is submitted, that—] *unless—*

(1) the request is made in good faith, and

(2) the supporting data are accurate and complete [to the best of that person's knowledge and belief].

\* \* \* \* \*

### **CHAPTER 169—MILITARY CONSTRUCTION AND MILITARY FAMILY HOUSING**

\* \* \* \* \*

#### **SUBCHAPTER III—ADMINISTRATION OF MILITARY CONSTRUCTION AND MILITARY FAMILY HOUSING**

Sec.

2851. Supervision of military construction projects.

\* \* \* \* \*

[2855. Law applicable to contracts for architectural and engineering services and construction design.]

\* \* \* \* \*

#### **[§2855. Law applicable to contracts for architectural and engineering services and construction design]**

[(a) Contracts for architectural and engineering services and construction design in connection with a military construction project or a military family housing project shall be awarded in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.).

[(b)(1) In the case of a contract referred to in subsection (a)—

[(A) if the Secretary concerned estimates that the initial award of the contract will be in an amount greater than or equal to the threshold amount determined under paragraph

(2), the contract may not be set aside exclusively for award to small business concerns; and

[(B) if the Secretary concerned estimates that the initial award of the contract will be in an amount less than the threshold amount determined under paragraph (2), the contract shall be awarded in accordance with the set aside provisions of the Small Business Act (15 U.S.C. 631 et seq.).]

[(2) The initial threshold amount under paragraph (1) is \$85,000. The Secretary of Defense may revise that amount in order to ensure that small business concerns receive a reasonable share of contracts referred to in subsection (a).]

[(3) This subsection does not restrict the award of contracts to small business concerns under section 8(a) of the Small Business Act (15 U.S.C. 637(a)).]

\* \* \* \* \*

## **Subtitle B—Army**

\* \* \* \* \*

## **PART IV—SERVICE, SUPPLY, AND PROCUREMENT**

\* \* \* \* \*

### **CHAPTER 433—PROCUREMENT**

Sec.

\* \* \* \* \*

[4540. Architectural and engineering services.]

\* \* \* \* \*

#### **[\$4540. Architectural and engineering services**

[(a) Whenever he considers that it is advantageous to the national defense and that existing facilities of the Department of the Army are inadequate, the Secretary of the Army may, by contract or otherwise, employ the architectural or engineering services of any person outside that Department for producing and delivering designs, plans, drawings, and specifications needed for any public works or utilities project of the Department.]

[(b) The fee for any service under this section may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies.]

[(c) Sections 305, 3324, and 7204, chapter 51, and subchapters III, IV, and VI of chapter 53 of title 5 do not apply to employment under this section.]

\* \* \* \* \*

## **Subtitle C—Navy and Marine Corps**

\* \* \* \* \*

## PART IV—GENERAL ADMINISTRATION

\* \* \* \* \*

### CHAPTER 631—SECRETARY OF THE NAVY: MISCELLANEOUS POWERS AND DUTIES

Sec.

\* \* \* \* \*

[7212. Employment of outside architects and engineers.]

\* \* \* \* \*

#### **[§ 7212. Employment of outside architects and engineers**

[(a) Whenever the Secretary of the Navy believes that the existing facilities of the Department of the Navy are inadequate and he considers it advantageous to national defense, he may employ, by contract or otherwise, without advertising and without reference to sections 305, 3324, and 7204, chapter 51, and subchapters III, IV, and VI of chapter 53 of title 5, architectural or engineering corporations, or firms, or individual architects or engineers, to produce designs, plans, drawings, and specifications for the accomplishment of any naval public works or utilities project or for the construction of any vessel or aircraft, or part thereof.

[(b) The fee for any service under this section may not exceed 6 percent of the estimated cost, as determined by the Secretary, of the project to which the fee applies.]

\* \* \* \* \*

## Subtitle D—Air Force

\* \* \* \* \*

## PART IV—SERVICE, SUPPLY, AND PROCUREMENT

\* \* \* \* \*

### CHAPTER 933—PROCUREMENT

Sec.

\* \* \* \* \*

[9540. Architectural and engineering services.]

\* \* \* \* \*

#### **[§ 9540. Architectural and engineering services**

[(a) Whenever he considers that it is advantageous to the national defense and that existing facilities of the Department of the Air Force are inadequate, the Secretary of the Air Force may, by contract or otherwise, employ the architectural or engineering services of any person outside that Department for producing and delivering designs, plans, drawings, and specifications needed for any public works or utilities project of the Department.

[(b) The fee for any service under this section may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies.

[(c) Sections 305, 3324, and 7204, chapter 51, and subchapters III, IV, and VI of chapter 53 of title 5 do not apply to employment under this section.]

\* \* \* \* \*

## FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

### SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Federal Property and Administrative Services Act of 1949”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Declaration of policy.

\* \* \* \* \*

### TITLE III—PROCUREMENT PROCEDURE

Sec. 301. Declaration of purpose.

\* \* \* \* \*

[Sec. 303. Competition requirements.]

Sec. 303. *Contracts: competition requirements.*

\* \* \* \* \*

[Sec. 303C. Encouragement of new competition.]

\* \* \* \* \*

Sec. 303M. *Merit-based selection.*

Sec. 304. *Contract types.*

\* \* \* \* \*

Sec. 304D. *Contractor share of gains and losses from cost, schedule, and performance experience.*

\* \* \* \* \*

### TITLE I—ORGANIZATION

\* \* \* \* \*

### SEC. 111. AUTOMATIC DATA PROCESSING EQUIPMENT

(a) \* \* \*

\* \* \* \* \*

[(f)(1) Upon request of an interested party in connection with any procurement that is subject to this section (including any such procurement that is subject to delegation of procurement authority), the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the “board”) shall review, as provided in this subsection, any decision by a contracting officer that is alleged to violate a statute, a regulation, or the conditions of a delegation of procurement authority. Such review shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals. The authority of the board to conduct such review shall include the authority to determine whether any procurement is subject to this section and the authority to review regulations to determine their

consistency with applicable statutes. A proceeding, decision, or order of the board pursuant to this subsection shall not be subject to interlocutory appeal or review. An interested party who has filed a protest under subchapter V of chapter 35 of title 31, United States Code, with respect to a procurement or proposed procurement may not file a protest with respect to that procurement or proposed procurement under this subsection.

[(2)(A) When a protest under this subsection is filed before the award of a contract in a protested procurement, the board, at the request of an interested party and within 10 days of the filing of the protest, shall hold a hearing to determine whether the board should suspend the procurement authority or the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

[(B)(i) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority unless the Federal agency concerned establishes that—

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

[(II) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

[(ii) A suspension under this subparagraph shall not preclude the Federal agency concerned from continuing the procurement process up to but not including award of the contract unless the board determines such action is not in the best interests of the United States.

[(3)(A)(i) If, with respect to an award of a contract, the board receives notice of a protest under this subsection within the period described in clause (ii), the board shall, at the request of an interested party, hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

[(ii) The period referred to in clause (i) is the period beginning on the date on which the contract is awarded and ending at the end of the later of—

[(I) the tenth day after the date of contract award; or

[(II) the fifth day after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

[(iii) The board shall hold the requested hearing within 5 days after the date of the filing of the protest or, in the case of a request for debriefing under the provisions of section 2305(b)(5) of title 10, United States Code, or section 303B(e) of this Act, within 5 days after the later of the date of the filing of the protest or the date of the debriefing.

[(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances

which significantly affect interests of the United States will not permit waiting for the decision of the board.

[(4)(A) The board shall conduct such proceedings and allow such discovery as may be required for the expeditious, fair, and reasonable resolution of the protest.

[(B) Subject to any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)), the board shall give priority to protests filed under this subsection. The board shall issue its final decision within 65 days after the date of the filing of the protest, unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the board shall issue such decision within the longer period determined by the chairman. An amendment which adds a new ground of protest should be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest.

[(C) The board may dismiss a protest that the board determines—

[(i) is frivolous;

[(ii) has been brought or pursued in bad faith; or

[(iii) does not state on its face a valid basis for protest.

[(5)(A) In making a decision on the merits of protests brought under this section, the board shall accord due weight to the policies of this section and the goals of economic and efficient procurement set forth in this section. The board may consider any decision, determination, opinion, or statement made by the Director of the Office of Management and Budget or any officer of any other Federal agency regarding applicability of this section to a particular procurement, and may request the advice of the Director or such officer with regard to such applicability, but shall not be bound by any such decision, determination, opinion, or statement when determining whether a procurement is subject to this section.

[(B) If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

[(C) Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate prevailing party to be entitled to the cost of filing and pursuing the protest (including reasonable attorneys' fees and consultant and expert witness fees), and bid and proposal preparation. However, no party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled to costs for consultants and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government, and no party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled to attorneys' fees that exceed \$150 per hour unless the board, on a case by case basis, determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.



[(D) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be submitted to the board and shall be made a part of the public record (subject to any protective order considered appropriate by the board) before dismissal of the protest. If a Federal agency is a party to a settlement agreement, the submission of the agreement to the board shall include a memorandum, signed by the contracting officer concerned, that describes in detail the procurement, the grounds for protest, the Federal Government's position regarding the grounds for protest, the terms of the settlement, and the agency's position regarding the propriety of the award or proposed award of the contract at issue in the protest.

[(E) Payment of amounts due from an agency under subparagraph (C) or under the terms of a settlement agreement under subparagraph (D) shall be made from the appropriation made by section 1304 of title 31, United States Code, for the payment of judgments. The Federal agency concerned shall reimburse that appropriation account out of funds available for the procurement.

[(6)(A) The final decision of the board may be appealed by the head of the Federal agency concerned and by any interested party, including interested parties who intervene in any protest filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

[(B) If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation.

[(C) Nothing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation. However, the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section. In addition, nothing contained in this subsection shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court.

[(7)(A) The board shall adopt and issue such rules and procedures as may be necessary to the expeditious disposition of protests filed under the authority of this subsection.

[(B) The procedures shall provide that, in the computation of any period described in this subsection—

[(i) the day of the act, event, or default from which the designated period of time begins to run not be included; and

[(ii) the last day after such act, event, or default be included, unless—

[(I) such last day is a Saturday, a Sunday, or a legal holiday; or

[(II) in the case of a filing of a paper at the board, such last day is a day on which weather or other conditions cause the closing of the board in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included.

[(C) The procedures may provide for electronic filing and dissemination of documents and information required under this subsection and in so providing shall consider the ability of all parties to achieve electronic access to such documents and records.

[(D) The procedures shall provide that if the board expressly finds that a protest or a portion of a protest is frivolous or has been brought or pursued in bad faith, or that any person has willfully abused the board's process during the course of a protest, the board may impose appropriate procedural sanctions, including dismissal of the protest.

[(9) For purposes of this subsection:

[(A) The term "protest" means a written objection by an interested party to any of the following:

[(i) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

[(ii) The cancellation of such a solicitation or other request.

[(iii) An award or proposed award of such a contract.

[(iv) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

[(B) The term "interested party" means, with respect to a contract or proposed contract described in subparagraph (A), an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

[(C) The term "prevailing party", with respect to a determination of the board under paragraph (5)(B) that a challenged action of a Federal agency violates a statute or regulation or the conditions of a delegation of procurement authority issued pursuant to this section, means a party that demonstrated such violation.]

\* \* \* \* \*

### TITLE III—PROCUREMENT PROCEDURE

\* \* \* \* \*

#### [SEC. 303. COMPETITION REQUIREMENTS.

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

[(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the Federal Acquisition Regulation; and

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

[(2) In determining the competitive procedures appropriate under the circumstances, an executive agency—

[(A) shall solicit sealed bids if—

[(i) time permits the solicitation, submission, and evaluation of sealed bids;

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

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

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

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

[(b)(1) 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 agency head 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;

[(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;

[(D) would ensure the continuous availability of a reliable source of supply of such property or service;

[(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

[(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies.

[(2) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures, but excluding other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 639; 644).

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

[(4) A determination under paragraph (1) may not be made for a class of purchases or contracts.

[(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 executive agency is

permitted to limit the number of sources from which it solicits bids or proposals;

[(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (B) to 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, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;

[(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) subject to subsection (h), 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 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 the Congress in writing of such determination not less than 30 days before the award of the contract.

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

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

[(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) 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.

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

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

[(B) the justification is approved—

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

[(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate 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)) (without further delegation); and

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

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

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

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

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

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

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

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

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

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

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

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

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

[(4) The justification required by paragraph (1)(A) and any related information 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, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold.

[(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

[(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

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

[(4) In using the simplified procedures, an executive agency shall promote competition to the maximum extent practicable.

[(h)(1) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

[(2) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

[(A) specifically refers to this subsection;

[(B) specifically identifies the particular non-Federal Government entity involved; and

[(C) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in paragraph (1).

[(3) For purposes of this subsection, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

[(4) This subsection shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to the Congress or any agency of the Federal Government.]

**SEC. 303. CONTRACTS: COMPETITION REQUIREMENTS.**

(a) *COMPETITION.*—(1) Except as provided in subsections (b), (c), and (e) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

(A) shall obtain full and open competition—

(i) that provides open access, and

(ii) that is consistent with the need to efficiently fulfill the Government's requirements,

through the use of competitive procedures in accordance with this chapter and the Federal Acquisition Regulation; and

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

(2) In determining the competitive procedure appropriate under the circumstances, an executive agency—

(A) shall solicit sealed bids if—

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

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

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

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

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

(b) *EXCLUSION OF PARTICULAR SOURCE.*—An executive agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service. The Federal Acquisition Regulation shall set forth the circumstances under which a particular source may be excluded pursuant to this subsection.

(c) *EXCLUSION OF CONCERNS OTHER THAN SMALL BUSINESS CONCERNS AND CERTAIN OTHER ENTITIES.*—An executive agency may provide for the procurement of property or services covered by this

*section using competitive procedures, but excluding concerns other than small business concerns in furtherance of sections 9 and 15 of the Small Business Act (15 U.S.C. 638, 644) and concerns other than small business concerns, historically Black colleges and universities, and minority institutions in furtherance of section 7102 of the Federal Acquisition Streamlining Act of 1994 (15 U.S.C. 644 note).*

*(d) PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—(1) Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate. Standards for determining when the use of competitive procedures is not feasible or appropriate shall be set forth in the Federal Acquisition Regulation. Each procurement using procedures other than competitive procedures (other than a procurement for commercial items using simplified procedures or a procurement in an amount not greater than the simplified acquisition threshold) shall be justified in writing and approved in accordance with the Federal Acquisition Regulation.*

*(2) In the case of a procurement using procedures that preclude all but one source from responding (hereinafter in this subsection referred to as a "sole source procurement"), the Federal Acquisition Regulation shall provide for justification and approval under paragraph (1) of such procurement under standards that set forth limited circumstances for such sole source procurements, including circumstances when—*

*(A) 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;*

*(B) the executive 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 executive agency is permitted to award the contract for the property or services to a particular source;*

*(C) it is necessary to award the contract to a particular source in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, (ii) to 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, or (iii) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;*

*(D) 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 award of the contract for the property or services to a particular source;

(E) subject to section 303M, 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;

(F) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to award the contract for the property or services needed by the agency to a particular source; or

(G) the head of the executive agency—

(i) determines that it is necessary in the public interest to award the contract for the property or services needed by the agency to a particular source in the particular procurement concerned, and

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

(3) The authority of the head of an executive agency under paragraph (2)(G) may not be delegated.

(e) *SIMPLIFIED PROCEDURES.*—(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for special simplified procedures for purchases of commercial items and for purchases of property and services for amounts not greater than the simplified acquisition threshold.

(2)(A) The Administrator of General Services shall prescribe regulations that provide special simplified procedures for acquisitions of leasehold interests in real property at rental rates that do not exceed the simplified acquisition threshold.

(B) For purposes of subparagraph (A), the rental rate or rates under a multiyear lease do not exceed the simplified acquisition threshold if the average annual amount of the rent payable for the period of the lease does not exceed the simplified acquisition threshold.

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

(4) In using simplified procedures, an executive agency shall ensure that competition is obtained to the maximum extent practicable consistent with the particular Government requirement.

(5) The Federal Acquisition Regulation shall provide that, in the case of a purchase of commercial items in an amount greater than the simplified acquisition threshold, an executive agency may not conduct the purchase on a sole source basis unless the need to do so is justified in writing and approved in accordance with the Federal Acquisition Regulation.

#### **SEC. 303A. PLANNING AND SOLICITATION REQUIREMENTS.**

(a) [(1) In preparing 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 procurement;

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

[(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.] *(1) In preparing for the procurement of property or services, an executive agency shall use advance procurement planning and market research.*

[(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 executive agency or as authorized by law.]

[(3) For the purposes of paragraphs (1) and (2), the] *(2) Each solicitation under this title shall include specifications that include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law. The type of specification included in a 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

(C) design requirements.

(b) In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for a *procurement for commercial items using simplified procedures* or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—

(1) \* \* \*

\* \* \* \* \*

#### SEC. 303B. EVALUATION AND AWARD.

(a) \* \* \*

\* \* \* \* \*

(d)(1) An executive agency shall evaluate competitive proposals in accordance with subsection (a) and may award a contract—

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

\* \* \* \* \*

(e)(1) \* \* \*

\* \* \* \* \*

[(6) The contracting officer shall include a summary of the debriefing in the contract file.]

*(f)(1) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise ex-*

cludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within 3 days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable and may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.

(2) The contracting officer is required to debrief an excluded offeror in accordance with subsection (e) of this section only if that offeror requested and was refused a preaward debriefing under paragraph (1) of this subsection.

(3) The debriefing conducted under this subsection shall include—

(A) the executive agency's evaluation of the significant elements in the offeror's offer;

(B) a summary of the rationale for the offeror's exclusion; and

(C) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(4) The debriefing conducted pursuant to this subsection may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.

(g) The contracting officer shall include a summary of the any debriefing conducted under subsection (e) or (f) in the contract file.

[(f)] (h) If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action.

[(g)] (i)(1)(A) In preparing a solicitation for the award of a development contract for a major system, the head of an agency shall consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a development contract are the following:

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

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

(2)(A) In preparing a solicitation for the award of a production contract for a major system, the head of an agency shall consider

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

(B) The proposals that the head of an agency is to consider requiring in a solicitation for the award of a production contract are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocurd in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

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

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

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

[(h)] (j) PROTEST FILE.—(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an executive agency, a protest is filed pursuant to the procedures in [subchapter V of chapter 35 of title 31, United States Code] *title II of the Office of Federal Procurement Policy Act*, and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5, United States Code, may be redacted in a file established pursuant to paragraph (1) unless an applicable protective order provides otherwise.

[(3) Regulations implementing this subsection shall be consistent with the regulations regarding the preparation and submission of an agency's protest file (the so-called "rule 4 file") for protests to the General Services Board of Contract Appeals under section 111 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 759).]

[(i)] (k) AGENCY ACTIONS ON PROTESTS.—If, in connection with a protest, the head of an executive agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of such executive agency—

(1) may take any action set out [in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31, United States Code] *section 214(h)(2) of the Office of Federal Procurement Policy Act*; and

(2) may pay costs described in [paragraph (1) of section 3554(c) of such title within the limits referred to in paragraph (2)] *subparagraph (A) of section 214(i)(1) of the Office of Federal Procurement Policy Act within the limits referred to in subparagraph (B) of such section.*

**[SEC. 303C. ENCOURAGEMENT OF NEW COMPETITION.**

[(a) In this section, “qualification requirement” means a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract.

[(b) Except as provided in subsection (c), the head of the agency shall, before enforcing any qualification requirement—

[(1) prepare a written justification stating the necessity for establishing the qualification requirement and specify why the qualification requirement must be demonstrated before contract award;

[(2) specify in writing and make available to a potential offeror upon request all requirements which a prospective offeror, or its product, must satisfy in order to become qualified, such requirements to be limited to those least restrictive to meet the purposes necessitating the establishment of the qualification requirement;

[(3) specify an estimate of the costs of testing and evaluation likely to be incurred by a potential offeror in order to become qualified;

[(4) ensure that a potential offeror is provided, upon request, a prompt opportunity to demonstrate at its own expense (except as provided in subsection (d)) its ability to meet the standards specified for qualification using qualified personnel and facilities of the agency concerned or of another agency obtained through interagency agreement, or under contract, or other methods approved by the agency (including use of approved testing and evaluation services not provided under contract to the agency);

[(5) if testing and evaluation services are provided under contract to the agency for the purposes of clause (4), provide to the extent possible that such services be provided by a contractor who is not expected to benefit from an absence of additional qualified sources and who shall be required in such contract to adhere to any restriction on technical data asserted by the potential offeror seeking qualification; and

[(6) ensure that a potential offeror seeking qualification is promptly informed as to whether qualification is attained and, in the event qualification is not attained, is promptly furnished specific information why qualification was not attained.

[(c)(1) Subsection (b) of this section does not apply with respect to a qualification requirement established by statute prior to the date of enactment of this section.

[(2) Except as provided in paragraph (3), if it is unreasonable to specify the standards for qualification which a prospective offeror or its product must satisfy, a determination to that effect shall be submitted to the advocate for competition of the procuring activity responsible for the purchase of the item subject to the qualification requirement. After considering any comments of the advocate for competition reviewing such determination, the head of the procur-

ing activity may waive the requirements of paragraphs (2) through (5) of subsection (b) for up to two years with respect to the item subject to the qualification requirement.

[(3) The waiver authority contained in paragraph (2) shall not apply with respect to any qualified products list.

[(4) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror has not been identified as meeting a qualification requirement, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

[(5) Nothing contained in this subsection requires the referral of an offer to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act if the basis for the referral is a challenge by the offeror to either the validity of the qualification requirement or the offeror's compliance with such requirement.

[(6) The head of an agency need not delay a proposed procurement in order to comply with subsection (b) or in order to provide a potential offeror with an opportunity to demonstrate its ability to meet the standards specified for qualification.

[(d)(1) If the number of qualified sources or qualified products available to compete actively for an anticipated future requirement is fewer than two actual manufacturers or the products of two actual manufacturers, respectively, the head of the agency concerned shall—

[(A) periodically publish notice in the Commerce Business Daily soliciting additional sources or products to seek qualification, unless the contracting officer determines that such publication would compromise national security; and

[(B) bear the cost of conducting the specified testing and evaluation (excluding the costs associated with producing the item or establishing the production, quality control, or other system to be tested and evaluated) for a small business concern or a product manufactured by a small business concern which has met the standards specified for qualification and which could reasonably be expected to compete for a contract for that requirement, but such costs may be borne only if the head of the agency determines that such additional qualified sources or products are likely to result in cost savings from increased competition for future requirements sufficient to offset (within a reasonable period of time considering the duration and dollar value of anticipated future requirements) the costs incurred by the agency.

[(2) The head of an agency shall require a prospective contractor requesting the United States to bear testing and evaluation costs under paragraph (1)(B) to certify as to its status as a small business concern under section 3 of the Small Business Act.

[(e) Within seven years after the establishment of a qualification requirement, the need for such qualification requirement shall be examined and the standards of such requirement revalidated in accordance with the requirements of subsection (b). The preceding

sentence does not apply in the case of a qualification requirement for which a waiver is in effect under subsection (c)(2).

[(f) Except in an emergency as determined by the head of the agency, whenever the head of the agency determines not to enforce a qualification requirement for a solicitation, the agency may not thereafter enforce that qualification requirement unless the agency complies with the requirements of subsection (b).]

\* \* \* \* \*

**SEC. 303M. MERIT-BASED SELECTION.**

[(h)(1)] (a) It is the policy of Congress that an executive agency should not be required by legislation to award a new contract to a specific non-Federal Government entity. It is further the policy of Congress that any program, project, or technology identified in legislation be procured through merit-based selection procedures.

[(2)] (b) A provision of law may not be construed as requiring a new contract to be awarded to a specified non-Federal Government entity unless that provision of law—

[(A)] (1) specifically refers to this [subsection] *section*;

[(B)] (2) specifically identifies the particular non-Federal Government entity involved; and

[(C)] (3) specifically states that the award to that entity is required by such provision of law in contravention of the policy set forth in [paragraph (1)] *subsection (a)*.

[(3)] (c) For purposes of this [subsection] *section*, a contract is a new contract unless the work provided for in the contract is a continuation of the work performed by the specified entity under a preceding contract.

[(4)] (d) This [subsection] *section* shall not apply with respect to any contract that calls upon the National Academy of Sciences to investigate, examine, or experiment upon any subject of science or art of significance to an executive agency and to report on such matters to the Congress or any agency of the Federal Government.

**[SEC. 304. CONTRACT REQUIREMENTS.]**

**SEC. 304. CONTRACT TYPES.**

(a) Except as provided in subsection (b) of this section, contracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government, *based on market conditions, established commercial practice (if any) for the product or service being acquired, and sound business judgment*. [Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The pre-

ceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.】

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be 【used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 percent of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 percent of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either the simplified acquisition threshold or 5 percent of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.】 *used.*

**SEC. 304A. COST OR PRICING DATA: TRUTH IN NEGOTIATIONS.**

(a) \* \* \*

【(b) EXCEPTIONS.—

【(1) IN GENERAL.—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or a modification of a contract or subcontract—

【(A) for which the price agreed upon is based on—

【(i) adequate price competition;

【(ii) established catalog or market prices of commercial items that are sold in substantial quantities to the general public; or

【(iii) prices set by law or regulation; or

【(B) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

【(2) MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the prohibition on the submission of cost or pricing data in paragraph (1)(A), submission of cost or pricing data shall not be required under subsection (a) if—

【(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A); and

【(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a con-



tract or subcontract for the acquisition of an item other than a commercial item.

[(3) FAR STANDARDS.—The Federal Acquisition Regulation shall provide clear standards for determining whether the exceptions provided in paragraph (1)(A) apply. In the case of the exception provided in paragraph (1)(A)(i), the regulations shall specify the criteria to be used to determine whether adequate price competition exists. In the case of the exception provided in paragraph (1)(A)(ii), the regulations shall provide that the exception applies to items that are sold in substantial quantities to the general public, without regard to the quantity of items that may be sold to the Federal Government.

[(c) RESTRICTIONS ON ADDITIONAL AUTHORITY TO REQUIRE COST OR PRICING DATA OR OTHER INFORMATION.—

[(1) AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.—(A) Subject to subparagraph (B), when cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

[(B) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subsection (b)(1)(A).

[(C) The head of a procuring activity may not delegate the functions under this paragraph.

[(2) AUTHORITY TO REQUIRE INFORMATION OTHER THAN CERTIFIED COST OR PRICING DATA.—When certified cost or pricing data are not required to be submitted under this section for a contract, subcontract, or modification of a contract or subcontract, the head of the procuring activity may require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract.

[(d) ADDITIONAL EXCEPTION PROVISIONS REGARDING COMMERCIAL ITEMS.—

[(1) PROCUREMENTS BASED ON ADEQUATE PRICE COMPETITION.—To the maximum extent practicable, the head of an executive agency shall conduct procurements of commercial items on a competitive basis. In any procurement of a commercial item conducted on a competitive basis and based upon adequate price competition, the head of the executive agency conducting the procurement shall not require cost or pricing data to be submitted under subsection (a) for the contract, subcontract, or modification of the contract or subcontract under the procurement. If additional information is necessary to de-

termine the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract, the head of the executive agency shall, to the maximum extent practicable, obtain the additional information from sources other than the offeror.

[(2) PROCUREMENTS NOT BASED ON ADEQUATE PRICE COMPETITION.—(A)(i) In any case in which it is not practicable to conduct a procurement of a commercial item covered by subsection (a) on a competitive basis, and the procurement is not covered by an exception in subsection (b), the contracting officer shall seek to obtain from the offeror or contractor information described in clause (ii). When such information is not available from that source, the contracting officer shall seek to obtain such information from another source or sources.

[(ii) The information referred in clause (i) is information on prices at which the same item or similar items have been sold in the commercial market that is adequate for evaluating, through price analysis, the reasonableness of the price of the contract, subcontract, or modification of the contract or subcontract under the procurement.

[(B) The contracting officer shall exempt a contract, subcontract, or modification of a contract or subcontract under the procurement from the requirements of subsection (a) if the contracting officer obtains the information described in subparagraph (A)(ii) in accordance with standards and procedures set forth in the Federal Acquisition Regulation.

[(C) A contracting officer may require submission of cost or pricing data under subsection (a) only if the contracting officer makes a written determination that the agency is unable to obtain the information described in subparagraph (A)(ii).

[(3) AUTHORITY TO AUDIT.—(A) In accordance with procedures prescribed in the Federal Acquisition Regulation, the head of an executive agency is authorized to examine all information provided by an offeror, contractor, or subcontractor pursuant to paragraph (2)(A) and all books and records of such offeror, contractor, or subcontractor that directly relate to such information in order to determine whether the agency is receiving accurate information required under this section.

[(B) The right under subparagraph (A) shall expire 2 years after the date of award of the contract, or 2 years after the date of the modification of the contract, with respect to which the information was provided.

[(4) LIMITATIONS ON REQUESTS FOR DATA.—The Federal Acquisition Regulation shall include reasonable limitations on requests under this subsection for sales data relating to commercial items.

[(5) FORM OF INFORMATION.—In requesting information from an offeror under this subsection, a contracting officer shall, to the maximum extent practicable, limit the scope of the request to include only information that is in the form regularly maintained by the offeror in commercial operations.

[(6) CONFIDENTIALITY.—Any information received under this subsection that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.]

(b) *EXCEPTIONS.*—

(1) *IN GENERAL.*—Submission of cost or pricing data shall not be required under subsection (a) in the case of a contract, a subcontract, or a modification of a contract or subcontract—

(A) for which the price agreed upon is based on—

- (i) adequate price competition; or
- (ii) prices set by law or regulation;

(B) for the acquisition of a commercial item; or

(C) in an exceptional case when the head of the procuring activity, without delegation, determines that the requirements of this section may be waived and justifies in writing the reasons for such determination.

(2) *MODIFICATIONS OF CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.*—In the case of a modification of a contract or subcontract for a commercial item that is not covered by the exception on the submission of cost or pricing data in paragraph (1)(A) or (1)(B), submission of cost or pricing data shall not be required under subsection (a) if—

(A) the contract or subcontract being modified is a contract or subcontract for which submission of cost or pricing data may not be required by reason of paragraph (1)(A) or (1)(B); and

(B) the modification would not change the contract or subcontract, as the case may be, from a contract or subcontract for the acquisition of a commercial item to a contract or subcontract for the acquisition of an item other than a commercial item.

(c) *AUTHORITY TO REQUIRE COST OR PRICING DATA ON BELOW-THRESHOLD CONTRACTS.*—(1) Subject to paragraph (2), when certified cost or pricing data are not required to be submitted by subsection (a) for a contract, subcontract, or modification of a contract or subcontract, such data may nevertheless be required to be submitted by the head of the procuring activity, but only if the head of the procuring activity determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract, subcontract, or modification of a contract or subcontract. In any case in which the head of the procuring activity requires such data to be submitted under this subsection, the head of the procuring activity shall justify in writing the reason for such requirement.

(2) The head of the procuring activity may not require certified cost or pricing data to be submitted under this paragraph for any contract or subcontract, or modification of a contract or subcontract, covered by the exceptions in subparagraph (A) or (B) of subsection (b)(1).

(3) The head of a procuring activity may not delegate the functions under this paragraph.

(d) *LIMITATIONS ON OTHER INFORMATION.*—The Federal Acquisition Regulation shall include the following:

(1) Provisions concerning the types of information that contracting officers may consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section, including appropriate information on

*the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the proposed contract or subcontract for the procurement.*

*(2) Reasonable limitations on requests for sales data relating to commercial items.*

*(3) A requirement that a contracting officer shall, to the maximum extent practicable, limit the scope of any request for information relating to commercial items from an offeror to only that information that is in the form regularly maintained by the offeror in commercial operations.*

*(4) A statement that any information received relating to commercial items that is exempt from disclosure under section 552(b) of title 5 shall not be disclosed by the Federal Government.*

\* \* \* \* \*

**[(h) REQUIRED REGULATIONS.—**The Federal Acquisition Regulation shall include regulations concerning the types of information that offerors must submit for a contracting officer to consider in determining whether the price of a procurement to the Government is fair and reasonable when certified cost or pricing data are not required to be submitted under this section because the price of the procurement to the United States is not expected to exceed the applicable threshold amount set forth in subsection (a) (as adjusted pursuant to paragraph (7) of such subsection). Such information, at a minimum, shall include appropriate information on the prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of a proposed contract or subcontract for the procurement.]

**[(i)] (h) DEFINITIONS.—**In this section:

(1) **COST OR PRICING DATA.**—The term “cost or pricing data” means all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification) or, if applicable consistent with subsection (e)(1)(B), another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

(2) **SUBCONTRACT.**—The term “subcontract” includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor.

(3) **COMMERCIAL ITEM.**—The term “commercial item” has the meaning provided such term by section 4(12) of the Office of Federal Procurement Policy Act.

#### **SEC. 304B. MULTIYEAR CONTRACTS.**

(a) **AUTHORITY.**—An executive agency [may] *shall, to the maximum extent possible*, enter into a multiyear contract for the acquisition of property or services if—

(1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and

(2) the executive agency determines that—

(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

(B) a multiyear contract will serve the best interests of the United States by [encouraging full and open competition or] promoting economy in administration, performance, and operation of the agency's programs.

\* \* \* \* \*

**SEC. 304D. CONTRACTOR SHARE OF GAINS AND LOSSES FROM COST, SCHEDULE, AND PERFORMANCE EXPERIENCE.**

*The Federal Acquisition Regulation shall contain provisions to ensure that, for any cost-type contract or incentive-type contract, the contractor may be rewarded for contract performance exceeding the contract cost, schedule, or performance parameters to the benefit of the United States and may be penalized for failing to adhere to cost, schedule, or performance parameters to the detriment of the United States.*

\* \* \* \* \*

**SEC. 309. DEFINITIONS.**

As used in this title—

(a) \* \* \*

(b) [The term “competitive procedures” means procedures under which an executive agency enters into a contract pursuant to full and open competition.] *The term “competitive procedures” means procedures under which an executive agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government's requirements.* Such term also includes—

(1) \* \* \*

\* \* \* \* \*

(c) The following terms have the meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403):

(1) \* \* \*

\* \* \* \* \*

(4) The term “[full and open competition] *open access*”.

\* \* \* \* \*

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**OFFICE OF FEDERAL PROCUREMENT POLICY ACT**

***TITLE I—FEDERAL PROCUREMENT  
POLICY GENERALLY***

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the “Office of Federal Procurement Policy Act”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

*TITLE I—FEDERAL PROCUREMENT POLICY GENERALLY*

Sec. 1. Short title; table of contents.

[Sec. 2. Declaration of policy.

[Sec. 3. Findings and purpose.]

\* \* \* \* \*

[Sec. 8. Responsiveness to Congress.]

Sec. 9. Effect on existing laws.

[Sec. 10. Effect on existing regulations.

[Sec. 11. Authorization of appropriations.]

\* \* \* \* \*

Sec. 17. *Government reliance on the private sector.*

\* \* \* \* \*

Sec. 29. *Contract clauses and certifications.*

\* \* \* \* \*

Sec. 35. *Contractor performance.*

Sec. 36. *Rapid contracting goal.*

Sec. 37. *Value engineering.*

Sec. 38. *Acquisition workforce.*

*TITLE II—DISPUTE RESOLUTION*

*SUBTITLE A—GENERAL PROVISIONS*

Sec. 201. *Definitions.*

Sec. 202. *Membership.*

Sec. 203. *Chairman.*

Sec. 204. *Rulemaking authority.*

Sec. 205. *Authorization of appropriations.*

*SUBTITLE B—FUNCTIONS OF THE DEFENSE AND CIVILIAN BOARDS OF CONTRACT  
APPEALS*

Sec. 211. *Alternative dispute resolution services.*

Sec. 212. *Alternative dispute resolution of disputes and protests submitted to  
Boards.*

Sec. 213. *Contract disputes.*

Sec. 214. *Protests.*

Sec. 215. *Applicability to certain contracts.*

**[SEC. 2. DECLARATION OF POLICY.**

[It is the policy of the United States Government to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by—

[(1) promoting full and open competition;

[(2) establishing policies, procedures, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost;

[(3) promoting the development of simplified uniform procurement processes;

[(4) promoting the participation of small business concerns;

[(5) supporting the continuing development of a competent, professional work force;

[(6) eliminating fraud and waste in the procurement process;

[(7) eliminating redundant administrative requirements placed on contractor and Federal procurement officials;

[(8) promoting fair dealings and equitable relationships with the private sector;

[(9) ensuring that payment is made in a timely manner and only for value received;

[(10) requiring, to the extent practicable, the use of commercial products to meet the Government's needs;

[(11) requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract;

[(12) ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements;

[(13) promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required; and

[(14) establishing policies and procedures that encourage the consideration of the offerors' past performance in the selection of contractors.

### **[SEC. 3. FINDINGS AND PURPOSE.]**

[(a) The Congress finds that economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by establishing an office to exercise responsibility for Government-wide procurement policies, regulations, procedures, and forms.

[(b) The purpose of this Act is to establish an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.]

### **SEC. 4. DEFINITIONS.**

[As used in this Act:] *Except as otherwise specifically provided, as used in this Act:*

(1) \* \* \*

\* \* \* \* \*

[(5) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition.

[(6) The term "full and open competition", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.]

*(5) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government's requirements.*

*(6) The term "open access", when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.*

\* \* \* \* \*

(12) The term "commercial item" means any of the following:  
(A) \* \* \*

\* \* \* \* \*

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on es-

established [catalog] prices for specific tasks performed and under standard commercial terms and conditions.

\* \* \* \* \*

#### SEC. 5. OFFICE OF FEDERAL PROCUREMENT POLICY.

[(a) There is established in the Office of Management and Budget an office to be known as the Office of Federal Procurement Policy (hereinafter referred to as the "Office").]

*(a) To promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government, there shall be an Office of Federal Procurement Policy (hereinafter referred to as the "Office") in the Office of Management and Budget to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies.*

\* \* \* \* \*

#### SEC. 6. AUTHORITY AND FUNCTIONS OF THE ADMINISTRATOR.

(a) \* \* \*

\* \* \* \* \*

(d) The functions of the Administrator shall include—

(1) \* \* \*

\* \* \* \* \*

(5) providing for and directing the activities of the Federal Acquisition Institute (including recommending to the Administrator of General Services a sufficient budget for such activities), which shall be located in the General Services Administration, in order to—

(A) foster and promote [Government-wide career management programs for a professional procurement work force] *the development of a professional acquisition workforce Government-wide;*

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to [procurement by the] *acquisition by the* executive agencies; [and]

[(C) establish policies and procedures for the establishment and implementation of education and training programs authorized by this Act, including the establishment and implementation of training, in conjunction with the General Services Administration, for critical procurement personnel designed to increase the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals, women, and other minorities in procurement activities conducted by an executive agency.]

*(C) administer the provisions of section 38;*

*(D) collect data and analyze acquisition workforce data from the Office of Personnel Management, the heads of executive agencies, and, through periodic surveys, from individual employees;*



*(E) periodically analyze acquisition career fields to identify critical competencies, duties, tasks, and related academic prerequisites, skills, and knowledge;*

*(F) coordinate and assist agencies in identifying and recruiting highly qualified candidates for acquisition fields;*

*(G) develop instructional materials for acquisition personnel in coordination with private and public acquisition colleges and training facilities;*

*(H) evaluate the effectiveness of training and career development programs for acquisition personnel;*

*(I) promote the establishment and utilization of academic programs by colleges and universities in acquisition fields;*

*(J) facilitate, to the extent requested by agencies, inter-agency intern and training programs; and*

*(K) perform other career management or research functions as directed by the Administrator.*

\* \* \* \* \*

#### **[SEC. 8. RESPONSIVENESS TO CONGRESS.**

[(a) The Administrator shall keep the Congress and its duly authorized committees fully and currently informed of the major activities of the Office of Federal Procurement Policy, and shall submit a report thereon to the House of Representatives and the Senate annually and at such other times as may be necessary for this purpose.

[(b) At least 30 days prior to the effective date of any policy or regulation prescribed under section 6(a), the Administrator shall transmit to the Congress a report on the proposed policy or regulation. Such report shall include—

[(1) a full description of the policy or regulation;

[(2) a summary of the reasons for the issuance of such policy or regulation; and

[(3) the names and positions of employees of the Office who will be made available, prior to such effective date, for full consultation with such Committees regarding such policy or regulation.

[(c) In the case of an emergency, the President may waive the notice requirement of subsection (b) by submitting in writing to the Congress his reasons therefor at the earliest practicable date on or before the effective date of any policy or regulation.]

\* \* \* \* \*

#### **[SEC. 10. EFFECT ON EXISTING REGULATIONS.**

[Procurement policies, regulations, procedures, or forms in effect on the date of enactment of the Office of Federal Procurement Policy Act Amendments of 1983 shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator.

#### **[SEC. 11. AUTHORIZATION OF APPROPRIATIONS.**

[There are authorized to be appropriated to carry out the provisions of this Act, and for no other purpose, \$4,500,000 for the fiscal

year ending September 30, 1984, and such sums as may be necessary for each succeeding fiscal year.】

\* \* \* \* \*

**SEC. 16. EXECUTIVE AGENCY RESPONSIBILITIES.**

To further 【achieve】 *promote* effective, efficient, and economic administration of the Federal procurement system, the head of each executive agency shall, in accordance with applicable laws, Government-wide policies and regulations, and good business practices—

【(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 service procured;】

*(1) to implement competition that provides open access for responsible sources in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that are consistent with the need to efficiently fulfill the Government's requirements;*

\* \* \* \* \*

**SEC. 17. GOVERNMENT RELIANCE ON THE PRIVATE SECTOR.**

*It is the policy of the Federal Government to rely on the private sector to supply the products and services the Federal Government needs.*

**SEC. 18. PROCUREMENT NOTICE.**

(a)(1) Except as provided in subsection (c)—

(A) an executive agency intending to—

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed \$25,000; or

(ii) place an order, expected to exceed \$25,000, under a basic agreement, basic ordering agreement, or similar arrangement,

shall furnish for publication by the Secretary of Commerce a notice of solicitation described in subsection (b);

(B) an executive agency intending to solicit bids or proposals for a contract for property or services *for a price expected to exceed \$10,000 but not to exceed \$25,000* shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in 【subsection (f)—

【(i) in the case of an executive agency other than the Department of Defense, if a contract is for a price expected to exceed \$10,000, but not to exceed \$25,000; and

【(ii) in the case of the Department of Defense, if the contract is for a price expected to exceed \$5,000, but not to exceed \$25,000; and】 *subsection (b); and*

\* \* \* \* \*

[(4) An executive agency intending to solicit offers for a contract for which a notice of solicitation is required to be posted under paragraph (1)(B) shall ensure that contracting officers consider each responsive offer timely received from an offeror.]

[(5)] (4) An executive agency shall establish a deadline for the submission of all bids or proposals in response to a solicitation with respect to which no such deadline is provided by statute. Each deadline for the submission of offers shall afford potential offerors a reasonable opportunity to respond.

[(6)] (5) The Administrator shall prescribe regulations defining [limited] circumstances in which flexible deadlines can be used under paragraph (3) for the *issuance of solicitations and the submission of bids or proposals for the procurement of commercial items.*

(b) Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include—

(1) \* \* \*

(2) provisions that—

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

[(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and if so, identify the office from which the qualification requirement may be obtained;]

*(B) state whether the acquisition is to be conducted pursuant to a contractor verification system (as provided pursuant to section 35) or whether the offeror, its product, or its service otherwise must meet a qualification requirement in order to be eligible for award and, if so, identify the criteria to be used in determining such eligibility;*

\* \* \* \* \*

[(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency;]

*(4) a statement that all responsible sources may submit for consideration a bid, proposal, or quotation;*

\* \* \* \* \*

(6) in the case of a contract in an amount estimated to be greater than \$25,000 but not greater than the simplified acquisition [threshold—] *threshold, or a contract for the procurement of commercial items using simplified procedures—*

(A) a description of the procedures to be used in awarding the contract; and

(B) a statement specifying the periods for prospective offerors and the contracting officer to take the necessary preaward and award actions.

\* \* \* \* \*

## SEC. 20. ADVOCATES FOR COMPETITION.

(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) The advocate for competition of an executive agency shall—

(1) be responsible for challenging barriers to and promoting full and open competition *that provides open access and is consistent with the need to efficiently fulfill the Government's requirements* 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 *that provides open access and is consistent with the need to efficiently fulfill the Government's requirements* 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—

(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] *that remain to achieving full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government's requirements*;

(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 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; 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 promoting full and open competition *that provides open access and is consistent with the need to efficiently fulfill the Government's requirements*, promoting the acquisition of commercial items, and challenging barriers to such acquisition, including such barriers as unnecessarily restrictive statements of need,

unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.

\* \* \* \* \*

#### **SEC. 26. COST ACCOUNTING STANDARDS BOARD.**

(a) \* \* \*

\* \* \* \* \*

(f) COST ACCOUNTING STANDARDS AUTHORITY.—(1) \* \* \*

(2)(A) Cost accounting standards promulgated under this section shall be mandatory for use by all executive agencies and by contractors and subcontractors in estimating, accumulating, and reporting costs in connection with pricing and administration of, and settlement of disputes concerning, all negotiated prime contract and subcontract procurements with the United States in excess of \$500,000.

(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

[(i) Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.]

*(i) Contracts or subcontracts for the acquisition of commercial items.*

(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

[(iii) Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.]

\* \* \* \* \*

#### **[SEC. 27. PROCUREMENT INTEGRITY.**

[(a) PROHIBITED CONDUCT BY COMPETING CONTRACTORS.—During the conduct of any Federal agency procurement of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly—

[(1) make, directly or indirectly, any offer or promise of future employment or business opportunity to, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any procurement official of such agency, except as provided in subsection (c);

[(2) offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or other thing of value to any procurement official of such agency; or

[(3) solicit or obtain, directly or indirectly, from any officer or employee of such agency, prior to the award of a contract any proprietary or source selection information regarding such procurement.

[(b) PROHIBITED CONDUCT BY PROCUREMENT OFFICIALS.—During the conduct of any Federal agency procurement of property or services, no procurement official of such agency shall knowingly—

[(1) solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representa-

tive, agent, or consultant of a competing contractor, except as provided in subsection (c);

[(2) ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any money, gratuity, or other thing of value from any officer, employee, representative, agent, or consultant of any competing contractor for such procurement; or

[(3) disclose any proprietary or source selection information regarding such procurement directly or indirectly to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

[(c) RECUSAL.—(1) A procurement official may engage in a discussion with a competing contractor that is otherwise prohibited by subsection (b)(1) if, before engaging in such discussion—

[(A) the procurement official proposes in writing to disqualify himself from the conduct of any procurement relating to the competing contractor (i) for any period during which future employment or business opportunities for such procurement official with such competing contractor have not been rejected by either the procurement official or the competing contractor, and (ii) if determined to be necessary by the head of such procuring official's procuring activity (or his designee) in accordance with criteria prescribed in implementing regulations, for a reasonable period thereafter; and

[(B) the head of that procuring activity of such procurement official (or his designee), after consultation with the appropriate designated agency ethics official, approves in writing the recusal of the procurement official.

[(2) A procurement official who, during the period beginning with the issuance of a procurement solicitation and ending with the award of a contract, has participated personally and substantially in the evaluation of bids or proposals, selection of sources, or conduct of negotiations in connection with such solicitation and contract may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

[(3) A procurement official who, during the period beginning with the negotiation of a modification or extension of a contract and ending with—

[(A) an agreement to modify or extend the contract, or

[(B) a decision not to modify or extend the contract,

has participated personally and substantially in the evaluation of a proposed modification or extension or the conduct of negotiations may not be approved for a recusal under paragraph (1) during such period with respect to such procurement.

[(4) A competing contractor may engage in a discussion with a procurement official that is otherwise prohibited by subsection (a)(1) if, before engaging in such discussion, the procurement official has been recused in accordance with this subsection.

[(5) Regulations implementing this subsection shall include specific criteria to be used in making determinations and approving recusals under paragraph (1).

[(d) DISCLOSURE TO UNAUTHORIZED PERSONS.—During the conduct of any Federal agency procurement of property or services, no person who is given authorized or unauthorized access to propri-

etary or source selection information regarding such procurement, shall knowingly disclose such information, directly or indirectly, to any person other than a person authorized by the head of such agency or the contracting officer to receive such information.

[(e) CERTIFICATION AND ENFORCEMENT MATTERS.—(1) A Federal agency may not award a contract for the procurement of property or services to any competing contractor, or agree to any modification or extension of a contract, unless the officer or employee of such contractor responsible for the offer or bid for such contract, or the modification or extension of such contract, as the case may be—

[(A)(i) certifies in writing to the contracting officer responsible for such contract that such officer or employee of the competing contractor has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f), or applicable implementing regulations, pertaining to such procurement; or

[(ii) discloses to such contracting officer any and all such information and certifies in writing to such contracting officer that any and all such information has been disclosed; and

[(B) certifies in writing to such contracting officer, except in the case of a contract for the procurement of commercial items, that each officer, employee, agent, representative, and consultant of such competing contractor who has participated personally and substantially in the preparation or submission of such bid or offer, or in such modification or extension of such contract, as the case may be, has certified to such competing contractor that he or she—

[(i) is familiar with, and will comply with, the requirements of subsection (a) and applicable implementing regulations; and

[(ii) will report immediately to the officer or employee of the competing contractor responsible for the offer or bid for any contract or the modification or extension of such contract, as the case may be, any information concerning a violation or possible violation of subsection (a), (b), (d), or (f), or such applicable implementing regulations, pertaining to such procurement.

[(2) A Federal agency may not award a contract for the procurement of property or services, or agree to any modification or extension of any such contract, unless the contracting officer responsible for such procurement—

[(A) certifies in writing to the head of such agency that the contracting officer has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f), or applicable implementing regulations, pertaining to such procurement; or

[(B) discloses to the head of such agency any and all such information and certifies in writing that any and all such information has been disclosed.

[(3) The head of a Federal agency may require any procurement official or any competing contractor, at any time during the conduct of any Federal agency procurement of property or services—

[(A) to certify in writing to the head of such agency that such procurement official or the officer or employee of the competing contractor responsible for the offer or bid for such contract or the modification or extension of such contract, as the

case may be, has no information concerning a violation or possible violation of subsection (a), (b), (d), or (f), or applicable implementing regulations, pertaining to such procurement; or

[(B) to disclose to the head of such agency any and all such information and to certify in writing that any and all such information has been disclosed.

[(4) If a procurement official leaves the Government during the conduct of such a procurement, such official shall certify that he or she understands the continuing obligation not to disclose proprietary or source selection information.

[(5) For the purposes of enforcing the requirements of this section, the contracting officer responsible for the conduct of a procurement shall maintain, as part of the procurement file—

[(A) all certifications made by procurement officials and competing contractors with regard to such procurement, as required by this subsection; and

[(B) a record of all persons who have been authorized by the head of the agency or the contracting officer to have access to proprietary or source selection information regarding such procurement.

[(6) Any person making a certification required by this subsection shall be notified of the applicability of section 1001 of title 18, United States Code, to false, fictitious, or fraudulent statements in such certification.

[(7)(A) This subsection applies only to contracts, extensions, and modifications in excess of \$100,000.

[(B) This subsection need not be applied to a contract—

[(i) with a foreign government or an international organization that is not required to be awarded using competitive procedures pursuant to section 303(c)(4) of the Federal Property and Administrative Services Act of 1949 or section 2304(c)(4) of title 10, United States Code; or

[(ii) in an exceptional case, when the head of the Federal agency concerned determines in writing that this subsection should be waived pursuant to procedures and criteria established in implementing regulations issued pursuant to subsection (o) and notifies the Congress in writing of such determination.

The authority to make determinations under clause (ii) of this subparagraph may not be delegated.

[(f) RESTRICTIONS RESULTING FROM PROCUREMENT ACTIVITIES OF PROCUREMENT OFFICIALS.—(1) No individual who, while serving as an officer or employee of the Government or member of the Armed Forces, was a procurement official with respect to a particular procurement may knowingly—

[(A) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification, or extension of a contract for such procurement, or

[(B) participate personally and substantially on behalf of the competing contractor in the performance of such contract, during the period ending 2 years after the last date such individual participated personally and substantially in the conduct of such



procurement or personally reviewed and approved the award, modification, or extension of any contract for such procurement.

[(2) This subsection does not apply to any participation referred to in paragraph (1)(A) or (1)(B) with respect to a subcontractor who is a competing contractor unless—

[(A) the subcontractor is a first or second tier subcontractor and the subcontract is for an amount that is in excess of \$100,000;

[(B) the subcontractor significantly assisted the prime contractor with respect to negotiation of the prime contract;

[(C) the procurement official involved in the award, modification, or extension of the prime contract personally directed or recommended the particular subcontractor to the prime contractor as a source for the subcontract; or

[(D) the procurement official personally reviewed and approved the award, modification, or extension of the subcontract.

[(3)(A)(i) The President may grant a waiver of a restriction imposed by paragraph (1) (relating to post-Government service employment) to an officer or employee described in subparagraph (B) if the President determines and certifies in writing that it is in the public interest to grant the waiver and that the services of the officer or employee are critically needed for the benefit of the Federal Government. Not more than 25 officers and employees currently employed by the Government at any one time may hold waivers under this subparagraph.

[(ii) A waiver granted under this subparagraph to any person shall apply only with respect to activities engaged in by that person after that person's Government employment is terminated and only to that person's employment at a Government-owned, contractor operated entity with which the person served as an officer or employee immediately before the person's Government employment began.

[(B) Waivers under subparagraph (A) may be granted only to civilian officers and employees of the executive branch, other than officers and employees in the Executive Office of the President.

[(C) A certification under subparagraph (A) shall take effect upon its publication in the Federal Register and shall identify—

[(i) the officer or employee covered by the waiver by name and by position, and

[(ii) the reasons for granting the waiver.

A copy of the certification shall also be provided to the Director of the Office of Government Ethics.

[(D) The President may not delegate the authority provided by this paragraph.

[(E)(i) Each person granted a waiver under this paragraph shall prepare reports, in accordance with clause (ii), stating whether the person has engaged in activities otherwise prohibited by this section for each six-month period described in clause (ii), and if so, what those activities were.

[(ii) A report under clause (i) shall cover each six-month period beginning on the date of the termination of the person's Government employment (with respect to which the waiver under this paragraph was granted) and ending two years after that date. Such

report shall be filed with the President and the Director of the Office of Government Ethics not later than 60 days after the end of the six-month period covered by the report. All reports filed with the Director under this subparagraph shall be made available for public inspection and copying.

[(iii) If a person fails to file any report in accordance with clauses (i) and (ii), the President shall revoke the waiver and notify the person of the revocation. The revocation shall take effect upon the person's receipt of the notification and shall remain in effect until the report is filed.

[(iv) Any person who is granted a waiver under this paragraph shall be ineligible for appointment in the civil service unless all reports required of such person by clauses (i) and (ii) have been filed.

[(F) As used in this paragraph, the term "civil service" has the meaning given that term in section 2101 of title 5, United States Code.

[(g) CONTRACTUAL PENALTIES.—(1) Regulations issued pursuant to subsection (o) shall require that each contract awarded by a Federal agency contain a clause specified in such regulation that provides appropriate contractual penalties for conduct of any competing contractor prohibited by subsection (a) and for any such conduct of any officer, employee, agent, representative, or consultant of such contractor.

[(2) The following remedies are authorized to be included in, and shall be considered in the development of, such regulations:

[(A) Denial of payment of all or any portion of the profit component of amounts otherwise payable to the contractor by the Federal agency under the contract and recovery of all or any portion of the profit component of amounts paid to the contractor by the Federal agency under the contract.

[(B) Termination of the contract for default.

[(C) Any other appropriate penalty.

[(h) ADMINISTRATIVE ACTIONS.—(1) If an agency receives a disclosure of information pursuant to subsection (e) or otherwise receives or obtains information providing a reasonable basis to believe that an officer, employee, agent, representative, or consultant of a competing contractor has knowingly violated the requirements of this section—

[(A) in the case of a procurement in which a contract has not been awarded, the agency shall determine whether to terminate the procurement or take other appropriate actions;

[(B) in the case of a procurement with respect to which a contract has been awarded, the agency shall determine whether to void or rescind the contract, to terminate the contract for default, to impose sanctions upon the contractor, or to permit the contractor to continue to perform the contract, subject to review in accordance with, and to the extent provided in, the Contract Disputes Act of 1978, or to take other appropriate actions; and

[(C) if the agency determines that such a knowing violation has occurred, the agency, pursuant to procedures specified in the Federal Acquisition Regulation—

[(i) may impose an immediate suspension, and

[(ii) shall determine whether to initiate a debarment proceeding,  
against the competing contractor or other person who committed such violation.

[(2) Any procurement official of a Federal agency who engages in conduct prohibited by subsection (b) or (d) shall be subject to removal or other appropriate adverse personnel action pursuant to the procedures specified in chapter 75 of title 5, United States Code, or other applicable law or regulation.

[(3) The actions taken under paragraph (1) or (2) may be suspended by the agency head upon the request of the Attorney General pending the disposition of any civil or criminal actions pursuant to subsections (i) and (j).

[(i) CIVIL PENALTIES.—Any person who engages in conduct prohibited by subsection (a), (b), (d), or (f) shall be subject to the imposition of a civil fine in a civil action brought by the United States in an appropriate district court of the United States. The amount of any such civil fine for such violation may not exceed—

[(1) \$100,000 in the case of an individual; or

[(2) \$1,000,000 in the case of a competing contractor (other than an individual).

[(j) CRIMINAL PENALTIES.—Whoever, during the conduct of a Federal agency procurement of property or services—

[(1) being a competing contractor or an officer, employee, representative, agent, or consultant of a competing contractor, knowingly and willfully solicits or obtains, directly or indirectly, from any officer or employee of such agency any proprietary or source selection information (as such terms as defined in subsection (p) and in regulations prescribed pursuant to subsection (o)), or

[(2) being an officer or employee of such agency, knowingly and willfully discloses or promises to disclose, directly or indirectly, to any competing contractor or any officer, employee, representative, agent, or consultant of a competing contractor any proprietary or source selection information,

shall be imprisoned for not more than 5 years, or fined in accordance with title 18, United States Code, or both.

[(k) ETHICS ADVICE.—(1) Regulations implementing this section shall include procedures for a procurement official or former procurement official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether such procurement official or former procurement official is or would be precluded by this section from engaging in a specified activity.

[(2) A procurement official or former procurement official of an agency who requests advice from a designated agency ethics official pursuant to paragraph (1) shall provide the agency ethics official with all information reasonably available to the procurement official or former procurement official that is relevant to a determination regarding such request.

[(3) Not later than 30 days after the date on which the appropriate designated agency ethics official receives a request for advice pursuant to paragraph (1) accompanied by the information required by paragraph (2), or as soon thereafter as practicable, the official shall issue a written opinion regarding whether the request-

ing procurement official or former procurement official is precluded by this section from engaging in the specified activity.

[(l) TRAINING.—The head of each Federal agency shall establish a procurement ethics program for its procurement officials. The program shall, at a minimum—

[(1) provide for the distribution of written explanations of the provisions of subsections (b), (c), and (e) to such procurement officials; and

[(2) require each such procurement official, as a condition of serving as a procurement official, to certify that he or she is familiar with the provisions of subsections (b), (c), and (e), and will not engage in any conduct prohibited by such subsection, and will report immediately to the contracting officer any information concerning a violation or possible violation of subsection (a), (b), (d), or (f), or applicable implementing regulations.

[(m) REMEDIES NOT EXCLUSIVE.—Nothing in this subsection shall be construed to limit the applicability of the requirements, sanctions, contract penalties, and remedies established under any other law, but no agency shall be relieved of the obligation to carry out the requirements of this section because such agency has also applied such other requirements, sanctions, contract penalties, or remedies.

[(n) NO AUTHORITY TO WITHHOLD INFORMATION.—Nothing in this section shall be construed to authorize the withholding of any information from the Congress, any committee or subcommittee thereof, a Federal agency, any board of contract appeals of a Federal agency, the Comptroller General, or an Inspector General of a Federal agency.

[(o) IMPLEMENTING REGULATIONS AND GUIDELINES.—(1) Government-wide regulations and guidelines appropriate to carry out this section shall be included in the Federal Acquisition Regulation.

[(2) Regulations implementing this section shall—

[(A) define the term “thing of value” for the purposes of this section and shall include a single uniform Government-wide exclusion at a specific minimal dollar amount; and

[(B) authorize the delegation of the functions assigned to designated agency ethics officials under this section.

[(3) Notwithstanding sections 6 and 25 of this Act, on and after June 1, 1990, the Director of the Office of Government Ethics shall have the responsibility for issuance, modification, or termination of Government-wide regulations implementing paragraphs (1) and (2) of subsection (a), paragraphs (1) and (2) of subsection (b), subsections (c), (f), and (k), and paragraph (2) of this subsection. The Director shall exercise such responsibility in coordination with the Federal Acquisition Regulatory Council.

[(p) DEFINITIONS.—As used in this section:

[(1) The term “during the conduct of any Federal agency procurement of property or services” means the period beginning on the earliest specific date, as determined under implementing regulations, on which an authorized official orders or requests an action described in clauses (i)–(viii) of paragraph (3)(A), and concluding with the award, modification, or exten-

sion of a contract, and includes the evaluation of bids or proposals, selection of sources, and conduct of negotiations.

[(2) The term “competing contractor”, with respect to any procurement (including any procurement using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

[(3)(A) The term “procurement official” means, with respect to any procurement (including the modification or extension of a contract), any civilian or military official or employee of an agency who has participated personally and substantially in any of the following, as defined in implementing regulations:

[(i) The drafting of a specification developed for that procurement.

[(ii) The review and approval of a specification developed for that procurement.

[(iii) The preparation or issuance of a procurement solicitation in that procurement.

[(iv) The evaluation of bids or proposals for that procurement.

[(v) The selection of sources for that procurement.

[(vi) The conduct of negotiations in the procurement.

[(vii) The review and approval of the award, modification, or extension of a contract in that procurement.

[(viii) Such other specific procurement actions as may be specified in implementing regulations.

[(B) For purposes of subparagraph (A), the term “employee of an agency” includes a contractor, subcontractor, consultant, expert, or adviser (other than a competing contractor) acting on behalf of, or providing advice to, the agency with respect to any phase of the agency procurement concerned.

[(4) The term “contracting officer” means any official or employee of a Federal agency who has been authorized by the agency head or his or her designee to enter into, administer, or terminate contracts and make related determinations and findings.

[(5) The term “Federal agency” has the meaning provided by section 3(b) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472(b)).

[(6) The term “proprietary information” means—

[(A) information contained in a bid or proposal;

[(B) cost or pricing data; or

[(C) any other information submitted to the Government by a contractor and designated as proprietary, in accordance with law or regulation, by the contractor, the head of the agency, or the contracting officer.

[(7) The term “source selection information” means information determined by the head of the agency or the contracting officer to be information—

[(A) the disclosure of which to a competing contractor would jeopardize the integrity or successful completion of the procurement concerned; and

[(B) which is required by statute, regulation, or order to be secured in a source selection file or other restricted facility to prevent such disclosure;  
as further defined by regulations issued pursuant to subsection (m) of this section.

[(8) The term “designated agency ethics official” has the meaning given such term by section 109(3) of the Ethics in Government Act of 1978 (5 U.S.C. App.).]

**SEC. 27. RESTRICTIONS ON DISCLOSING AND OBTAINING CONTRACTOR BID OR PROPOSAL INFORMATION OR SOURCE SELECTION INFORMATION.**

(a) *PROHIBITION ON DISCLOSING PROCUREMENT INFORMATION.—*  
(1) *A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.*

(2) *Paragraph (1) applies to any person who—*

(A) *is a present or former officer or employee of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and*

(B) *by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.*

(b) *PROHIBITION ON OBTAINING PROCUREMENT INFORMATION.—*A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.

(c) *PROHIBITION ON DISCLOSING OR OBTAINING PROCUREMENT INFORMATION IN CONNECTION WITH A PROTEST.—*(1) *A person shall not, other than as provided by law, knowingly violate the terms of a protective order described in paragraph (2) by disclosing or obtaining contractor bid or proposal information or source selection information related to the procurement contract concerned.*

(2) *Paragraph (1) applies to any protective order issued by the United States Board of Contract Appeals in connection with a protest against the award or proposed award of a Federal agency procurement contract.*

(d) *PENALTIES AND ADMINISTRATIVE ACTIONS.—*

(1) *CRIMINAL PENALTIES.—*

(A) *Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) shall be imprisoned for not more than one year or fined as provided under title 18, United States Code, or both.*

(B) *Whoever engages in conduct constituting an offense under subsection (a), (b), or (c) for the purpose of either—*

(i) *exchanging the information covered by such subsection for anything of value, or*

(ii) *obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract,*

*shall be imprisoned for not more than 15 years or fined as provided under title 18, United States Code, or both.*

(2) *CIVIL PENALTIES.*—The Attorney General may bring a civil action in the appropriate United States district court against any person who engages in conduct constituting an offense under subsection (a), (b), or (c). Upon proof of such conduct by a preponderance of the evidence, the person is subject to a civil penalty. An individual who engages in such conduct is subject to a civil penalty of not more than \$50,000 for each violation plus twice the amount of compensation which the individual received or offered for the prohibited conduct. An organization that engages in such conduct is subject to a civil penalty of not more than \$500,000 for each violation plus twice the amount of compensation which the organization received or offered for the prohibited conduct.

(3) *ADMINISTRATIVE ACTIONS.*—(A) If a Federal agency receives information that a contractor or a person has engaged in conduct constituting an offense under subsection (a), (b), or (c), the Federal agency shall consider taking one or more of the following actions, as appropriate:

(i) Cancellation of the Federal agency procurement, if a contract has not yet been awarded.

(ii) Rescission of a contract with respect to which—

(I) the contractor or someone acting for the contractor has been convicted for an offense under subsection (a), (b), or (c), or

(II) the head of the agency that awarded the contract has determined, based upon a preponderance of the evidence, that the contractor or someone acting for the contractor has engaged in conduct constituting such an offense.

(iii) Initiation of suspension or debarment proceedings for the protection of the Government in accordance with procedures in the Federal Acquisition Regulation.

(iv) Initiation of adverse personnel action, pursuant to the procedures in chapter 75 of title 5, United States Code, or other applicable law or regulation.

(B) If a Federal agency rescinds a contract pursuant to subparagraph (A)(ii), the United States is entitled to recover, in addition to any penalty prescribed by law, the amount expended under the contract.

(C) For purposes of any suspension or debarment proceedings initiated pursuant to subparagraph (A)(iii), engaging in conduct constituting an offense under subsection (a), (b), or (c) affects the present responsibility of a Government contractor or subcontractor.

(e) *DEFINITIONS.*—As used in this section:

(1) The term “contractor bid or proposal information” means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(A) Cost or pricing data (as defined by section 2306a(h) of title 10, United States Code, with respect to procurements subject to that section, and section 304A(h) of Fed-

*eral Property and Administrative Services Act of 1949 (41 U.S.C. 254b(h), with respect to procurements subject to that section).*

*(B) Indirect costs and direct labor rates.*

*(C) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.*

*(D) Information marked by the contractor as "contractor bid or proposal information", in accordance with applicable law or regulation.*

*(2) The term "source selection information" means any of the following information prepared for use by a Federal agency for the purpose of evaluating a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:*

*(A) Bid prices submitted in response to a Federal agency solicitation for sealed bids, or lists of those bid prices before public bid opening.*

*(B) Proposed costs or prices submitted in response to a Federal agency solicitation, or lists of those proposed costs or prices.*

*(C) Source selection plans.*

*(D) Technical evaluation plans.*

*(E) Technical evaluations of proposals.*

*(F) Cost or price evaluations of proposals.*

*(G) Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.*

*(H) Rankings of bids, proposals, or competitors.*

*(I) The reports and evaluations of source selection panels, boards, or advisory councils.*

*(J) Other information marked as "source selection information" based on a case-by-case determination by the head of the agency, his designee, or the contracting officer that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates.*

*(3) The term "Federal agency" has the meaning provided such term in section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).*

*(4) The term "Federal agency procurement" means the acquisition (by using competitive procedures and awarding a contract) of goods or services (including construction) from non-Federal sources by a Federal agency using appropriated funds.*

*(5) The term "contracting officer" means a person who, by appointment in accordance with applicable regulations, has the authority to enter into a Federal agency procurement contract on behalf of the Government and to make determinations and findings with respect to such a contract.*

*(6) The term "protest" means a written objection by an interested party to the award or proposed award of a Federal agency procurement contract, pursuant to title IV of the Federal Acquisition Reform Act of 1995.*



(f) *LIMITATION ON PROTESTS.*—No person may file a protest against the award or proposed award of a Federal agency procurement contract alleging an offense under subsection (a), (b), or (c), of this section, nor may the United States Board of Contract Appeals consider such an allegation in deciding a protest, unless that person reported to the Federal agency responsible for the procurement information that the person believed constituted evidence of the offense no later than 14 days after the person first discovered the possible offense.

(g) *SAVINGS PROVISIONS.*—This section does not—

(1) restrict the disclosure of information to, or its receipt by, any person or class of persons authorized, in accordance with applicable agency regulations or procedures, to receive that information;

(2) restrict a contractor from disclosing its own bid or proposal information or the recipient from receiving that information;

(3) restrict the disclosure or receipt of information relating to a Federal agency procurement after it has been canceled by the Federal agency before contract award unless the Federal agency plans to resume the procurement;

(4) prohibit individual meetings between a Federal agency employee and an offeror or potential offeror for, or a recipient of, a contract or subcontract under a Federal agency procurement, provided that unauthorized disclosure or receipt of contractor bid or proposal information or source selection information does not occur;

(5) authorize the withholding of information from, nor restrict its receipt by, Congress, a committee or subcommittee of Congress, the Comptroller General, a Federal agency, or an inspector general of a Federal agency;

(6) authorize the withholding of information from, nor restrict its receipt by, the United States Board of Contract Appeals in the course of a protest against the award or proposed award of a Federal agency procurement contract; or

(7) limit the applicability of any requirements, sanctions, contract penalties, and remedies established under any other law or regulation.

#### **[SEC. 29. NONSTANDARD CONTRACT CLAUSES.]**

##### **SEC. 29. CONTRACT CLAUSES AND CERTIFICATIONS.**

(a) *NONSTANDARD CONTRACT CLAUSES.*—The Federal Acquisition Regulatory Council shall promulgate regulations to discourage the use of a nonstandard contract clause on a repetitive basis. The regulations shall include provisions that—

(1) clearly define what types of contract clauses are to be treated as nonstandard clauses; and

(2) require prior approval for the use of a nonstandard clause on a repetitive basis by an official at a level of responsibility above the contracting officer.

(b) *PROHIBITION ON CERTIFICATION REQUIREMENTS.*—(1) A requirement for a certification by a contractor or offeror may not be included in the Federal Acquisition Regulation unless—

(A) the certification is specifically imposed by statute; or

(B) written justification for such certification is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification.

(2)(A) A requirement for a certification by a contractor or offeror may not be included in a procurement regulation of an executive agency unless—

(i) the certification is specifically imposed by statute; or

(ii) written justification for such certification is provided to the head of the executive agency by the senior procurement executive of the agency, and the head of the executive agency approves in writing the inclusion of such certification.

(B) For purposes of subparagraph (A), the term “head of the executive agency” with respect to a military department means the Secretary of Defense.

(C) The Secretary of Defense may delegate his duties under this paragraph only to the Under Secretary of Defense for Acquisition and Technology.

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#### **SEC. 32. PROCEDURES APPLICABLE TO PURCHASES BELOW MICRO-PURCHASE THRESHOLD.**

(a) \* \* \*

\* \* \* \* \*

[(c) **APPLICABILITY OF CERTAIN PROVISIONS.**—For purposes of section 27, an officer or employee of an executive agency, or a member of the Armed Forces of the United States, shall not be considered a procurement official if—

[(1) the contracting authority of the officer, employee, or member does not exceed \$2,500; and

[(2) the head of the contracting activity concerned (or a designee of the head of the contracting activity concerned) determines that the duties of the position of that officer, employee, or member are such that it is unlikely that the officer, employee, or member will be required to conduct procurements in a total amount greater than \$20,000 in any 12-month period.]

[(d)] (c) **PURCHASES WITHOUT COMPETITIVE QUOTATIONS.**—A purchase not greater than \$2,500 may be made without obtaining competitive quotations if the contracting officer determines that the price for the purchase is reasonable.

[(e)] (d) **EQUITABLE DISTRIBUTION.**—Purchases not greater than \$2,500 shall be distributed equitably among qualified suppliers.

[(f)] (e) **IMPLEMENTATION THROUGH FAR.**—This section shall be implemented through the Federal Acquisition Regulation.

[(g)] (f) **MICRO-PURCHASE THRESHOLD DEFINED.**—For purposes of this section, the micro-purchase threshold is the amount of \$2,500.

\* \* \* \* \*

#### **SEC. 35. CONTRACTOR PERFORMANCE.**

(a) **VERIFICATION SYSTEM.**—

(1) **REQUIREMENT.**—The Federal Acquisition Regulation shall provide for a contractor verification system in accordance with this section.

(2) *PROCEDURES.*—The Federal Acquisition Regulation shall provide procedures for the head of an executive agency to follow in order to verify a contractor as eligible to compete for contracts to furnish property or services that are procured by the executive agency on a recurring basis.

(3) *NOTIFICATION.*—The procedures shall include a requirement that the head of an executive agency provide for the publication of appropriate notification about the verification system in the Commerce Business Daily.

(b) *EVALUATION.*—(1) Under the procedures referred to in subsection (a)(2), the head of an executive agency in granting a verification to a contractor shall use the following factors as the basis of the evaluation:

(A) The efficiency and effectiveness of its business practices.

(B) The level of quality of its product or service.

(C) Past performance of the contractor with regard to the particular property or service.

(2)(A) The evaluation of past performance may include performance under—

(i) a contract with an executive agency of the Federal Government;

(ii) a contract with an agency of a State or local government;

or

(iii) a contract with an entity in the private sector.

(B) The procedures shall include a requirement that, in the case of a contractor with respect to which there is no information on past contract performance or with respect to which information on past contract performance is not available, the contractor may not be evaluated favorably or unfavorably on the factor of past performance.

(c) *OPPORTUNITY FOR ALL INTERESTED SOURCES.*—The Federal Acquisition Regulation shall provide procedures for ensuring that all interested sources, including small businesses, have a fair opportunity to be considered for verification under the verification system.

(d) *PROCUREMENT FROM VERIFIED CONTRACTORS.*—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency may enter into a contract for the procurement of property or services referred to in subsection (a)(2) on the basis of a competition in accordance with section 2304 of title 10, United States Code, or section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) for contractors verified with respect to such property or services pursuant to the contractor verification system.

(e) *TERMINATION OF VERIFICATION.*—The Federal Acquisition Regulation shall provide procedures under which the head of an executive agency—

(1) may provide for the termination of a verification granted a contractor under this section upon the expiration of a period specified by the head of an executive agency;

(2) may revoke a verification granted a contractor under this section upon a determination that the quality of performance of the contractor does not meet standards applied by the head of the executive agency as of the time of the revocation decision; and

(3) may provide that a contractor whose verification is terminated or revoked will have a fair opportunity to be considered for reentry into the verification system.

(f) *SPECIAL APPLICABILITY RULE.*—Notwithstanding section 34, the verification system shall apply to the procurement of commercial items.

**SEC. 36. RAPID CONTRACTING GOAL.**

The Administrator for Federal Procurement Policy shall establish a goal of reducing by 50 percent the time necessary for executive agencies to acquire an item for the user of that item.

**SEC. 37. VALUE ENGINEERING.**

(a) *IN GENERAL.*—Each executive agency shall establish and maintain effective value engineering procedures and processes.

(b) *THRESHOLD.*—The procedures and processes established pursuant to subsection (a) shall be applied to those programs, projects, systems, and products of an executive agency that, in a ranking of all programs, projects, systems, and products of the agency according to greatest dollar value, are within the highest 20th percentile.

(c) *DEFINITION.*—As used in this section, the term “value engineering” means a team effort, performed by qualified agency or contractor personnel, directed at analyzing the functions of a program, project, system, product, item of equipment, building, facility, service, or supply for the purpose of achieving the essential functions at the lowest life-cycle cost that is consistent with required or improved performance, reliability, quality, and safety.

**SEC. 38. ACQUISITION WORKFORCE.**

(a) *APPLICABILITY.*—This section does not apply to an executive agency that is subject to chapter 87 of title 10, United States Code.

(b) *MANAGEMENT POLICIES.*—

(1) *POLICIES AND PROCEDURES.*—The head of each executive agency, after consultation with the Administrator for Federal Procurement Policy, shall establish policies and procedures for the effective management (including accession, education, training, career development, and performance incentives) of the acquisition workforce of the agency. The development of acquisition workforce policies under this section shall be carried out consistent with the merit system principles set forth in paragraphs (1) and (2) of section 2301(b) of title 5, United States Code.

(2) *UNIFORM IMPLEMENTATION.*—The head of each executive agency shall ensure that, to the maximum extent practicable, acquisition workforce policies and procedures established are uniform in their implementation throughout the agency.

(3) *GOVERNMENT-WIDE POLICIES AND EVALUATION.*—The Administrator shall issue policies to promote uniform implementation of this section by executive agencies, with due regard for differences in program requirements among agencies that may be appropriate and warranted in view of the agency mission. The Administrator shall coordinate with the Deputy Director for Management of the Office of Management and Budget to ensure that such policies are consistent with the policies and procedures established and enhanced system of incentives provided pursuant to section 5051(c) of the Federal Acquisition Stream-

lining Act of 1994 (41 U.S.C. 263 note). The Administrator shall evaluate the implementation of the provisions of this section by executive agencies.

(c) *SENIOR PROCUREMENT EXECUTIVE AUTHORITIES AND RESPONSIBILITIES.*—Subject to the authority, direction, and control of the head of an executive agency, the senior procurement executive of the agency shall carry out all powers, functions, and duties of the head of the agency with respect to implementation of this section. The senior procurement executive shall ensure that the policies of the head of the executive agency established in accordance with this section are implemented throughout the agency.

(d) *MANAGEMENT INFORMATION SYSTEMS.*—The Administrator shall ensure that the heads of executive agencies collect and maintain standardized information on the acquisition workforce related to implementation of this section. To the maximum extent practicable, such data requirements shall conform to standards established by the Office of Personnel Management for the Central Personnel Data File.

(e) *ACQUISITION WORKFORCE.*—The programs established by this section shall apply to all employees in the General Schedule Contracting series (GS-1102) and the General Schedule Purchasing series (GS-1105), and to any employees regardless of series who have been appointed as contracting officers whose authority exceeds the micro-purchase threshold, as that term is defined in section 32(g). The head of each executive agency may include employees in other series who perform acquisition or acquisition-related functions.

(f) *CAREER DEVELOPMENT.*—

(1) *CAREER PATHS.*—The head of each executive agency shall ensure that appropriate career paths for personnel who desire to pursue careers in acquisition are identified in terms of the education, training, experience, and assignments necessary for career progression to the most senior acquisition positions. The head of each executive agency shall make information available on such career paths.

(2) *CRITICAL DUTIES AND TASKS.*—For each career path, the head of each executive agency shall identify the critical acquisition-related duties and tasks in which, at minimum, employees of the agency in the career path shall be competent to perform at full performance grade levels. For this purpose, the head of the executive agency shall provide appropriate coverage of the critical duties and tasks identified by the Director of the Federal Acquisition Institute.

(3) *MANDATORY TRAINING AND EDUCATION.*—For each career path, the head of each executive agency shall establish requirements for the completion of course work and related on-the-job training in the critical acquisition-related duties and tasks of the career path. The head of each executive agency shall also encourage employees to maintain the currency of their acquisition knowledge and generally enhance their knowledge of related acquisition management disciplines through academic programs and other self-developmental activities.

(4) *PERFORMANCE INCENTIVES.*—The head of each executive agency, acting through the senior procurement executive for the agency, shall provide for an enhanced system of incentives for

*the encouragement of excellence in the acquisition workforce which rewards performance of employees that contribute to achieving the agency's performance goals. The system of incentives shall include provisions that—*

*(A) relate pay to performance;*

*(B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel contributed to achieving the agency's performance goals; and*

*(C) provide pay and promotion incentives to be awarded, and unfavorable personnel actions to be imposed, under the system on the basis of the contributions of personnel to achieving the agency's performance goals.*

*(g) QUALIFICATION REQUIREMENTS.—*

*(1) GENERAL SCHEDULE CONTRACTING SERIES (GS-1102).—*

*(A) ENTRY LEVEL QUALIFICATIONS.—The Director of the Office of Personnel Management shall require that, after October 1, 1996, a person may not be appointed to a position in the GS-1102 occupational series unless the person—*

*(i) has received a baccalaureate degree from an accredited educational institution authorized to grant baccalaureate degrees,*

*(ii) has completed at least 24 semester credit hours (or the equivalent) of study from an accredited institution of higher education in any of the following disciplines: accounting, business finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management, or*

*(iii) has passed a written test determined by the Administrator for Federal Procurement Policy, after consultation with the Director of the Office of Personnel Management, to demonstrate the judgmental skills necessary for positions in this series.*

*(B) QUALIFICATIONS FOR SENIOR CONTRACTING POSITIONS.—The Director of the Office of Personnel Management shall require that, after October 1, 1996, persons may be appointed to positions at and above full performance grade levels in the GS-1102 occupational series only if those persons—*

*(i) have satisfied the educational requirement either of subparagraph (A)(i) or (A)(ii),*

*(ii) have successfully completed all training required for the position under subsection (f)(3), and*

*(iii) have satisfied experience and other requirements established by the Director for such positions.*

*However, this requirement shall apply to persons employed on October 1, 1996, in GS-1102 positions at those grade levels only as a prerequisite for promotion to a GS-1102 position at a higher grade.*

*(2) GENERAL SCHEDULE PURCHASING SERIES (GS-1105).—The Director of the Office of Personnel Management shall require that, after October 1, 1996, a person may not be appointed to*

a position in the GS-1105 occupational series unless the person—

(A) has successfully completed 2 years of course work from an accredited educational institution authorized to grant degrees, or

(B) has passed a written test determined by the Administrator for Federal Procurement Policy, after consultation with the Director of the Office of Personnel Management, to demonstrate the judgmental skills necessary for positions in this series.

(3) *CONTRACTING OFFICERS.*—The head of each executive agency shall require that, beginning after October 1, 1996, a person may be appointed as a contracting officer with authority to award or administer contracts for amounts above the micro-purchase threshold, as that term is defined in section 32(g), only if the person—

(A) has successfully completed all mandatory training required of an employee in an equivalent GS-1102 or 1105 position under subsection (f)(3); and

(B) meets experience and other requirements established by the head of the agency, based on the dollar value and complexity of the contracts that the employee will be authorized to award or administer under the appointment as a contracting officer.

(4) *EXCEPTIONS.*—(A) The requirements set forth in paragraphs (1) and (2), as applicable, shall not apply to any person employed in the GS-1102 or GS-1105 series on October 1, 1996.

(B) Employees of an executive agency who do not satisfy the full qualification requirements for appointment as a contracting officer under paragraph (3) may be appointed as a contracting officer for a temporary period of time under procedures established by the agency head. The procedures shall—

(i) require that the person have completed a significant portion of the required training,

(ii) require a plan be established for the balance of the required training,

(iii) specify a period of time for completion of the training, and

(iv) include provisions for withdrawing or terminating the appointment prior to the scheduled expiration date, where appropriate.

(5) *WAIVER.*—The senior procurement executive for an executive agency may waive any or all of the qualification requirements of paragraphs (1) and (2) for a person if the person possesses significant potential for advancement to levels of greater responsibility and authority, based on demonstrated job performance and qualifying experience. This authority may not be redelegated by the senior procurement executive. With respect to each waiver granted under this subsection, the senior procurement executive shall set forth in writing the rationale for the decision to waive such requirements.

(h) *PROGRAM ESTABLISHMENT AND IMPLEMENTATION.*—

(1) *FUNDING LEVELS.*—(A) The head of an executive agency shall request in the budget for a fiscal year for the agency—

(i) for education and training under this section, an amount equal to no less than 2.5 percent of the base aggregate salary cost of the acquisition workforce subject to this section for that fiscal year; and

(ii) for salaries of the acquisition workforce, an amount equal to no more than 97.5 percent of such base aggregate salary cost.

(B) The head of the executive agency shall set forth separately the funding levels requested in the budget justification documents submitted in support of the President's budget submitted to Congress under section 1105 of title 31, United States Code.

(C) Funds appropriated for education and training under this section may not be obligated or used for any other purpose.

(2) *INTERAGENCY AGREEMENTS.*—The head of an executive agency may enter into a written agreement with another agency to participate in programs established under this section on a reimbursable basis.

(3) *TUITION ASSISTANCE.*—Notwithstanding the prohibition in section 4107(b) of title 5, United States Code, the head of each executive agency may provide for tuition reimbursement and education (including a full-time course of study leading to a degree) for acquisition personnel in the agency related to the purposes of this section.

(4) *INTERN PROGRAMS.*—The head of each executive agency may establish intern programs in order to recruit highly qualified and talented individuals and provide them with opportunities for accelerated promotions, career broadening assignments, and specified training for advancement to senior acquisition positions. For such programs, the head of an executive agency, without regard to the provisions of title 5, United States Code, may appoint individuals to competitive GS-5, GS-7, or GS-9 positions in the General Schedule Contracting series (GS-1102) who have graduated from baccalaureate or master's programs in purchasing or contracting from accredited educational institutions authorized to grant baccalaureate and master's degrees.

(5) *COOPERATIVE EDUCATION PROGRAM.*—The head of each executive agency may establish an agencywide cooperative education credit program for acquisition positions. Under the program, the head of the executive agency may enter into cooperative arrangements with one or more accredited institutions of higher education which provide for such institutions to grant undergraduate credit for work performed in such position.

(6) *SCHOLARSHIP PROGRAM.*—

(A) *ESTABLISHMENT.*—Where deemed appropriate, the head of each executive agency may establish a scholarship program for the purpose of qualifying individuals for acquisition positions in the agency.

(B) *ELIGIBILITY.*—To be eligible to participate in a scholarship program established under this paragraph by an executive agency, an individual must—

(i) be accepted for enrollment or be currently enrolled as a full-time student at an accredited educational institution authorized to grant baccalaureate or graduate degrees (as appropriate);



(ii) be pursuing a course of education that leads toward completion of a bachelor's, master's, or doctor's degree (as appropriate) in a qualifying field of study, as determined by the head of the agency;

(iii) sign an agreement described in subparagraph (C) under which the participant agrees to serve a period of obligated service in the agency in an acquisition position in return for payment of educational assistance as provided in the agreement; and

(iv) meet such other requirements as the head of the agency prescribes.

(C) *AGREEMENT.*—An agreement between the head of an executive agency and a participant in a scholarship program established under this paragraph shall be in writing, shall be signed by the participant, and shall include the following provisions:

(i) The agreement of the head of the agency to provide the participant with educational assistance for a specified number of school years, not to exceed 4, during which the participant is pursuing a course of education in a qualifying field of study. The assistance may include payment of tuition, fees, books, laboratory expenses, and a stipend.

(ii) The participant's agreement—

(I) to accept such educational assistance,

(II) to maintain enrollment and attendance in the course of education until completed,

(III) while enrolled in such course, to maintain an acceptable level of academic standing (as prescribed by the head of the agency), and

(IV) after completion of the course of education, to serve as a full-time employee in an acquisition position in the agency for a period of time of one calendar year for each school year or part thereof for which the participant was provided a scholarship under the program.

(D) *REPAYMENT.*—(i) Any person participating in a program established under this paragraph shall agree to pay to the United States the total amount of educational assistance provided to the person under the program if the person is voluntarily separated from the agency or involuntarily separated for cause from the agency before the end of the period for which the person has agreed to continue in the service of the agency in an acquisition position.

(ii) If an employee fails to fulfill the agreement to pay to the Government the total amount of educational assistance provided to the person under the program, a sum equal to the amount of the educational assistance may be recovered by the Government from the employee (or the estate of the employee) by setoff against accrued pay, compensation, amount of retirement credit, or other amount due the employee from the Government; and by such other method as is provided by law for the recovery of amounts owing to the Government.

(iii) The head of an executive agency may waive in whole or in part a repayment required under this paragraph if the head of the agency determines the recovery would be against equity and good conscience or would be contrary to the best interests of the United States.

(E) *TERMINATION OF AGREEMENT.*—There shall be no requirement that a position be offered to a person after such person successfully completes a course of education required by an agreement under this paragraph. If no position is offered, the agreement shall be considered terminated.

## **TITLE II—DISPUTE RESOLUTION**

### **Subtitle A—General Provisions**

#### **SEC. 201. DEFINITIONS.**

*In this title:*

(1) The term “Defense Board” means the Department of Defense Board of Contract Appeals established pursuant to section 8(a) of the Contract Disputes Act of 1978 (41 U.S.C. 607).

(2) The term “Civilian Board” means the Civilian Board of Contract Appeals established pursuant to section 8(b) of the Contract Disputes Act of 1978 (41 U.S.C. 607).

(3) The term “Board judge” means a member of the Defense Board or the Civilian Board, as the case may be.

(4) The term “Chairman” means the Chairman of the Defense Board or the Civilian Board, as the case may be.

(5) The term “Board concerned” means—

(A) the Defense Board with respect to matters within its jurisdiction; and

(B) the Civilian Board with respect to matters within its jurisdiction.

(6) The term “executive agency”—

(A) for purposes of contract disputes under section 213—

(i) with respect to contract disputes under the jurisdiction of the Defense Board, means the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force; and

(ii) with respect to contract disputes under the jurisdiction of the Civilian Board, has the meaning given by section 2(2) of the Contract Disputes Act of 1978 (41 U.S.C. 601(2)) except that the term does not include the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force; and

(B) for purposes of protests under section 214—

(i) with respect to protests under the jurisdiction of the Defense Board, means the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force; and

(ii) with respect to protests under the jurisdiction of the Civilian Board, has the meaning given by section 4(1) of this Act except that the term does not include

*the Department of Defense, the Department of the Army, the Department of the Navy, and the Department of the Air Force.*

*(7) The term "alternative means of dispute resolution" has the meaning given by section 571(3) of title 5, United States Code.*

*(8) The term "protest" means a written objection by an interested party to any of the following:*

*(A) A solicitation or other request by an executive agency for offers for a contract for the procurement of property or services.*

*(B) The cancellation of such a solicitation or other request.*

*(C) An award or proposed award of such a contract.*

*(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.*

*(9) The term "interested party", with respect to a contract or a solicitation or other request for offers, means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.*

*(10) The term "prevailing party", with respect to a determination of the Board under section 214(h)(2) that a decision of a contracting officer violates a statute or regulation, means a party that demonstrated such violation.*

**SEC. 202. MEMBERSHIP.**

*(a) APPOINTMENT.—(1)(A) The Defense Board shall consist of judges appointed by the Chairman, without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Defense Board judge, from a register of applicants maintained by the Defense Board.*

*(B) The Civilian Board shall consist of judges appointed by the Chairman, without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board judge, from a register of applicants maintained by the Civilian Board.*

*(2) The members of the Defense Board and the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, United States Code, with an additional requirement that such members shall have had not fewer than five years of experience in public contract law.*

*(3) Notwithstanding paragraph (2) and subject to subsection (b), the following persons shall serve as Board judges:*

*(A) For the Defense Board, any full-time member of the Armed Services Board of Contract Appeals serving as such on the day before the effective date of this title.*

*(B) For the Civilian Board, any full-time member of any agency board of contract appeals other than the Armed Services Board of Contract Appeals serving as such on the day before the effective date of this title.*

(C) For either the Defense Board or the Civilian Board, any person serving on the day before the date of the enactment of this title in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code.

(b) **REMOVAL.**—Members of the Defense Board and the Civilian Board shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5, United States Code.

(c) **COMPENSATION.**—Compensation for the Chairman of the Defense Board and the Chairman of the Civilian Board and all other members of each Board shall be determined under section 5372a of title 5, United States Code.

**SEC. 203. CHAIRMAN.**

(a) **DESIGNATION.**—(1)(A) The Chairman of the Defense Board shall be designated by the Secretary of Defense to serve for a term of five years. The Secretary shall select the Chairman from among sitting judges each of whom has had at least five years of service—

(i) as a member of the Armed Services Board of Contract Appeals; or

(ii) in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this title).

(B) The Chairman of the Civilian Board shall be designated by the Administrator of General Services to serve for a term of five years. The Administrator shall select the Chairman from among sitting judges each of whom has had at least five years of service—

(i) as a member of an agency board of contract appeals other than the Armed Services Board of Contract Appeals; or

(ii) in a position at a level of assistant general counsel or higher with authority delegated from the Comptroller General to decide bid protests under subchapter V of chapter 35 of title 31, United States Code (as in effect on the day before the effective date of this title).

(2) A Chairman of a Board may continue to serve after the expiration of the Chairman's term until a successor has taken office. A Chairman may be reappointed any number of times.

(b) **RESPONSIBILITIES.**—The Chairman of the Defense Board or the Civilian Board, as the case may be, shall be responsible on behalf of the Board for the executive and administrative operation of the Board, including functions of the Board with respect to the following:

(1) The selection, appointment, and fixing of the compensation of such personnel, pursuant to part III of title 5, United States Code, as the Chairman considers necessary or appropriate, including a Clerk of the Board, a General Counsel, and clerical and legal assistance for Board judges.

(2) The supervision of personnel employed by or assigned to the Board, and the distribution of work among such personnel.

(3) The operation of an Office of the Clerk of the Board, including the receipt of all filings made with the Board, the as-

*signment of cases, and the maintenance of all records of the Board.*

*(4) The prescription of such rules and regulations as the Chairman considers necessary or appropriate for the administration and management of the Board.*

*(c) VICE CHAIRMEN.—The Chairman of the Defense Board or the Civilian Board, as the case may be, may designate up to four other Board judges as Vice Chairmen. The Chairman may divide the Board into two divisions, one for handling contract disputes and one for handling protests, and, if such division is made, shall assign a Vice Chairman to head each division. The Vice Chairmen, in the order designated by the Chairman, shall act in the place and stead of the Chairman during the absence of the Chairman.*

**SEC. 204. RULEMAKING AUTHORITY.**

*The Chairman of the Defense Board and the Chairman of the Civilian Board shall jointly issue and maintain—*

*(1) such procedural rules and regulations as are necessary to the exercise of the functions of the Boards under sections 213 and 214; and*

*(2) statements of policy of general applicability with respect to such functions.*

**SEC. 205. AUTHORIZATION OF APPROPRIATIONS.**

*There are authorized to be appropriated for fiscal year 1997 and each succeeding fiscal year such sums as may be necessary to carry out the provisions of this title. Funds for the activities of each Board shall be separately appropriated for such purpose. Funds appropriate pursuant to this section shall remain available until expended.*

## **Subtitle B—Functions of the Defense and Civilian Boards of Contract Appeals**

**SEC. 211. ALTERNATIVE DISPUTE RESOLUTION SERVICES.**

*(a) REQUIREMENT TO PROVIDE SERVICES UPON REQUEST.—The Defense Board and the Civilian Board shall each provide alternative means of dispute resolution for any disagreement regarding a contract or prospective contract of an executive agency upon the request of all parties to the disagreement.*

*(b) PERSONNEL QUALIFIED TO ACT.—Each Board judge and each attorney employed by the Board concerned shall be considered to be qualified to act for the purpose of conducting alternative means of dispute resolution under this section.*

*(c) SERVICES TO BE PROVIDED WITHOUT CHARGE.—Any services provided by the Board concerned or any Board judge or employee pursuant to this section shall be provided without charge.*

*(d) RECUSAL OF CERTAIN PERSONNEL UPON REQUEST.—In the event that a matter which is presented to the Board concerned for alternative means of dispute resolution, pursuant to this section, later becomes the subject of formal proceedings before such Board, any Board judge or employee who was involved in the alternative means of dispute resolution shall, if requested by any party to the formal proceeding, take no part in that proceeding.*

**SEC. 212. ALTERNATIVE DISPUTE RESOLUTION OF DISPUTES AND PROTESTS SUBMITTED TO BOARDS.**

With reasonable promptness after the submission to the Defense Board or the Civilian Board of a contract dispute under section 213 or a bid protest under section 214, a Board judge to whom the contract dispute or protest is assigned shall request the parties to meet with a Board judge, or an attorney employed by the Board concerned, for the purpose of attempting to resolve the dispute or protest through alternative means of dispute resolution. Formal proceedings in the appeal shall then be suspended until such time as any party or a Board judge to whom the dispute or protest is assigned determines that alternative means of dispute resolution are not appropriate for resolution of the dispute or protest.

**SEC. 213. CONTRACT DISPUTES.**

The Defense Board shall have jurisdiction as provided by section 8(a) of the Contract Disputes Act of 1978 (41 U.S.C. 601–613). The Civilian Board shall have jurisdiction as provided by section 8(b) of such Act.

**SEC. 214. PROTESTS.**

(a) *REVIEW REQUIRED UPON REQUEST.*—Upon request of an interested party in connection with any procurement conducted by an executive agency, the Defense Board or the Civilian Board, as the case may be, shall review, as provided in this section, any decision by the head of the executive agency alleged to violate a statute or regulation. A decision or order of the Board concerned pursuant to this section shall not be subject to interlocutory appeal or review.

(b) *STANDARD OF REVIEW.*—In deciding a protest, the Board concerned may consider all evidence that is relevant to the decision under protest. It shall accord a presumption of correctness to the decision under protest. The protester may rebut such presumption by showing, by a preponderance of the evidence, that the decision was arbitrary or capricious or violated a statute or regulation.

(c) *NOTIFICATION.*—Within one day after the receipt of a protest, the Board concerned shall notify the executive agency involved of the protest.

(d) *SUSPENSION OF CONTRACT AWARD.*—(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the executive agency has received notice of a protest with respect to such procurement from the Board concerned and while the protest is pending.

(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the executive agency has notice under this section)—

(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board concerned under this section; and

(B) after the Board concerned is advised of that finding.

(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days after the making of such finding.

(4) The suspension of the award under paragraph (1) shall not preclude the executive agency concerned from continuing the procurement process up to but not including the award of the contract.

(e) *SUSPENSION OF CONTRACT PERFORMANCE.*—(1) A contractor awarded an executive agency contract may, during the period described in paragraph (4), begin performance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.

(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that—

(A) a protest is likely to be filed; and

(B) the immediate performance of the contract is not in the best interests of the United States.

(3)(A) If the executive agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)—

(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the executive agency has notice under this section)—

(i) upon a written finding that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision concerning the protest by the Board concerned; and

(ii) after the Board concerned is notified of that finding.

(4) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of—

(A) the date that is 10 days after the date of the contract award; or

(B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

(f) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (d) and (e) of this section may not be delegated.

(g) *PROCEDURES.*—

(1) *PROCEEDINGS AND DISCOVERY.*—The Board concerned shall conduct proceedings and allow such discovery to the minimum extent necessary for the expeditious, fair, and cost-effective

resolution of the protest. The Board concerned shall limit discovery to material which is relevant to the grounds of protest or to such affirmative defenses as the executive agency involved, or any intervenor supporting the agency, may raise.

(2) *PRIORITY.*—The Board concerned shall give priority to protests filed under this section over contract disputes and alternative dispute services. Except as provided in paragraph (3), the Board concerned shall issue its final decision within 65 days after the date of the filing of the protest, unless the Chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the Board concerned shall issue such decision within the longer period determined by the Chairman. An amendment that adds a new ground of protest should be resolved, to the maximum extent practicable, within the time limits established for resolution of the initial protest.

(3) *THRESHOLD.*—(A) Except as provided in subparagraph (B), any protest in which the anticipated value of the contract award that will result from the protested procurement, as estimated by the executive agency involved, is less than \$20,000,000 shall be considered under simplified rules of procedure. Such simplified rules shall provide that discovery in such protests shall be in writing only. Such protests shall be decided by a single Board judge. The Board concerned shall issue its final decision in each such protest within 40 days after the date of the filing of the protest, unless the Chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the Board concerned shall issue such decision within the longer period determined by the Chairman.

(B) If the Chairman of the Board concerned determines that special and unique circumstances of a protest that would otherwise qualify for the simplified rules described in subparagraph (A), including the complexity of a protest, requires the use of full procedures as described in paragraphs (1) and (2), the Chairman shall use such procedures in lieu of the simplified rules described in subparagraph (A).

(4) *CALCULATION OF TIME FOR ADR.*—In calculating time for purposes of paragraph (2) or (3) of this subsection, any days during which proceedings are suspended for the purpose of attempting to resolve the protest by alternative means of dispute resolution, up to a maximum of 20 days, shall not be counted.

(5) *DISMISSAL OF FRIVOLOUS PROTESTS.*—The Board concerned may dismiss a protest that the Board concerned determines—

(A) is frivolous,

(B) has been brought or pursued in bad faith; or

(C) does not state on its face a valid basis for protest.

(6) *PAYMENT OF COSTS FOR FRIVOLOUS PROTESTS.*—(A) If the Board concerned expressly finds that a protest or a portion of a protest is frivolous or has been brought or pursued in bad faith, the Board concerned shall declare that the protester or other interested party who joins the protest is liable to the Unit-



ed States for payment of the costs described in subparagraph (B) unless—

(i) special circumstances would make such payment unjust; or

(ii) the protester obtains documents or other information after the protest is filed with the Board concerned that establishes that the protest or a portion of the protest is frivolous or has been brought or pursued in bad faith, and the protester then promptly withdraws the protest or portion of the protest.

(B) The costs referred to in subparagraph (A) are all of the costs incurred by the United States of reviewing the protest, or of reviewing that portion of the protest for which the finding is made, including the fees and other expenses (as defined in section 2412(d)(2)(A) of title 28, United States Code) incurred by the United States in defending the protest.

(h) DECISIONS AND CORRECTIVE ACTIONS ON PROTESTS.—(1) In making a decision on protests filed under this section, the Board concerned shall accord due weight to the goals of economic and efficient procurement, and shall take due account of the rule of prejudicial error.

(2) If the Board concerned determines that a decision of the head of the executive agency violates a statute or regulation, the Board concerned may order the agency (or its head) to take such corrective action as the Board concerned considers appropriate. Corrective action includes requiring that the executive agency—

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

(B) recompile the contract immediately;

(C) issue a new solicitation;

(D) terminate the contract;

(E) award a contract consistent with the requirements of such statute and regulation;

(F) implement any combination of requirements under subparagraphs (A), (B), (C), (D), and (E); or

(G) implement such other actions as the Board concerned determines necessary.

(3) If the Board concerned orders corrective action after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the corrective action was ordered.

(4) Any agreement that provides for the dismissal of a protest and involves a direct or indirect expenditure of appropriated funds shall be submitted to the Board concerned and shall be made a part of the public record (subject to any protective order considered appropriate by the Board concerned) before dismissal of the protest.

(i) AUTHORITY TO DECLARE ENTITLEMENT TO COSTS.—(1)(A) Whenever the Board concerned determines that a decision of a contracting officer violates a statute or regulation, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate prevailing party to be entitled to the costs of—

(i) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees, and

(ii) bid and proposal preparation.

(B) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be declared entitled under this paragraph to costs for—

(i) consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government, or

(ii) attorneys' fees that exceed \$150 per hour unless the Board concerned, on a case by case basis, determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(2) Payment of amounts due from an agency under paragraph (1) or under the terms of a settlement agreement under subsection (h)(4) shall be made from the appropriation made by section 1304 of title 31, United States Code, for the payment of judgments. The executive agency concerned shall reimburse that appropriation account out of funds available for the procurement.

(j) *APPEALS.*—A final decision of the Board concerned may be appealed as set forth in section 8(g)(1) of the Contract Disputes Act of 1978 by the head of the executive agency concerned and by any interested party, including interested parties who intervene in any protest filed under this section.

(k) *ADDITIONAL RELIEF.*—Nothing contained in this section shall affect the power of the Board concerned to order any additional relief which it is authorized to provide under any statute or regulation.

(l) *NONEXCLUSIVITY OF REMEDIES.*—Nothing contained in this section shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims or in a United States district court.

#### **SEC. 215. APPLICABILITY TO CERTAIN CONTRACTS.**

(a) *CONTRACTS AT OR BELOW THE SIMPLIFIED ACQUISITION THRESHOLD.*—Notwithstanding section 33 of this Act, the authority conferred on the Defense Board and the Civilian Board by this title is applicable to contracts in amounts not greater than the simplified acquisition threshold.

(b) *CONTRACTS FOR COMMERCIAL ITEMS.*—Notwithstanding section 34 of this Act, the authority conferred on the Defense Board and the Civilian Board by this title is applicable to contracts for the procurement of commercial items.

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## **FEDERAL ACQUISITION STREAMLINING ACT OF 1994**

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## **TITLE V—ACQUISITION MANAGEMENT**

### **Subtitle A—Armed Services Acquisitions**

#### **SEC. 5001. PERFORMANCE BASED MANAGEMENT.**

(a) \* \* \*

(b) **ENHANCED SYSTEM OF PERFORMANCE INCENTIVES.**—(1) Within one year after the date of the enactment of this Act, the Secretary of Defense shall review the incentives and personnel actions available to the Secretary of Defense for encouraging excellence in the management of defense acquisition programs and provide an enhanced system of incentives to facilitate the achievement of goals approved or defined pursuant to section 2220(a) of title 10, United States Code.

(2) The enhanced system of incentives shall, to the maximum extent consistent with applicable law—

[(1)] (A) relate pay to performance (including the extent to which the performance of personnel in such programs contributes to achieving the cost goals, performance goals, and schedule goals established for acquisition programs of the Department of Defense pursuant to section 2220(a) of title 10, as added by subsection (a)); and

[(2)] (B) provide for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such programs contributes to achieving the cost goals, performance goals, and schedule goals established for acquisition programs of the Department of Defense pursuant to section 2220(a) of title 10, United States Code, as added by subsection (a).

(3) *The Secretary shall include in the enhanced system of incentives the following:*

(A) *Pay bands.*

(B) *Significant and material pay and promotion incentives to be awarded, and significant and material unfavorable personnel actions to be imposed, under the system exclusively, or primarily, on the basis of the contributions of personnel to the performance of the acquisition program in relation to cost goals, performance goals, and schedule goals.*

(C) *Provisions for pay incentives and promotion incentives to be awarded under the system.*

\* \* \* \* \*

#### **SEC. 5002. REVIEW OF ACQUISITION PROGRAM CYCLE.**

(a) **REVIEW.**—The Secretary of Defense shall review the regulations of the Department of Defense (1) to ensure that acquisition program cycle procedures are focused on achieving the goals that are consistent with the program baseline description established pursuant to section 2435 of title 10, United States Code[.]; (2) *to ensure that the regulations compress the time periods associated with developing, procuring, and making operational new systems;* and (3) *to ensure that Department of Defense directives relating to development and procurement of information systems (numbered in the 8000 series) and the Department of Defense directives numbered in the 5000 series are consolidated into one series of directives that is consistent with such compressed time periods.*

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## Subtitle B—Civilian Agency Acquisitions

### SEC. 5051. PERFORMANCE BASED MANAGEMENT.

(a) \* \* \*

\* \* \* \* \*

(c) ENHANCED SYSTEM OF PERFORMANCE INCENTIVES.—(1) Within one year after the date of the enactment of this Act, the Deputy Director for Management of the Office of Management and Budget, in consultation with appropriate officials in other departments and agencies of the Federal Government, shall, to the maximum extent consistent with applicable law—

[(1)] (A) establish policies and procedures for the heads of such departments and agencies to designate acquisition positions and manage employees (including the accession, education, training and career development of employees) in the designated acquisition positions; and

[(2)] (B) review the incentives and personnel actions available to the heads of departments and agencies of the Federal Government for encouraging excellence in the acquisition workforce of the Federal Government and provide an enhanced system of incentives for the encouragement of excellence in such workforce which—

[(A)] (i) relates pay to performance (including the extent to which the performance of personnel in such workforce contributes to achieving the cost goals, schedule goals, and performance goals established for acquisition programs pursuant to section 313(b) of the Federal Property and Administrative Services Act of 1949, as added by subsection (a)); and

[(B)] (ii) provides for consideration, in personnel evaluations and promotion decisions, of the extent to which the performance of personnel in such workforce contributes to achieving such cost goals, schedule goals, and performance goals.

(2) *The Deputy Director shall include in the enhanced system of incentives under paragraph (1)(B) the following:*

*(A) Pay bands.*

*(B) Significant and material pay and promotion incentives to be awarded, and significant and material unfavorable personnel actions to be imposed, under the system exclusively, or primarily, on the basis of the contributions of personnel to the performance of the acquisition program in relation to cost goals, performance goals, and schedule goals.*

*(C) Provisions for pay incentives and promotion incentives to be awarded under the system.*

\* \* \* \* \*

## Subtitle C—Pilot Programs

### SEC. 5061. OFPP TEST PROGRAM FOR EXECUTIVE AGENCIES.

(a) \* \* \*

\* \* \* \* \*

[(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—(1) The Administrator may not exercise the authority to conduct a test under subsection (a) in an agency and to award contracts under such a test before the date on which the head of the agency certifies to Congress under section 30A(a)(2) of the Office of Federal Procurement Policy Act that the agency has implemented a full FACNET capability.

[(2) The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall expire 4 years after the date on which the head of the agency makes the certification referred to in paragraph (1). Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of the authority to conduct the test under this section.]

*(j) COMMENCEMENT AND EXPIRATION OF AUTHORITY.—The authority to conduct a test under subsection (a) in an agency and to award contracts under such a test shall take effect on August 1, 1995, and shall expire on August 1, 2000. Contracts entered into before such authority expires in an agency pursuant to a test shall remain in effect, notwithstanding the expiration of the authority to conduct the test under this section.*

\* \* \* \* \*

### SEC. 5064. DEPARTMENT OF DEFENSE ACQUISITION PILOT PROGRAMS.

(a) IN GENERAL.—The Secretary of Defense is authorized to designate the following defense acquisition programs for participation in the defense acquisition pilot program authorized by section 809 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2430 note):

(1) \* \* \*

\* \* \* \* \*

*(6) JOINT STANDOFF WEAPON UNITARY VARIANT (JSOW-UV).—The Joint Standoff Weapon Unitary Variant program with respect to all contracts directly related to the development and procurement of an air-delivered, standoff weapon that incorporates a global positioning system-aided inertial navigation system, a data link capability, and a unitary warhead.*

\* \* \* \* \*

(c) SPECIAL AUTHORITY.—The authority delegated under subsection (a) may include authority for the Secretary of Defense—

(1) to apply any amendment or repeal of a provision of law made in this Act to the pilot programs before the effective date of such amendment or repeal; [and]

(2) to apply to a procurement of items other than commercial items under such programs—

(A) any authority provided in this Act (or in an amendment made by a provision of this Act) to waive a provision of law in the case of commercial items, and

(B) any exception applicable under this Act (or an amendment made by a provision of this Act) in the case of commercial items,

before the effective date of such provision (or amendment) to the extent that the Secretary determines necessary to test the application of such waiver or exception to procurements of items other than commercial items[.]; and

(3) *with respect to the program described in subsection (a)(6)—*

*(A) to apply any amendment or repeal of a provision of law made in the Federal Acquisition Reform Act of 1995 to the pilot program before the effective date of such amendment or repeal; and*

*(B) to apply to a procurement of items other than commercial items under such program any waiver or exception applicable under the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) or the Federal Acquisition Reform Act of 1995 (or an amendment made by a provision of either Act) in the case of commercial items before the effective date of such provision (or amendment), to the extent that the Secretary determines necessary to test the application of such waiver or exception to procurements of items other than commercial items.*

\* \* \* \* \*

## **TITLE VII—SMALL BUSINESS AND SOCIOECONOMIC LAWS**

### **Subtitle A—Small Business Laws**

\* \* \* \* \*

#### **SEC. 7102. CONTRACTING PROGRAM FOR CERTAIN SMALL BUSINESS CONCERNS.**

(a) **PROCUREMENT PROCEDURES AUTHORIZED.**—(1) To facilitate the attainment of a goal for the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals that is established for a Federal agency pursuant to section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)), the head of the agency may enter into contracts using—

(A) **[less than full and open competition]** *procedures other than competitive procedures* by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and

(B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation.

\* \* \* \* \*

## TITLE 31, UNITED STATES CODE

\* \* \* \* \*

### CHAPTER 13—APPROPRIATIONS

\* \* \* \* \*

#### SUBCHAPTER III—LIMITATIONS, EXCEPTIONS, AND PENALTIES

\* \* \* \* \*

#### **§ 1352. Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions**

(a) \* \* \*

(b)(1) \* \* \*

(2) A declaration filed by a person pursuant to paragraph (1)(A) of this subsection in connection with a Federal contract, grant, loan, or cooperative agreement shall contain—

(A) a statement setting forth whether such person—

(i) has made any payment with respect to that Federal contract, grant, loan, or cooperative agreement, using funds other than appropriated funds, which would be prohibited by subsection (a) of this section if the payment were paid for with appropriated funds; or

(ii) has agreed to make any such payment; *and*

\* \* \* \* \*

[(C) a certification that the person making the declaration has not made, and will not make, any payment prohibited by subsection (a).]

\* \* \* \* \*

### CHAPTER 35—ACCOUNTING AND COLLECTION

\* \* \* \* \*

#### [SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

[3551. Definitions.

[3552. Protests by interested parties concerning procurement actions.

[3553. Review of protests; effect on contracts pending decision.

[3554. Decisions on protests.

[3555. Regulations; authority of Comptroller General to verify assertions.

[3556. Nonexclusivity of remedies; matters included in agency record.]

\* \* \* \* \*

## **[SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM**

### **[§ 3551. Definitions**

**[In this subchapter—**

**[(1) The term “protest” means a written objection by an interested party to any of the following:**

**[(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.**

**[(B) The cancellation of such a solicitation or other request.**

**[(C) An award or proposed award of such a contract.**

**[(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.**

**[(2) The term “interested party”, with respect to a contract or proposed contract described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.**

**[(3) The term “Federal agency” has the meaning given such term by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).**

### **[§ 3552. Protests by interested parties concerning procurement actions**

**[A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter. An interested party who has filed a protest under section 111(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)) with respect to a procurement or proposed procurement may not file a protest with respect to that procurement under this subchapter.**

### **[§ 3553. Review of protests; effect on contracts pending decision**

**[(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.**

**[(b)(1) Within one day after the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.**

**[(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement—**

**[(A) within 35 days after the date of the agency’s receipt of that notice;**

**[(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require a longer**



period, within the longer period determined by the Comptroller General; or

[(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within 20 days after the date of the Federal agency's receipt of that determination.

[(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(3) of this title.

[(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

[(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

[(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

[(B) after the Comptroller General is advised of that finding.

[(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days after the making of such finding.

[(d)(1) A contractor awarded a Federal agency contract may, during the period described in paragraph (4), begin performance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.

[(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that—

[(A) a protest is likely to be filed; and

[(B) the immediate performance of the contract is not in the best interests of the United States.

[(3)(A) If the Federal agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)—

[(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

[(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

[(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

[(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

[(i) upon a written finding that—

[(I) performance of the contract is in the best interests of the United States; or

[(II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

[(ii) after the Comptroller General is notified of that finding.

[(4) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of—

[(A) the date that is 10 days after the date of the contract award; or

[(B) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

[(e) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (c) and (d) of this section may not be delegated.

[(f)(1) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive.

[(2)(A) The Comptroller General may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to a party under paragraph (1), that prohibit or restrict the disclosure by the party of information described in subparagraph (B) that is contained in such a document.

[(B) Information referred to in subparagraph (A) is procurement sensitive information, trade secrets, or other proprietary or confidential research, development, or commercial information.

[(C) A protective order under this paragraph shall not be considered to authorize the withholding of any document or information from Congress or an executive agency.

#### **§ 3554. Decisions on protests**

[(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 125 days after the date the protest is submitted to the Comptroller General.

[(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines

suitable for resolution within 65 days after the date the protest is submitted.

[(3) An amendment to a protest that adds a new ground of protest, if timely made, should be resolved, to the maximum extent practicable, within the time limit established under paragraph (1) of this subsection for final decision of the initial protest. If an amended protest cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection.

[(4) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

[(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—

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

[(B) recompetete the contract immediately;

[(C) issue a new solicitation;

[(D) terminate the contract;

[(E) award a contract consistent with the requirements of such statute and regulation;

[(F) implement any combination of recommendations under clauses (A), (B), (C), (D), and (E); or

[(G) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

[(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(2)(A)(i) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeteting, or reawarding the contract.

[(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period.

[(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

[(A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and

[(B) bid and proposal preparation.

[(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid,

pursuant to a recommendation made under the authority of paragraph (1)—

[(A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or

[(B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

[(3) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency shall—

[(A) pay the costs promptly; or

[(B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow the Comptroller General's recommendation.

[(4) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs to be paid. If the Federal agency and the interested party are unable to agree on the amount to be paid, the Comptroller General may, upon the request of the interested party, recommend to the Federal agency the amount of the costs that the Federal agency should pay.

[(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

[(e)(1) The Comptroller General shall report promptly to the Committee on Governmental Affairs and the Committee on Appropriations of the Senate and to the Committee on Government Operations and the Committee on Appropriations of the House of Representatives any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General under subsection (b) or (c). The report shall include—

[(A) a comprehensive review of the pertinent procurement, including the circumstances of the failure of the Federal agency to implement a recommendation of the Comptroller General; and

[(B) a recommendation regarding whether, in order to correct an inequity or to preserve the integrity of the procurement process, the Congress should consider—

[(i) private relief legislation;

[(ii) legislative rescission or cancellation of funds;

[(iii) further investigation by Congress; or

[(iv) other action.

[(2) Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully im-

plement a recommendation of the Comptroller General under subsection (b) or (c) during the preceding year. The report shall also describe each instance in which a final decision in a protest was not rendered within 125 days after the date the protest is submitted to the Comptroller General.

**§ 3555. Regulations; authority of Comptroller General to verify assertions**

[(a) The Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing.

[(b) The procedures shall provide that, in the computation of any period described in this subchapter—

[(1) the day of the act, event, or default from which the designated period of time begins to run not be included; and

[(2) the last day after such act, event, or default be included, unless—

[(A) such last day is a Saturday, a Sunday, or a legal holiday; or

[(B) in the case of a filing of a paper at the General Accounting Office or a Federal agency, such last day is a day on which weather or other conditions cause the closing of the General Accounting Office or Federal agency, in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included.

[(c) The Comptroller General may prescribe procedures for the electronic filing and dissemination of documents and information required under this subchapter. In prescribing such procedures, the Comptroller General shall consider the ability of all parties to achieve electronic access to such documents and records.

[(d) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

**§ 3556. Nonexclusivity of remedies; matters included in agency record**

[This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or

proposed procurement shall be considered to be part of the agency record subject to review.]

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## SECTION 5152 OF THE DRUG-FREE WORKPLACE ACT OF 1988

### SEC. 5152. DRUG-FREE WORKPLACE REQUIREMENTS FOR FEDERAL CONTRACTORS.

#### (a) DRUG-FREE WORKPLACE REQUIREMENT.—

(1) REQUIREMENT FOR PERSONS OTHER THAN INDIVIDUALS.—No person, other than an individual, shall be considered a responsible source, under the meaning of such term as defined in section 4(8) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(8)), for the purposes of being awarded a contract for the procurement of any property or services of a value greater than the simplified acquisition threshold (as defined in section 4(11) of such Act (41 U.S.C. 403(11))) by any Federal agency, other than a contract for the procurement of commercial items as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403), unless such person [has certified to the contracting agency that it will] *agrees to* provide a drug-free workplace by—

(A) \* \* \*

\* \* \* \* \*

(2) REQUIREMENT FOR INDIVIDUALS.—No Federal agency shall enter into a contract with an individual unless such [contract includes a certification by the individual] *individual agrees* that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.

#### (b) SUSPENSION, TERMINATION, OR DEBARMENT OF THE CONTRACTOR.—

(1) GROUNDS FOR SUSPENSION, TERMINATION, OR DEBARMENT.—Each contract awarded by a Federal agency shall be subject to suspension of payments under the contract or termination of the contract, or both, and the contractor thereunder or the individual who entered the contract with the Federal agency, as applicable, shall be subject to suspension or debarment in accordance with the requirements of this section if the head of the agency determines that—

[(A) the contractor or individual has made a false certification under subsection (a);]

[(B)] (A) the contractor violates [such certification by failing to carry out] the requirements of subparagraph (A), (B), (C), (D), (E), or (F) of subsection (a)(1); or

[(C)] (B) such a number of employees of such contractor have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that

the contractor has failed to make a good faith effort to provide a drug-free workplace as required by subsection (a).

\* \* \* \* \*

## SECTION 21 OF THE ARMS EXPORT CONTROL ACT

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### Chapter 2.—FOREIGN MILITARY SALES AUTHORIZATIONS

#### SEC. 21. SALES FROM STOCKS.—(a) \* \* \*

\* \* \* \* \*

(e)(1) After September 30, 1976, letters of offer for the sale of defense articles or for the sale of defense services that are issued pursuant to this section or pursuant to section 22 of this Act shall include appropriate charges for—

(A) administrative services, calculated on an average percentage basis to recover the full estimated costs (excluding a pro rata share of fixed base operations costs) of administration of sales made under this Act to all purchasers of such articles and services as specified in section 43(b) and section 43(c) of this Act; *and*

[(B) a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment (except for equipment wholly paid for either from funds transferred under section 503(a)(3) of the Foreign Assistance Act of 1961 or from funds made available on a nonrepayable basis under section 23 of this Act); and]

[(C)] (B) the recovery of ordinary inventory losses associated with the sale from stock of defense articles that are being stored at the expense of the purchaser of such articles.

[(2) The President may reduce or waive the charge or charges which would otherwise be considered appropriate under paragraph (1)(B) for particular sales that would, if made, significantly advance United States Government interests in North Atlantic Treaty Organization standardization, standardization with the Armed Forces of Japan, Australia, or New Zealand in furtherance of the mutual defense treaties between the United States and those countries, or foreign procurement in the United States under coproduction arrangements.]

[(3)] (2)(A) The President may waive the charges for administrative services that would otherwise be required by paragraph (1)(A) in connection with any sale to the Maintenance and Supply Agency of the North Atlantic Treaty Organization in support of—

(i) a weapon system partnership agreement; or

(ii) a NATO/SHAPE project.

(B) The Secretary of Defense may reimburse the fund established to carry out section 43(b) of this Act in the amount of the charges waived under subparagraph (A) of this paragraph. Any such reimbursement may be made from any funds available to the Department of Defense.

(C) As used in this paragraph—

(i) the term “weapon system partnership agreement” means an agreement between two or more member countries of the Maintenance and Supply Agency of the North Atlantic Treaty Organization that—

(I) is entered into pursuant to the terms of the charter of that organization; and

(II) is for the common logistic support of a specific weapon system common to the participating countries; and

(ii) the term “NATO/SHAPE project” means a common-funded project supported by allocated credits from North Atlantic Treaty Organization bodies or by host nations with NATO Infrastructure funds.

\* \* \* \* \*

### **SECTION 33 OF THE FEDERAL ENERGY ADMINISTRATION ACT OF 1974**

#### **【ORGANIZATIONAL CONFLICTS**

【SEC. 33. (a) The Administrator shall, by rule, require any person proposing to enter a contract, agreement, or other arrangement, whether by competitive bid or negotiation, under this Act or any other law administered by him for the conduct of research, development, evaluation activities, or for technical and management support services, to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information, as determined by the Administrator, bearing on whether that person has a possible conflict of interest with respect to—

【(1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons, or

【(2) being given an unfair competitive advantage.

Such person shall insure, in accordance with regulations prescribed by the Administrator, compliance with this section by any subcontractor (other than a supply subcontractor) of such person in the case of any subcontract of more than \$10,000.

【(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he finds, after evaluating all information provided under subsection (a) and any other information otherwise available to him that—

【(1) it is unlikely that a conflict of interest would exist, or

【(2) such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement;

except that if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement. If he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

【(c) The Administrator shall publish rules for the implementation of this section, in accordance with section 533 of title 5, United



States Code (without regard to subsection (a)(2) thereof) as soon as practicable after the date of the enactment of this section, but in no event later than 120 days after such date.】

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## TITLE 18, UNITED STATES CODE

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### PART I—CRIMES

\* \* \* \* \*

#### CHAPTER 15—CLAIMS AND SERVICES IN MATTERS AFFECTING GOVERNMENT

Sec.

【281. Restrictions on retired military officers regarding certain matters affecting the Government.】

\* \* \* \* \*

#### 【§281. Restrictions on retired military officers regarding certain matters affecting the Government

【(a)(1) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, directly or indirectly receives (or agrees to receive) any compensation for representation of any person in the sale of anything to the United States through the military department in which the officer is retired (in the case of an officer of the Army, Navy, Air Force, or Marine Corps) or through the Department of Transportation (in the case of an officer of the Coast Guard) shall be fined under this title or imprisoned not more than two years, or both.

【(2) Any person convicted under paragraph (1) shall be incapable of holding any office of honor, trust, or profit under the United States.

【(b) A retired officer of the Armed Forces who, while not on active duty and within two years after release from active duty, acts as agent or attorney for prosecuting or assisting in the prosecution of any claim against the United States—

【(1) involving the military department in which the officer is retired (in the case of an officer of the Army, Navy, Air Force, or Marine Corps) or the Department of Transportation (in the case of an officer of the Coast Guard); or

【(2) involving any subject matter with which the officer was directly connected while in an active-duty status; shall be fined under this title or imprisoned not more than one year, or both.

【(c) This section does not apply—

【(1) to any person because of the person's membership in the National Guard of the District of Columbia; or

【(2) to any person specifically excepted by law.】

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## SECTION 19 OF THE FEDERAL NONNUCLEAR ENERGY RESEARCH AND DEVELOPMENT ACT OF 1974

【SEC. 19. (a) The Administrator shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, with the Energy Research and Development Administration whether by advertising or negotiation, or for technical consulting and management support services or other such similar services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other interests or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by subcontractors of such person who are engaged to perform similar services.

【(b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: *Provided*, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

【(c) The Administrator shall publish rules for the implementation of this section, in accordance with section 553 of title 5, United States Code, as soon as possible after the date of enactment of this section but in no event later than 180 days after such date.】

## CONTRACT DISPUTES ACT OF 1978

### DEFINITIONS

SEC. 2. As used in this Act—

(1) \* \* \*

\* \* \* \* \*

【(6) The term “agency board” means an agency board of contract appeals established under section 8 of this Act; and】

(6) *the term “Defense Board” means the Department of Defense Board of Contract Appeals established under section 8(a) of this Act;*

(7) *the term “Civilian Board” means the Civilian Board of Contract Appeals established under section 8(b) of this Act; and*

【(7)】 (8) The term “misrepresentation of fact” means a false statement of substantive fact, or any conduct which leads to a

belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

\* \* \* \* \*

#### DECISION BY THE CONTRACTING OFFICER

##### SEC. 6. (a) \* \* \*

\* \* \* \* \*

(c)(1) A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claim of more than \$100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

\* \* \* \* \*

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a [court or an agency board of contract appeals] *court, the Defense Board, or the Civilian Board* of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by [an agency board of contract appeals] *the Defense Board or the Civilian Board*, the court or [agency board] *the Board concerned* shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

\* \* \* \* \*

#### CONTRACTOR'S RIGHT OF APPEAL TO BOARD OF CONTRACT APPEALS

SEC. 7. Within ninety days from the date of receipt of a contracting officer's decision under section 6, the contractor may appeal such decision to [an agency board of contract appeals] *the Defense Board or the Civilian Board*, as provided in section 8.

#### [AGENCY BOARDS OF CONTRACT APPEALS]

##### DEFENSE AND CIVILIAN BOARDS OF CONTRACT APPEALS

SEC. 8. [(a)(1) Except as provided in paragraph (2) an agency board of contract appeals may be established within an executive agency when the agency head, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least three members who shall have no other inconsistent du-

ties. Workload studies will be updated at least once every three years and submitted to the Administrator.

[(2) The Board of Directors of the Tennessee Valley Authority may establish a board of contract appeals for the Authority of an indeterminate number of members.

[(b)(1) Except as provided in paragraph (2), the members of agency boards shall be selected and appointed to serve in the same manner as hearing examiners appointed pursuant to section 3105 of title 5 of the United States Code, with an additional requirement that such members shall have had not fewer than five years' experience in public contract law. Full-time members of agency boards serving as such on the effective date of this Act shall be considered qualified. The chairman and vice chairman of each board shall be designated by the agency head from members so appointed. Compensation for the chairman, the vice chairman, and all other members of an agency board shall be determined under section 5372a of title 5, United States Code.

[(2) The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to its agency board of contract appeals established in subsection (a)(2), and shall designate a chairman of such board. The chairman and all other members of such board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, United States Code, for each day they are engaged in the actual performance of their duties as members of the board.]

*(a) There is established in the Department of Defense a board of contract appeals to be known as the Department of Defense Board of Contract Appeals.*

*(b) There is established in the General Services Administration a board of contract appeals to be known as the Civilian Board of Contract Appeals.*

[(c) If the volume of contract claims is not sufficient to justify an agency board under subsection (a) or if he otherwise considers it appropriate, any agency head shall arrange for appeals from decisions by contracting officers of his agency to be decided by a board of contract appeals of another executive agency. In the event an agency head is unable to make such an arrangement with another agency, he shall submit the case to the Administrator for placement with an agency board. The provisions of this subsection shall not apply to the Tennessee Valley Authority.]

(d) [Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal.] *The Defense Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, or the Department of the Air Force relative to a contract made by that department. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense or the Department of the Army, the Navy, or the Air Force) relative to a contract made by that agency. In exercising this jurisdiction, [the agency board] the Board concerned is au-*

thorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Claims Court.

(e) **[An agency board shall provide]** *The Defense Board and the Civilian Board shall each provide*, to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted, and shall mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(f) The rules of **[each agency board]** *the Defense Board and the Civilian Board* shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$100,000 or less. The accelerated procedure shall be applicable at the sole election of only the contractor. Appeals under the accelerated procedure shall be resolved, whenever possible, within one hundred and eighty days from the date the contractor elects to utilize such procedure.

(g)(1) The decision of **[an agency board of contract appeals]** *the Defense Board or the Civilian Board, as the case may be*, shall be final, except that—

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) The agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, United States Code, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

**[(2) Notwithstanding the provisions of paragraph (1), the decision of the board of contract appeals of the Tennessee Valley Authority shall be final, except that—**

**[(A) a contractor may appeal such a decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code within one hundred twenty days after the date of receipt of a copy of such decision, or**

**[(B) The Tennessee Valley Authority may appeal the decision to a United States district court pursuant to the provisions of section 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.]**

**[(3)] (2)** An award by an arbitrator under this Act shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

**[(h)** Pursuant to the authority conferred under the Office of Federal Procurement Policy Act, the Administrator is authorized and directed, as may be necessary or desirable to carry out the provisions of this Act, to issue guidelines with respect to criteria for the establishment, functions, and procedures of the agency boards (except for a board established by the Tennessee Valley Authority).

**[(i)** Within one hundred and twenty days from the date of enactment of this Act, all agency boards, except that of the Tennessee

Valley Authority, of three or more full time members shall develop workload studies for approval by the agency head as specified in section 8(a)(1).]

#### SMALL CLAIMS

SEC. 9. (a) The rules of [each agency board] *the Defense Board and the Civilian Board* shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$50,000 or less. The small claims procedure shall be applicable at the sole election of the contractor.

(b) The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal thereunder. Such appeals may be decided by a single member of [the agency board] *the Board concerned* with such concurrences as may be provided by rule or regulation.

\* \* \* \* \*

#### ACTIONS IN COURT: JUDICIAL REVIEW OF BOARD DECISIONS

SEC. 10. (a)(1) [Except as provided in paragraph (2), and in] *In lieu of appealing the decision of the contracting officer under section 6 to [an agency board] the Defense Board or the Civilian Board*, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

[(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, United States Code, notwithstanding any contract provision, regulation, or rule of law to the contrary.]

[(3)] (2) Any action under paragraph (1) [or (2)] shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) In the event of an appeal by a contractor or the Government from a decision of [any agency board] *the Defense Board or the Civilian Board* pursuant to section 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of [the agency board] *the Board concerned* on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of [an agency board] *the Defense Board or the Civilian Board* pursuant to section 8, the court may render an opinion and judgment and remand the case for further action by [the agency board] *the Board concerned* or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) If two or more suits arising from one contract are filed in the Court of Claims and [one or more agency boards] *the Defense Board or the Civilian Board (or both)*, for the convenience of parties

or witnesses or in the interest of justice, the United States Claims Court may order the consolidation of such suits in that court or transfer any suits to [or among the agency boards involved] *one or both of the Boards*.

\* \* \* \* \*

#### SUBPENA, DISCOVERY AND DEPOSITION

SEC. 11. A member of [an agency board of contract appeals] *the Defense Board or the Civilian Board* may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of [the agency board through the Attorney General; or upon application by the board of contract appeals of the Tennessee Valley Authority] *the Defense Board or the Civilian Board*, shall have jurisdiction to issue the person an order requiring him to appear before the agency board or a member thereof, to produce evidence or to give testimony, or both. Any failure of any such person to obey the order of the court may be punished by the court as a contempt thereof.

\* \* \* \* \*

#### APPROPRIATIONS

SEC. 13. (a) \* \* \*

(b) Any monetary award to a contractor by [an agency board of contract appeals] *the Defense Board or the Civilian Board* shall be paid promptly in accordance with the procedures contained in subsection (a) above.

\* \* \* \* \*

(d)(1) \* \* \*

(2) Notwithstanding the provisions of subsection (a) through (c), any monetary award to a contractor [by the board of contract appeals for] *by the Defense Board or the Civilian Board from the Tennessee Valley Authority* shall be paid in accordance with the provisions of section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831(h)).

\* \* \* \* \*

### SECTION 5372a OF TITLE 5, UNITED STATES CODE

#### § 5372a. Contract appeals board members

(a) For the purpose of this section—

(1) the term “contract appeals board member” means a member of [an agency board of contract appeals appointed under section 8 of the Contract Disputes Act of 1978] *the Department of Defense Board of Contract Appeals or the Civilian Board of*

*Contract Appeals appointed under section 202 of the Office of Federal Procurement Policy Act; and*

(2) the term “appeals board” means [an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978] *the Department of Defense Board of Contract Appeals or the Civilian Board of Contract Appeals.*

\* \* \* \* \*

#### IX. COMMITTEE RECOMMENDATION

On July 27, 1995, a quorum being present, the Committee ordered the bill favorably reported.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT—104TH  
CONGRESS ROLLCALL

Date: July 27, 1995.

Amendment No. 1.

Description: Amendment in the Nature of a Substitute.

Offered By: Mr. Clinger.

Voice Vote: Ayes.

Date: July 27, 1995.

Final Passage of H.R. 1670.

Offered By: Mr. Horn.

Voice Vote: Ayes.

#### X. CONGRESSIONAL ACCOUNTABILITY ACT; PUBLIC LAW 104-1; SECTION 102(b)(3)

This provision is inapplicable to the legislative branch because it does not relate to any terms or conditions of employment or access to public services or accommodations.



## XI. MINORITY AND ADDITIONAL VIEWS

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### MINORITY VIEWS

The Committee on Government Reform and Oversight met on Thursday, July 27, 1995, and marked-up H.R. 1670, the Federal Acquisition Reform Act of 1995. The Committee Report reflects the fact that Chairman Clinger offered an amendment in the nature of a substitute, which was favorably reported to the House by voice vote.

However, the report does not reflect the concerns expressed at the mark-up by Democrats that small business may be placed at a significant competitive disadvantage by the bill's change in the "full and open" competition standard. Neither does the report reflect the fact that the Democrats did not oppose the bill in the committee because of a promise by Chairman Clinger to continue to review the impact upon small business, and to support our right to offer an amendment on the House floor to correct the bill.

We were only able to examine new changes to H.R. 1670 two days before the bill was marked-up. It, after a more careful analysis of the new competition language and after consultation with small business it continues to appear that small business will be disadvantaged by the change in the "full and open competition" standard, we will offer an amendment on the floor to ensure a level playing field for small business.

Our difference with H.R. 1670 is that we want to preserve full and open competition in procurement. It is an important principle to ensure that every business, old and new, large and small, has a fair chance to compete for government contracts. We know from experience if you allow government bureaucrats to limit competition, they will invariably do so. We would most certainly return to a "old boy network" in which only the large and established companies can successfully compete.

At the same time we should note our support for the overwhelming majority of H.R. 1670. Generally, the bill contains changes that are consistent with the streamlining efforts we made less than a year ago, with the most comprehensive government-wide acquisition reform act in over a decade, the Federal Acquisition Streamlining Act of 1994, known as FASA.

### DEFENSE AUTHORIZATION BILL

Despite objections from the committee Democrats, the Committee on Rules made H.R. 1670 in order as an amendment on the Defense Authorization bill. Prior to floor consideration of that amendment, the Ranking Democratic Member of the full committee, Rep. Cardiss Collins, and the ranking Democratic Member of the Gov-

ernment Information and Technology Subcommittee, Representative Maloney, attempted to work with Chairman Clinger to improve his amendment. Chairman Clinger accepted four of our five concerns. As a result of these changes, the modified Clinger amendment was a substantial improvement over the original amendment.

The first of our changes accepted by Chairman Clinger improved the government procurement management practices, by requiring Federal agencies to make more effective use of the cost-management tools and procedures known generally as Value Engineering. Value engineering is a long-standing and widely-accepted technique in both the public and private sectors that, despite its proven capabilities, remains under-utilized in the Federal acquisition process.

Our second change retains the "knowing" standard for criminal violations of our procurement integrity laws, and increases the maximum criminal penalty from 5 to 15 years. This change will facilitate the Justice Department's ability to prosecute criminal and civil procurement fraud cases.

Third, Chairman Clinger accepted our change to limit sole-source contracting for commercial products. While we believe that the complete elimination of the simplified acquisition threshold contained in the Clinger amendment will raise problems, our amendment will place limits on its use and will help to ensure that an adequate level of competition is maintained with the expanded use of commercial items.

Finally, Chairman Clinger accepted an amendment by Representative Maloney that improves the performance capability of the frontline contracting personnel. The Maloney language requires civilian agency heads to adopt education, training and incentive features that raise the level of excellence and professionalism of the acquisition work force.

The one change that Chairman Clinger did not accept was our "full and open" competition amendment. Our amendment did three things: First it retained the current full and open competition standard. Second, it eliminated an unnecessary system of Federal agency verification, whereby agency bureaucrats determine which firms are allowed to bid for Federal contracts. Third, it moves us closer to commercial buying practices, by empowering agency officials to have more open communication with the private sector. Rep. Cardiss Collins offered this amendment on the floor.

The Collins amendment passed on June 14, 1995 with bipartisan support, and then Chairman Clinger's amendment, as amended, passed by a truly bipartisan vote of 420-1.

#### COMMITTEE MARKUP

A Committee markup and scheduled for Thursday, July 27, 1995. Prior to the committee markup, Chairman Clinger made an effort to move H.R. 1670 closer to the concept of full and open competition which passed with bipartisan support on the House floor as a part of the Defense Authorization bill.

In Title I in the Clinger substitute, the term "full and open competition" has been included in the text. However, its meaning is substantively changed from the language in the Collins amendment, that passed on the House floor. The Collins "full and open competition" language has been replaced by "open access", the defi-

inition of which is identical to the definition of "full and open" in the Competition in Contracting Act. However, a subsequent provision of the bill creates large loopholes through which bureaucrats may be able to ignore full competition, and instead more easily limit competition.

For example, the new section 2304(d), entitled "PROCEDURES OTHER THAN COMPETITIVE PROCEDURES" states that "Procedures other than competitive procedures may be used for purchasing property and services only when the use of competitive procedures is not feasible or appropriate." Standards for determining what is feasible or appropriate will be written by the procurement officers, and the procurement officers must justify their decision in writing. It is impossible to know whether those new standards will hamstring small business because there has never been such a broad exception to full and open competition.

The hearing record of H.R. 1670 does not establish any problems with the current "full and open competition" standard. The cornerstone of our free enterprise system is full and open competition. The competitive market ensures fair prices to the government. If a vendor's product costs too much it will not survive. At the same time full and open competition provides the opportunity for all vendors, particularly small businesses, to participate in the Federal marketplace, to be judged on merit. This creates incentives for the development of new and innovative products. These market forces are essential if we are to position our country for economic leadership into the next century.

Small businesses may be threatened by the change in competition standard. Maybe they won't. At this stage we just don't know, because the language has not been thoroughly circulated for comments. We have held no hearings on the new provisions. Affected businesses have not been consulted.

Preliminary indications are that small business believes that Chairman Clinger's revised competition standard is a problem for small business. Representative Maloney entered into the record a letter sent to Chairman Clinger, and signed by the U.S. Chamber of Commerce and the Small Business Working Group on Procurement Reform, which includes the Small Business Legislative Council, National Small Business United, the National Association of Women Business Owners, the Latin American Management Association, the Minority Business Enterprise Legal Defense and Education Fund, the National Association of Minority Business, the National Association of Minority Contractors, and Women Construction Owners and Executives and the American Gear Manufacturers Association. The letter indicates that the organizations have serious and substantial objections to the new competition standard in Title I, and concerns were expressed regarding the unseen bid protest language in Title IV.

CARDISS COLLINS.  
CAROLYN B. MALONEY.

#### ADDITIONAL MINORITY VIEWS

If enacted, H.R. 1670 would make sweeping changes in the current Federal procurement system. It would do this by changing the basic competition standard required of Federal agencies when purchasing goods or services. While the Chairman's genuine commitment to procurement reform is commendable, I continue to have serious reservations about this fundamental transformation of Federal acquisition law. The Federal government spends over \$200 billion per year on the acquisition of goods and services—\$800 for every person in the United States. Especially in an era of every-tightening fiscal constraint, if we want to control spending and better manage our limited resources, there are few areas of the Federal government that are more important.

The House of Representatives has already taken a position supporting the current standard of full and open competition by adopting Ranking Member Collins' amendment to Chairman's Clinger amendment to H.R. 1530, the National Defense Authorization bill. The July 10th version of H.R. 1670 replaced "full and open competition." With "open access," and defined "open access" identically to "full and open competition." In the July 19th version of H.R. 1670, both terms are used in the new standard. On its surface then, the final version of H.R. 1670 appears to maintain the current standard by directing the government to "obtain full and open competition." However, in practical effect this language restricts full and open competition because the directive to "obtain full and open competition" is modified by "that is consistent with the need to efficiently fulfill the Government's requirements." Full and open competition is also substantially restricted by allowing the contracting officer greater discretion as to when other than competitive procedures may be used. This is discussed more fully below.

The case that the full and open competition standard needs to be changed has yet to be made in a credible and coherent fashion. It was not raised during the Committee's February 28, 1995 hearing on procurement reform. At the joint Government Reform and Oversight/National Security Committee hearing witnesses did not address the fundamental question of whether the Federal government should move away from the full and open competition standard, but rather testified on the specific language of H.R. 1670 at that time, i.e. "maximum practicable" competition.

Abandonment of the full and open competition standard has not been recommended by any recent authoritative study of the Federal procurement system. Indeed, the so-called Section 800 Panel, whose 1800 page report provided the analytical basis for last year's landmark Federal Acquisition Streamlining Act, considered and explicitly rejected moving away from full and open competition. In addition, changing the full and open competition standard is vigorously opposed by the small business community. In a letter to

Chairman Clinger dated July 27th, the Small Business Working Group on Procurement Reform and the U.S. Chamber of Commerce wrote "we believe that it is essential that H.R. 1670 be modified to maintain the current standard of 'full and open competition', established by the landmark Competition in Contracting Act of 1984 (CICA) \* \* \*. The competitive standard established by CICA has proven itself for over a decade, resulting in a steady decrease in sole source contract awards. It assures a fair and open procurement process, which is essential to small business."

H.R. 1670 also substantially broadens the contracting officer's authority to award contracts through other than competitive procedures. CICA established seven statutory exceptions that would justify the use of other than competitive procedures and required that their use be justified and approved. H.R. 1670 retains these exceptions, but applies them only when a contract is done on a sole source basis, significantly weakening their effect. In addition, H.R. 1670 adds two new and extremely broad exceptions to competition, allowing use of other than competitive procedures when those procedures are not "feasible or appropriate." The bill leaves the definition of these exceptions to the Federal Acquisition Regulation. At the very least, there should be some statutory definition of these terms.

The concern most frequently cited by industry representatives and the sponsors of H.R. 1670 with respect to the Federal procurement system center around the desire, at some point early in the process, to limit the competitive range. For businesses, this will save time and money by letting them know early that they have little chance of winning the contract. For the government, this ability would lead to greater efficiency and cost-savings. This problem can be addressed by improving communication between vendors and the government, and by modifying current law to make explicit the ability of the contracting officer to establish an initial competitive range and eliminate those offers that are clearly unacceptable. This can be done without changing the full and open competition standard that has been in effect for over a decade.

Title II (Commercial Items) of H.R. 1670 includes a provision which would allow the purchase of commercial items with the use of "simplified procedures" without any dollar value limitation. Currently, such procedures can be used only for small (under \$25,000). When FASA is fully implemented later this year, that threshold will rise to \$100,000. At that level, over 90% of all commercial item procurements will be able to use streamlined procedures. The small business community continues to be concerned that these streamlined procedures encourage the use of "telephone call competitions" in which three phone calls would constitute competition. Abolishing any threshold at this time is unwise, especially since the definition of "commercial item" included in FASA is very broad. We should wait until we have had time to analyze the effects of the \$100,000 threshold before lifting it all together.

CAROLYN B. MALONEY.

#### ADDITIONAL VIEWS

During the mark-up, an amendment was offered by Rep. Zeff, and later withdrawn. The amendment would repeal section 1555 of the Federal Acquisition Streamlining Act of 1994, which authorizes GSA to allow State and local government entities to purchase goods and services under GSA's Federal Supply Schedule contract program. It is known as the Cooperative Purchasing Program.

Before Rep. Zeff withdrew his amendment, I offered my support for the amendment and requested that a statement regarding the intent of the amendment appear in the committee report.

The Cooperative Purchasing Program has not yet been implemented by GSA. But considerable objections have been heard from small businesses and local dealers about the difficulties the program would present for them. GSA's market power would give companies listed through GSA catalogs an incredible competitive advantage. Those companies not listed, particularly small manufacturers and local wholesalers and distributors, could be squeezed out of the municipal and state marketplaces.

The Zeff amendment does not appear to interfere with other programs under which state and local governments may acquire Government property, such as recent legislation allowing state and local government to purchase police equipment through the Department of Defense.

BOB WISE.

