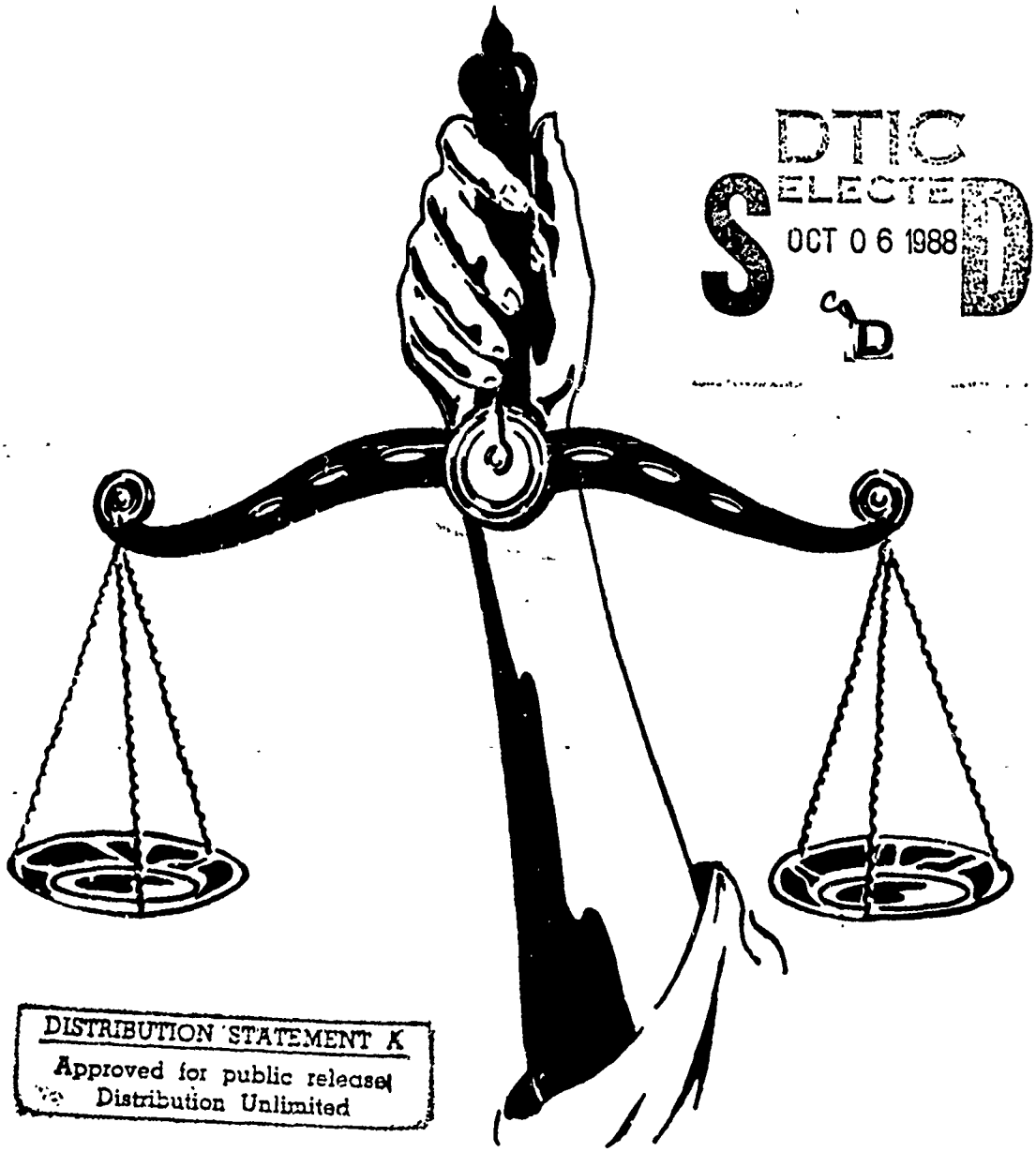
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GOVERNMENT CONTRACT LAW

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This text is used in teaching a two week course in Government Contract Law to non-lawyer but experienced contract personnel. Contains and appendix with most applicable statutes and clauses current to date of publication.

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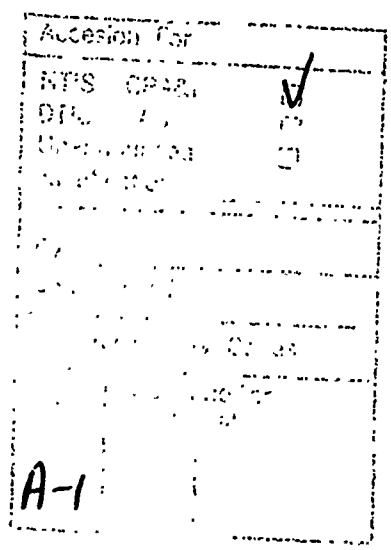
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THIS PUBLICATION HAS BEEN REVIEWED AND APPROVED BY COMPETENT PERSONNEL OF THE PREPARING COMMAND IN ACCORDANCE WITH CURRENT DIRECTIVES ON DOCTRINE, POLICY, ESSENTIALITY, PROPRIETY, AND QUALITY. USE OF THE MASCULINE GENDER HEREIN (UNLESS REFERRING TO A PARTICULAR INDIVIDUAL) SHALL BE READ AS INCLUDING THE FEMININE GENDER.

FOREWORD

THIS NINTH EDITION, like its predecessors, will serve as the textbook for the Government Contract Law Course taught at the School of Systems and Logistics. The primary purpose of this text is to facilitate course instruction at the class sessions presented at Wright-Patterson Air Force Base and around the world.

The course outline and content were approved by the Defense Contracting /Acquisition Career Management Board. Study materials for this text have been produced from official, as well as auxiliary, sources by the faculty of the Department of Contracting Management of the School of Systems and Logistics, Air Force Institute of Technology of the Air University.

As it is intended for non-lawyers attending a short course, the law is presented in a concise narrative form. This material is supplemented with cases drawn from Government Contract Law Cases, 1987 edition, for a rounded approach to the subject. This edition of the text includes coverage of the legislation of the 99th Congress, not found in previous editions.

The subject matter covered is aimed at the broad Government outlook. In this respect, Government Contract Law complements the Federal Acquisition Regulation and provides a preventive law treatment for contracting personnel. While it may suggest workable solutions to legal problems, it does not purport to promulgate policy or be, in any sense, directive. Keywords: Procurement; Contract administration; Law; Acquisition process; (KT)

Of special help and value to students are the appendices A through F contained in this volume. The topics covered are: "Government Organization Charts", "Glossary of Legal Terms", "Selected Bibliography", "Contract Clauses", "Roadmap of Contractor Remedies", and "Statutes", pertinent to specific chapters of the text. In addition an Index, Table of Cases Cited, and Table of Statutes Cited, are included.

Acknowledgement and thanks are offered to Colonel Larry L. Smith, Dean, School of Systems and Logistics, and Dr. William C. Pursch, Chief, Department of Contracting Management, who provided administrative support to the project.

The authors are listed on the inside title page. They are to be commended for undertaking a work of this magnitude in conjunction with their daily teaching responsibilities and within the time limitations for completion. Not to be forgotten are contributing authors to past editions: Attorneys Richard L. Stanley, Richard H. Shutte, W. Jack Grosse, William J. McGrath, John M. Rankin, Robert Bruce Shearer, Rufus Boutwell, Roy Garr, Samuel R. Perkins, Edwin J. Smithson and Associate Editor John A. McCann.

Mr. Ernest Keucher of the Department of Nonresident Programs made significant contributions to this text by shaping the book into final form, and by extremely helpful advice. Eileen Donnelly contributed our "replacement page" format, for which we thank her. Nancy Wiviott, Arlene Mohr, Norma Mullennex and Ron Keucher were most helpful in typing and proofreading the manuscript.

Professor James O. Mahoy, Editor

April 1987

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW: ORGANIZATION OF THE FEDERAL GOVERNMENT

0-1. The purpose of this chapter is to provide a theoretical framework within which the concept of Government contracts can be understood in the light of historical and current practices. The law of Government contracts, which is highly specialized, has increased in importance, scope and complexity with the growth in the size of the Government and the volume of its business. For this reason a knowledge of the organization of the Federal Government, the legislation pertinent to Government contracting, and the regulations through which legislation is implemented will facilitate the study of succeeding chapters.

0-2. Although it may be generally stated that the same basic legal principles which govern private contracts apply to Government contracts, exceptions are numerous because of the unique status of the Government as a contracting party. As a sovereign, the Government has certain unusual powers and immunities. On the other hand, it is subject to limitations arising from the fact that the United States is a Government of delegated powers. In particular, the agencies of the Government, such as military departments, have only that authority to contract which Congress or the President chooses to delegate. By comparison, private parties have full power to contract as they please, subject only to specific limitations imposed by law which are based on public policy.

1. CONSTITUTIONAL PRINCIPLES OF SEPARATION OF POWERS

1-1. The document emanating from the Philadelphia Convention of 1787, ratified by State conventions and chosen by the people, is called the Federal Constitution. Together with later amendments, this Constitution established the basic legal relationships which characterize our form of Government. The most fundamental concept contained in the Constitution is the principle of separation of governmental powers; Chief Justice Taft expressed it as follows:

> *"The Federal Constitution nowhere expressly declares that the branches of the Government shall be kept separate and independent. All legislative powers are vested in a Congress. The executive power is vested in a President. The judicial power is vested in one Supreme Court and in such inferior courts as Congress may from time to time establish. The judges are given life tenure and a compensation that may not be diminished during their continuance in office with the evident purpose of securing them and their courts in independence of Congress and the Executive. Complete independence and separation between the three branches, however, are not attained, or intended, as other provisions of the constitution and the normal operation of the Government under it easily demonstrate. By affirmative action through the veto power, the executive and one more than one-third of either house may defeat all legislation. One-half of the House and two-thirds of the Senate may impeach and remove the members of the judiciary. The executive can reprieve or pardon all offenses after their commission either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress. . . Negatively one House of Congress can withhold all appropriations and stop the operations of Government. The Senate can hold up all appointments, confirmations of which either the Constitution or a statute requires, and thus deprive the President of the necessary agents with which he is to take care that the laws be faithfully executed."*

1-2. These are some examples of positive and negative restraints available under the Constitution to each branch of the Government in defeat of the actions of the others. They show that although each of the three branches is independent, the intended functioning of the Government requires a measure of cooperation among the branches. Indeed, while the Constitution has made the judiciary as independent of the other branches as is practicable, it is, as often remarked, the weakest of the three. It must look to the force of public opinion for support in the face of reluctance of either of the other branches to enforce its will.

1-3. From this point of view, each of the three branches of Government balances the others and this system of checks and balances is designed to prevent abuse of power by any one branch. In a sense, therefore, the Constitution creates powers and distributes them among the three branches of Government, while at the same time imposing limitations on each to induce cooperation with the others.

2. GENERAL CONCEPT OF DELEGATION OF POWER

2-1. Whether a power can be legally delegated often depends on the terms of the Constitution itself. Some powers cannot be delegated because they are granted to a specific person in the Constitution. For example, only Congress can declare war, because the Constitution specifically assigns this power to Congress as a legislative function. But where a power is not specifically assigned, and where it logically appears that it would be impossible for the holder of the power to exercise the power personally, delegation is not only permitted but necessary. Generally, however, final responsibility for the exercise of the power or the duty, as the case may be, must remain with the one initially charged with the responsibility. Historically, whether a power was properly delegated depended upon the presence of a standard or prescribed formula to guide the person to whom it was delegated. More recently it has been recognized that a proper delegation can allow greater discretion in exercising the delegated power. "In order to avoid an unconstitutional delegation of power, it is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the problem." (*Lichter v. U.S.*, 334 U.S. 742 (1947)).

2-2. **Executive Branch.** Article II of the Federal Constitution is often referred to as the executive Article. It provides in Section 1, "The Executive Power shall be vested in a President of the United States of America." The executive power is given in general terms but, where necessary, limitations are expressly and specifically provided. With one notable exception, the field of foreign affairs, where the President is said to have inherent power, the powers of the Chief Executive are enumerated in Sections 2 and 3:

(1) He is Commander-in-Chief of the Army and Navy of the United States and the Militia of the various states when called to actual service.

(2) He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their offices.

(3) He has the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

(4) He has the power to make treaties by and with the advice and consent of the Senate, provided that two-thirds of the Senators present concur.

(5) He nominates and appoints, with the advice and consent of the Senate, ambassadors, other public ministers and consuls, Supreme Court Justices, and all other officers of the United States (except that Congress can in some instances authorize the courts or other officials to make appointments).

(6) He may fill vacancies that occur during the recess of the Senate (such appointments expire at the end of the next session).

(7) He may, on extraordinary occasions, convene one or both Houses and in the case of disagreement with respect to time of adjournment, he may adjourn them to such time as he shall think proper.

(8) He shall receive ambassadors and other public ministers.

(9) He shall commission all officers of the United States.

2-3. In addition to the above powers, the President has the following duties:

(1) He shall take care that the laws be faithfully executed.

(2) He shall from time to time give to the Congress information of the State of the Union.

(3) He shall recommend to Congress such measures as he shall judge necessary and expedient.

2-4. **Presidential Delegation.** Very early in our history, it was recognized by the judicial branch of our Government that it would be literally impossible for the President to effectuate or superintend every power or duty that he pos-

sessed either expressly or implicitly. In *Williams v. United States*, 1 How 290 (1843), Justice Daniel speaking for the court stated, "The President's duty in general requires his superintendence of the administration, yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to such services, which nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform." The first agencies to be created were the cabinet posts approved by President Washington. As the Government became more complex and demanding, it was necessary to expand agency development in both the executive area of responsibility and in its legislative counterpart. This has resulted in the existence of hundreds of agencies and subagencies in Government today.

2-5. In the executive branch of the Government there are departments, agencies, and offices which are responsible to the executive. These instrumentalities are the agencies through which the President discharges the responsibilities of his office. While it is neither feasible nor prudent to discuss all of the numerous agencies at great length, a few of the more important ones will be briefly touched upon at this point. (See chart in Appendix A)

2-6. The Executive Office of the President consists of a number of offices, councils and advisory boards created to assist the President in carrying out his functions by providing services and advice:

a. The White House Office is staffed by special assistants who serve the President in the performance of the many detailed activities he conducts personally. Many of these assistants are personal aides and are specialists in fields in which the President wishes and needs to be informed.

b. The Office of Management and Budget performs many services, the majority of which relate to the responsibility that the President has, under the Budget and Accounting Act, to transmit to Congress the proposed annual budget of the United States. In addition, that office serves as the Government's budget agency and plans and promotes improvement, development, and coordination of Federal and other statistical agencies.

c. The Council of Economic Advisors analyzes the Nation's economy, advises the President on economic developments, and recommends to the President policies for economic growth and stability.

d. The National Security Council, which includes the Vice President, Secretary of State, and Secretary of Defense, is advised by the Director of the Central Intelligence Agency and the Chairman of the Joint Chiefs of Staff. It functions to advise the President on the integration of domestic, foreign and military policies relating to national security.

e. The Office of Science and Technology Policy advises and assists the President in developing policies to coordinate programs to use science and technology most effectively.

f. The Office of the United States Trade Representative sets and administers overall trade policy.

g. The Council on Environmental Quality formulates and recommends national policies to promote the improvement of the quality of the environment.

h. The Office of Policy Development, established in 1977, formulates and coordinates recommendations on domestic policy being made to the President.

i. The Office of Administration provides administrative support services to all units within the Executive Office of the President.

2-7. The Cabinet, which consists of thirteen executive departments, advises the President on the many matters which he is expected to superintend as the Chief Executive. The executive departments of the Cabinet are as follows: Department of State; Department of Treasury; Department of Defense; Department of Justice; Department of the Interior; Department of Agriculture; Department of Commerce; Department of Labor; Department of Health and Human Services; Department of Housing and Urban Development; Department of Transportation; Department of Energy; and Department of Education.

2-8. Many "independent" agencies tend to function for the benefit of other agencies or other activities not so closely associated with Presidential functions. Some of these independent agencies are listed below, and others are listed in Appendix A.

a. The General Services Administration manages Government property records, and provides systems for procurement and distribution

of supplies.

b. The Nuclear Regulatory Commission develops national policy for generation, use, and control of atomic energy.

c. The National Aeronautics and Space Administration assists in implementing the policy that activities in space be devoted to peaceful purposes.

d. The Small Business Administration promotes the interests of small businesses.

2-9. For purposes of Government contracts, the most important executive department is the Department of Defense. Within this Department are the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense for Acquisition (and Deputy), the Defense Staff Offices, the Joint Chiefs of Staff, the three military departments and the military services within those departments, the unified and specified commands, and other Department of Defense agencies. The Secretary of Defense is the principal assistant to the President in matters relating to the Department of Defense. The Department contains a number of Assistant Secretaries in special functional fields. The Under Secretary for Acquisition has responsibility for all acquisition by the Department of Defense.

2-10. The National Security Act, as amended in 1949, established the Department of Defense as an executive department, and at the same time designated the Department of the Army, the Department of the Navy and the Department of the Air Force as military departments within the Department of Defense. Each of the military departments is headed by a Secretary who is subject to the direction, authority and control of the President as Commander-in-Chief and of the Secretary of Defense. Each Secretary of a military department is a member of the Armed Forces Policy Council, which functions as an advisory body to the Secretary of Defense on matters of broad policy relating to the armed forces.

2-11. Each of the military departments within the Department of Defense has an organization responsible for procurement. In the Department of the Army, the Assistant Secretary (Research, Development and Acquisition) is authorized and directed to act for the Secretary of the Army in the field of procurement and production. In the Department of the Navy, the Assistant Secretary of the Navy (Shipbuilding and Logistics), the Office of Naval Acquisition Support (ONAS) and the Executive Director for Contracts and Business Management are responsible for providing material support to the operating forces of the Navy. In the Department of the Air Force, the Assistant Secretary of the Air Force (Research, Development and Logistics) is responsible for the direction, guidance and supervision of procurement activities. Procurement authority has been delegated to the Office of Aerospace Research and all of the major commands. However, the bulk of USAF procurement is done by the Air Force Systems Command for the acquisition of weapon systems and by the Air Force Logistics Command for the support of those systems when they become operational.

2-12. In addition to the procurement organizations of the military departments, the Department of Defense has, as an integral part of its organization, the Defense Logistics Agency. This Agency functions to provide logistical services directly associated with supply management activities and other support services as directed by the Secretary of Defense.

2-13. **Civilian Agency Procurement.** Most civilian agencies engage in some procurement peculiar to the function or mission of the agency.

2-14. Easily the most important civilian agency procurement function is that of the General Services Administration (GSA) - the central supply agency of the Federal Government. It procures the items common to more than one agency, such as office equipment, computer services, automobiles, etc. Under the Federal Property and Administrative Services Act of 1949, it governs (1) procurement, supply and maintenance of real and personal property and nonpersonal services; (2) promotion of utilization of excess property; (3) disposal of domestic surplus property; and (4) sound records management. To accomplish these functions it operates the Office of National Archives and Records Service, the Office of Federal Supply and Services, the Federal Property Resources Service, the Public Buildings Service and the Office of Information Resources Management. GSA operates regional offices to carry out its mandates, especially procurement and property disposal.

2-15. Although DOD and GSA dominate federal procurement, other agencies issue procurement regulations to govern their own purchases, supplemental to the Federal Acquisition

Regulation (FAR).

2-16. **Legislative Branch.** The legislative branch of the Government is often referred to as the law-making branch. This body, divided into several offices, exercises certain powers that are provided by the Constitution.

2-17. **Legislative Powers.** Article I of the Constitution is called the "Legislative Article" and sets forth the organization of the legislative branch of our Government. The various sections of Article I provide for the creation of the two houses of Congress which comprise our legislature, grant express powers (Section 8) and limitations on the exercise of power (Section 9). Under Section 8, the Congress is given powers which can be implemented only through legislation. Under this Section, clauses 1 through 10 give Congress the power to regulate commerce, establish laws for maintenance of a monetary system, establish postal systems, promote science and useful arts, provide for courts lower than the Supreme Court, and to punish crimes committed on the high seas. Clauses 11 through 16 are the "War clauses" and consist of the following powers:

> *To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To Raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States.*

Clause 17 provides for the District of Columbia to be the seat of Government, and Clause 18 broadly gives the Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." As in the case of the executive branch, the legislative branch finds it necessary to delegate many of the functions expressly and implicitly granted by the Constitution. To facilitate the discharge of its responsibilities, Congress has created the numerous agencies which characterize our governmental system today.

2-18. **Legislative Departments.** Within the legislative branch itself there are several offices created by acts of Congress. The most important of these offices, in terms of Government contracts, is the General Accounting Office (GAO). This Office was created by the Budget and Accounting Act of 1921, and its functions and activities have been broadened and extended by subsequent amendments. The primary purpose of this office is to assist the Congress in providing legislative control over the receipt, disbursement and application of public funds. It operates principally in the fields of auditing, accounting, claims settlement, legal decisions and records management. The GAO is under the direction of the Comptroller General of the United States. The Comptroller General is appointed by the President with the advice and consent of the Senate for a term of 15 years, but can be removed from office only by the Congress. This office reports to the Congress and publishes the decisions it renders concerning the legality of expenditures of public funds. (Under some circumstances, Contracting Officers may request advance decisions on questions involving the awarding of a contract. In addition, any bidder may request a decision on the legality of a proposed or actual award of a contract adversely affecting him.) Recently added in the legislative branch offices are the Congressional Budget Office and the Office of Technology Assessment.

2-19. **Judicial Branch.** The third branch of the checks and balances system is the judicial branch of Government. The Constitution provides for the establishment of the Supreme Court and lower courts, and outlines their functions as law interpreting bodies. (See Appendix A)

2-20. **Jurisdiction.** Article III, Section 1 of the Constitution of the United States provides that "The Judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Judiciary Act of 1789 created the Supreme Court of the United States in accordance with this constitutional provision. Section 2 of Article III provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall

be a Party; to Controversies between two or more States; between a State and Citizens of another State (since affected by the eleventh amendment); between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Constitution then proceeds to designate the "original" jurisdiction of the Supreme Court (i.e., when a law suit may originate in the Supreme Court) as extending to all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases in which the Supreme Court has jurisdiction, such jurisdiction is appellate.

2-21. The Constitution grants Congress the power to create courts lower than the Supreme Court, and at various times in the history of the United States, Congress has in fact created such courts as the need became apparent. Immediately below the Supreme Court in the Federal Court System are the United States Courts of Appeals. The United States is divided into 13 judicial circuits, including the Court of Appeals for the Federal Circuit, and in each of these circuits there is a Circuit Court of Appeals. The purpose of the Courts of Appeals is to relieve the Supreme Court from having to consider all appeals in cases originally decided by Federal trial courts. These appellate courts also may review final decisions of many Federal administrative bodies. The decision of a United States Court of Appeals is final except that it is subject to review by the Supreme Court.

2-22. The U.S. District Courts are the general trial courts in the Federal Court System. Each state has at least one district court and many have more than one. There are 104 district courts. Decisions of the district courts may be appealed to the Circuit Courts of Appeals. Since the passage of the Contract Disputes Act of 1978, government contract cases no longer are heard by district courts. The only exceptions are cases arising out of contracts of the Tennessee Valley Authority (TVA).

2-23. In addition to these courts of "general jurisdiction", Congress has created various specialized courts. The United States Court of Claims (established in 1855), was reestablished in March 1982 as the United States Claims Court. Its original jurisdiction extends to any claim against the United States founded upon the Constitution, upon any act of Congress, upon any regulation of an executive department, or upon any express or implied contract with the United States. The United States Court of Military Appeals is an appellate tribunal in court-martial convictions. This court is judicially independent although it operates as a part of the Department of Defense for administrative purposes. Appeals from this court may now be taken to the United States Supreme Court.

2-24. **Administration of United States Courts.** The Administrative Office of the United States Courts functions as the administrative office for all Federal Courts. It is responsible for the supervision of all matters relating to clerical and administrative personnel and for statistical data relating to the operations of the Federal courts.

3. SOURCES OF PROCUREMENT LAW

3-1. The following sources are of particular importance in the area of Government procurement law.

3-2. **Statutes.** Acts of Congress are codified under general topics in the United States Code (*U.S.C.*). Those laws relating specifically to the armed forces are found in Title 10 of the Code. References to the Code will be title and section number; e.g., 10 U.S.C. § 2304(a). Some Acts are not codified and are referred to only by their public law number and number of the Congress which enacted them; e.g., Public Law 83-324 was enacted by the 83rd Congress in 1953 (its first session) or in 1954 (its second session); Public Law 84-324 would be enacted by the 84th Congress in 1955 or 1956; and so on. These uncodified Acts are generally appropriation acts, legislation too recent to have been published in the Code, or temporary laws.

3-3. **Executive Orders.** Administrative directives are issued by the President, frequently implementing authority provided by Congress. These orders will be referred to by numbers and dates; e.g., Executive Order No. 9859, May 21, 1947.

3-4. **Decisions.** Some decisions made by the executive, legislative and judicial branches of the Government are given the force and effect of law. These decisions are published periodically for public information and are the largest body of government contract law.

3-5. **Administrative Agencies.** Some of the agencies responsible for such Governmental decisions are:

a. **Comptroller General.** As the head of the General Accounting Office, the Comptroller General of the United States is the "watchdog" charged with making certain that appropriated funds are spent properly. Since nearly all procurement involves appropriated funds, this officer's authority extends to nearly all areas of procurement law. He may not rule on Contract Disputes, however, which by definition are related to contract performance. This area is reserved by law to the Boards of Contract Appeals, the U.S. Claims Court, the Court of Appeals for the Federal Circuit, and the Supreme Court. His more important decisions are published periodically in a set of books entitled "Decisions of the Comptroller General." These will be referred to by volume and page number; e.g., 21 Comp. Gen. 324. His unpublished decisions will be referred to by their individual numbers and dates.

b. **Attorney General.** The Attorney General of the United States also renders opinions interpreting statutes governing procurement matters, which are published in a series of bound volumes entitled "Opinions of Attorneys General" published from 1852 to date and containing opinions from 1791. These are cited, for example, as 20 Ops. Atty. Gen. 105.

c. **Boards of Contract Appeals.** The Armed Services Board of Contract Appeals (ASBCA), established by charter within the Department of Defense, is a single Board consisting of civilian attorneys. Its function is to decide contract claims under the Contract Disputes Act of 1978. (See Appendix F.) Civilian agency disputes are heard by similar boards in the various agencies. These boards furnish the greatest number of procurement law decisions.

3-6. **Courts.** All of the Federal courts' decisions are published in bound form in one of several reporting series. References will be by volume and page number; e.g., 137 US 286. These cases form the most authoritative source of decisional law on the subject of federal contracts.

3-7. **Regulations.** It is important to note that the decision-making processes of Government agencies are governed by regulations.

a. **The Federal Acquisition Regulation.** The Federal Acquisition Regulation (FAR) is the primary regulation for use by all Federal executive agencies in their acquisition of supplies and services with appropriated funds. The FAR system has been developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, as amended by Pub. L. 96-83. The FAR is issued under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidelines of the Administrator for Federal Procurement Policy.

The FAR, together with agency supplemental regulations, replaced the Federal Procurement Regulations System, the Defense Acquisition Regulation, and the NASA Procurement Regulation as to new procurements on April 1, 1984. It precludes agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR and it limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency. The FAR is intended to provide for coordination, simplicity, and uniformity in the Federal acquisition process. The FAR includes changes recommended by the Commission on Government Procurement, the Federal Paperwork Commission, various Congressional groups, and others. It also provides for agency and public participation in developing the FAR and agency acquisition regulations.

b. **DOD FAR Supplement.** The Department of Defense issued its agency regulations concurrently (April 1, 1984) with the FAR. It was key-numbered to the FAR for ease of use and thus gives direct access to implementing agency policy.

3-8. **Office of Federal Procurement Policy (OFPP).** At the apex of procurement policy is the Office of Federal Procurement Policy, housed in the Office of Management and Budget, which in turn is within the Executive Office of the President. Created by Public Law 93-400 on August 30, 1974, it prescribed uniform procurement policy for all federal agencies toward six statutory goals: (1) uniform regulations, (2) criteria for soliciting viewpoints of interested parties in developing policies and regulations, (3) policy relating to reliance on the private sector to provide needed property and services, (4) promote and conduct research in procurement, (5) establish a government-wide procurement data system and (6) recommend and promote programs for recruitment, training, career development and performance evaluation of procurement personnel.

3-9. State Law. In general, Federal procurement is subject only to Federal law and is unaffected by State or local law. However, the Uniform Commercial Code (*UCC*) has been adopted by nearly all the states and may be followed in Federal procurement cases if there is no applicable Federal law.

CHAPTER 2

ESSENTIAL ELEMENTS OF A CONTRACT

The purpose of this chapter is to provide a frame of reference within which one can understand the formation of a simple contract. The essential elements in contract formation are analyzed and related to the intentions of the parties who seek to enter the contractual relationship.

1. DEFINITION OF A CONTRACT

1-1. A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. *(Restatement of Contracts, Section 1).* A contract may consist of a single promise by one person to another or it may involve any number of persons or any number of promises. Technically, there is a difference between a contract and an agreement. Agreement is a broader term since it encompasses both those promises which the law will enforce and those which the law will not enforce. This difference illustrates the point that a contract is strictly a legal concept and that the kinds of promises that are enforceable through the legal system are those which the system deems of sufficient social or economic importance to warrant enforcement.

2. CONTRACT ELEMENTS

2-1. In order for our legal system to enforce agreements as contracts, certain essential elements must be present. There must be at least two persons, each of whom has legal capacity to act. The parties to the contract must, by offer and acceptance, manifest assent to the terms of the contract. The phrase "manifest assent" is used rather than the word "agree" because contract formation is essentially an objective process; the parties are judged not by what their subjective intention might be, but by what they lead others to reasonably believe. Use of this objective standard to measure assent prevents one party from claiming, after it becomes apparent to him that the bargain or agreement is not what he really wanted, that he really meant something else that the other party did not know about. Through the use of an objective standard, the parties are held to have intended that which a reasonable person would interpret their statements or actions to mean.

2-2. The parties must each give something of value, called "consideration". The terms of the agreement must be clear and certain. The agreement must not require the performance of an act which has been declared illegal, either by statute or by special rules of the common law. Finally, to be enforceable, the agreement must be in the form required by law, i.e., it must be written when required by the Statute of Frauds. This chapter will explore the first five of these elements; capacity, mutual assent, consideration, lawful purpose and certainty of terms. A discussion of the sixth element, form provided by law, will be reserved for Chapter 3, and may be found there under the section entitled "Oral and Written Contracts".

3. CAPACITY

3-1. Legal incapacity or legal incompetence is the method the law uses to protect a party who may not have the ability to understand the terms of an agreement. For the most part, a contract entered by a person lacking legal capacity is *voidable*: it is enforceable only at the option of the party the law seeks to protect; *in contrast*, a *void* contract is not enforceable at all, because in the eyes of the law it never existed. The intention of the legal system is to protect certain classes of persons against their own unwise acts, while at the same time to allow members of that class to enforce contracts that will benefit them. Under this theory the contract is enforceable against the party who is not to be protected by the incapacity rule. Legal incapacity may arise from infancy, insanity, drunkenness, and contractual incapacity on the part of corporations.

3-2. In general, the contracts of infants (historically defined to be persons under twenty-one years of age) are voidable at their option. This means in most cases that the infant need not do any affirmative act in order to derive the benefit of the rule of voidability. An infant may avoid his obligations under an executory (i.e., unperformed) contract by merely doing nothing. In order to bind himself in a contract entered during infancy, the infant must ratify the contract upon reaching majority. Ratification is any act which indicates that the infant intends to be

bound by his promise. Such ratification can be expressed, orally or in writing, or implied. Ratification by implication occurs where the infant after reaching majority performs the contract (or begins performance), e.g., an infant obligated to repay a loan makes an installment payment after reaching majority.

3-3. Where the contract has been performed or partially performed by the infant, he must take some affirmative action in order to avoid obligation under the contract. The affirmative action is referred to as disaffirmance. The result will be to have the contract rescinded, and as in any case of rescission each party must return any consideration received from the other party. Therefore, when an infant disaffirms a contract he must return whatever consideration he has received or he will not be able to demand the consideration that he transferred to the adult party. An interesting question arises when the infant cannot return what he has received in consideration because he has squandered it. The majority of states would hold that the infant is still entitled to the return of the consideration with which he parted.

3-4. There is one major exception in which the infant is liable for consideration given to him under the terms of a contract. The general rule is that an infant is liable for the reasonable value of "necessaries" that are furnished him. This liability arises not out of any contract that he may have entered (this contract is still voidable at his option), but out of the theory of "quasi contract," which is discussed in the next chapter. In other words, an infant is not liable for necessaries which he has contracted for but not utilized, but only for those necessaries that he has actually consumed. The value that the infant is liable for is not the retail price or the cost to the one who furnished the necessaries but rather the value that these things were to the infant. In most cases, of course, the value will be approximately the same as the retail price, assuming that the infant would have had to pay a retail price for these necessaries. Generally speaking, a necessary includes subsistence, health, comfort and education. However, the age of the infant, his customary standard of living and other factors will bear heavily on the definition in any particular case.

3-5. The law concerning insane persons relative to voidability is much the same as it is for infants. One important difference involves the distinction between nondeclared and adjudicated insanity. Where a party to a contract has, prior to the contract formation, been legally adjudged insane, his contracts are absolutely void. Where a party to a contract has not been legally declared insane before entering the contract, the contract is voidable only if the insanity existed at the time that the contract was formed. If the party was lucid at the precise moment of contract formation, the contract is not voidable.

3-6. A contract made by a person while he is drunk, so that he is incapable of understanding the effect and nature of it, is voidable at his option. The rules which are applicable to infancy with respect to affirmance, ratification and disaffirmance are generally applicable to contracts of drunken persons.

3-7. The corporation as party to a contract presents, on occasion, a special case. Generally, a corporation has implicit power to enter a contract, insofar as the contract relates to the accomplishment of the corporation's stated purpose. However, where a corporation enters a contract which does not advance the stated purpose, or is not within the corporation's powers as granted by the charter of incorporation it receives from the state, the contract is said to be *ultra vires*. While there is some difference of opinion as to the effect of an *ultra vires* contract, all states agree that where the contract has been fully performed on both sides, neither party to the contract may disaffirm it. Where the contract is wholly executory (i.e., unperformed), all states agree that neither party may enforce it. However, where there has been part performance on each side, or where one side has performed, the majority of courts treat the contract as if the corporation did in fact have the authority to enter the contract. A small minority of states would allow a recovery only on the basis of quasi-contract.

4. OFFER

4-1. Reduced to its simplest components, a contract is formed by acceptance of an offer. An offer is a proposal by a person, referred to as the offeror, that a contract be entered into. The person to whom the offer is extended is called the offeree. When the offeree intends to accept the offer and communicates this acceptance to the offeror, a contract is formed. Despite this simple explanation, however, contract formation is not as simple or as easy as it may appear to be. First, there is often a question as to what is an offer, and exactly what is required for an acceptance to

be effective. One of the most frequent problems arising in this area concerns the distinction between an offer and an advertisement. Advertisements are generally construed as invitations for offers, primarily because the language of the advertisement does not indicate a present contractual intention on the part of the one advertising. Thus, where published notices state that competitive bids will be received for a particular construction project or for the supply of materials, the submission of a bid in response to the request merely constitutes an offer and not an acceptance of an offer.

4-2. Another frequent problem with respect to an offer is its lack of clarity. An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party to the contract are reasonably certain. This is not interpreted to mean that every term in the offer must be absolutely certain. It is enough if the essential terms are certain, and under the *Uniform Commercial Code* even certain essential terms can be supplied by implication.

4-3. As an example, under Section 2-305 of the *Code*, the parties can conclude a contract even though the price term is left open, in which case the courts will interpret the contract as calling for a reasonable price at the time set for delivery. The courts and the *Code* also allow the implication of other terms, and in all cases the missing term is deemed to be a reasonable one under all the surrounding circumstances.

4-4. It is a cardinal rule that only the intended offeree can accept an offer. In many cases this means that there is one and only one specific offeree in whom the power of acceptance is vested. Acceptance of an offer by one other than the intended offeree does not result in contract formation. Obviously the offeror may direct the offer to more than one person; he may direct it to a class of persons or to the public generally, intending that any member of the class or public has the power to accept. For example, reward notices for the apprehension of known criminals are posted or circulated and the intention of the offeror (the one promising to pay the reward) is that all members of the public are offerees and can meet the terms of the offer by accepting. Of course, under most circumstances there can be only one acceptance, but the number of offerees is unlimited.

4-5. In most situations, however, the power of acceptance is limited to a specific offeree, and no other may accept the offer. The notice of the offer must be communicated to the offeree before the offer can be accepted. An uncommunicated offer is not an offer at all. Furthermore, an offer communicated to a particular offeree cannot be accepted by another person who was not intended to be an offeree. So, learning about an offer will not necessarily give one the opportunity to accept. It is not necessary that the offeror personally communicate the offer to the one intended to be the offeree. This communication can be made by an agent who has the authority of the offeror to contact the intended offeree.

4-6. The foregoing might indicate that there are a number of contingencies which often make contract formation difficult, but in the vast majority of cases, contract formation is easily accomplished. The most important ingredient necessary for contract formation is that the parties involved in the offer and acceptance must intend that a contract be formed. Where it is apparent to the courts, in any dispute over contract formation, that the parties really intended to be bound by their promises or acts, a contract will be found and enforced.

4-7. A general rule is that an offer continues to exist until the time stated in the offer itself for its expiration, or if no such time is stated, until the expiration of a reasonable time. When the stated time (or a reasonable time, if no time is stated) has elapsed, the offeree's power of acceptance terminates; unless the offer is reinstated, there can be no contract formation involving the original offer. The clearest case, of course, is the one in which the offer itself contains a time limit. The offeree must accept within the stipulated time, and it is no excuse that circumstances beyond the control of the offeree caused the delay. Frequently, the time stated in the offer is not fixed as to a specific calendar day, but rather is based on the happening or the nonhappening of a condition Thus a statement in the offer that the offer will remain open as long as the offeree remains in possession and control of a specific item or real property would extend the duration of the offer until the offeree no longer has such possession or control. If the offeror does not express a definite time period for the duration of the offer, the offer remains open for a reasonable time. What is reasonable usually depends upon the nature of the contract proposed, the usage of business, and other cir-

cumstances in or surrounding the particular situation. Certain offers by the very nature of the subject matter involved are implicitly intended to expire within a relatively short time period. Thus where the offer is for the sale of corporate stock, futures, or other subject matter which have quickly fluctuating prices, a reasonable time may be defined in hours or days. On the other hand, certain types of subject matter may have rather constant price structures over an extended period of time. In these cases a reasonable time may be defined in terms of weeks or months. In any case, a reasonable time is a question of fact to be decided on a case by case basis and according to what the offeror must have reasonably intended under all the surrounding circumstances.

4-8. There are ways, other than by lapse of time, in which an offer may be terminated. Termination of an offer can be brought about by an act of the offeror, by an act of the offeree, or by acts or circumstances beyond the control of either the offeree or the offeror. The act of the offeror which terminates an offer is called a revocation. At the outset it is important to keep in mind that an offer for a proposed contract is under the absolute control of the offeror, at least in its inception. An offeror may designate the time that the offer is to remain open, whether fair to the offeree or not; the place where the acceptance is to be communicated; the manner in which the offer may be accepted; and any conditions that he wants to impose, unless public policy intervenes to prevent any of these stipulations from becoming effective. In addition, an offeror can recall his offer at any time before the acceptance has become effective. This power of recall is virtually absolute with very limited exceptions, such as where an option has been paid for by the offeree.

4-9. A paid option is, in a sense, a separate contract to preserve a continuing right to accept an offer. In the typical case, an offeror makes an offer and promises that it will remain open for a stipulated period of time. To insure that the offeror will keep his promise, the offeree gives to the offeror some consideration with the intention that this exchange will bind the offeror to his time promise. This contract involves (1) one party's promise to keep an offer open and (2) the other party's payment or promise of payment of consideration; thus the offeror is being paid to keep the offer open for the stated amount of time. This paid for option is necessary to prevent the offeror from revoking his offer because, in the event that the offeror merely promises to keep the offer open a certain time period, he may with impunity revoke the offer at any time prior to its acceptance. (A notable exception is contained in the "firm bid" rule discussed in Chapter 5.) The rationale behind allowing an offeror to revoke his offer is that, at least in the United States and Great Britain, a person is not held to his bare, unsupported promise. From time to time exceptions are made and this proposition becomes somewhat less absolute (e.g., *Restatement of Contracts*, section 90.) In many European countries (Italy, France, Holland, Germany, etc.) promises are expected to be kept and they are for the most part binding without consideration being exchanged for them. However, we are primarily concerned with contract formation in the United States, and here promises not supported by consideration will generally not be enforced by the courts.

4-10. Where the offeror is looking forward to a return act rather than a return promise as consideration (called an offer for a "unilateral contract") and the offeree actually begins performance of the requested act, it would be unfair to allow the offeror to revoke his offer; commencement of performance of the requested act therefore prevents revocation of the offer unless a reasonable time passes without performance being completed. More will be said about unilateral contracts in subsequent paragraphs.

4-11. Revocation of an offer is generally not effective until it has been communicated to the offeree. However, if the notice of revocation is not received by the offeree because of the fault of the offeree or his agent, then the revocation is effective even though the offeree does not have actual knowledge of it.

4-12. In many situations, a revocation may be implied by the circumstances. As an example, where an offer is for the purchase and sale of a specific thing and the offeree receives reliable information that the thing has been lost or destroyed or sold to another before he accepts the offer, the offer is implicitly revoked. The theory is that the offeree could not rationally believe that the offeror still wants to sell or buy, as the case may be, a thing that either no longer exists or that he no longer has available for sale. As one might imagine, cases arise in which there is a question as to the definition of "reliable information," particularly where the information proves to be false. That the information was false does

not, in all cases, mean that the information was unreliable, however.

4-13. The most frequent offeree act that terminates an offer is rejection of the offer. A rejection may be manifested in several ways. The method which is the most unequivocal is the express rejection. When an intended offeree communicates to the offeror that he does not want to accept the proposal, the offer is terminated. As in the case of the revocation of an offer, a rejection must be communicated to the offeror in order to become effective. The problems discussed above concerning the communication of revocations are also true with respect to rejection.

4-14. Another method by which the offeree rejects the offer is by proposing a counter offer, which is either an attempt to accept an offer, but with a material term changed or altered, or a counter proposal. In one case the offeree may state "I accept your offer except that I am unwilling to pay the price stipulated, instead I accept at .... price." In another case the offeree may state "I am willing to contract with you but instead of your terms I propose the following terms...." In either of these examples the communication by the offeree constitutes a counter offer. The effect of a counter offer is twofold. First, the original offer is effectively terminated in the same manner that it would have been by an express rejection. Secondly, the counter offer itself becomes an offer and the result is that there is an offer outstanding between the original parties, except that their positions are reversed; that is, the original offeror now becomes the offeree of the counter offer, and the original offeree becomes the offeror of the counter offer. Occasionally a counter offer will not constitute a rejection of the original offer. This happens where either the offeree makes it clear in the counter offer that he is not rejecting the original offer but merely bargaining for different terms, or where the original offer itself leaves some room for negotiation. The instances in which counter offers do not reject the original offer are very few indeed.

4-15. Circumstances beyond the control of either the offeror or the offeree may occur which have the effect of terminating the offer. Death of either the offeror or the offeree prevents contract formation. The principle involved is that one cannot contract with a dead man. Thus where the offeror dies there cannot be any presumption of a continuing intention to be bound into contract. Similarly, where the offeree dies there cannot be a valid acceptance because offers are personal to specific offerees and cannot ordinarily be accepted by others. An exception is recognized in those situations where the offer is an irrevocable one (e.g., an option). The legal theory is that the offeror by binding himself by contract to keep an offer open for a stated time has knowingly and willingly relinquished his right to revoke, and that his own continued existence is therefore not vital to contract formation. But this is true only in those cases where the proposed contract does not require the personal services of the offeror or the offeree. Where the offeree dies before accepting, there cannot in any case be a valid acceptance.

4-16. Where a positive law is enacted which declares the subject matter of the contract to be illegal, it is said that the offer is terminated as a matter of public policy. This termination will occur whether the performance of the offeror or the offeree is declared to be illegal or against some positive rule involving public policy.

5. ACCEPTANCE

5-1. Most offers can be accepted only by or on behalf of the designated offeree. As explained before, the offeror generally has the absolute right to choose the person with whom he wants to enter a contract. Subject to the ordinary rules concerning the legal relationship of principal-agent, someone other than the offeree can accept the offer for the benefit of the offeree provided that the offeror has not stipulated to the contrary. The acceptance by the offeree must be unequivocal. The reason is that the offeror must know what the state of his offer is and he must not be put in a position of uncertainty by a communication from the offeree that is ambiguous. Therefore, a conditional acceptance (where the offeree accepts subject to the offeror doing something more than he promised in the offer) or a communication which hedges, procrastinates, or leaves the offeror in doubt does not constitute a binding acceptance. Adherence to the strict rule of unequivocality in the acceptance frequently causes not only hardship on the part of the offeree but also often prevents a willing offeror from considering the acceptance as effective. In an attempt to alleviate some of the problems in this area, the *Uniform Commercial Code* has mitigated the common law rule by providing that additional or different terms in an acceptance become part of the contract unless: (l) they

materially alter the terms of the offer, (2) the offeror gives prompt notification of his objection to them or (3) the offer expressly limits acceptance to its terms as stated (U.C.C. 2-207). The effect of the code is generally to increase communication concerning the offer and acceptance, which tends to reduce the amount of uncertainty in contract formation.

5-2. Unless otherwise indicated by the offeror or by the circumstances, an acceptance must be communicated in order to become effective and bind the parties in contract. One situation in which notice of acceptance is not necessary to contract formation is where the offer looks forward to a unilateral contract and under the circumstances the offeror will know that the offer has been accepted by inspection of the place where the act is to be performed. Where the offeror asks for his grass to be cut by the offeree, it is not ordinarily necessary for the offeree to notify the offeror that he has accepted the offer by completing the act requested. It is only in those unilateral contract cases where the offeror would not in the ordinary course of events know that the act had in fact been performed, that the offeree is under a duty to communicate the acceptance of the offer to the offeror. In contrast, in all bilateral contract situations it is absolutely necessary for the offeree to communicate his acceptance (the return promise) to the offeror unless by an express provision of the contract or by implication from past dealings the offeror waives communication of the acceptance.

5-3. Time, manner, form, and other conditions relating to communication of the acceptance are within the absolute control of the offeror. If the time, place and means of communication are specified by the offeror, no other time, place or means will constitute an acceptance. Occasionally it is important to distinguish between the requirement that the acceptance must meet certain stated conditions and a mere suggestion in the offer that certain conditions would be desirable. In the latter case the acceptance could be effective even though the offeree ignored the suggestions of the offeror.

5-4. The problem which arises most frequently concerning the acceptance is that of when the acceptance becomes effective. Published cases are replete with communication time dilemmas. Was a contract formed when the acceptance was mailed before the offeree received a revocation? Was a contract formed when the offeree mailed his letter, even though the letter was lost in the mail? Was a contract formed when the offeree mailed an acceptance but then changed his mind and telegraphed a rejection which reached the offeror before the mailed acceptance? Before answers can be given to these questions, it is necessary to establish when an acceptance becomes effective.

5-5. Although both a revocation and a rejection are effective only when received, this is not true of acceptances. It is a general rule that an acceptance is effective as soon as it is dispatched by the offeree, if the means used to communicate the acceptance is one authorized by the offeror. Since the offeror has the absolute power and right to determine how the acceptance must be communicated, he may choose the agency and he is deemed to guarantee that the agency will properly handle the communication; in effect, the agency for communication becomes the legal agent of the offeror. Under the familiar theory that notice to the agent serves as notice to the principal, the communication of the acceptance becomes effective and binding when the offeree gives the acceptance to the agency for communication. But there is a distinction between so-called "authorized" and "unauthorized" means of communication. If the offeree uses an authorized means of communication, then the acceptance is effective as soon as dispatched by the offeree. If an unauthorized means of communication is used, then the acceptance is effective, if at all, only when received by the offeror. It is quite possible for the offeror to designate a means of communication which must be used, so that any other will be ineffective even if the acceptance is actually received. In most cases, however, the offer is not so restrictive and any means of communication used by the offeree will be effective; yet the time of its effect will depend on whether or not the means was authorized.

5-6. A very general rule is that the offeree is authorized to use the same means of communication as the offeror used. Technically, any means of communication other than one used by the offeror or designated by him is an unauthorized means of communication. The *Uniform Commercial Code* encourages liberalization in the area of communication of the acceptance. Section 2-206(1)(a) provides, "An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable under the circumstances." The official *Code*

comment expresses very clearly the intention behind this particular section, that ". . .former technical rules as to acceptance, such as requiring that telegraphic offers be accepted by telegraphed acceptance, etc. . . . are rejected and a criterion that the acceptance be in any manner and by any medium reasonable under the circumstances is substituted. This section is intended to remain flexible and its applicability to be enlarged as new media of communication develop or as more time saving present media come into general use."

5-7. An attempted acceptance after the time for acceptance as stipulated in the offer (or after the lapse of a reasonable time) is merely a counter-offer which in turn may be accepted or terminated in the usual manner.

5-8. Acceptance of an offer comes about by the offeree expressing in so many words that he accepts the proposal put forth by the offeror. But this is not an exclusive method of accepting an offer. On some occasions the offeree's *conduct* will result in an acceptance being implied. As an example, receipt and retention of goods or property by the offeree may result in the implication that the offeree accepts the goods or property and the contract of which their shipment was a part. Similarly, performing an act that is inconsistent with a theory that the offeree does not intend to be bound by a contract (such as exercising physical control over property or selling it to another) may imply acceptance of an offer concerning the property.

5-9. In addition to affirmative conduct on the part of the offeree, inaction may constitute an acceptance. From past dealings, custom of the trade or other standards which bind the parties to particular conduct, silence on the part of the offeree may result in acceptance The general rule, that silence alone is not acceptance, is universally followed But silence coupled with something else, such as past dealings, or the circumstances surrounding the particular offer, may constitute acceptance. The formation of contracts through silent acceptance is rare

5-10. Contract formation is a manifestation of mutual assent by at least two persons. In order for there to be a contract there must be a "meeting of the minds" of the parties The minds need not "meet" in a subjective sense, it is sufficient that the parties have manifested mutual assent in an objective sense Where the offeree misunderstands what the offeror meant his subjective understanding is material only if the offeror's words could have had two or more meanings.

5-11. The two types of situations involving mistake are usually designated as unilateral and mutual mistake. The general rule as to unilateral or one-sided mistake is that a contract will not be rescinded but there are some exceptions to this rule. The general rule is based on the theory that the offer is what the offeree believes it is, and it would be inequitable to charge the offeree with that which would not put a reasonable person on notice. The courts do not say that where one party makes a mistake the other party can hold him to it. This certainly would be inequitable in many cases. Rather the courts say that where the error or mistake made was the result of negligence and the other party did not or could not be reasonably expected to know that a mistake had been made, the contract will be enforced according to the terms which were the cause of the mistake. If a mistake is not due to the negligence of one party but the other party reasonably relies on the mistake, the contract is still valid according to the terms expressed including the mistake. An exception is made where the contract is still executory and the parties can be put in a position of status *quo ante.*

5-12. Mutual mistake presents a slightly different situation. The parties disagree even though they appear to be in harmony. This happens where the language has two different meanings. One must analyze the subjective intentions of the parties to ascertain whether the agreement constitutes a legally binding contract. A contract could exist if one of the parties knew or should have known that the other party could reasonably have attached a different meaning to the language. Such a contract would exist according to the meaning attached to the term by the party who knew only one possible meaning. Cases involving mutual mistake are rare.

6. CONSIDERATION

6-1. A fundamental concept involved in contract formation is bargain and exchange. Each party receives something of value and gives something of value Consideration is the name given to the "something of value," i.e., the price paid for a promise. Our legal system requires only a promise to do or not do something in order to form a binding contract. In bilateral contracts each party exchanges a prom-

ise for a promise. In a unilateral contract the consideration is the act requested, rather than a promise. Actually, a number of things may constitute consideration, according to the *Restatement of Contracts*: an act, a promise, a "forbearance", or the creation, modification or destruction of a legal relation. (*Restatement of Contracts*, Section 75.)

6-2. The law distinguishes between "sufficiency" and "adequacy" of consideration. "Adequacy" of consideration refers to the weight or substantiality of the act or promise given in exchange (e.g., whether the amount being paid is appropriate value). Because of the difficulty in determining the actual worth of a promise or an act, the law will generally not delve into the adequacy of the consideration. In contrast, the term "sufficiency" means that consideration must have value in the eyes of the law, i.e., that it is legally "valid." "Sufficiency" is frequently defined in a negative sense: every consideration is sufficient except that which is against public policy. An obvious example of an insufficient consideration would be a promise to murder Aunt Minnie.

6-3. Historically, the test of sufficiency has involved the concepts of benefit and detriment. In order for a promise to be binding, the promisor must receive in return a legally sufficient consideration. It is said that the return consideration must be legally detrimental to the one who gives it or promises to do so.

6-4. A promise to do something that the promisor is not otherwise legally bound to do, or a promise not to do something that the promisor has a legal right to do, constitutes a detriment. In most cases the detriment incurred as consideration is of benefit to the other party, but this is not always true. For example, if one person promises to pay another $100 if the other person promises to give up smoking cigarettes, the promise to give up smoking is a detriment to the promisor because he is giving up something that he has a legal right to do. It may not be a benefit to the one who extracted the promise, but it is not necessary that such benefit exist. It is enough that the one promising to give up smoking suffers a detriment. On the other hand, mere benefit without detriment is not sufficient consideration. So where Able agrees not to murder Baker, it can hardly be denied that Baker received a benefit. However, such a promise is not sufficient consideration because Able does not suffer a legal detriment; he is promising not to do something that he does not have a legal right to do anyway. There are several instances where a promise to do something or not to do something is deemed not to be detrimental. Where one promises to do something and lacks legal capacity to bind himself (insanity, or perhaps infancy in a state where these contracts are void rather than voidable), the promise is not detrimental. Where one who promises to do something is already legally bound to do that act, or where a promise is illusory in the sense that it really promises nothing meaningful (e.g., a promise to buy all of a product that the promisor may later choose to buy), there is no detriment. The same can be said of a promise to do an illegal act.

6-5. Another important concept is that of mutuality of obligation, meaning that both parties must be bound by the contract or neither is bound. If consideration given by one party to another is legally insufficient, the party receiving the legally insufficient consideration is not obligated. For example, if Able promises to do something that he is already bound to do (finish constructing a building according to an existing agreement) and this promise is given in exchange for Baker's promise (to pay additional money for the completion of work). Since Able would not be suffering a detriment, then Baker is not receiving sufficient consideration in exchange for his promise. For this reason, Baker could not be held to his promise. An interesting line of cases involves the problem of "requirements contracts". Suppose, for instance, that Able promises to buy from Baker all the widgets that he needs or requires in the next year, in return for Baker's promise that he will not sell to anyone else; this is binding on both parties, because both parties have incurred a detriment: Able has given up his legal right to purchase elsewhere and Baker has given up his legal right to sell elsewhere.

6-6. The promise of future performance and the giving up of a right are valid consideration, but past acts or "favors" of contractors for which no present legal obligation exists may not be consideration for present promises by the Government. Thus, a contractor who voluntarily "gave" supplies to the Government could not claim this as consideration for slipping the delivery schedule on a later acquired Government contract.

6-7. The doctrine of consideration has from time to time come under attack as being unfair and in many instances, unrealistic. The require-

ment of consideration in contracts stems from the theory that it is more likely that one party to an agreement will perform according to his promise if he at least has the possibility of receiving something of value in exchange and, therefore, it will not be necessary to force compliance by court action. Furthermore, the courts feel it is more likely that a promise has in fact been made where there is consideration supporting it than where the promise is bare. In early England it was possible to make unsupported promises binding by the use of the seal. It was thought that where the promisor took the time and trouble to affix his seal to a written promise, there was not much doubt that he made the promise and that he was serious. Today the majority of states have abolished the seal as a substitute for consideration. Some states have, by statute, made consideration unnecessary in certain situations. Pennsylvania, New Mexico, California and New York are typical of states which have statutes which make promises in writing valid even though they are not supported by consideration. The *Uniform Commercial Code* in Section 2-205 provides that under some circumstances, an offer which states that it is irrevocable for a stipulated length of time is in fact irrevocable if the promise is in writing and signed by the offeror or his agent. Because of the hardship that is sometimes caused by the unenforceability of promises which are not supported by consideration, the doctrine of promissory estoppel was created. The *Restatement of Contracts*, Section 90, states, "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promissee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Through the use of this doctrine the law attempts to prevent hardship even though a promise is not supported by consideration. The doctrine is applied infrequently.

7. CERTAINTY OF TERMS

7-1. It is essential to the enforceability of a contract that its terms be sufficiently clear to permit the courts to conclude that a contractual agreement was intended. The courts will apply well established rules of construction to interpret the language used by the parties. They sometimes even supply important provisions, such as price and delivery schedule when missing (a reasonable price or time) in order to find the contract enforceable. Thus, to be fatally uncertain, the contract must be so indefinite as to have no exact meaning.

8. LAWFUL PURPOSE

8-1. The right to contract is fundamental but not absolute. It must yield if it conflicts with the public welfare, and reasonable restrictions may be imposed under the police power when required for the public interest. In addition to statutory limitations of the right to contract, the courts have the power to declare certain types of contracts void on the grounds that they are contrary to the public policy.

8-2. As a general rule, a contract which violates a statute is unlawful and void and will not be enforced. A statute can expressly declare that a specific type of contract is prohibited, and such contract is absolutely void. This is true whether the statute is State or Federal. An example of this type of statute is the one pertaining to gambling contracts.

8-3. However, there are some problems in this area. The view once taken was that a contract was void if made in violation of a statute which imposed a penalty. The modern trend seems to be to consider whether the legislature intended the statute for the protection of the public or merely provided a penalty for the purpose of raising revenue. If raising revenue was the intention, then the contract is not void and as a result is not illegal. The following types of statutes, found in many states, are in general for the protection of the public, so that contracts made in violation of these statutes are void:

1. Statutes prohibiting gaming and wagers;
2. Statutes prohibiting the taking of usury;
3. Statutes prohibiting labor, business, etc., on Sunday;
4. Statutes regulating the traffic in intoxicating liquor; and
5. Statutes regulating a particular article of commerce.

8-4. Even without the benefit of statute, certain categories of contracts are against public policy. "Public policy" is the common sense and conscience of the community extended and applied throughout the state to matters of public morals, health, safety, and welfare. The principle of law is based on the theory that one cannot lawfully do that which has a tendency to be injurious to the public or against the public good.

Contracts which bring about results which the law seeks to prevent are said to be unenforceable as "against public policy." Generally, actual injury or damage need not be shown, since it is the tendency to prejudice the public good that is being prohibited. The following list is not exhaustive but merely illustrative of those types of contracts which are deemed to be against the public interest:

1. Agreements to unreasonably restrain trade or business (reasonable restraints, such as a promise not to engage in business for a short time and in a small area, are not against public policy and are therefore enforceable).

2. Agreements for the sale of, or traffic in, a public office (as where I contract with you for a price to use my political influence to get you appointed to a public office).

3. Agreements by public officers for greater pay than is fixed by law for the performance of official duties (where I offer a public official money to do something that he already is required to do - here the danger is that he may not want to do this job in the future unless he gets extra pay).

4. Agreements involving the assignment by a public officer of his pay for future duties to be performed (an assignment for past duties is not illegal or against public policy - here the harm is that the public officer is not as likely to perform as diligently where he knows that his future compensation in reality does not belong to him).

5. Agreements to influence legislation by personal solicitation of the legislature or other objectionable means rather than by objective persuasion and argument (the distinction here is that I can persuade him to pass this bill because of personal or political reasons).

6. Agreements to procure Government contracts by personal or political influence or corrupt means. Here, the general rule is that if the fee is contingent upon receiving a contract, it appears that corrupt means or duress will be used and this is against the public interest.

7. Agreements by or between public or quasi public corporations which interfere with their public duty (e.g., where two railroads might contract to do something in unison which might adversely affect their service to the public).

8. Agreements between private citizens which would violate duties owed to the public (such as an agreement whereby one person for a return consideration agrees to withdraw his appeal to the legislature for a public improvement).

8-5. Other types of contracts are illegal and unenforceable, not because of public policy or because they violate a statute, but because they are considered unfair, overreaching, or tend to corrupt morals. Some of these are as follows:

1. Contracts to defraud or injure third persons (an agreement to sell inferior goods and falsely advertise them - a contract to induce a person to break a contract with another person - a racially restrictive covenant in a contract for the sale of real estate - a contract to commit a tort against another person, etc.).

2. Contracts harmful to the administration of justice (a contract to perjure yourself in a trial - a contract to suppress lawful evidence - a contract to not prosecute a felony, etc.)

3. Contracts whereby one party who does not have any interest in a law suit maintains one of the parties to the controversy, with the result that a suit is brought which would not have been brought had it not been for the financial assistance (called "maintenance").

4. Contracts whereby one party unrelated to the suit agrees with a party to the suit that they will split the proceeds of the suit and the one not related to the suit will bear all the expenses of the suit (called "champerty"). Champerty and "maintenance" are considered objectionable because they tend to encourage and "stir up" litigation.

5. Contracts harmful to the marriage relation (a contract between two persons to prevent the marriage of a third person - a contract whereby one person "bets" the other that he will not marry within a certain time period - a marriage brokerage contract - a contract whereby the father for consideration promises that his daughter will marry the other, etc.).

8-6. The law will not aid either party to an illegal contract. If the contract is executory (unperformed), neither party may enforce it. If the contract is executed (performed), a court will not permit rescission and recovery of what was given in performance. Where an agreement is illegal in part only, the part which is lawful may be enforced, provided that it can be separated from the part which is illegal, but not otherwise. If any part of the consideration which is given

for a single promise is illegal and there is no possibility of separation, there can be no enforcement. If several considerations, one of which is bad, are given for several promises, and the legal consideration is by its terms apportioned to the legal promise, the legal part is enforceable. If two promises, one lawful and one unlawful, are given for a legal consideration, the lawful promise is enforceable.

8-7. There are some exceptions to this "hands-off" doctrine in which the court "leaves the parties where it finds them." Where a party to the contract is a member of the class of persons for whose protection the contract was made illegal, he may enforce it or obtain restitution. Examples would include the following:

1. Where a person buys bonds which are illegal because they conflict with Blue Sky laws, the one who buys them is the very one for whose benefit the laws were passed and, therefore, can elect to enforce the contract.

2. An insured under a policy which is illegal because the company did not use an approved form can enforce the insurance policy.

3. Where a party to an illegal contract repents and rescinds before any part of the illegal purpose is carried out, he may have restitution of the money or goods he has given in performance.

4. Where one party to the contract is not *in pari delicto* with the other (i.e., is not as guilty) because he was induced to enter into the bargain by fraud, duress or strong economic pressure, he may have restitution of that which he has given in performance.

CHAPTER 3

GENERAL CONTRACT PRINCIPLES AND AUTHORITY

Subject to some important exceptions, general contract principles apply equally to both private contracts and Government contracts. It is essential, therefore, that fundamental contract principles become a part of the working knowledge of anyone interested in the subject of Government contracts. To this end the present chapter endeavors to highlight some of the more basic general contract principles.

1. CLASSIFICATION OF CONTRACTS

1-1. Contracts are usually classified according to the intention of the offeror at the time he extends his offer. They may be bilateral or unilateral, express or implied, oral or written. The different classifications are discussed in the following paragraphs.

1-2. **Bilateral and Unilateral Contracts.** An offer which asks for a promise in return as the agreed exchange for a promise is an offer to enter a bilateral contract. In such a contract each party is both a promisor and a promisee. Probably the majority of contracts are of this type. On the other hand, an offer which looks forward to an act as the agreed exchange is an offer to enter a unilateral contract. Of course, in this situation only one party is a promisor, while the other is only a promisee. The promise is conditioned upon performance of the requested act and does not become fully binding until the exact act is performed. In some circumstances it is very difficult to determine just what the offeror wants in return for his promise. In these cases it is presumed that an offer invites the formation of a bilateral contract. The rationale behind this presumption is that if the consideration sought is a return promise, the offeror has somewhat greater protection than if there is no acceptance prior to actual performance. If the offer is for a unilateral contract, the offeree may begin the act but not finish it, in which case the offeror does not receive what he wanted but is bound to keep his offer open for a reasonable time once performance is undertaken.

1-3. **Express and Implied Contracts.** There are express contracts and two kinds of implied contracts: implied in fact contracts and implied in law contracts. The latter are sometimes called *quasi*-contracts. Express and implied in fact contracts are both based on actual agreement between the parties. In express contracts, the parties manifest their intention to be bound by the use of oral or written words or by other signs or symbols that by previous convention stand for words and predetermined meanings. In the implied in fact contract, the parties manifest their intentions by conduct rather than by such words or other symbols. In contrast, implied in law contracts (*quasi*-contracts) are not based upon any actual agreement or promises, and they do not involve any intention to enter a contract. In very general terms, an implied in law contract exists where one person has received or used something for which it is just that he should compensate the other. More specifically, if one person confers upon another a benefit, he may recover in quasi-contract the reasonable value of it if it would be unjust for the recipient to retain or enjoy the benefit. Under quasi-contract the amount of recovery is not necessarily the amount that is paid for like things or services (although this may be the price arrived at by the courts in some cases), but rather the measure of the benefits received depends on the worth of these benefits or things to the person who has received them. Therefore, if Able expends costly time and money on doing something for Baker under such circumstances where the doctrine of quasi-contract would be brought into effect, Able may not recover any monetary return if the service performed for Baker was not of any monetary value to Baker. In addition, not all benefits are compensable. One cannot force benefits on another. So, where one person refuses the service and the other still performs the services anyway, there will not be any recovery in quasi-contract. The reason for this is that quasi-contract is utilized only where it would be unjust not to compensate the person who performs the service or who transferred title or use of goods.

1-4. Generally speaking, there are two prime areas in which quasi-contract cases arise. The first involves emergency fact situations. Where there is an emergency and one performs services for another, there is a presumption that the services are performed gratuitously. An

exception is made when the performer of the services goes to great trouble or expense in performing the service, and this is allowed to override the presumption of gratuity. Another exception is made where the one performing the service is a professional in that particular line of work. In that instance, a presumption arises that the professional is not performing a gratuity but rather pursuing his profession.

1-5. The second area in which quasi-contract cases arise is where one has a duty to do something and someone else voluntarily acts for him so that the duty is discharged or satisfied. The one who had the duty is unjustly enriched and can be required to compensate the acting party in quasi-contract.

1-6. The courts will not bind the Government under the quasi-contract doctrine. It is simply too weak and remote to provide an adequate basis for the obligation of public funds.

1-7. **Oral and Written Contracts.** As a general rule, a contract need not be in writing to be enforceable. Undoubtedly the vast majority of contracts executed today are oral ones. However, there are some very important exceptions to the general rule, and for the most part, the majority of these exceptions were initiated about three hundred years ago in England. The British Statute of Frauds was enacted by Parliament in 1677. Its purpose as stated in its recital was "the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury." It contained two sections which related to the requirement of a writing in contract formation. Most states by the enactment of their own statutes have followed the substance of each of these sections; however, in many states variations have been deemed necessary and desirable. Section Four of the original statute required that no action could be brought on contracts in the following categories unless the agreement was in writing or unless there was some note or memorandum relating to the agreement and signed by the party who was to be charged with the contract:

1. promises by an executor or administrator to answer damages to the estate out of his own estate,

2. promises to answer for the debt of another,

3. promises made upon the consideration of marriage,

4. contracts for the sale of lands or any interest in land, and

5. contracts not to be performed within one year of their making.

Section Seventeen of the original statute related to the sale of goods over a specified value. Both the Uniform Sales Act and the *Uniform Commercial Code* contain sections reflecting the provisions of the original Section Seventeen. Most states will not enforce a contract for more than $500 unless it is embodied in a written contract or memorandum signed by the party to be charged. There are some escape clauses in both of these uniform acts relating primarily to receipt and retention of goods.

1-8. The statute of frauds requirements do not apply to fully executed (completed on both sides) contracts; in many cases partial performance will make contracts enforceable which otherwise would not have been enforceable.

1-9. In the vast majority of cases involving large and socially important contracts, the parties reduce their understanding to writing so as to preclude any problems concerning the statute of frauds. In very few cases does one find any difficulty with a statute of frauds problem in large contracts. Probably the most frequent area in which statute of fraud questions arise is where the parties to a written agreement purport to modify it orally. The oral modification is unenforceable if it is still executory. Of course, if the oral agreement is performed, then it is enforceable because the only purpose of the statute is to prevent the enforcement of executory oral agreements.

1-10. The oral contract as such is not used in government contracting. There is a statutory requirement that any obligation of Government funds be supported by "documentary evidence of a binding agreement that is . . . in writing . . .." (31 U.S.C. § 1501) Oral orders under $10,000 may be placed with Federal Supply Schedule contractors (DOD FAR SUPP 8.405-2) and the "writing" requirement is satisfied by the contractor's use of a delivery ticket.

2. GENERAL CONTRACT PRINCIPLES

2-1. In this chapter we shall see how certain principles relate to four important aspects of Contract Law: contract conditions, divisibility, substantial performance, and discharge of contracts.

2-2. **Conditions.** The parties in many contracts either expressly or implicitly make their duty to perform dependent upon the happening or nonhappening of an event or a fact, which is called a condition. This condition can be almost anything other than the mere passage of time. It is customarily said that only contingent events (i.e., events which are not certain to occur) can constitute conditions because if an event is certain to happen in time, it falls within the rule that mere passage of time is not a condition.

2-3. Although it is only procedurally important, there is a distinction between the types of conditions that can qualify a promise. A condition which must happen before a duty to perform arises is called a condition *precedent*. A condition which follows the performance and may operate to defeat or annul it is called a condition *subsequent*. In either case, the happening of the condition excuses performance, whether or not performance has already begun. The effect of a failure of a condition is to discharge the duty of the promisor to perform, except where the condition is within his control and he is under a duty to bring about the condition. In that instance, the failure of the condition not only excuses performance by the other party, but also gives him a cause of action for breach of contract.

2-4. Where there are promises in a contract which are not expressly related to each other, the law may interpret either one or both of them to be "constructive" conditions. If a contractual promise is found by the court to be a "constructive" condition, that promise must be performed before the other party's duty to perform arises. The question in each instance is whether one promise is independent of the return promise (in a bilateral contract); if so, the promisee may bring an action for breach of contract if the promisor fails to perform, without first having to perform his own promise. As an example, suppose that Able agrees to buy Baker's house, with delivery of the deed to be made on May 1, 1986. Tender of payment must be made by Able before Baker is obligated to perform or before Able can sue for breach. This is true even though Baker did not extract from Able the condition that Able must pay or offer to pay simultaneously. It is a general rule that in bargains in which promises are agreed to in exchange for each other, if they are to be performed simultaneously, then performance of each is a constructive condition of the duty to perform the other. If under the contract one promise is to be performed before the other, the performance of the one is as much a condition precedent to the other's duty as though expressly stated. This was not always true. In the distant past, if promises were not expressly made dependent and conditional on each other, they were construed as independent and not conditional. The end of this doctrine of presumption of independent covenants came in the early English case of *Kingston v. Preston*, Kings Bench, 1773. Today the general rule is that performances in bilateral contracts for an agreed exchange are presumed mutually dependent and conditional, solely in the interests of a just result, whatever the intention of the parties in this regard.

2-5. **Divisibility.** Problems frequently arise with respect to contracts in which performances are in installments. Where the parties to a contract have divided their respective performances into installments or separate units, it is important to determine whether or not the contract is divisible. If the contract is divisible, it is only necessary to perform one installment in order to be entitled to receive the corresponding performance from the other party. Where a contract is not divisible, then all of the installments would have to be performed before any payment or performance by the other party could be demanded. As an example, suppose that Able has agreed to build four houses for Baker at a price of $50,000 per house, total price for four houses to be $200,000. Able can collect $50,000 as soon as he finishes the first of the four houses and need not complete all of them before he collects any of the agreed price. This is truly a divisible contract. On the other hand, suppose Able agrees to supply Baker with 75,000 bricks, to be delivered in installments of 25,000 each on specified dates. Baker would not be obligated to pay for installments (unless specifically agreed upon as part of the contract provisions) and would be required to pay only upon the condition that all of the 75,000 bricks were in fact delivered.

2-6. As previously mentioned, where by terms of the contract the respective performances for an agreed exchange are to be rendered at different times, the performance which is to come first in time is a constructive (if not expressed) condition precedent to the duty of the other party to perform. So, if Able promises to buy goods from Baker on June 1 and pay on June 15, and Baker promises to deliver the goods

on June 1, the delivery on June 1 by Baker is a constructive condition precedent; Able may sue for nondelivery on June 2 without tendering payment (which would not be due until June 15 as agreed in the contract). However, if Able waits until June 15 to bring suit, then he would be forced to tender payment before Baker would be in breach of the contract. Although the performances were originally due at different times, so that one performance (Baker's delivery) was a condition precedent to the duty of the other performance (Able's tender of payment), the passage of time has made it possible for both promises to be performed simultaneously. Accordingly, the law will establish concurrent constructive conditions, in which the performance of each promise is conditional upon performance of the other.

2-7. If one performance takes time while the other can be performed instantaneously, the one that takes time is a condition precedent to the duty to perform the other. If Able agrees to work for Baker for one month, he cannot collect until he finishes the month's work.

2-8. **Substantial Performance.** The word *performance* is deserving of some comment since it has been used with regularity. Where a party to a contract promises a certain performance, there is no doubt that the other party (promisee) expects full performance, even if it is extremely difficult. The parties can require exact, perfect, full performance if they so desire. However, where the promisor has substantially but not completely performed, he has met the condition precedent to the extent that he can recover the full contract price, less the damages suffered by the other party because the performance was incomplete. This so-called doctrine of substantial performance does not apply where the party who only partly performed is guilty of bad faith, or willfully breached, in only partially performing his promise.

2-9. The doctrine of substantial performance requires that the performance actually tendered by the promisor be substantial in an objective sense. It is said that performance is substantial where there has not been a "material" breach of a duty to perform; if a breach is "material" (i.e., important), the performance has not been substantial. In determining the materiality of a failure to fully perform a promise, the courts use a variety of considerations. Typical considerations include the degree of completion of performance in a physical sense, the hardship on each party, the determination of the type of behavior of the one failing to fully perform, and the adequacy of compensation to the injured party.

2-10. **Discharge of Contracts.** The "discharge of a contract" means that obligations incurred by the parties when they entered into the agreement are excused; no longer are they bound to perform as they had promised. Contracts may be discharged in a number of ways:

1. Performance by both parties.

2. An agreement to rescind the contract is binding on both parties and discharges all obligations.

3. A new contract may, by agreement of all parties to the original contract, expressly or implicitly discharge the original contract. An express substitution of the new contract for the original one would be given that effect by the courts. Additionally, a new contract between the same parties relating to same subject matter, but which is wholly or substantially inconsistent with the first contract, may discharge the duties arising under that first contract. The courts under such circumstances could infer a substitution.

4. Frequently the original parties agree to substitute a new party for one of them. Assuming consent of the new party is obtained, the new party assumes the obligations of the original party. An agreement called a *novation* acts to discharge the obligations of only the party who has been replaced by the substitution.

5. An accord and satisfaction operates to discharge a contract. On occasion at least one of the parties to a contract may become dissatisfied with his promise and wish to substitute a new promise. There are even instances where the parties are not certain just what they did promise. In both of these cases the parties might agree to a new contract which has the effect of discharging the old one. An example would be where Able contracted to provide a service for Baker, with the price term left open (which is not unusual for service contractors, who frequently only quote cost estimates). After the work is completed, Able sends Baker a bill for $500, and Baker, believing the bill to be unreasonable, refuses to pay it. After several discussions, the parties are unable to reach an agreement on the price. Finally, Baker sends Able a check for $400 and states "Final payment of amount due from Baker to Able on Service Contract No. 1234" on the reverse side of the check. Cashing of the

check by Able would be interpreted by the Courts as final agreement on the price. Such an agreement is called an accord. When the bank honors the check by making payment, the agreement has been performed, and performance of the new agreement in lieu of the old obligation is called a satisfaction. Thus, by accord and satisfaction, Baker's obligations under the original contract have been discharged. The reader should note, however, that an accord and satisfaction will operate only where there is a genuine dispute over a contract term.

6. When a contract provides for the payment of a stated sum, payment of that amount will of course discharge the paying party of any further obligations. But actual payment is not essential. Tender of the contract amount is sufficient to act as a discharge. If tender of payment did not have such effect, the party to be paid could withhold performance by merely refusing to accept payment.

7. Finally, contract duties could be discharged by operation of law, such as the execution of a judgment already obtained for the full amount of the judgment, or through the adjudication of bankruptcy.

3. AUTHORITY AND POWER OF THE UNITED STATES TO CONTRACT

3-1. Among the powers delegated to the United States is the authority to enter into contracts. Though some of the specific contract duties are authorized in the Constitution, other duties are implied in governmental theory.

3-2. **Inherent Power to Contract.** The United States Government, as a sovereign, has the right to contract as an essential element of its sovereign powers. This right is not expressed in so many words, but instead is implied from the theory that a government is charged with the performance of public duties and that in order to discharge its obligations, contract formation is not only proper but necessary. Since our Government is one of delegated powers, this right to contract is limited in scope to the authority delegated to the Government. Therefore, in order to ascertain whether a particular contract entered into by the Government is valid, it would be necessary to examine the subject matter of the contract in light of constitutional authority. Both the executive and legislative branches of our Government are delegated specific duties under the Constitution, and in carrying into effect the majority of these duties, it is necessary for a branch of the Government to enter into contracts with non-government parties. For example, Article I, which establishes the Legislative Branch of our Government, designates the power that is vested in Congress. Section VIII of Article I lists a number of powers which require contract formation. The most prominent powers in Section VIII include, "To raise and support armies . . .", "To provide and maintain a Navy," "To borrow money on the credit of the United States." One of the most important clauses, not only in Section VIII but in the entire Constitution, is Section VIII, Clause 18, which provides "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." This so-called "necessary and proper clause" supplies by implication power for the Government to enter into contracts, or engage in other acts which promote the discharge of responsibilities delegated to it by express provisions of the Constitution.

3-3. **The Concept of Authority.** The role of the Contracting Officer or agent is important in forming contracts. Since the agent exercises certain powers, his actions are crucial to the legal relations between the principal and the third party.

3-4. What a person can do himself, he can appoint someone else to do for him, subject to certain exceptions. In many cases it is not only permissible for one to act for another, but absolutely necessary. This is true in situations where the one purporting to act is not a real person but either a corporate or governmental entity.

3-5. **Principal-Agent Relationship.** Our Government can act only through persons, called agents. An agent can be defined as one who represents another person, called a principal, in contractual matters. The relationship created by the association of a principal and agent is called agency. This relationship arises when the principal authorizes the agent to act as his representative with respect to another person (a "third party") and the agent consents to so act.

(A). **Authority of the Agent.** The link that binds third parties to the principal is the concept of authority. "Authority is the power of the agent to affect the legal relationships of the prin-

cipal by acts done in accordance with the principal's manifestations of consent to him." *(Restatement of Agency, Section 5).* This authority depends on the type of agency that is created by the principal and agent. Agencies are usually classified as (1) real or actual and (2) apparent. Real or actual agency is further divided into Express, Implied, and by Operation of Law. Apparent authority is basically an application of the doctrine of estoppel. It will be fruitful to discuss each of these agencies in moderate detail.

(1). **Express Authority.** Express agency or authority is, as the name indicates, created by explicit language either in writing or orally. Ordinarily, where authority is given in writing, the element of proof necessary where a dispute arises concerning the agency relationship is easily supplied by the writing itself. In those cases where the writing is ambiguous, parol or oral evidence may be used to prove the existence and limits of the authority, subject to the rule that oral evidence may not be used to contradict the plain and clear meaning of a writing. Agency created by spoken words is generally as binding as agency created by a writing. However, it is sometimes more difficult to prove.

(2). **Implied Authority.** The second type of actual agency or authority is implied authority. Usually this term means incidental authority, authority which is implicitly, not expressly, given to an agent so that he may accomplish the task which is expressly assigned to him by the principal. It frequently happens that the agent is assigned a task to accomplish, but the minor details are not spelled out in the oral or written authority given to him. It can be safely assumed that the agent has implied authority to do what is needed to be done in order to accomplish the purpose of the agency. This incidental authority is usually defined in general terms to include such as "usual, customary and necessary" authority. On other occasions implied authority is supplied by conduct rather than by expression. It is likened to an implied in fact contract situation, where the act of a person creates authority in an agent to act for him. One case, *Moore v. Switzer,* 78 Colo. 63, defined implied authority as follows: "Implied authority of an agent is actual authority evidenced by conduct; that is, the conduct of the principal has been such as to justify the jury in finding that the agent had actual authority in what he did. This may be proved by evidence of acquiescence with knowledge of the agent's acts, and such knowledge and acquiescence may be shown by evidence of the agent's course of dealing for so long a time that knowledge and acquiescence may be presumed."

(3). **By Operation of Law.** Agency or authority by operation of law occurs where the principal has not actually given the agent his authority, but the authority has been created in the agent by some statute or rule of common law. Frequently it happens that the legislature creates authority but in order for this authority to be actually implemented, regulations or directives must be published to set into motion the machinery which will accomplish the purposes of the agency. Authority in these cases has been created by operation of law and an agent acting within the scope of his authority can bind the principal without the implementing regulations or rules.

(4). **Apparent Authority.** Apparent agency or authority is not real or actual authority, but arises on equitable grounds. Furthermore, the agency created is effective only between the principal and the third party, and not as between the principal and the agent. This authority is supplied after the fact, and the only purpose in finding such authority is to prevent unjust consequences when a third party relies on the appearance that the agent is acting for the principal. There are some elements that must be found before apparent authority becomes effective to bind the principal. First, it is only the appearance created by the principal that the agent has authority, and not the agent's own action, that creates the authority. Secondly, the holding out by the principal must be such that the third party was acting reasonably in relying on the authority, and this reliance must have caused some detriment. There are numerous situations wherein agency by apparent authority can be found. One of the most frequent areas is where the principal puts someone in charge of property or of a business where ordinarily the person in such a position is in fact an agent. Thus, where a store owner asks a friend to "mind the store for him but don't sell anything or take any orders" and a prospective customer walks into the store and buys an article under circumstances where the customer could not but believe that the friend was in fact a clerk, the necessary authority for the sale will be found under the theory of apparent authority. Other cases arise where there really is an agency relationship between the principal and his agent but the agent is given less authority than is usually vested in agents in simi-

lar positions. Where a third party justifiably relies to his detriment on the usual authority of such perso. in similar positions, apparent authority will supply the missing authority. Of course in all of these cases there are shades of differences, so that each case depends on its own particular facts. All cases in which the facts are somewhat similar will not necessarily be decided in the same way.

(B). **Ratification.** All of the above agencies are based on facts existing at the moment when a third party purports to enter a contract with an agent for the benefit of a principal. In other words, either there is or is not an agency relationship existing at the time that the third party deals with the agent. Facts or events happening after the reliance by the third party are not material to the question of whether agency actually or apparently existed. There are, however, events or facts which may happen after the time when the third party purports to enter the contract with what he thinks is an agent, that create the agency or authority. The principle involved is called ratification. As a general rule, a principal may ratify an unauthorized act of his agent which the principal could have authorized at the time that the agent performed the act. Generally, ratification can occur only with acts which the principal could have authorized and not with acts that the principal could not have authorized at the time the agent entered the contract with the third party. If the agent actually acted for his own benefit, then the principal cannot ratify.

(C). **Burden of Proof.** One final comment on the subject of the creation of the agency relationship is that agency is not presumed, but must be proved by he who asserts that there is an agency relationship.

(D). **Principal-Agency Relationship.** There are many ramifications following from the relationship of principal and agent.

(1). **Fiduciary Relationship.** It is generally stated that there exists between the principal and agent a fiduciary relationship which requires the utmost good faith and loyalty on the part of the agent in his performance of his duties for the principal. In addition, the agent must act solely for the principal and must not work against the principal's best interests in the agent's own personal capacity.

(2) **Liability of Agent.** An agent is liable to his principal for the wrongful use of the principal's property which is in the agent's charge. If the agency relationship is known to the third party, the agent is not liable in his personal capacity for any of the contracts that he enters in behalf of his principal, unless he exceeds his authority and the principal does not ratify his unauthorized acts.

(3). **Imputation of Knowledge.** Probably the most outstanding characteristics of the relationship, as it affects third parties, is the imputation to the principle of knowledge acquired by the agent. Any knowledge acquired by the agent, within the scope of his duties, must be relayed to his principal and if the agent either does not relay the information, or does so belatedly, the principal may suffer injury that may have been caused by such inaction. The rationale is that in reality the agent is the principal for purposes falling within the scope of his agency. There are several exceptions to this rule, which will relieve the principal of liability for knowledge not communicated to him by his agent. Where the agent acquires knowledge from a source which requires that he keep it confidential, such knowledge will not be imputed to the principal. Secondly, where the agent and the third party collude to cheat or injure the principal, the knowledge of the agent will not be imputed to the principal. Thirdly, where the agent acquired knowledge in some capacity other than his agency, such knowledge will not be imputed to his principal.

3-6. In previous paragraphs reference was made to the concept of delegated authority given to branches of Government by the express or implied terms of the Federal Constitution, and to the fact that redelegation was necessary in order for the branch to carry into effect its charged duties and granted powers. Reference was also made to the Federal Acquisition Regulation, which is in reality a codification of redelegated authority designed to implement the responsibilities charged to the branches of Government by the Federal Constitution. The Federal Acquisition Regulation (*FAR*) was issued in accordance with the Office of Federal Procurement Policy Act. It established a Government-wide procurement system, subject to discretion accorded by statute to specific Departments or agencies. The FAR unifies the implementation of the exercise of the authority by subordinate officers and agents, and specifies the duties, responsibilities and express authority of officers contracting for the benefit of the Government. Thus it can be readily seen that the Constitution, legislative

acts, and executive department regulations provide a framework within which the concept of authority is defined.

3-7. **Similarities and Differences Between Commercial and Government Authority and Contracts.** In this section we shall examine some contract similarities and differences to better understand the principles of Contract Law. Generally, these similarities and differences are centered around the roles of the government and the commercial agent.

3-8. **Similarities.** There are many similarities between commercial and Government contracts with respect to the concept of authority. Of course, when we speak of a principal in the context of Government procurement, we are usually speaking of the United States Government. All those who act for or in the name of the Government are agents. As in private contracting, the Government is bound by the acts of its agents committed within the scope of their authority. In many cases the problem is one of ascertaining the authority of the officer or person purporting to act in behalf of the Government. Fortunately, in the majority of cases the authority of agents is express, that is, it is a matter of statute or regulation. Therefore, where the duties, powers, responsibilities and authority exercised by a government official are not in conformity with the statute or regulation, that exercise is *ultra vires* and not binding on the Government. This may appear to have harsh consequences where a private contractor has relied on an official's unauthorized actions and suffers a resulting injury, but one is presumed to know the law; stated another way, ignorance of the law is no excuse. Since all statutes and regulations are required by law to be published and available to the general public, one cannot claim ignorance of the written law. Even though a party dealing with the Government does not, in fact, know of the appropriate law, he is deemed to know it under the doctrine of constructive notice.

(A). **Ratification.** In the area of ratification, the rules in Government contracts are approximately the same as in private contracts. A contract made by an agent of the Government, which is not binding because the agent lacked the authority to act, may become binding on the Government upon ratification by a principal (i.e., by a superior agent who would stand in the position of a principal) who had the power to grant the authority at the time the unauthorized act was committed. The Head of the Contracting Activity has this authority.

(B). **Approval.** One final word on the subject of authority concerns the concept of "approval." Ratification and approval of contracts are two entirely different concepts. Approval of a contract, if required by statute or other rule, involves the procedure of submitting a proposed contract (or provision of a contract) to superior authority as a condition precedent to binding effect. At all times the agent has authority to enter the contract, subject to this condition precedent.

3-9. The Government may be legally bound by acts of its agents, even though the authority of the agent as exercised is not spelled out in a statute or regulation. Where a Contracting Officer by virtue of his warrant has express authority to act, he generally has implied authority to take the necessary actions to implement the responsibility as charged to him. This is the doctrine of implied authority discussed earlier. If an agent of the Government needs to act in order to accomplish the express authority, he then has implied authority to do whatever is necessary to carry into effect his express obligation. This implied authority is usually referred to as being incidental to express authority. The rules regarding implied authority as applied to Government contracts are no different from those applied in private contracts.

3-10. **Differences.** One of the major differences between Government contract law and commercial contract law is the agent's authority to exercise the proper power within certain bounds. The doctrine that deals with this concept is apparent authority (or *estoppel*).

(A). **Apparent Authority and Estoppel.** Government contract law differs from private contract law in the area of apparent authority and estoppel. It has been repeated that the Government is not bound by the unauthorized acts of its agents. This is based on the doctrine that a party entering into arrangements with representatives of the United States has the responsibility of ascertaining whether the representative is acting within the bounds of his authority. Since apparent authority and estoppel are both based on the concept of reliance, a party doing business with an agent of the Government relies at his own risk; if the agent does not have actual authority to act, the Government may not be bound to the contract

because the agent will not be found to have apparent authority. This is frequently said to be a departure from private contract law principles. However, in discussing apparent authority, it was previously noted that justification for applying the doctrine could be found only in those cases where it was the holding out of the principal that the agent had authority, and not the holding out of the agent himself that caused the third party's reliance. Since the delegation of authority from principal to agent in the area of Government contracts is open and available for everyone to see, it can hardly be said that the third party was misled as to the actual authority of the agent. The doctrine of apparent authority or estoppel will not apply to bind the Government where the act by the agent was not authorized by legislation or is unconstitutional. On the other hand, where an agent makes false representations in an area where he is authorized to make representations, the Government will be bound by such misrepresentations. A more difficult problem arises where the agent either exercises authority that he does not have, although the agency which he represents does in fact have the authority to authorize such an act, or acts in excess of his actual authority. In either of these cases it is entirely possible that the Government can and will be found to be estopped to assert that the agent lacked the authority that he exercised. The reason for allowing the third party to hold the Government to contracts based on the unauthorized acts of its agents is not much different than it is in the area of private contracts. Two elements are present: it will be unjust not to protect the third party , and the principal has the legal ability to allow the agent such authority. (It almost goes without saying that a principal cannot be held to authorize an act which is illegal or which he could not authorize.) Where the legal ability to authorize an act is found, then it is necessary to examine the circumstances. More and more Government contracts or parts of them are being enforced on the basis of equitable estoppel.

(B). **Equitable Estoppel.** The form of estoppel employed by contractors to bind the Government to the actions of its agents is called "equitable estoppel." It arises only when: (1) the Government is acting in its proprietary, rather than sovereign capacity; and (2) the agent of the Government is acting within the scope of his authority. Of course, contracting is a proprietary function of government, so that requirement is easily satisfied, and most actions of Government contracting personnel are within the scope of their authority. When the above criteria are present, the Government may be estopped from denying the binding nature of its agent's action when:

(a) the Government knew the facts;

(b) the Government intended the contractor to rely on its actions;

(c) the contractor was ignorant of the facts; and

(d) the contractor relied, to its detriment.

An exhaustive treatment of the doctrine is given in *United States v. Georgia–Pacific Co.*, 421 F.2d 92, 99 (9th Cir., 1970). The Comptroller General has applied the doctrine in bidding situations. *Fink Sanitary Service, Inc.*, B-179040 (1974). Although the doctrine is employed sparingly, courts do expect the Government to turn "square corners" in its dealings with the people.

3-11. **Sovereignty of the Government.** Sovereignty of the government suggests autonomous control or existence without external control. Although the Government is sovereign, it permits itself to appear nonsovereign as situations require.

3-12. **General Nature.** The Supreme Court of the United States has said that when the Government comes down from its position of sovereignty and enters commerce, it submits itself to the same laws that govern individuals. Literally, this statement fairly represents the position that our Government and its myriad agencies occupy in the field of commercial contracts. The Government is on an equal footing with the contractor as a party to the contract. An important point to keep in mind, however, is that the Government never fully "steps down" from its position, and the Constitution itself prevents a complete stepping down. Actually, our Government never gives up its image as a sovereign unless it does so voluntarily, and this can be done only to the extent that the Constitution either expressly or implicitly authorizes.

3-13. Earlier, reference was made to certain provisions of the Constitution delegating power to the executive and legislative branches to carry on certain specified activities. In addition, the so-called "necessary and proper clause" vested discretionary power in the Congress to delegate to agencies authority to carry these activities into effect, with whatever reasonable means are

deemed necessary. The absolute extension of this "necessary and proper clause" involves the concept of "eminent domain." Under this theory the Government can appropriate whatever is needed to accomplish its legitimate ends, as long as the government pays fair compensation. So in a very practical sense, it can be said that the Government never really steps into another world, but merely allows itself to become involved to the extent thought desirable to accomplish its objectives.

3-14. Why bother to enter the field of commercial contracts at all if the Government could, as a sovereign, acquire whatever it needed by eminent domain, or "condemnation"? Undoubtedly, the philosophy that it is easier to encourage cooperation rather than demand compliance lies at the root of the answer. The Government encourages private action so as to accomplish the end delegated to the Government by the people themselves. The primary method used to accomplish tight control is to require those dealing with the Government to do so on an all-or-nothing basis. Through the use of a standard form contract designed to afford maximum protection to the Government under all anticipated circumstances, the Government is able to dictate the terms of contracting to such an extent that the non-Government contracting party really has very little to say about what the contract terms shall be in any given contract. The judicial branch of the Government frequently decrees relief to non-Government parties in contracts on the grounds that in case of ambiguity, a contract is construed against the one who dictates the terms. This is consistent with the "balancing" theory that is used in private contract law to protect the weaker party.

3-15. In summary, it is fair to state that the Federal Government maintains its image of a sovereign at all times; but it can and does permit itself to play the role, at least in part, of a nonsovereign. That role is always subject to change. It could be said that the Government is still the prince although clothed in commercial rags.

3-16. **Fundamental Rules.** With a few notable exceptions, the differences between contracts involving the Government and those involving strictly private parties are attributable to the nature of contract negotiations rather than to some theory of governmental privilege. However, there are some fundamental rules by which the Government receives preferential treatment.

(A). **Immunity from Suit.** One aspect of this preferential treatment is that the sovereign is immune from suit. A sovereign acting in accordance with its delegated responsibilities must not be harassed by private suits to such an extent that its function is impaired. Actually, the Government puts aside its sovereign immunity and allows itself to be sued under certain circumstances. Under the Tucker Act, the Government permits suits which arise out of express or implied contracts. These actions may be brought in federal courts and are subject to review by higher courts in the federal system.

(B). **Sovereign Acts.** Another aspect of the concept of sovereignty is the immunity that the Government enjoys from acts of obstruction to the performance of its contracts. Where one agency (say legislative) obstructs or impairs the performance of another governmental agency (say executive branch), the Government is not liable for such obstruction. This immunity is subject to one exception: where the obstruction is of a direct rather than indirect nature. The distinction is in reality between an act committed for the general public good and an act committed solely for the purpose of interfering with a particular contract. While the effect of the latter might be general, its application is direct and any such obstruction caused by the act would be compensable or remediable in favor of the private contractor.

(C). **Federal Law Governs.** Another aspect of sovereignty is the question of which law is to be applied to a contract involving the Government. The very famous case of *Erie R. R. v. Tompkins,* 304 U.S. 64 (1938), held that in cases in federal courts involving private parties, state law will be applicable to the controversy. If the *Erie* doctrine were applied, the Government's rights under a contract could vary from state to state. Yet it is highly desirable that the Government's affairs be administered on a uniform basis, and the *Erie* doctrine would not be productive toward this end. The case of *Clearfield Trust Company v. United States,* 318 U.S. 363 (1943), however, held that the *Erie* doctrine does not apply to cases to which the Government is a party. The rule of law that governs litigation between private parties and the Government is formulated either by the Congress through appropriate acts or by the federal judiciary through case decisions.

(D). **Immunity from Taxation.** Finally, the Federal Government and its agencies and pro-

perty are immune from state and local taxation, under the supremacy clause of the Federal Constitution. This tax immunity was established in the very famous case of *McCulloch v. Maryland,* 4 Wheaton 316 (1819), where John Marshall stated "the power to tax involves the power to destroy." The modern tendency is to retreat from a strict interpretation of this principle. In many situations a tax either on a party dealing with the Government or upon property owned by the Federal Government will be upheld unless the tax discriminates against the Government or its business associates.

3-17. **Contract Principles.** Generally speaking, there are three areas in which government contracts may differ from commercial contracts: Required Clauses, the Firm Bid Rule, and Implied Contracts.

(A). **Required Clauses.** The majority of the differences between Government and private contracts arise because of clauses included in Government contracts. The Federal Acquisition Regulation requires that certain clauses be inserted in contracts to which the Government is a party. Many of these mandatory clauses would not be found in contracts between private parties. An example is the Changes clause. Under this clause a Contracting Officer may make changes within the general scope of the contract and, where a change in the cost of the promised performance results, an equitable adjustment is provided for. The unique feature of this clause is that the contractor is required to proceed with the work as changed *before* negotiating the price of the change. The Disputes clause also sets apart Government contracts from those involving strictly private parties. Under this clause, any dispute between the contractor and the Contracting Officer which relates to the contract must first be determined by the Contracting Officer himself. An appeal by the contractor may be taken to the agency Board of Contract Appeals, but unless the decision of that Board is fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith, or not supported by substantial evidence, it is final. In the field of private contracts there is no such provision to be found anywhere. Perhaps the closest similarity would be in contracts involving mandatory arbitration of a dispute over a question of fact.

(B). **Firm Bid Rule.** Under ordinary contract law, an offeror may withdraw his offer (bid) at any time before it is accepted unless consideration is received for agreement to keep it open for a stipulated time. This is generally true even though the offeror has expressly promised to keep the offer open. In Government contracting, however, under sealed bid procurement, the general rule is that an offeror (bidder) cannot, in the absence of special circumstances, either withdraw a bid after it is opened or recover a deposit made, after bid opening. On occasion this doctrine has been relaxed by the courts where there are special circumstances such as an honest mistake or a misleading on the part of the Government. The rationale behind the doctrine is that the Government is at a disadvantage in comparison with private offerees in the sense that the Government must either accept the highest (or lowest as the case may be) responsive bid or reject all of the bids and readvertise. Therefore, the Government should be allowed a reasonable time after the opening of bids to ascertain whether collusion or fraud has been perpetrated.

(C). **Implied in Law Contracts.** A final difference between private and Government contracts can be found in the area of implied contracts. Earlier reference was made to the distinction between an implied in fact contract and an implied in law contract. Generally, the Government is subject to the same rules concerning implied in fact contracts as a private party would be in the same circumstances. Implied in law contracts present a different situation. The crux of the matter is consent. The courts have consistently declined to recognize a contract as binding upon the United States where the element of consent was wholly lacking and could not be reasonably implied from the facts and circumstances and acts of the Government representatives. Even in those instances where the Government has actually derived a benefit from the services of a private individual, the courts have refused to recognize an obligation on the part of the United States to pay where no evidence of consent on the part of the Government could be shown. In many similar situations involving private contracts, the law would imply consent on the theory of unjust enrichment. As in all cases of doctrine, there are some exceptions. Where the Government has taken property or services under fraud (through its authorized agents), relief may be given in *quasi*-contract. Also, where the Government uses property with the express consent of the owner, but where the owner expects compensation, an implied contract to pay a reasonable compensation for such usage

arises. Notwithstanding these two areas of exception, the cases in which the Government has been held liable under a theory of implied in law contract are very few indeed.

4. Procurement.

4-1. In order for the Government's many branches to properly carry out their numerous functions, they must engage in the business of acquiring equipment and supplies. By far the most significant (by volume of dollar expenditure) is military procurement. Military procurement began even before the founding of the Nation. The problem of equipping and supplying the forces of George Washington must have been as complex, measured by the standards of the time, as the problems of the missile and space age are today. Our Nation was still an infant when familiar questions arose--who should control military purchasing and how should it be accomplished?

4-2. **History.** From the very early years of this country's beginning, the military faced problems of procuring equipment and supplies for its forces. However, provisions were made by Congress that authorized certain Departments to be responsible for certain procurement matters. As the procurement matters grew more complex, more provisions had to be made to insure that the business of acquiring supplies and equipment could be regulated more efficiently.

4-3. In 1792, Congress provided that War Department supplies would be purchased by the Treasury Department. Just six years later in 1798, the War Department and the newly created Navy Department were authorized to procure all the supplies and services needed for the military and naval services. In 1809, the first federal statute requiring advertising appeared. In pertinent part it read: "... All purchases and contracts for supplies or services which are or may, according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made, whether by open purchase, or by previously advertising for proposals respecting the same..." Although a literal reading of this early statute would indicate Contracting Officers had a choice between two equally available methods of procurement, purchases were made by advertising except where public exigencies necessitated immediate contract performance. Subsequent statutes developed specific ground rules for advertising. In 1842, a law dealing with stationery supplies and printing required: (1) advertising for bids once a week for at least four weeks in a newspaper published where the work was to be performed, (2) description of the required supplies or services in the advertisement, (3) sealed bids opened under direction of the procurement officer in the presence of at least two persons, (4) award to the low bidder, provided he could furnish security for the Government in case of default.

4-4. In 1843, a statute added another requirement, the preparation of an abstract of bids. In 1852, contracts were required to be advertised at least sixty days before award and the presence of bidders at the bid opening was authorized. These requirements are quite similar to those now set forth in 10 U.S.C. § 2305. In 1860 a statute was passed which was later incorporated in section 3709 of the *Revised Statutes* of the United States (1878), the first comprehensive codification of United States Statutes. The statute read:

> *All purchases and contracts for supplies or services, in any of the departments of Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by public exigency, the article or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals.*

The particular significance of this statutory provision was the requirement of advertising with only two exceptions, contracts for personal services and contracts where public exigencies necessitated immediate performance. This statute was later reissued as 41 U.S.C. § 5 in 1926. With certain exceptions, it continued to regulate the placement of military contracts until World War II.

4-5. One further and important exception to Section 3709 of the *Revised Statutes* must be mentioned. The courts, the Attorney General and the Comptroller General consistently ruled that advertising was not required under that sta-

tute in circumstances which made competition impracticable (e.g. the existence of only one source). From these early days, then, in some cases where only one source was available, neither the War nor Navy Department utilized the procedures of formal advertising to effect such procurements.

4-6. Less than two weeks after Pearl Harbor, the Congress enacted Title II of the First War Powers Act of 1941. This Act authorized the President to empower agencies connected with the war effort to enter into contracts without regard to existing provisions of law, wherever such action was deemed to facilitate prosecution of the war. On December 27, 1941, Executive Order 9001 implemented the act and authorized the War and Navy Departments to make contracts without compliance with statutory requirements for formal advertising. On March 3, 1942, the Chairman of the War Production Board prohibited all contracting by the formal advertising method unless specially authorized. For the duration of World War II, the great bulk of military procurement was negotiated under the authority of the First War Powers Act.

4-7. At the close of World War II, a study was initiated for the purpose of developing peacetime procurement methods. The proposed bill which evolved from that study was transmitted to Congress by the Acting Secretary of the Navy, who stated that its primary purpose was to permit the War and Navy Departments to award contracts by negotiation when the national defense or sound business judgment dictated the use of negotiation rather than the more rigid formal advertising procedures. The Senate Committee on Armed Services, in commenting on the purpose of the bill in its report, stated:

> *This bill, as amended, provides for a return of normal purchasing procedures through the advertising—bid method on the part of the armed services, namely, the War Department, the Navy Department, and the United States Coast Guard. It capitalizes on the lessons learned during wartime purchasing and provides authority, in certain specific and limited categories, for the negotiation of contracts without advertising. It restates the rules governing advertising and making awards as well as fixing types of contracts that can be made.*

This bill was eventually enacted as the Armed Services Procurement Act of 1947. Chapter 137 of Title 10, United States Code, which amended and codified the Armed Services Procurement Act of 1947, required Department of Defense contracts for property or services to be formally advertised, except under seventeen specific situations where negotiations may be used. The Act has been amended many times - most extensively in July 1984 by the "Competition in Contracting Act" (P.L. 98-369). Effective April 1, 1985, this Act substituted the term "sealed bid" for "formal advertising" and replaced the seventeen specific situations with a few broad exceptions, discussed more fully in Chapter 5, *infra.*. Chapter 137 is applicable to the purchases and contracts to purchase of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, the National Aeronautics and Space Administration, and the Department of Transportation.

4-8. **Armed Services Procurement Regulation.** The Armed Services Procurement Regulation (*ASPR*)was issued by direction of the Assistant Secretary of Defense (Installation and Logistics) under the authority contained in 10 U.S.C. § 2202 and Department of Defense Directive No. 4105.30 dated March 11, 1959. ASPR stated in its Introduction (1-101) that it ". . . establishes for the Department of Defense, uniform policies and procedures relating to the procurement of supplies and services under the authority of Chapter 137, Title 10 of the United States Code, or under other statutory authority." The Armed Services Procurement Regulation, later called the Defense Acquisition Regulation (*DAR*), was superseded on April 1, 1984 by the Federal Acquisition Regulation (*FAR*).

4-9. It is important to note that some mandatory provisions of the FAR have the force and effect of law. The very important case of *G. L. Christian and Associates v. United States,* 312 F.2d 418 (1963), held that the termination for convenience available to the Government was a part of the contract between the parties even though the mandatory clause to that effect had not been included in the contract.

CHAPTER 4

SOCIO-ECONOMIC CRITERIA IN THE AWARD OF GOVERNMENT CONTRACTS

This Chapter examines the socio-economic, statutory, and procedural framework affecting the award of Government contracts. The preceding chapter explained legal concepts and principles generally applicable to the formation, performance, and discharge of contracts.

1. THE STATUTORY FRAMEWORK

1-1. A review and analysis of all the statutes which may affect the formation of federal acquisition contracts exceeds the scope of this text. This section is limited to a cursory review of some of the more noteworthy statutes not covered elsewhere in this work. Understanding of the operation of various statutes to effect the formation of Government contracts is essential to an explanation of the legal concepts and principles involved.

1-2. **The Small Business Act.** General policies of the United States respecting aid, counsel and protection to small business concerns by the Government have been announced by Congress on numerous occasions. The Armed Services Procurement Act and the Federal Property and Administrative Services Act each announce a policy that a fair proportion of the total purchases and contracts or subcontracts for property and services provided by the Government be let to small business concerns. The Small Business Act, codified at 15 U.S.C. § 631 *et seq.* (the "Act"), declares such a policy and establishes an independent Federal agency to execute specific measures to carry it out. It is recognized that such policies and measures are required to further the national interest in preserving free and open competition in the United States' market place.

1-3. **Small Business Administration.** The Small Business Act creates a Small Business Administration (*SBA*), an independent Federal agency operating under the general direction and supervision of the President. It also authorizes the SBA to provide specific kinds of assistance to small business concerns in competing for and obtaining Federal Acquisition contracts or subcontracts. The Act, at § 637, empowers and imposes the duty on SBA:

(a) To enter into contracts with the U.S. Government and any agency or officer thereof having procurement powers, which oblige the SBA to furnish articles, equipment, supplies or materials to the Government or to perform construction services for the Government, (15 U.S.C. § 637(a)(1)(A)). This section of the Act also authorizes any officer of the Government having procurement powers, in the discretion of such officer, to let procurement contracts to the SBA in any case where the SBA certifies that the SBA is competent and responsible to perform such contracts. The Administrator of the SBA (the "Administrator") is directed to refer appropriate matters to the head of the agency concerned if the SBA and the Contracting Officer are unable to agree on the terms and conditions of such procurement contracts.

(b) To arrange for performance of procurement contracts placed with the SBA by letting subcontracts to socially and economically disadvantaged small business concerns as may be necessary to enable the SBA to perform such procurement contracts, (15 U.S.C. § 637(a)(1)(c)). The term "socially and economically disadvantaged small business concerns" is defined to include:

(i) Any small business concern which is at least 51 percent owned by socially and economically disadvantaged individuals or, if publicly owned, 51 percent of the stock of which is owned by such individuals. It is also required that the management and daily business operations be controlled by one or more socially and economically disadvantaged individuals in order that a small business concern qualify for this kind of subcontract assistance. Only those individuals who are considered to have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group are "socially disadvantaged" within the meaning of the Act. The Act infers that group membership alone is a sufficient indicator of social disadvantagement and no other reference is to be made to the particular attributes of any individual. If an individual is considered socially disadvantaged, then such individual may also be considered economically disadvantaged. They are so considered if their competitive ability has been

impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. Reference to the assets and net worth of a particular socially disadvantaged individual is required to determine the degree of impairment of capital and credit opportunities, (15 U.S.C. § 637(a)(6)).

The threshold inquiry then is whether a small business concern has the requisite degree of ownership by members of prescribed groups. Then inquiry should be made to determine if management is controlled by socially disadvantaged individuals. Since the Act provides for subcontract assistance to firms which can be considered both socially and economically disadvantaged, the next inquiry is whether the assets and net worth of the individual reflect a degree of impairment regarding capital and credit opportunities. Whether a group is such that its members should be considered socially disadvantaged is to be determined by the Administrator after consultation with a designated associate administrator.

The degree to which an enterprise is owned and managed by socially disadvantaged individuals and whether a socially disadvantaged individual is also economically disadvantaged is to be determined by the Associate Administrator for Minority Small Business and Capital Ownership Development, rather than the Administrator.

(c) To determine within any industry the business enterprises which are to be designated "small business concerns", and issue, upon request, certificates certifying an individual concern as a "small business concern". Such certificate shall be accepted as conclusive by Government Officers having procurement or property disposal powers, (15 U.S.C. § 637(b)(6)).

(d) To certify, with respect to all elements of responsibility of any small business concern or group of concerns, the ability to perform a specific Government contract. Whether certified responsible by SBA or not, no small business concern may be precluded from being awarded a Federal Procurement or Property disposal contract on the basis of any element of responsibility, without referring the matter for final disposition to the SBA, (15 U.S.C. § 637(6)(7)(A)).

(e) To dismiss findings by a Contracting Officer that a small business concern does not comply with the manufacturer or regular dealer requirements of the Walsh-Healey Public Contracts Act, (41 U.S.C. § 35(a)) and certify the small business concern eligible as a Federal contractor, or to refer the matter to the Secretary of Labor, if the SBA concurs with the Contracting Officer. If the SBA refers a matter of compliance with this provision of Walsh-Healey to the Labor Department, the small concern cannot be certified eligible for Federal contracts unless the Secretary of Labor finds the concern not in violation, (15 U.S.C. § 637(b)(7)(B)). Once SBA certifies a small business concern competent, such certification is to be accepted as conclusive by Contracting Officers.

1-4. Thus SBA has obligations and authority under the Act to determine which firms in any industry will be considered small business concerns, to certify that individual businesses are small business concerns, and to certify that an individual business or group of businesses is competent to perform a particular Government contract. Accordingly, SBA: (i) promulgates size standards for each industry, (ii) issues certificates of Small Business Status upon request, and (iii) issues certificates of competency where required. The foregoing assistance is available to any small business concern. Assistance, where the SBA acts as a prime contractor and awards subcontracts, is available to socially and economically disadvantaged small business concerns.

1-5. Notwithstanding Congressional action vesting sole discretion in SBA to determine all matters relating to the competency of small business concerns to perform federal contracts, FAR provides that DOD will endeavor to make such matters subject to agreement between DOD and SBA. (See FAR 19.602-1(c)). A significant portion of the FAR on this subject is devoted to procedures and methods for challenging SBA certificates of size or competency. (See FAR 19.602-1(c)). Where a small business concern is not the manufacturer of items which it proposes to supply, and such items are distributed or manufactured by enterprises which are not small business concerns, FAR limits application of SBA certificates regarding competency to the non-manufacturing small business concern. The competency of such distributor or manufacturer must be separately determined by the Contracting Officer, (See FAR 19.101). FAR also limits the applicability of SBA certificates of competency where the highest competency obtainable or the best scientific approach is needed by

the Government. (See FAR 19.602-3(a)).

1-6. The Act imposes obligations (upon the agencies effecting a particular acquisition) which promote subcontracting opportunities for socially and economically disadvantaged and other Small Business concerns. It requires, in each designated contract, inclusion of a clause containing an agreement by contractor to carry out a national policy that such small business concerns shall have the maximum practicable opportunity to participate in contracts let by any agency. The term "small business concern", for the purpose of the obligations of contractors in this connection, is one which meets SBA size standards or which is certified as a small business concern by SBA. Contractors are directed to presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities or any other individual found by the Administrator or Associate Administrators to be disadvantaged. The Act provides no expressed certification provision to the effect that an individual or small business concern is socially and economically disadvantaged. Therefore contractors are obliged to either make their own determination in this regard, inquire of the Administration, or inquire of the potential subcontractor. The Act permits contractors acting in good faith to rely upon written representation by subcontractors as to their status, (15 U.S.C. § 637(d)(3)(D)).

1-7. The Act further requires the inclusion of a subcontracting plan as a material part of each contract or amendment or modification of contract which:

(i) may exceed $1 million where the contract is for construction of any public facility;

(ii) may exceed $500 thousand where the contract is for any other object;

(iii) is for more than $25 thousand, is not for services, and will not be performed entirely outside U.S. Territory;

(iv) offers subcontracting possibilities. The subcontracting plan is required to include percentage goals for utilization of sub..... contractors, small business concerns and socially and economically disadvantaged small business concerns. It is also required to include a description of the contractor's plans to assure that such firms have an equitable opportunity to compete for such contracts. The prime contractor is required to assure that such contractors who receive subcontracts meeting the tests for covered prime contracts undertake to carry out national policy in this regard and, as appropriate, include subcontracting plans in contracts with next-tier subcontractors, (15 U.S.C. § 637(d)(1) through (6)).

1-8. If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

1-9. Despite any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in the Act, is authorized to provide such incentives as the agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract.

1-10. Each subcontracting plan required shall include, according to the Act:

(a) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(b) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(c) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

(d) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all subcontracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all

other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(e) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency, or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(f) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and efforts to identify and award subcontracts to such small business concerns, (15 U.S.C. § 637(d)(6)).

1-11. The Small Business Act commits certain determinations to the discretion of the SBA or the Administrator of the SBA or the Associate Administrator for Minority Small Business and Capital Ownership Development. Such determinations are subject to the requirements and standards of the Administrative Procedures Act discussed in paragraph 3-3, *infra* Procedures Act, and are made by the SBA or its Administrator, they have the force and effect of law.

1-12. Included in such determinations are: (a) whether a particular group has been subject to prejudice or bias; (b) whether a particular business meets small business size standards; (c) all elements of responsibility of any small business concerns or group of such concerns to receive and perform a particular Government contract. The Small Business Act specifically prohibits rejection of any small business or small business group for award of a contract on the grounds of responsibility without a final disposition of the matter by the SBA. Thus it would appear that a Contracting Officer may determine a small business concern to be responsible without intervention of the SBA. The converse is not true, however.

1-13. No award can be made or proposal accepted, unless the procuring authority determines that the subcontracting plan provides maximum practicable opportunity for designated small businesses to participate in performance of the contract. There is no apparent exemption of this determination from the standards of the Administrative Procedures Act. While inclusion of such subcontracting plan in the contract is a precondition to award of a contract, it has been considered a matter of responsibility in advertised procurements. Thus a bid which does not contain an appropriate subcontracting plan may be considered for award, so long as a plan is included in the bid prior to award. It has also been held that the procuring agency may require a bid to include such a subcontracting plan in order to be considered for award; making it a matter of bid responsiveness. GAO pronouncements discourage this practice.

1-14. In order to further enlarge small business awards the Defense Acquisitions Improvement Act of 1986 (effective variously from October 1, 1986 to April 10, 1987) establishes further affirmative rules for awards to Small Business.

The first is the provision that awards must be made at not to exceed "fair market price". Additionally, a firm must do 50 % of the work itself on service contracts, and in manufacturing it will expend 50 % of the cost of manufacturing less material costs. (15 U.S.C. § 637a (i & ii)). These provisions are to avoid the small business which is merely a "front" for others. The law here recognizes that these percentages may not be appropriate in all situations and it thus authorizes the administrator to change these percentages where industry practice dictates.

A further provision attempts to assure small business in five categories a specific maximum percentage of the total business of that class. These five areas are: Construction, Shipbuilding and repair, Architectural and Engineering contracts, refuse systems, and related services. They are targeted to get 30 % of their category's business. The size standards for such a small business are therefore variable to keep the awards at not more than this level. These size standards must be kept current by a review every three years at least.

2. AID TO LABOR SURPLUS AREAS

2-1. Small Business concerns are required to receive". . . any award or contract or any part thereof. . . " which is determined by the administration and the contracting procurement agency:

a. to be in the interest of maintaining or mobilizing the nation's full production capacity;

b. to be in the interest of war or National Defense Programs;

c. to be in the interest of assuring that a fair proportion of purchases and contracts are placed with small business concerns. Such determinations may be made for "---individual awards or contracts or for classes of awards or contracts", (15 U.S.C. § 644(a)). Priority in awarding contracts set aside pursuant to § 644 of the Act is given to small business concerns which will perform a substantial portion of production on those contracts in areas of concentrated unemployment or underemployment or of labor surplus.

2-2. The Department of Defense policy and procedures, with respect to aiding areas of persistent or substantial labor surplus, hereinafter referred to as labor surplus areas, in the United States, its possessions, Puerto Rico and the Trust Territory of the Pacific Islands is covered in FAR 20.000, *et seq.* The policy of the Government is to encourage the hiring of disadvantaged individuals and to aid areas of persistent or substantial labor surplus by the placing of contracts and facilities in these areas, and also to assist such areas in making the best use of their available resources.

2-3. **Labor Surplus Area Concern** (FAR 20.101). The term "labor surplus area concern" means a concern that agrees to perform or cause to be performed a substantial proportion of a contract in labor surplus areas A concern shall be deemed to perform a substantial proportion of a contract in labor surplus areas if the aggregate costs that will be incurred by the concern or its first tier subcontractors, on account of manufacturing or production performed in labor surplus areas, amount to more than 50% of the contract price.

2-4. The policy of the Government is to aid labor surplus areas by placing contracts with labor surplus area concerns, to the extent consistent with procurement objectives and where such contracts can be awarded at prices no higher than those obtainable from other concerns. It also encourages prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas. This general policy and its implementing procedures are found in FAR 19.202 and FAR 20.103 [Reserved]. When reviewing this policy, one should also review the policy of FAR 19.508-B, Combined Small Business-Labor Surplus Area Set-Aside.

2-5. In no case will price differentials be paid for the purpose of carrying out this policy. Heads of procuring activities and heads of field purchasing and contract administration activities are responsible for the effective implementation of the Labor Surplus Area Program within their respective activities. Responsibility for administration of the program may be assigned to small business specialists appointed pursuant to FAR 19.501 *et seq.*

2-6. **Labor Surplus Area Set-Asides.** The procedures for making a set-aside are set forth in FAR 19.502 *et seq.* and require the use of the "Notice of Labor Surplus Area Set-Aside." This basic policy is as outlined in the FAR Set-Aside Procedures.

2-7. **Subcontracting With Concerns in Labor Surplus Areas.** It is the policy of the Government to promote equitable opportunities for labor surplus area concerns to compete for defense subcontracts and to encourage placement of subcontracts with concerns which will perform such contracts substantially in areas of persistent or substantial labor surplus in the order of priority described in FAR 19.2022, where this can be done, consistent with efficient performance of contracts, at prices no higher than are obtainable elsewhere.

2-8. Policy reflected by FAR 19.201 and FAR 19.2 requires that small business concerns be afforded an equitable opportunity to compete for all contracts that they can perform. Therefore, the Military Departments, to the extent consistent with the best interests of the Government, are expected to:

(1) Attempt to locate additional qualified small business suppliers by all appropriate methods, including use of the facilities of the Small Business Administration, particularly where only a limited number of small business concerns are on bidders' mailing lists.

(2) Give wide publicity to purchasing methods and practices.

(3) Publicize proposed procurements by the use of advance notices or other appropriate methods.

(4) Include all established and qualified potential small business suppliers on the bidders' mailing lists.

(5) Send solicitations to all firms on the appropriate list, except that where less than a complete list is to be used pursuant to FAR, at

least a pro rata number of small business concerns shall be solicited.

(6) Divide proposed procurement of supplies and services, except construction, into quantities not less than economic production runs, so as to permit bidding on quantities less than the total requirements; allow the maximum time practicable for preparation and submission of bids, proposals, or quotations; where feasible, establish delivery schedules which will encourage small business participation.

(7) Examine each major procurement to determine the extent to which small business subcontracting should be encouraged and required.

(8) Use small business concerns to the maximum extent feasible as planned producers in the Industrial Readiness Planning Program.

(9) Maintain liaison with Federal, State, local agencies and other organizations for the purpose of providing information and assistance to small business concerns.

2-9. **Small Business Set-Asides.** FAR 19.5 and FAR 19.501 detail the procedures for making contracts available to small business firms by a procedure called a Set-aside.

2-10. **Small Business Protests.** Representation by a bidder or offeror that it is a small business concern shall be effective, even though questioned, unless the Small Business Administration, in response to such question determines that the bidder or offeror in question is not a small business concern. The controlling point in time for a determination concerning the size status of a questioned bidder or offeror is the date of award, except that no bidder or offeror is eligible for award as a small business concern unless it has, in good faith, represented itself as a small business prior to the opening of bids or closing date for submission of offers.

2-11. Any bidder or offeror may, in connection with a contract involving a small business set-aside or otherwise involving small business preferential consideration, question the small business status of any apparently successful bidder or offeror by sending a written protest to the Contracting Officer who is responsible for the particular procurement. The protest should contain the basis for the protest, together with specific detailed evidence supporting the protestant's claim, that such bidder or offeror is not a small business.

(A). **Timely Protests.** When the Contracting Officer receives a timely protest prior to award, he shall forward the protest record to the Small Business Administration's regional office serving the area in which the protested concern is located. The Small Business Administration will promptly notify the Contracting Officer of the date of its receipt of any such protest and will advise the bidder or offeror in question that its small business status is under review.

(B). **Untimely Protests.** A protest which is not timely, even though received before award, should be forwarded to the Small Business Administration's regional office serving the area in which the protested concern is located; with the notation thereon that the protest is not timely. The protester should be notified that his protest cannot be considered on the instant procurement but has been referred to Small Business Administration for its consideration in any future actions.

(C). **Post Award Protests.** A protest received after award of a contract shall be forwarded to the Small Business Administration's regional office serving the area in which the protested concern is located with a notation thereon that award has been made. The protester shall be notified that award has been made and that its protest has been forwarded to Small Business Administration for consideration in future actions.

(D). **Questioning Status of Small Business.** A Contracting Officer may, any time prior to award, question the small business status of the apparently successful bidder or offeror by sending a written notice to the Small Business Administration regional officer of the region in which the bidder or offeror has his principal place of business. The notice should contain a statement of the basis for the question, together with available supporting facts. The Small Business Administration will advise the bidder or offeror in question that his small business status is under review.

(E). **Determination by the Small Business Administration Regional Director.** The Small Business Administration Regional Director will determine the small business status of the questioned bidder or offeror and notify the Contracting Officer and the bidder or offeror of the Director's determination. This determination is final, unless it is appealed and the Contracting Officer is notified of the appeal prior to award. If

an award was made prior to the time the Contracting Officer received notice of the appeal, the contract is presumed to be valid.

3. PROCUREMENT STATUTES

3-1. The principal statutes which specifically regulate the process of forming Federal acquisition contracts are the Armed Services Procurement Act, 10 U.S.C. § 2301 *et seq.* (*ASPA*) and the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 470 *et seq.* (*FPASA*). The specific methods, prescribed by these statutes for obtaining offers by those wishing to engage in business with the Government, are described more fully in Chapter 5 *infra* The omission of any other methods of obtaining offers from ASPA and FPASA is considered a preclusion of any other method.

3-2. **Multiyear Contracting.** Heads of agencies, covered by ASPA, are authorized to make contracts for periods up to five years, in some cases. Subsection (g) was added to 10 U.S.C. § 2306 by P.L. 90-378 imposing a $5 million ceiling on convenience termination costs under multiyear contracts. The Defense Authorization Act of 1982 added a new subsection (b) to 10 U.S.C. § 2306 which removed the foregoing convenience termination ceiling and inserted instead, a provision requiring notice to Congress before the Government agrees to convenience termination costs of $100 million or more.

3-3. Policies and procedures for use of multiyear contracting are set forth in FAR 17.101-1-2-3 & 102-1-2-3 & 103-1-2-3 to FAR 52.217-2 ALT-1. The Defense Authorization Act of 1982 specifically limits the application of multiyear contracting methods in the cases of the Coast Guard and the National Aeronautics and Space Administration. Use of multiyear contracting under ASPA is also limited in the acquisition of automatic data processing equipment covered by FPASA.

3-4. Multiyear contracting is only authorized, in any case, to the extent that funds are otherwise available for obligation by the Head of the procuring agency. This has been interpreted as neither authorizing violation of the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, nor limiting contracts to the term of annual appropriation acts. Generally, this method of contracting appears to contemplate either the use of multiyear or no-year funds or inclusion of provisions for cancellation of contracts, in the event funds are not made available.

3-5. **Procurement for Foreign Military Sales.** The Arms Export Control Act of 1976, 22 U.S.C. § 2751 *et seq.* (*AECA*) provides statutory authority to sell articles and services to certain friendly foreign countries. The AECA, at section 2762, authorizes the making by Federal acquisition of contracts for the procurement of such articles and services for sale. The sales are to be for U.S. dollars and to countries which furnish a dependable understanding for payment, 22 U.S.C. § 2762(a) or made on the basis of several deferred payment arrangements. Letters of offer may be issued with respect to pending sales with payment on 120 day billing terms provided that the customer country has inadequate funds, and an emergency need exists, as determined by the President of the United States, 22 U.S.C. § 2762(b). Sales on credit for up to 12 years are authorized by 22 U.S.C. § 2763.

3-6. Sales under contracts of $7,000,000 or more for defense articles, or $25,000,000 or more for defense services, are subject to a prior notice to Congress of the pending transactions. There is no specific statutory requirement for Congressional approval of such transactions. Licenses for commercial sales of major military equipment, whereby private U.S. companies sell directly to foreign governments, are prohibited with respect to contracts of $100,000,000 or more, except in accord with the AECA, (See 22 U.S.C. § 2778(b)(3)). Such commercial sales to Australia, Japan, the NATO member countries and New Zealand are not subject to this prohibition, under certain conditions. However, the President has authority to require that any commercial sales of defense articles and services be made under AECA.

3-7. DoD FAR SUPP 25.7300 sets forth policies and procedures for acquisitions made for foreign military sales (*FMS*) cases under AECA. It describes the functions of letters of offers and acceptance, as well as the role of Government to Government agreements, in acquisitions for FMS purposes. It directs Contracting Officers to honor, for example, requests by customer countries for sole source prime and subcontracts. It prohibits Contracting Officers from accepting directions of FMS customers as to source selection decisions or contract terms. FMS customer representatives may not direct exclusion of particular firms from bidders' lists. FMS customers are not permitted to interfere in the placement of subcontracts by prime contractors, (See DoD

FAR SUPP 25.7307).

3-8. FMS agreements may affect source selection in U.S. procurement to the extent that they require procurement from foreign sources under off-set arrangements. DoD FAR SUPP 25.7310 provides policies and procedures for effecting off-set arrangements.

3-9. **GATT Government Procurement Code.** The General Agreement on Trade and Tariffs (*GATT*) is a multilateral treaty which obliges signatory countries to seek reductions of various national barriers to international trade. The latest round of negotiations resulted in a number of international trade agreements, including the International Government Procurement Code.

3-10. The GATT Government Procurement Code (*GPC*) is intended to reduce various nontariff barriers to international participation in procurement activities of member governments. Examples of such non- tariff barriers include the Buy American Act, the Balance of Payments Program, and unpublished or informal procurement procedures. This international agreement on Government procurement, along with other agreements negotiated under the GATT, were implemented by the Trade Agreement Act of 1979, P.L. 96-39 (*TAA*) and Executive Order 122607, December 21, 1980. The TAA is codified at 19 U.S.C. § 2511-2518. It has been implemented by the U.S. Department of Defense by promulgation of DoD FAR SUPP 25.000 entitled "Purchases Under the Trade Agreements Act of 1979."

3-11. The GPC requires, among other things, that GATT signatory countries, including the U.S.: (1) establish and publish formal bidding procedures, (2) publicize pending procurements, and (3) avoid discrimination against qualified foreign sources.

3-12. The TAA, in effect, authorizes the President to accord either Most-Favored-Nation (*MFN*) treatment or National Treatment to eligible products of specified types of countries. Most-favored-nation treatment generally means that the most favorable treatment given by the United States to any other country must be given to all countries entitled to MFN treatment. National treatment means, in effect, that nationals of the other countries are to be treated no less favorably by the United States than a United States national would be treated by the United States. Countries designated as eligible for either national treatment or MFN treatment, are those:

(1) which have become parties to the GPC and will provide reciprocal competitive government procurement opportunities to United States products and suppliers of United States products;

(2) which, though possibly not a party to the GPC, in the case of countries which are not major industrial countries, will assume the obligation of the GPC and provide reciprocal opportunities to United States products and suppliers of United States products;

(3) which, though possibly not a party to the GPC and though possibly unwilling to otherwise assume the obligations of the GPC, are nevertheless willing to provide reciprocal opportunities to United States products and to suppliers of United States products, or,

(4) which are least developed countries, 19 U.S.C. § 2511(b).

3-13. The TAA defines the term "major industrial country" to include Canada, The European Economic Community, and the member countries thereof, Japan and any other country so designated by the President, 19 U.S.C. § 2136(d). The European Economic Community, as an entity, is permitted to be a country or instrumentality entitled to MFN or National Treatment in source selections, 19 U.S.C. § 2518(s). The term "Least Developed Country" is defined to include countries on the United Nations General Assembly list of Least Developed Countries, 19 U.S.C. § 2518(b).

3-14. The GPC and TAA do not automatically apply to services; only to products and suppliers of products according to the terms of the TAA. FAR 25.4, DoD FAR SUPP 25.4, and AFFAR SUPP 25.4 contain a list of items covered by TAA, insofar as DOD is concerned. The GPC and TAA apply to agencies not covered by FAR, however. A list of federal agencies covered was set forth in 46 Fed. Reg. 1654-1655. Moreover the TAA allows the President to accord MFN or National Treatment for "eligible products". The term "eligible product" is defined at 19 U.S.C. § 2518(4)(A), to include, at least, services which are presumably related to "products".

3-15. DoD FAR SUPP 25.402 announces the policy of evaluating offers in DOD procurement, of eligible products with a total value up to $182,000, without regard to the restrictions of the Buy American Act and the Balance of Payments Program. DoD FAR SUPP 25.403

preserves such restrictions with respect to the exceptions listed therein.

3-16. If the head of the procuring agency determines it to be in the public interest, contracts with foreign governments, agencies, international organizations, or subsidiaries of such entities, may be exempted from the Contract Disputes Act (*CDA*) of 1978, 41 U.S.C. § 602(c). The CDA is silent, however, with respect to contracts by Government-owned or operated commercial activities. The TAA specifically precludes its operation to create a private right of action, or remedy, not explicitly made under the laws of the United States, 19 U.S.C. § 2504. It does not, on the other hand, bar recognition of rights or remedies. The Administrative Procedure Act, 5 U.S.C. § 702, recognizes a right of Judicial review held by a person, suffering legal wrong, adversely affected or who is aggrieved as a consequence of agency action. It has been legalistically recognized, that disappointed bidders may have standing, under § 702 of the APA, to obtain judicial review of source selection procedures in Government contracts. It would appear that, once the President exercises discretion to accord a country and its products and suppliers either MFN or National Treatment in United States procurement, such suppliers would receive National Treatment on the question of standing.

3-17. Countries which do not enjoy either MFN or National Treatment, because of Presidential waiver under the TAA, may nevertheless enjoy nondiscriminatory treatment. Such treatment, considered favorable, involves treating a country no worse than other countries are treated who receive nondiscriminatory treatment. The TAA. in effect, bars United States procurement of supplies, or, from suppliers of countries which have not, in effect, been designated for MFN or National Treatment. Apparently an attempt to effect a procurement from a country enjoying mere nondiscrimination treatment could give rise to grounds for a judicial challenge from both United States domestic and foreign competing suppliers.

4. PROCEDURAL FRAMEWORK

4-1. **The Freedom of Information and Privacy Acts.** The disclosure of information, obtained by the Government in its procurement activities, to the general public and to competitors of Government contractors raises several policy and legal considerations. The Freedom of Information Act, (*FOIA*)5 U.S.C. § 552 amends the Administrative Procedure Act by creating a statutory presumption in favor of making Government records open to the public. The Privacy Act, 5 U.S.C. § 552(a), also amends the Administrative Procedure Act but recognizes that disclosure of some information, collected by Government pertaining to private individuals, may infringe upon the right of such individuals to privacy.

4-2. Openness in Government contracting activities, along with vigorous competition for Government business opportunities, is thought to be a fundamental safeguard to the public, against abuse and unscrupulous conduct. Yet, important property rights information or data may be, in effect, confiscated by the Government through disclosure to competitors and to the general public.

4-3. The FOIA created a statutory right to judicial process to compel Governmental release of certain information. Such information must be disclosed, unless it falls within one of the recognized exceptions to the Act. However, a person required to submit information to a Federal agency may obtain judicial review of an agency decision to release such information to others. The right to obtain such review may be based, either upon the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. § 706, or upon the Trade Secrets Act, 18 U.S.C. § 1905, (See *Chrysler v. Brown,* 99 S. C. 1705 (1979)).

4-4. **Protest of Award - Jurisdiction.** With the enactment of the Contract Disputes Act of 1978 it appeared that the Boards of Contract Appeals would have jurisdiction to offer protestors relief. Some early cases so held [see *Hi-Tech Electronics* (ASBCA No 25968, dated Sept 22, 1981)]. This is not true. The Boards of Contract Appeals have no jurisdiction to review protests and grant any relief to protestors. *Coastal Corp., et al v. United States,* 713 F.2d. 728, 3 Aug 1983, makes clear that the BCA's have no such power. The Court vacated the DOE BCA's decision, thus denying its jurisdiction. It said:

> *That implied contract which defines the way the Government must deal with bids in the process of the selecting [of] a contractor, is not a contract for the procurement of goods or services under section 3(a) of the [Contract Disputes] Act. The scope of the [Contract Disputes] Act thus is limited to express or implied*

contracts for the procurement of services and property and for the disposal of Government property. It does not cover all Government contracts [41 U.S.C. § 602(a)].

Consequently, Protests are beyond BCA's jurisdiction. Further the Congress, with the passage of the Competition in Contracting Act (*CICA*), a part of the Deficit Reduction Act of 1984 (H.R.) 4170 Title VII, Public Law (P.L.) 98-369, 98 Stat 494 (1984) July 18, 1984, expressly granted a statutory basis in 31 U.S.C. §§ 3551 through 3556 [see Appendix F hereto] for Protest review and resolution to the Comptroller General. This codifies the Protest authority and practice that has been administratively exercised by the Comptroller General for over fifty years.

4-5. This new Act comprehensively provides for the disposition of bid and proposal protest matters. Its purpose is to provide a remedy for bidders who have been excluded from the competitive process. It provides for the codifying and strengthening of the General Accounting Office bid protest authority and procedures. It establishes time frames within which protests must be filed, agencies must respond, and final decisions must be rendered.

4-6. The FAR coverage that implements this law is found in FAR 33.101 through 33.106, which is briefly described below:

4-7. Contracting Officers shall consider all written protests, submitted both before and after award, whether filed with the agency, the GAO or GSA. Upon resolution of the protest, the protestor shall be notified in writing of the resulting final decision.

4-8. **Protests before award.** If a protest is filed before contract award, the contract may not be awarded while the protest is pending, unless the agency determines that urgent and compelling circumstances will not permit awaiting the GAO decision, due to urgent need for the product, undue delay in performance if award is delayed, or prompt award will otherwise be advantageous to the Government.

If the contract is not then awarded, other offerors who are reasonably likely to get the award shall be notified, given the Government's protest response, and asked to extend their offers to avoid re-solicitation. These other offerors may file comments on the protest. If time extensions are not granted, consideration should be given to proceed immediately with the award.

4-9. **Protests after award.** If a protest is filed only with the agency, who determines that the protest is not valid, it need not delay performance. Agency policy will govern this situation.

4-10. When a protest is filed with the GAO, the agency and other interested parties will be notified within one workday -- i.e., the protestor must notify the Contracting Officer within one workday of filing with the GAO, and the Contracting Officer upon receiving such notice must notify other interested parties, the otherwise successful awardee, or those in consideration if no award is yet made. If the protestor fails to so notify the Contracting Officer, the GAO can dismiss the protest.

4-11. **Filing times and GAO response.** Protests must be filed within 10-working days of the protestor learning of the initial adverse agency action. Normally, the agency shall submit its bid protest package to the GAO within 25 workdays from its telephonic notice from GAO of such protest. If GAO chooses to use the "express" option, this filing time is reduced to 10 workdays! GAO will issue its recommendations within 45 days on the "express" option, and 90 days on the normal time protests.

4-12. The new law (*CICA*) also authorized the General Services Administration Board of Contract Appeals (*GSBCA*), on a three-year test basis, to decide protests involving contracts for automated data processing equipment. The purpose of this test program is to determine whether the boards of contract appeals, government-wide, would be an appropriate forum for bid protests. The Defense Acquisition Improvement Act of 1986 expanded its jurisdiction to include review of the question of what is an "automated data processing" protest.

4-13. The remedies provided by this Act are not exclusive with the Comptroller General. A protestor still has all his remedies before both the GAO and courts, at law.

4-14. The procedures that the GAO has published to implement the above law are contained in Title 4, Code of Federal Regulations, Part 21, and following.

4-15. **Constitutional Questions.** Three provisions of the above statute were considered by the U.S. Attorney General to raise grave constitutional questions. He considered 31 U.S.C. § 3553(c) and (d) unconstitutional because he saw

them as a legislative branch (*GAO*) exercising an executive branch function; i.e. the stay provision, and most specifically its subprovision that allows the GAO to lift the stay by finding a particular protest is frivolous. He saw 31 U.S.C. § 3554(c) as raising another constitutional question in that it grants to the same legislative function (GAO) the judicial power of awarding to protestors protest and filing costs, including reasonable attorneys' fees and bid and proposal preparation costs. These awards provide that they be paid from the executive agency's funds.

4-16. The issue was joined in the case of *Ameron v. U.S.*, DC NJ No. 85-1064A. The District Court upheld the constitutionality of the stay provision, ordering the government to honor it. As a result, FAC 84-9 was issued on June 20, 1985 requiring agencies to implement the stay and cost reimbursement provisions of CICA. The government then appealed this ruling to the Third Circuit Court of Appeals (NJ) which affirmed the lower court.

4-17. In appropriate cases, notice of a protest will be given to bidders affected thereby. For example, when a protest against the making of an award is received and the Contracting Officer determines to withhold the award, pending disposition of the protest, the bidders, whose bids might become eligible for award, should be informed of the protest. They are then requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance (with consent of sureties, if any), in order to avoid the need for readvertisement.

4-18. **Judicial Review.** The question of whether and under what circumstances courts will judge the propriety of Government conduct in the course of forming Government contracts has a long and interesting history. Federal Courts have long followed a policy of self-imposed restraint in exercising their power to determine the propriety of actions by other branches of Government. One means of effecting such restraint is the imposition of a requirement that a protagonist challenging Government conduct have adequate standing to do so.

4-19. This judicial restraint has been neither absolute nor evenly applied. It involves competing fundamental public policies. On the one hand it is antithetical to U.S. notions of openness and accountability in Government to completely preclude Judicial review of Executive action. On the other, Government could not operate if its functions were interrupted by incessant challenges by those who may be unhappy with the way Government operates.

4-20. The U.S. Constitution vests power in the Federal Judiciary to decide "Cases and controversies arising under the Constitution and laws of the United States." The U.S. Supreme Court early decided that a case or controversy involves a situation where there are competing claims of legal right involved. It later decided, in 1939, that Government procurement laws and regulations do not confer legal rights upon those seeking to do business with the Government. [i.e., a bidder does not have a "right" to be awarded a Government contract.] Thus, procurement laws and regulations in and of themselves do not provide a basis upon which vendors may stand to challenge Government action. *Perkins vs. Lukens Steel Co.*, 310 U.S. 113.

4-21. The Administrative Procedures Act of 1965 (5 U.S.C. § 551 *et seq.)* (the *APA*), following the *Perkins* case by 26 years, codified a previously recognized basis for "standing", in addition to the narrow concept of legal rights. The APA reflected fairly consistent Congressional policy favoring judicial review. It focused on the propriety of Government actions and actual or threatened harm to the challenger of such official action. The APA specifically provides for judicial review when it is alleged that such Government procurement actions are improper and that they harm or threaten harm to such challengers.

4-22. The U.S. Court of Appeals for the District of Columbia decided, in *Scanwell Laboratories v. Shaffer,* 424 F.2d. 859, (1970) that Federal Courts have the power under their policy of self restraint to determine whether Governmental conduct was proper. Such power exists particularly where propriety depends upon conflicting interpretations of the legal effect of specified Governmental acts and conduct. This Court later clarified its meaning of "self restraint" in *M. Steinthal & Co. v. Seamans,* 147 US App D.C. 221, 455 F.2d. 1289 (1971). Here it was faced with the question of "whether there was an ambiguity which resulted in an inequality among the bidders and therefore warranted readvertisement." The Court, citing *Scanwell, supra,* focused the scope of judicial action, saying: "The Court is obligated to restrict its inquiry to a determination of whether the procurement agency's decision had a reasonable basis." It summarized its rule limiting *Scanwell, supra,* by

saying: *"The Court must refrain from judicial intervention into the procurement process unless the actions of the executive officials are without any rational basis."* [Emphasis added].

4-23. The position of the Executive branch in forming Government contracts has been that allowing judicial review permits interruption of procurement processes. This is especially so in light of the *Perkins* case holding that no vendor legal rights under procurement law are involved. In the absence of legal rights compensable by damages, disappointed vendors in our courts would be left equitable or injunctive remedies, i.e., restraining orders. Such injunctions may reasonably be expected to interrupt procurement processes. These fears were addressed in *Blackhawk Heating and Plumbing Co. v. Driver* 140 US App D.C. 31, 433 F.2d. at 1141 (1970). There the Court said "It would be intolerable for any frustrated bidder to render uncertain for a long period of time Government contracts which are vital to the functions performed by the sovereign." It then identifies the standard necessary to justify intervention, saying "Only when the Court concludes that there has been a clear violation of duty by the procurement officials should it intervene in the procurement process and proceed to a determination of the controversy on the merits. This principle, as applied in the procurement field, would be an updated analogue of the traditional doctrine that mandamus should be issued to compel performance only when there has been a clear violation of an official duty of what has come to be labeled a 'ministerial duty, a duty not involving any room for discretion."

4-24. The Claims Court, on the other hand, fashioned a remedy alternative to the injunction i.e., the award of bid or offer preparation costs. The theory supporting this is that a bidder is the beneficiary of an implied contract on the Government's part to fairly consider his bid. When it does not, the Court reasons, it has breached this implied contract entitling the disappointed bidder to breach of contract damages. The Declaratory Judgments Act provides for mere declarations by the Court as to matters properly before it, even in the absence of specific relief.

4-25. The Judiciary Act, 28 U.S.C. § 1491, was amended in 1982 to provide for the establishment of a new United States Claims Court. The new Court was given express statutory authority ". . . to afford complete relief on any contract claim brought before the contract is awarded, (28 U.S.C. § 1491(a)(3)). That section of the statute goes on to grant to the new Claims Court ". . . exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. Today, therefore, as the Act is interpreted, only this Court, not Federal District Courts, may grant injunction to stop an award. (This does not prevent Federal District Courts from enjoining performance after award.)

4-26. The Act provides for power to hear pre-award contract claims, but does not define this concept. The definition may well include an implied contract to consider offers fairly, or to conduct the process of Government contract formation according to the rules. The later passage of the CICA (July 1984), granting the Comptroller General express power to hear protests (31 U.S.C. § 3552 *et seq.),* will clarify the scope of this concept.

4-27. The United States has long admonished foreign state-owned or operated enterprises that, in effect, "when the sovereign descends from the throne and enters into the world of commerce, it will be treated as any other merchant". Precise formulations of rules by which commercial activities by Government organizations can be distinguished readily from sovereign activities (i.e., activities uniquely Governmental in nature) are difficult to devise. There would appear little that is uniquely Governmental in the purchasing of supplies, equipment or services needed to carry on governmental functions.

4-28. The road from *Perkins* to *Scanwell,* via the 1982 Federal Courts Improvement Act and the CICA, has been long; perhaps longer and more twisted than necessary. The time loss of interrupting essential Governmental functions to quarrel about how supplies and services are purchased is obvious. The potential abuse in using the crown of the sovereign to obtain preferential treatment by the courts with respect to commercial nongovernmental activities is no less obvious. Failure to make such distinctions, or worse, deliberately obscuring them, assures that one will be treated like the other. The proper functions of Government can only suffer as a result.

CHAPTER 5

METHODS OF FORMING GOVERNMENT CONTRACTS

This chapter describes methods of forming Government contracts prescribed by statute or regulation. It also explains the principles of law and policy related to each such method.

2. An understanding of the principles described will enable the reader to recognize the consistency of standards of Governmental conduct required in using each method. This understanding will help the reader to be able to distinguish the various means required to meet such standards according to the method used.

3. The discussion in this chapter is, to the extent practicable, limited to particular methods of forming federal acquisition contracts. Concepts and principles generally applicable to all such methods are largely confined to the discussion in the preceding chapters and Chapter 13 *infra* covering labor policies.

1. STATUTORY SCHEME

1-1. The principal statutes which describe specific methods of forming Government contracts were identified in the preceding Chapter 4. They are the Armed Services Procurement Act of 1947; codified at 10 U.S.C. Ch 137 ("ASPA" herein) (see Appendix-F) and the Federal Property and Administrative Service Act of 1949, codified at 40 U.S.C. § 471 et seq., ("FPASA" herein)(Appendix-F). Numerous other statutes generally affect specific matters involved in this process or which may arise under resulting contracts.

1-2. Some such statutes have been previously described. ASPA and FPASA specifically prescribe methods of forming Government contracts. Recognized rules of statutory construction require that these statutes take precedence over others which may more generally affect the selection and use of available methods of contracting. They must be interpreted and enforced in light of and in a manner consistent with such other statutes.

1-3. Statutes authorizing each federal department, agency or instrumentality usually authorize purchases of supplies and services necessary to effect statutory purposes as well. If such legislation prescribes methods of forming purchase contracts, it usually sets forth requirements in addition to but not in derogation of ASPA and FPASA standards. Therefore statutes and regulations specifically applicable to particular departments, agencies or instrumentalities are part of the general statutory scheme as well.

1-4. ASPA and FPASA prescribe methods of forming contracts which alter the usual positions of offeror and offeree in business transactions. The customary practice in business transactions is for sellers to solicit offers from purchasers and reserve powers of acceptance to themselves. This is the circumstance in the normal consumer transaction. Congress, however, requires the Government to solicit offers from sellers and to reserve the power of acceptance to the Government as purchaser. In this manner the Government retains control of the contract formation process. The Government thus controls the manner, means and conditions under which it will become obligated under contracts. Acceptance or award creating a contract is normally at the discretion of the Government.

1-5. Recently significant statutory enactments have occurred which change language, intensify emphasis on competitive contracting and in some ways, as described below, simplify and change the procurement process.

1-6. Title VII of the Spending Reduction Act of 1984, popularly called the Competition in Contracting Act of 1984-(HR 4190) Pub. L. 98-369 [hereinafter called "CICA"] signed by the President on July 18, 1984 and printed in Appendix F hereto, is the principal change.

1-7. The Congress perceived several problems with the content and implementation of the old law. (Effective only until March 31, 1985 due to passage of CICA). These perceptions are briefly outlined below in an abridged reprint of the congressional staff's short summary explaining this new law's justification and goals--

1-8. Both statutes (*ASPA* and *FPASA*) require government agencies to promote the use of full and open competition in the procurement of property and services. In government contracting, competition is a marketplace condition which results when several able contractors, act-

ing independently of each other and of the government, submit bids or proposals in an attempt to secure the government's business.

The two basic procurement procedures were formal advertising and negotiation. Former law required that government agencies formally advertise -- specify their needs, solicit sealed bids to meet those needs, and award the contract without discussions to the lowest responsive and responsible bidder -- whenever feasible and practicable.

For complex procurements, contracts cannot reasonably be awarded solely on the basis of price without discussions with the offerors. In these circumstances, negotiation affords the best opportunity to obtain competition.

The ASPA and the FPASA restricted negotiated procurement to certain conditions by providing 17 and 15 exceptions to formal advertising, respectively, under which an agency may negotiate. Many of the exceptions required a written justification (determinations and findings statement), and some also require approval by the agency head.

Unlike the rigid sealed bid procedures for formal advertising, negotiation allows for considerable flexibility. In a negotiated procurement, Contracting Officers are permitted to discuss the terms and conditions of the contract with all contractors in a competitive range.

The evaluation and award procedures for negotiated contracts allow for more discretion. Contracting officers are not required to award to the low offeror, as in formal advertising, but may "trade off" cost to the government against factors such as technical performance or management capability in selecting the source.

1-9. **Shortcomings in the Old Law.** The ASPA and the FPASA had two primary shortcomings: first, they did not recognize negotiation as a legitimate competitive procurement procedure; and second, they did not adequately restrict the use of noncompetitive negotiation.

1-10. **Lack of Recognition of Competitive Negotiation.** If Contracting Officers needed to consider factors other than price in making awards or must have discussions with prospective contractors, they were required to satisfy one of the exceptions to formal advertising that permitted negotiation. For all practical purposes, therefore, competitive negotiation lacked recognition as a bona fide competitive procedure.

A consequence of the old statutory framework was that agencies may be required to formally advertise when negotiation is more appropriate. In those situations, *the rigid requirements of formal advertising may inhibit the procuring agency from taking advantage of the competitive marketplace.* [Emphasis added]

When negotiation was appropriate, moreover, agencies were required to indulge in what the Commission on Government Procurement regarded as "expensive, wasteful, and time- consuming" procedures to justify its use. The Commission recommended that competitive negotiation should be recognized as an "acceptable and efficient alternative" to formal advertising.

1-11. **Lack of Restriction on Noncompetitive Negotiation.** While agencies are required to award negotiated contracts competitively to the maximum extent practical, negotiation can be -- and frequently is -- noncompetitive. Beyond the justification for negotiated procurement, however, former law did not require further justification for noncompetitive award.

Of the $146.9 billion in contracts (over $10,000) awarded in fiscal 1982, approximately 54 per cent ($79.2 billion) were negotiated noncompetitively. The Defense Department sole-sourced 53.3 per cent ($63.5 billion) of its contracts in fiscal 1982, a decrease from the previous year.

The justification most frequently invoked was the "competition is impracticable" exception. 56.1 per cent of the value of sole-source contracts awarded in fiscal 1982 were made pursuant to this justification. The Department of Defense "justified" a majority of its sole- source contracts under this exception, 63.4 per cent in fiscal 1981, and 57.8 per cent in fiscal 1982.

By using the broad exceptions to formal advertising as a means to sole-source contracting, the problem was the agency's justification for awarding a contract noncompetitively was hidden. While sole-source contracting is necessary in certain situations, [Congress determines that] *tighter control and greater visibility are needed to ensure its proper use.* [Emphasis Added]

1-12. **The New Law** (*CICA*). A purpose, therefore, is to increase the use of competition in Government contracting and to impose more stringent restrictions on the awarding of noncompetitive -- sole- source -- contracts. Agencies are required to use competitive procedures, whether by soliciting sealed bids or requesting competitive proposals, unless a statutory excep-

tion is met to use non-competitive procedures. This law also strengthens the justification, approval, and notice requirements to safeguard against unnecessary sole-source contracts and appoints a competition advocate in each procuring activity to enhance accountability and increase further emphasis on competition.

1-13. **Statutory Framework.** It changes and augments the two primary procurement statutes -- the Armed Services Procurement Act (*ASPA*), which governs the Department of Defense, the Coast Guard, and NASA, and the Federal Property and Administrative Services Act (*FPASA*), which applies to civil agencies -- to establish a uniform framework which distinguishes between competitive and noncompetitive procedures. The amendments to the two laws are nearly identical.

It also amends the Office of Federal Procurement Policy Act, a statute which governs all federal agencies, to establish reporting and notice requirements; define certain procurement terms, such as "full and open" competition; and create advocates for competition in all procuring activities.

1-14. **Competition Requirements.** The law establishes "full and open" competition as the standard for awarding federal contracts for property or services. Full and open competition is defined to mean that all responsible sources are permitted to submit bids or proposals for a proposed procurement.

1-15. **Definitions.** The CICA uses new terms to describe existing practices. The following comparison is offered to simplify reading the CICA.

Existing Word Usage June 1984	**CICA Equivalent Words April 1985**
Advertising	Sealed bidding [under full and open competition]
Bid	Bid
Competitive negotiation	Competitive proposals
Formal Advertising	Sealed bidding [under full and open competition]
Government Interest	Public Interest
Invitation	Solicitation
Invitation for Bid (*IFB*)	Request for Sealed Bid (*RSB*)
Noncompetitive, sole source	Other than open competition
Pre-Invitation	Pre-Solicitation
Price and other factors	Price and Related Factors
Readvertise	Resolicit
Request for Proposal	Solicitation
Terms	Provisions
Two-step formal advertising	Two-step sealed bid

1-16. To meet this new procurement method standard, executive agencies are required under the Act to use competitive procedures -- whether by soliciting sealed bids and making award without discussions (sealed bidding) or requesting proposals and making award with discussions (competitive proposals) -- whichever procedure is more conducive to the conditions of the contract.

1-17. Even though Congress has eliminated the need for Determination and Findings (*D & F*) under competitive negotiations, Sealed Bidding is still the primarily mandated method. FAR 14.103-1(a) states Sealed Bidding *shall* [emphasis added] be used whenever the conditions in FAR 6.102(a) are met. This requirement applies to any proposed contract action [initial award] under part 6. Section 6.102(a) refers to FAR 6.401(a), which states:

> *(a) Sealed bids. Contracting officers shall solicit sealed bids if —*
>
> *(1) Time permits the solicitation, submission and evaluation of sealed bids; [and]*
>
> *(2) The award will be made on the basis of price and other price-related factors; [and]*
>
> *(3) It is not necessary to conduct discussions with the responding offerors about their bids; and*
>
> *(4) There is a reasonable expectation of receiving more than one sealed bid.*
>
> *FAR § 6.401(b) states —*
>
> **Competitive Proposals.**
>
> *(1) Contracting Officers may request competitive proposals if sealed bids are not appropriate under paragraph (a) above.*

1-18. Therefore, full and open competition is met if either sealed bids or competitive proposals are used to buy the item or service the Government needs.

1-19. Additionally, under the "competition" umbrella is a third category of action called "Competition under limited conditions". [see 10 U.S.C. §§ 2301-2 and 4] These include contracts for:

1. Architecture and engineering,
2. Basic Research,
3. Contracts using competitive procedures by excluding a particular source to increase or maintain competition,
4. Multiple award schedules of GSA,
5. Set asides, and
6. Small purchases.

1-20. The final procurement category is noncompetitive -- sole source, now "other than open competition."

It provides seven exceptions to competitive procedures which, for the most part, parallel the conditions under which the Comptroller General has historically permitted agencies to award contracts on a sole-source [other than open competition] basis.

1-21. The seven exceptions under which sole source procurement is authorized are:

(1) The property or services needed by the agency are available from only one responsible source and there are no competitive alternatives.

(2) The agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources.

(3) It is necessary to award the contract to a particular source in order to maintain an essential industrial capability in the U.S. or to achieve national industrial mobilization.

(4) The terms of any international agreement or treaty with a foreign government, or the written directions of any foreign government, have the effect of requiring the use of noncompetitive procedures.

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

(6) The unrestricted disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources.

(7) The head of the agency determines that it is in the public interest to waive the requirements for competition and notifies the Congress of this determination 30 days before

the award of the contract. *The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the above exceptions.* [Emphasis added].

1-22. To assure meeting the safeguards against unnecessary sole- source contracting the CICA requires that, before a contract is awarded noncompetitively, the agency must justify its reason for going sole source, using one of the above seven exceptions. The justification statement must then be certified as accurate and complete by the Contracting Officer responsible for awarding the contract.

1-23. Further, this justification statement is required to be approved by the procuring activity's competition advocate for contracts over $100,000, by the head of the procuring activity for contracts over $1,000,000, or by the agency's senior procurement executive for contracts over $10,000,000.

1-24. Finally, to ensure that all potential competitors are given the opportunity to bid on a potential contract, the agency is required in most cases to publish a notice of the proposed noncompetitive contract in the *Commerce Business Daily* , inviting bids, and is required to consider all bids received in response to the notice.

2. MANAGEMENT DUTIES

2-1. The CICA further endeavors to assure competition by three additional methods, and improve success by requiring annual reporting to Congress.

2-2. The first method establishes an advocate for competition in each agency and, within the agency, in each procuring activity. The primary responsibility of the advocates for competition at both levels is to challenge barriers to, and promote full and open competition in, the procurement of property and services. The agency's advocate is required to report annually to the senior procurement executive on the progress made to enhance competition and the plans to remove remaining barriers.

2-3. The second method is to charge the procuring activity with the duty to do advance procurement planning and market research.

2-4. The third method is to develop specifications that obtain full and open competition, suggesting functional, or performance specifications, where practical.

2-5. To determine the compliance with and efficacy of these practices, the head of each agency, in turn, is required to submit an annual Report on Competition to Congress that includes actions taken to increase competition and reduce sole-source contracting.

3. MEANS AND CONDITIONS OF ACCEPTANCE

3-1. **Sealed Bids.** ASPA and FPASA prescribe which offers may be accepted by making award of contracts when solicitation by sealed bidding is used. They also prescribe the manner of acceptance. Acceptance of bids which conform to the solicitation and which are most advantageous to the Government, price and other factors considered, is mandated by each statute, provided that the offeror is considered responsible. The statutes provide relief from that mandate in effect only when the head of an agency determines that all offers (by way of offers submitted in response to a solicitation) be rejected and thus declined in the public interest. The manner of acceptance prescribed is the giving of notice, with reasonable promptness, in writing to the appropriate offeror.

3-2. **Negotiation.** Neither ASPA or FPASA expressly prescribe the offers which may be accepted when negotiation is permitted. They prescribe the manner of acceptance, i.e. written notice but not conditions of acceptance. ASPA requires either oral or written discussions with responsible offerors whose proposals are within a competitive range; price and other factors considered. It also permits acceptance of proposed offers without discussion under authorized set-aside programs or where the solicitation has provided notice of the possibility of acceptance without discussion. In the latter event it is necessary to demonstrate that offered prices are fair and reasonable. While both statutes mandate acceptance of most advantageous offers obtainable by sealed bidding, unless rejection of all offers is determined to be in the national interest, no such mandate or provision for rejection is prescribed in the case of negotiated offers.

3-3. Unless a statute is remedial in nature, definitions and descriptions therein are deemed to preclude application of other definitions or descriptions. Thus ASPA and FPASA are considered to preclude authority for any other methods of soliciting offers. They also preclude authority for acceptance of any other kind of offer. Regulations, however, permit negotiation

of the non-price terms of offers and subsequent solicitation of price offers by sealed bid to offerors who have negotiated acceptable non-price terms. This process is known as two-step formal advertising.

3-4. The Armed Services Procurement Act (*ASPA*) and Federal Property and Administrative Services Act (*FPASA*) are thus now nearly identical by their express terms. The terms and provisions of FPASA are as specific as those of its military counterpart. It is thus possible to conclude that Congress intended that advertising (sealed bidding) be impracticable or not feasible before negotiation is permitted under ASPA and FPASA. It would appear that there is no greater obligation on the Government to make an award by sealed bidding under ASPA than under FPASA. Absent a showing of national interest, a sealed bidding award under ASPA would appear mandatory unless negotiation is permitted. This is the case per FAR 6.401(b). In practice it would appear that ASPA and FPASA are treated as essentially the same.

3-5. The Government is not equally obliged to make awards where offers are solicited through sealed bidding rather than accept proposals obtained through negotiation. Under both statutes, in negotiated offers, there appears no requirement that any competitive proposal be included in the competitive range. Even if acceptance is allowed without discussions, or proposals have been placed in a competitive range, there is no statutory or regulatory requirement that any proposal be accepted. The only limitations apparent in this area are the possible normal limitations on abuse, capriciousness, arbitrariness and bad faith generally imposed on Government actions and decisions. Even if those limitations are exceeded, it is clear that no absolute vendor's right exists which compels the government to enter a contract. Thus, absent a determination that the national interest would be served otherwise, the Government has a greater obligation to make an award under sealed bidding procedures than it has to accept a proposal under competitive proposal procedures.

3-6. The Government, on the other hand, may not necessarily retain absolute freedom to reject all offers obtained through competitive proposal practices. At least one federal circuit court has prescribed tests for adjudicating whether the Government is bound to a contract prior to its execution in writing *(Banking and Trading Corp. v. Floete,* 257 F.2d 765 (2d Cir. 1958)). In that case an offer was made to the government which required a fully written offer with some representations [the critical one being that the offeror had title to what he offered to sell]. This gave rise to the question of whether either or both intended not to be bound to the transaction until these representations were complete, and in writing. To answer this the Court sets out several considerations that clarify whether a party [Government, here] is bound before a complete contract writing has occurred (an integrated contract). These are identified by the Court thus --

> *"* * * whether the contract is of that class which are usually found to be in writing, whether it is of such a nature as to need a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations. If a written draft is proposed, suggested, or referred to during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract."*
>
> *"* * * Whether during the negotiations the parties have fully agreed upon all of the details of the transaction, or whether pending final execution of a written document some of those details have remained unsettled."*

3-7. Based on these tests the Court held that the offeror had not presented a complete document, and the government only agreed to be bound upon its signing of a complete document [which never happened] -- so, no contractual duty arose as to the government. These above tests serve [to] help clarify when the government might be bound, before formal execution.

3-8. The government is required to adhere to proposal evaluation criteria once such criteria are made known to offerors (per CICA). Thus while offerors under competitive proposal procedures may not necessarily compel the Government to accept a proposal, it does not follow that the Government has unlimited freedom to reject or decline competitive proposals.

3-9. Additionally another group of changes have been enacted under the Defense Acquisition Improvement Act of 1986 (P.L. 99-591, October 30, 1986).

3-10. Many of these changes are an outgrowth of the Packard Commission report plus continuing Congressional interest in the Defense

procurement process. First, the act allows other than competitive procedures when, in addition to one source only, there may be "a limited number of responsible sources" (10 U.S.C. § 2304(c)(1)). It provides that evaluation factors' relative importance be spelled out in competitive proposals, (including technical capability, management capability and prior experience of the offeror. (10 U.S.C. § 2305(2)(a)(i)). It also makes clear that factors other than price can be evaluated in sealed bids as well.

3-11. The next area it specifically addresses is the spare parts buying situation. It provides that when spare parts are bought in other than competitive procurements, that the vendor must certify that these spare parts prices do not exceed the lowest commercial price for the pricing period, or show the difference in prices with the justification for such differences, except where such disclosure would impact national security considerations, or the terms of the Government contract are significantly different from a commercial sale including quality, quantity, delivery requirements or other terms and conditions.

3-12. Contractors spares cost data may be audited for up to three years from the certification date. Some items are exempt from the certification; they are:

(1) Items sold for resale

(2) Items sold to a subsidiary, parent or affiliate, or

(3) sold outside the U.S.A. (10 U.S.C. § 2323 replacing 10 U.S.C. § 2343.)

3-13. It provides that the Secretary of Defense shall issue rules to accomplish price evaluation on spares bought other than competitively (10 U.S.C. § 2304(i)). It also imposes a price evaluation limitation on sealed bids. It states that options may not be considered in determining the lowest price unless there is a "reasonable likelihood that the options will be exercised" (10 U.S.C. § 2301(a)(7)). This new law also seeks to prohibit buying, regardless of method, from foreign-owned or controlled business whose governments support terrorism (as determined by the Secretary of State) (10 U.S.C. § 2327).

4. PROCEDURES LEADING TO FORMATION OF GOVERNMENT CONTRACTS

4-1. Three separate phases are involved in formation of a Government contract. They are the solicitation phase, the evaluation phase and the award or acceptance phase. The procedures which may be used are: sealed bidding (including the two-step process), competitive proposals and sole source.

4-2. Acceptance or award involves a ministerial duty common to and dependent upon the solicitation and evaluation phases without respect to the kinds of procedures used. Technically it appears contracts are formed by making award when procedures involving sealed bids are used. When competitive negotiation or sole source procedures are used, contracts are formed by acceptance of proposals. The technical distinction between award and acceptance does not reflect substantive legal differences beyond the solicitation and evaluation phases. This section explains some of the substantive legal concepts and principles involved in the solicitation and evaluation phases of each prescribed method of forming Government contracts. It focuses first on the sealed bid method, because it is more often used. The next succeeding sections consider the competitive proposal and sole source method authorized by statute. The two-step sealed bid method is also authorized by regulations.

4-3. **Solicitation Phase of Sealed Bidding.** Federal agencies have been required by statute since 1809 to formally advertise their requirements for supplies and services to be purchased subject to exceptions based on sound public policy. The purposes served by formal advertising, now called sealed bids under full and open competition, continue to include: (a) obtaining maximum benefits to be secured by the utilization of competition in the market places of the country, and (b) maintenance of public trust in the propriety of methods used to expend public funds. Competition for Federal business is generally thought to result in lower prices and higher quality, over the long term. It also encourages maintenance of an adequate number of sources of supply through the elimination of favoritism. Thereby it also maintains the public trust.

4-4. **Definition.** Sealed bidding is the means of forming contracts through the use of a process which includes solicitation of sealed bids and the awarding of a contract to the responsive responsible bidder. The offer must conform to the solicitation, and be most advantageous to the

Government considering price and other factors. The term "most advantageous" in practice usually means lowest in price.

4-5. **Process of Sealed Bidding.** The process of sealed bidding begins when an agency needs a specified service or product. This need is communicated through a purchase request to the officer responsible for purchasing that particular service or product. The Contracting Officer then determines whether it is feasible or practicable to make the purchase by sealed bidding, and unless a negative determination is made, the Contracting Office transfers the information contained in the purchase request to the schedule of a request for sealed bid, which is then published. The Request for Sealed Bid is a solicitation for offers to be submitted by persons desiring to provide the needed supplies or services at a place, date and hour designated in the solicitation. It is circulated as widely as practicable in order to obtain maximum competition. FAR 13.106(b)(5) states "Generally solicitation of these suppliers may be considered to promote competition to the maximum extent practicable." All bids received at the proper place on or before the designated time, are publicly opened and read aloud. The apparent low bidder is evaluated for responsiveness. Finally, an offer is accepted, and an action, referred to as the award, is properly made. The award is made to the responsible offeror who submitted the lowest price-responsive sealed bid. Notification of the award is then communicated to this successful bidder in writing. Formalization of the contract constitutes the final step in the process.

4-6. **The Request for Sealed Bid Solicitation.** There are several aspects of the solicitation for bid that should be reviewed before we study the actual solicitation itself. This review will provide a clearer picture of the workings of the Request for Sealed Bid process. [Note: sealed bidding must be used as discussed in para. 1-17 above.]

4-7. **Definition.** The Request for Sealed Bid (*RSB*) is a formalized document issued by a Government procuring activity to prospective contractors. It is a standard form containing the terms and conditions under which the Government is willing to contract. In essence it is a request from those interested in entering the contract, on the terms outlined in the invitation, to submit sealed offers to the procuring activity by a certain date, of the explicitly identical product or service.

4-8. **Legal Status of the Solicitation.** The RSB is not an offer. It is an invitation to make an offer. It is comparable to those situations in commercial transactions where a seller advertises in media of general circulation for potential purchasers to submit offers. The significance of this is that a response by the one solicited is not an acceptance binding both parties to a contract; it is rather an offer by the potential buyer, which in turn must be accepted or rejected by the seller who circulated the advertisement for offers.

4-9. Although not subject to acceptance, solicitations for offers do operate to restrict the options available to the solicitor. Generally the solicitor has no obligation to accept any offer whether it conforms to the solicitation or not. If the solicitor does accept an offer, however, it must conform to the terms of the solicitation. This requirement has been effected by reading into the offer accepted the terms of the solicitation, *(Carill v. Carbolic Smokeball Co.),* 1 Q. B. 25b (1893). More often, it is effected by limiting the offeree's power of acceptance to the terms of the solicitation. (See the discussion in Chapter 4 *supra).*

4-10. **Solicitation.** Complete Requests for Sealed Bids are circulated as widely as possible in order to obtain maximum competition. [see 4-5 above]. There are various ways of soliciting offers. The principal method is to mail or deliver invitations to the prospective bidders. Mailing lists of potential bidders are kept at purchasing activities to provide ready information on current sources of supply. All known suppliers who appear to be qualified and eligible to fill the requirements of a particular procurement are carried on the appropriate mailing list. Additional methods of soliciting Requests for Sealed Bids include the display of copies of the invitation at the purchasing office and at other appropriate public places; publishing brief announcements of proposed purchases in trade journals; and in some instances, publishing the essential details of a proposed purchase in newspapers, and in the Government environment, publishing in the *Commerce Business Daily,* FAR 5.201 *et seq.*

4-11. **Equal Treatment.** One of the essential characteristics of Government procurement is that all offerors are treated equally. Necessary technical or other information to or from bidders during the solicitation phase in Sealed Bidding must, for this reason, be transmitted only through the Contracting Officer. No disclosures or commitments can be made which may give

any offeror an advantage over others. The Contracting Officer may discover through correspondence or by discussions with a prospective offeror that ambiguities or inconsistencies exist in the solicitation. If not corrected, this may result in the receipt of nonresponsive sealed bids. A timely amendment should then be made to the Request for Sealed Bids. Otherwise the solicitation may be cancelled, if necessary. Note that responsiveness is apparently determined in light of the actual needs of the Government, rather than the terms of the RSB where they differ.

4-12. To insure equal treatment of all suppliers, no information concerning a pending or prospective purchase can be divulged to Government personnel not directly concerned with the purchase, unless they require the information in the performance of their duties. All discussions or correspondence should be handled through the Contracting Officer or designated personnel.

4-13. Each RSB sets forth a specific place, date, and time for the opening of bids. The RSB should be circulated sufficiently in advance of the opening date so that all those who care to bid are afforded an adequate opportunity to prepare and submit their offers. It is the responsibility of each bidder to insure submission of bids in time to be received for the bid opening.

4-14. **Sealed Bid, definition.** A sealed bid is an offer to the Government submitted in response to a Request for Sealed Bid. Once the bids submitted in response to a Request for Sealed Bids are received, they are opened at the specified time and publicly read aloud. All bids received are recorded on a form called an abstract of bids. Such data as the name of the offeror, the request number, bid opening date, a description of the procurement item, prices bid and other pertinent information are included in the abstract of bids. The abstract is completed and certified by the bid opening officer as soon as possible after the opening of the bids.

(A) Bids may be modified or withdrawn, at any time prior to the time fixed for bid opening, by written or telegraphic notice if received prior to such time. As in the case of late bids, a notice of modification or withdrawal of a bid, if sent before the time set for opening, though not received until afterwards, may generally be given effect if (1) the bidder is not responsible for the delay in transmission, and (2) it is clearly shown that the modification or withdrawal was not submitted with knowledge of the terms of other bids. Inferentially lack of such knowledge follows from the mere fact that notice was sent before the time for bid opening. If it is apparent that notice was sent prior to bid opening with knowledge of the other bids, investigation by law enforcement officials may be in order. A bid may, however, still be modified after the opening of bids when the modification is in the interests of the Government and is not prejudicial to other bidders [very rare]. Where the low bidder offers to reduce its price, for example, the modification may be accepted. Since the low bidder was already entitled to the award, no valid complaint of prejudice could be made by other bidders.

(B) **Rejection of Bids.** All bids may be rejected but only when it is in the public interest to do so. The General Accounting Office strenuously objects to rejection of all bids when it believes there is an abuse of administrative discretion. Bidders may object where there is an abuse of discretion as well. The controlling consideration seems to be whether or not, by readvertising, the Government may reasonably expect to receive bids substantially more advantageous. If resolicitation is not contemplated, the mere fact that the Government's needs have changed may suffice.

4-15. **Bid Evaluation Phase.** Bid evaluation is the process of determining whether each bidder's offer meets the requirements of the Government, presumably as indicated in the invitation, both as to what is offered and as to the contractual terms offered. During evaluation, the Contracting Officer may be faced with the necessity of eliminating some bids from consideration, or even in some circumstances, of rejecting all bids and readvertising the procurement. Ordinarily, any bid which does not conform in every respect to the essential requirements of the invitation for bid is rejected (a non-responsive bid). The basic standard applied is whether any deviation in what is offered by the bidder affects the price, quantity, or quality of the item or the contract terms specified by the Government. If the deviation does affect terms or specifications, the Contracting Officer must reject the bid. The bidder cannot be permitted to alter the evaluation by curing the defect after the bids have been opened.

4-16. **Lapse of Bids.** If an offer (or in the case of Request for Sealed Bids, a bid) lapses, either by the passage of the time stipulated in the

bid itself, because it is withdrawn by the offeror (bidder) or rejected by the offeree (the Government), it cannot ordinarily be reinstated. Infrequently, a rejected bid may be reinstated and accepted without readvertising, where the bidder consents in writing and the Government has sufficient time to accept. An attempt to accept a bid which has in fact lapsed is in legal effect a counter-offer which in turn may be accepted or rejected by the counter-offeree contractor. Such a circumstance reverses the original positions of the offeror and offeree.

4-17. **Responsiveness of Bids.** A bid submitted in response to the invitation must comply in all material respects with the invitation both as to method and timeliness of submission and as to the substance of any resulting contract. A bid which is not submitted in accordance with the solicitation, or which contains qualifying terms or language of a substantial nature, is considered to be nonresponsive and must be rejected.

4-18. An unsigned bid may not be considered. A bid which contains the corporate name of the bidder and the typed name of the vice president in the space provided for signer's name and title, but no signature either in the box headed "signature of person authorized to sign bid" or anywhere else on the bid must be rejected. This defect is substantive and may not be waived. When the bid lacks proper signature, with no other indication in the bid that the purported bidder intended to be bound to an offer, a Contracting Officer cannot rely upon the document submitted. Acceptance of such a bid may not legally obligate the purported bidder.

4-19. A bid which fails to state opposite each part number that the article complies with the specifications, if required by the solicitation, must be rejected as nonresponsive. Bid information is material and a failure to indicate complete compliance of parts with the specifications, after specific admonition in the solicitation, is fatal to the bid. The deficiency may not be waived. The only errors which may be corrected after bid opening are those which do not affect responsiveness of the bid. The primary purpose in insisting on responsive bids is that all bidders must stand on an equal footing so that the integrity of the sealed bidding system may be maintained.

4-20. It is necessary to define and measure the meaning of compliance insofar as the relationship between the bid and the solicitation is concerned. The criteria most frequently used to measure compliance is reflected in the term "substantial deviation". A substantial deviation occurs where the deviation in terms, or qualifications of the terms, so changes or conditions the bid that the resulting contract would be materially altered so that the non-complying bidder is likely to thereby gain an unfair advantage over competing bidders.

4-21. Contracting Officers, when it is in the interest of the Government, may waive minor deviations in bids which (1) do not affect the price, quality, etc. of the articles to be furnished, and (2) do not prejudice the rights of other bidders. However, the preferred procedure, time permitting, is to allow the bidder to correct the minor irregularity prior to the award of the contract.

4-22. **Late Bids.** The bidder has the responsibility to communicate the bid to the correct person at the correct address at the proper time. Bids which are received in the office designated in the invitation for bids after the exact time set for opening are late bids, even though, as an example, they are received only one or two minutes late. Late bids may not be considered for award as a general rule, but there are several exceptions to the rule.

4-23. FAR 14.203-1 provides that late bids, modifications of bids or withdrawals of bids shall be considered if the circumstances outlined in FAR 52.214-7 warrant:

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids (e.g. a bid submitted in response to a solicitation requiring receipt of bid by the 20th of the month must have been mailed by the 15th or earlier); or,

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized. A bid may also be withdrawn in person by a bidder or his authorized

representative, provided his identity is made known and he signs a receipt for the bid, but only if the withdrawal is made prior to the exact time set for receipt of bids.

(c) The only acceptable evidence to establish:

(i) the date of mailing of a late bid, modification or withdrawal sent either by registered or certified mail is the U.S. or Canadian Postal Service postmark on the wrapper or on the original receipt from the U.S. or Canadian Postal Service. If neither postmark shows a legible date, the bid, modification or withdrawal shall be deemed to have been mailed late. (The term "postmark" means a printed, stamped, or otherwise placed impression [exclusive of a postage meter machine placed impression] that is readily identifiable without further action as having been supplied and affixed on the date of mailing by employees of the U.S. or Canadian Postal Service. Therefore offerors should request the postal clerk to place a hand cancellation bull's eye "postmark" on both the receipt and the envelope or wrapper).

(ii) the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

(d) Notwithstanding the above, a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

NOTE: The term "telegram" includes "mailgrams".

There is no apparent provision authorizing consideration of late bids delivered in person, by ordinary mail, postal express, private express or delivery company.

4-24. **Responsible Bidder.** The distinction between a responsive bid and a responsible bidder is that the latter concerns the offeror's ability to perform the contract while the former relates to the degree of consistency between the bidder's offer and the material aspects of the offers invited by the Government.

4-25. The phrase "responsible bidder" refers to bidders in sealed bidding solicitations and offerors in competitive proposals and sole source procurements and speaks to more than just pecuniary capacity of the offeror. Such factors as judgment, skill and integrity play important parts in the overall determination. The Federal Acquisition Regulation (FAR 9.104) defines a responsible bidder as one who meets all of the following general standards:

(a) has adequate financial resources, or the ability to secure such resources;

(b) is able to comply with the required or proposed delivery or performance schedule taking into account all existing business commitments, commercial as well as Governmental;

(c) has a satisfactory record of performance and integrity, and

(d) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

4-26. Additional standards apply if the procurement involves production maintenance, construction or research. These include having (a) necessary organization expertise and technical skills or the ability to obtain them, and (b) necessary production, construction and technical equipment and facilities or ability to obtain them.

4-27. In practice, there are four principal criteria used to determine whether or not a bidder is responsible. The four criteria are (a) status as a manufacturer, construction contractor, or regular dealer, (b) financial position, (c) skill and experience, and (d) prior conduct and performance of Government contracts. In addition, integrity, or the lack of it, is a major consideration in the determination of responsibility. Some of these criteria are worthy of brief comment at this point.

4-28. The requirement of a manufacturer or regular dealer, when supply procurement is involved, is contained in the Walsh-Healey Public Contracts Act, (41 U.S.C. § 35), and is based on the theory that the Government should not be required to deal with submarginal, irresponsible or unscrupulous persons. The Small Business Act dispenses with this requirement in some instances. (See discussion in Chapter 4, *supra)*

4-29. The determination of financial responsibility includes an evaluation of not only the offeror's current financial position but an evaluation of future plans and estimated financial position as well. An offeror who is in receivership is not normally a responsible offeror. In many borderline cases, however, a finding of financial nonresponsibility can be avoided by the requirement of a performance bond.

4-30. The skill of the offeror bears directly on its ability to perform the promises that it makes in the offer. Skill and experience are difficult, in many cases, to evaluate. Furthermore the degree of skill or experience required varies with the complexity of the undertaking the offeror assumes under the proposed contract. Standards to measure skill and experience are more or less subjective. In many cases performance bonds can reduce the effect of error and the resulting damage where the offeror's skill and experience are in doubt. Performance bonds, however, are normally only required in construction contracts. They may not be used in supply contracts as a substitute for a positive pre-award survey when finding a potential vendor nonresponsible.

4-31. The best measurement of skill and experience, and the probability that the offeror will satisfactorily complete the performance required is his prior conduct and performance record. The past is ordinarily an ample test of the future, but isolated events may be considered in order to determine what future performance is likely to be. A single default on a prior Government contract, standing alone, does not warrant a determination that the bidder is not presently responsible. On the other hand, prior misconduct or nonperformance can indicate the likelihood of current nonresponsibility. Debarment, suspension or prior criminal convictions are very serious matters and weigh heavily in the overall determination of current responsibility.

4-32. The Certificate of Competency (*COC*) obtained from the Small Business Administration is binding on the Contracting Officer in all aspects of the determination of responsibility of the small business bidder. One can be sought by the potential vendor when the examining DOD component finds the potential vendor nonresponsible. Thus it reverses DOD's finding and makes the potential vendor eligible for the award, should the SBA give him the COC. The FAR provides that Contracting Officers will generally accept a responsible Canadian firm proposed by the Canadian Commercial Corporation (*CCC*) as its subcontractor. (See the discussion in Chapter 4, *supra)*

4-33. If a bid is rejected because the prospective contractor is found to be not responsible, the Contracting Officer must place in the contract file a report of nonresponsibility. Supporting documents, including any surveys made, are attached to the filed report of nonresponsibility.

4-34. **The Firm-Bid Rule.** The Firm-Bid rule is that the bid in response to a solicitation cannot be withdrawn after the opening of the bids. This rule varies the ordinary principles of commercial contract law. The commercial rule is that an offer may be withdrawn (revoked) at any time prior to acceptance in the absence of an option. If the offer in a commercial transaction includes an appropriate option based on consideration, this option would make the offer irrevocable for the stipulated time. The Firm-Bid rule operates only after the opening of bids. It does not stop a bidder from withdrawing his bid after it is submitted, before opening. Actually there is no Federal statute which expressly forbids the withdrawing of a bid prior to its acceptance nor is there any Supreme Court case determining the issue of withdrawal prior to acceptance. Nevertheless, both the Comptroller General and the Claims Court consistently follow the Firm-Bid rule in their decisions.

4-35. There are some exceptions to the Firm-Bid rule. The rule does not apply to negotiated contracts. The rule does not apply where there has been a mutual mistake of material fact, where the invitation for bids is silent on the question of withdrawal, or where it is in the interests of the Government to allow the bidder to withdraw his bid. Finally, exceptions to the rule are made in cases where, if the Government would require performance, it would be inequitable or unconscionable. However, the Firm-Bid rule does not prevent a bidder from modifying a bid if a clerical or conceptual mistake is alleged, and proven by clear and convincing evidence.

4-36. **Mistakes in Bids.** A mistake has been defined as an erroneous mental condition, conception or conviction, induced by ignorance, misapprehension, or misunderstanding of the truth, but without negligence, and resulting in some act or omission done or suffered erroneously by one or both of the parties to a transaction, but without its erroneous character being intended or known at the time. (See discussion in Chapter 4, *supra).*

4-37. Where a mistake is made in a bid, there are two basic rules which come immediately into effect: (1) since a bid must conform to the invitation in order to be acceptable, a mistake in a material matter in the contract renders the bid nonresponsive and must be rejected; (2) since the bidder does not have the right to withdraw or modify a bid after opening, the bid is effective with the mistake as an included term

after the opening. Of course, if the mistake in the bid by the bidder is discovered by him before the opening, then the bid may be withdrawn.

4-38. **Relief Before Award.** Two types of relief are available if, before award, it can be shown that a mistake was made in the bid.

4-39. The bid can be completely withdrawn if it is reasonably established that it involves an honest mistake. The Contracting Officer cannot accept a bid in good faith if he knows (has actual knowledge) or reasonably should have known (constructive notice) that a mistake was made, i.e., that it does not in fact represent the bidder's actual intent. The mere claim of the bidder is not sufficient. The Contracting Officer must be reasonably certain that the claim of mistake has a basis in fact and is made in good faith.

4-40. In certain cases a bidder may be permitted to correct the bid after opening and prior to award. This is an exceptional remedy. It should be allowed in only a small percentage of cases.

4-41. The standard of proof required in all "Mistake in Bid" cases is "Clear and Convincing Evidence." A bidder must establish by such "clear and convincing evidence": (1) that a mistake was made, (2) the nature of the mistake, (3) the term actually intended. The correction will not be allowed if it will raise the bidder's price above that of the next lowest bidder.

4-42. In cases where both the error and the intended term can be determined from the face of the bid documents, the bidder may be allowed to correct a high bid price downward so as to make him the lower bidder. Acceptance of a bid which on its face is the lowest bid is not prejudicial to the other bidders.

4-43. After a bidder requests correction of a mistake, which he is unable to substantiate with evidence required to get a correction, he cannot waive the request for withdrawal and demand that the contract be awarded at the original erroneous low bid price. However, if the bidder can prove, with reasonable certainty, that the revised higher bid would still be the lowest, there is a possibility of acceptance of the bid.

4-44. A bid may be changed downward without any evidence where the bid is already low and the bidder wishes to further reduce. Here again, it is not prejudicial to other bidders.

4-45. **Relief After Award.** Another question which arises on occasion is what relief may a successful bidder be entitled to after the award has been made to him and a contract apparently results? The answer in the majority of cases involves a consideration of the question of mistake and error. Cases calling for relief after award fall into two categories: Mutual Mistake and Unilateral Mistake.

4-46. **Mutual Mistake.** If both the Government and the contractor made the same mistake, the contract document does not express the agreement both parties intended and the document may be reformed (changed) to express the parties' true understanding. Reformation is generally not permitted where the contractor claims that the Government and contractor would have come to a different agreement had both been aware that certain critical facts were actually not what the contractor erroneously supposed them to be.

4-47. **Unilateral Mistake.** A contract document normally cannot be reformed to correct a unilateral mistake. Once the Government accepts a contractor's bid, a binding contract is formed and the contractor must bear the consequences of his own mistake. The general rule is not applicable where the Contracting Officer had actual notice or constructive notice of the probability of an error, prior to accepting the contractor's bid. Acceptance does not result in a binding contract and the GAO or courts will either: (1) relieve the contractor from performance, or (2) allow an adjustment in price. The adjustment is to equalize the error; however, it may not result in the total corrected price exceeding the next low bid. If the Government makes a mistake of fact not known to or induced by the contractor, the contract may be enforced rather than reformed. In that instance the contractor will be permitted to perform the contract as intended or the contract will be terminated for the convenience of the Government. *supra).*

4-48. **Notice of Error.** There is no one answer to the question of what is required to place a Contracting Officer on notice of error. The rule of reasonableness--i.e., were there factors which reasonably should have raised the presumption of error in the Contracting Officer's mind--is applied.

4-49. The established rule is that where a bidder has made a mistake in a bid and the bid has been accepted, the bidder must bear the consequences thereof. This rule applies unless

the mistake was mutual or the error was so apparent that it must be presumed the Contracting Officer knew of the mistake and sought to take advantage thereof.

4-50. The Contracting Officer is charged with notice of mistakes obvious on the face of the bid (e.g. incorrect totaling of prices; failure to insert unit prices; inconsistency of unit prices and extended prices; or unreasonably low price as compared to other bidders).

4-51. Many bid invitations specifically provide that unit prices will govern. Despite this, if evidence establishes a mistake in unit price, the GAO has held that the extended price prevails since a bid cannot be accepted with notice of error.

4-52. Factors other than those on the face of the bid which may place the Contracting Officer on notice include:

(a) Wide range between low bid and several other bid prices,

(b) Government estimate substantially higher,

(c) Contracting officer knows of prior Government purchases of some similar items at substantially higher prices,

(d) Letter to Contracting Officer from higher bidder saying low bidder couldn't possibly meet contract at quoted price.

4-53. The Contracting Officer need not take note of general economic conditions, and he need not check the bid against wholesale labor and material indices.

4-54. A low bidder who alleges an error in bid after request for verification by the Government because the bid submitted was one-half the price quoted by other bidders, was permitted to withdraw his bid upon administrative determination that the bid was so far out of line that acceptance would be unfair to both the low bidder and other bona fide bidders. Correction in bid cannot be permitted in the absence of clear and convincing evidence of the bid price intended, in view of the rule that bids may not be changed after the time set for the bid opening has passed.

4-55. If the Contracting Officer suspects the low bid contains a mistake, he must request the contractor to verify his bid. If such verification is attempted and the contractor confirms the price, the Contracting Officer is under no obligation to inquire further. FAR 14.406-3, which deals with Bid Verification, requires the Contracting Officer to be specific, where possible, when notifying a bidder of a suspected mistake in bid. Moreover, the Contracting Officer's action bars a later presumption that he did not act in good faith.

4-56. Mistakes, other than clerical mistakes, require determinations by the Contracting Officer whether to permit or require correction or withdrawal of the bid. Such determinations may be made by procuring activities having legal counsel, in the case of withdrawals, or in the case of corrections, by designated officials pursuant to delegated authority, (FAR 14.406-3).

5. THE AWARD

5-1. A bid was defined as an offer submitted in response to a Request for Sealed Bids. An award is the acceptance of the offer. Legally, an award is a particular type of acceptance. It is only an acceptance of a bid submitted in response to a solicitation and not an acceptance of any offer. In other words it is a technical term used in connection with sealed bidding contracts.

5-2. **Award Must Be in Accord With the Bid.** It is the fundamental rule of both private and public contract law that an acceptance must be in accord with the offer before a binding contract can result. In legal effect, any material alteration or variation in the acceptance by the Government results in both a rejection of the offer (bid) and the institution of a counter offer by the Government which, in turn, can be accepted or rejected by the potential vendor. A material deviation would occur, of course, where the bid required acceptance by a certain date and the award was made after that date. Thus, late awards are not effective.

5-3. **Effective Time of Award.** The rule at common law is that an acceptance is effective when dispatched by the offeree if the means used to communicate it is authorized. The means of communication is authorized when the offeree uses the means indicated by the offeror (bidder) or, if not expressly indicated, then the same means used by the offeror to communicate the offer. Relating these principles to Government contracts, it would appear that in the typical case the acceptance would be effective so as to bind the parties in contract when the acceptance (award) is placed in the mails. United States Supreme Court cases have held this to be the true interpretation of the contractual situation.

Some Court of Claims cases have held, to the contrary. The decision in *Pacific Alaska Contractors, Inc. v. United States,* 141 Ct. Claims 303 (1958), reaffirmed the Court of Claims' position that the acceptance (award) is effective only when received by the bidder. The Comptroller General has stated that GAO will not follow the Court of Claims' interpretation until it is approved by the Supreme Court of the United States. To date the Supreme Court has not approved the Court of Claims' position.

5-4. **Required Form of Contract.** Under ordinary conditions the acceptance of a bid by the Government must be in writing. This is especially true where a statute requires the contract to be in writing. However, under emergency conditions, oral contracts have been upheld by the Armed Services Board of Contract Appeals.

5-5. **Types of Contracts to be Awarded After Sealed Bidding.** Contracts awarded after Sealed Bidding must be of the firm fixed-price type, except that fixed-price contracts with economic price adjustment clauses may be used where some flexibility is necessary and feasible.

5-6. Economic Price Adjustment clauses (reflecting such items as changes in labor rates) are not normally desirable, but, in appropriate cases, clauses providing for upward and downward revision of prices are used in order to protect the interests of both the Government and supplier. Where the Contracting Officer, on the basis of knowledge of the market or previous solicitations for like items, expects that a requirement for firm fixed-price bids will unnecessarily restrict competition, or unreasonably increase bid prices, Request for Sealed Bids may include an Economic Price Adjustment clause. Any Economic Price Adjustment clause must provide an escalation ceiling identical for all bidders so that each bidder is afforded an equal opportunity to bid.

5-7. Where a Request for Sealed Bid does not contain a price adjustment clause, bids received which quote a price and contain a price adjustment provision with a ceiling above which the price will not escalate, are evaluated on the maximum possible escalation of the quoted base price. If the bid is eligible for award, the Contracting Officer must request the bidder to agree to the inclusion in the award of an approved Economic Price Adjustment clause subject to the same ceiling. If the bidder will not agree to such approved clause, the award may be made on the basis of the bid as originally submitted. Bids which contain such clauses with no ceiling are rejected unless a clear basis for evaluation exists.

5-8. Where a Request for Sealed Bids contains an Economic Price Adjustment clause and no bidder takes exception to the price adjustment provisions, bids must be evaluated on the basis of the quoted prices without the allowable adjustment being added. Where a bidder increases the maximum percentage of adjustment stipulated in the Request for Sealed Bids or limits the downward adjustment provisions of the solicitation, the bid is rejected as nonresponsive. Where a bidder deletes the adjustment clause from its bid, the bid is rejected as nonresponsive since the downward escalation provisions are thereby limited. Where a bidder decreases the maximum percentage of escala- tion stipulated in the Request for Sealed Bids, the bid must be eval- uated at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, if, after evaluation, the bidder offering the lower ceiling is in a position to receive the award, the award must reflect the lower ceiling.

6. FORMING CONTRACTS BY NEGOTIATING OFFERS

6-1. We have seen that, as a rule, sealed bidding under full and open competition is the preferred method of procurement. Advantages of competition are sometimes more assured by use of this method. Basic assumptions that circumstances are normal and that the competitive condition exists must, in fact, precede the determination that sealed bidding shall be used. The history of Federal procurement attests to the fact that formal advertising (now called sealed bidding) is inadequate in a number of procurement circumstances. This section discusses the limitations, prohibitions, and conditions that prescribe the use of negotiation in procurement.

6-2. **The Concept of Negotiation.** Negotiation is a process of conferring, bargaining, or discussing with a view toward reaching agreement. It involves bargaining between buyer and seller with the objective of reaching an agreement on the price, terms and conditions of the transaction. In terms of the acquisition process, negotiation is any method of forming acquisition contracts without sealed bidding. In general terms, negotiation is used when. (1) there is no evidence, or insufficient evidence, of a competitive price situation; (2) urgent requirements override

the delays normally incident to formal advertising; or (3) public policy considerations supersede the benefits to be gained from formal advertising.

6-3. With the passage of CICA in July 1984, the methods and focus of negotiated procurements were simplified and clarified. The Act recognizes that there are two types of negotiation; competitive and noncompetitive. It simplifies using competitive negotiation, which it now calls "competitive proposals", by dispensing with the justification requirements known as Determinations and Findings. It allows this method, "if sealed bids are not appropriate under clause (A)", [Clause (A) is 10 U.S.C. § 2304(a)(2)(A), which prescribes sealed bidding use].

6-4. Competitive proposals (10 U.S.C. § 2304(a)(2)(B)) have been in use under the name of "competitive negotiations" since at least 1961. In fiscal year 1983, the Federal Procurement Data System reports that the Federal Government bought thirty-plus percent (30%+) aggregating fifty one billion dollars ($51,000,000,000.) using this method. Congress wants the Executive agencies to use it even more, thus the simplification of process (No D's & F's) and easy choice if sealed bids are not appropriate [See 6-3 above]. This emphasis arises in an attempt by Congress to get the Executive department to obtain even better values for the tax dollar. From its several public statements, the Congress has questioned whether we are getting those values under negotiated sole source procurement methods [1983 $96,000,000,000, equaling 57% of money spent].

6-5. Competitive proposals include many categories of buys. The first category is all buys that involve full and open competition, when not using sealed bidding procedures. The next several categories are forms of limited competition -- They are:

o Contracts using competitive proposals but excluding a given vendor, to establish or maintain an alternate source of supply, to:

(A) Increase competition

(B) Assure having an adequate national defense manufacturing base, or,

(C) To establish or maintain for national defense an engineering, or Research and Development capability using educational, other nonprofit institutions, or federally funded research and development centers.

o SBIR's (Small Business Innovative Research [organizations])

o Small purchases (up to $25,000 - [NOTE -- A LARGER BUY SHALL NOT BE SPLIT OR SEGMENTED TO COME WITHIN THIS CEILING])

o Small Business set-asides

o Architecture and Engineering

o Basic Research

o GSA multiple award schedules. These buys may be awarded with or without negotiation discussions as appropriate, to firms within competitive range, based only on solicitation factors in the solicitation.

6-6. When sealed bidding, competitive proposals or limited competition [6-5 above] are not possible, then and only then may sole source procurement be made. The CICA says -- " The head of an agency may use procedures other than competitive procedures (for using sole source)"-[10 U.S.C. § 2304(c)]. There are seven exceptions, set out below verbatim:

> *(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; [and furthermore]*
>
> *(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 that is (i) unique and innovative or, in the case of a service, for which the source demonstrates a unique capability of the source to provide the service; and (ii) the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and*
>
> *(B) in the case of a follow on contract for the continued development or production of a major system or highly specialized equipment or the continued provision of highly specialized services, such property or services may be deemed 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 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; [however] . . . (e) The head of the agency . . . . . shall request offers from as many potential sources as is practicable under the circumstances. [and] the justification and approval required by paragraph (f)(1)(10 U.S.C. § 2304) may be made after the contract is awarded. (10 U.S.C. § 2304(f)(2))

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

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

(5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale; [however] "In no case may the head of an agency — (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 service." (10 U.S.C § 2304(f)(5)(B).)

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

(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, [however]

(e) The head of an agency using any procedures other than competitive procedures to procure property or services by reason of the application of this subsection shall request offers from as many potential sources as is practicable under the circumstances. (10 U.S.C. § 2304(e).)

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)(2) The authority of the head of an agency under subsection (c)(7) may not be delegated. (10 U.S.C. § 2304(d)(2).)

(f)(2) . . ."The justification and approval requested by paragraph (f)(1) is not required in the case of a procurement permitted by [this] subsection (c)(7). . . (10 U.S.C. § 2304(f)(2).)

6-7. **Justification and Approvals.** The Act (10 U.S.C. § 2304(f)(1)) imposes stringent approvals of other than competitive contracts. These provisions are printed verbatim below:

(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);

(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 that notice have been considered by the head of the agency.

6-8. The approvals in para 6-7 *supra* are based on the justification required by 10 U.S.C. § 2304(f)(3) printed verbatim below:

(f)(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 the 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 (f)(1)(A) [above] and any related information shall be made available for inspection by the public consistent with the provisions of sc 552 of title 5 U.S.C.

6-9. There are some additional specific prohibitions imposed when using other than competitive procedures, as follows:

(f)(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.

6-10. Always, to any law there are exceptions. Such an exception to the approval and justification requirements of (f)(1) through (f)(3) [of 10 U.S.C. § 2304] above, is a procurement made under the "Act of June 25, 1938 (41 U.S.C. § 46 *et seq.),* popularly referred to as the Wagner-O'Day Act." [This Act is the one that provides for the Government to buy products from workshops of the blind or disabled.] Another exception relates to small business. HR 4209, the Small Business Federal Procurement Enhancement Act of 1984, exempts both 8a awards and SBIR's and set asides, competitively conducted.

7. EVALUATION CRITERIA

7-1. The CICA provides that evaluation criteria in contracts will be clearly set out and awards made only on the basis of criteria so set out in the proposal or sealed bid request, [10 U.S.C. § 2305 (b)(1)]. This law draws a distinction between criteria on a sealed bid versus competitive negotiation. In 10 U.S.C. § 2305 (b)(3), it provides, ". . . shall award [or sealed bids] . . . to bidder whose bid . . . is most advantageous considering *only* price and other price-related factors included in the solicitation." This section necessarily implies purchase of a generally market available product where quality [function performed] and delivery are basically uniform, so that price is then primarily the only remaining determinant of award.

7-2. In competitive proposals, 10 U.S.C. § 2305 (b)(4)(D), it states " . . . the head of the agency shall award a contract . . . to the responsible source whose proposal is most advantageous to the United States, *considering only price and the other factors included in the solicitation.* [Emphasis added]. Note that this does not say "price related factors" as does 7-1 above. -- Therefore any and all factors; technical, human, survivability, etc., etc., may be considered, as well as life cycle cost, as evaluation factors.

7-3. Such provisions have furnished the legal framework and standards for judging the negotiated award and defining the legal qualifications therefor. However, the following problem areas have emerged:

(1) **Competitive Range.** After receipt of proposals and resolution of any questions regarding the acceptance of late proposals, the procuring activity must determine with whom it will conduct discussion, i.e., who is within the "competitive range." In determining what is a competitive range, the Comptroller General has stated that negotiation should be conducted with offerors submitting proposals which are found to be in a competitive range and that the meaning of such determinations, particularly regarding technical considerations, is a matter of administrative discretion which will not be disturbed in the absence of a clear showing that such determination was an arbitrary abuse of discretion. In other words, this determination is a judgment question within the discretion of the agency. The question then arises to how far out of line must a proposal be in order for the agency to say that it is outside the competitive range and therefore not subject to further discussion with the supplier. It should be pointed out that the issue of competitive range in negotiation is not analogous to the issue of responsiveness in sealed bidding. This was emphasized by Comptroller General decisions stating that the primary consideration in negotiated procurements is not the responsiveness of proposals but the discussions (i.e., negotiations) with all offerors within a competitive range. In this connection, it should be noted that when a determination is made to conduct negotiations with all offerors within a competitive range, nonresponsive proposals are not automatically excluded from consideration but may be clarified or supplemented to bring them within the terms of specifications if they are determined to be within the competitive range from the standpoint of both price and technical considerations.

(2) The reason that responsiveness does not play the role in negotiation that it does in competitive bidding is that the flexibility of negotiations allows the supplier to change his initial proposal both as to price and technical considerations, and this serves the basic policy of encouraging the maximum possible competition in negotiated procurements. Therefore, the Comptroller General has held that a supplier may not be determined to be outside the competitive range because his initial proposal was unreasonably low, or technically inferior when the desired technical characteristics were not specifically set forth in the request for proposals. However, negotiations need not be conducted on proposals so technically inferior as to render meaningful discussions impossible.

7-4. What Constitutes Discussion: After receipt of proposals and establishment of competitive range, the procuring agency will normally begin discussions with those offerors within the competitive range. The concept of negotiation was described by the Comptroller General as follows:

> *"The term 'negotiation' implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. Title 10 U.S.C. § 2304(g) implements and clarifies the definition of that the term 'negotiate' must be read in conjunction with 10 U.S.C. § 2304(g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract." 45 Comptroller General 417 (1966).*

[Note -- The CICA contains the following language 2305 (b)(4)(B) "the head of the agency shall conduct, before such award, written or oral discussion with all responsible sources who submit proposals within the competitive range . . ." So the new law reaffirms the language above in the case cited.]

(1) After receipt of proposals or quotations, no information contained in any proposal or quotation, or information regarding the number or identity of the offerors, shall be made available to the public including also other offerors or to anyone within the Government not having a legitimate interest therein. The Contracting Officer will then conduct negotiations with the prospective contractors, and he may not furnish any information to potential suppliers which alone or together with other information may afford them any advantage over others. Furthermore auction techniques are strictly prohibited nor may "technical transfusion" be used to upgrade competitive proposals. Once the decision has been made to conduct discussions, then discussions must be entered into concurrently with all suppliers within the competitive range. It might be noted that a Contracting Officer's acceptance of a contractor's acknowledgment of an amendment to the solicitation after the date set for receipt of proposals has been held to constitute "discussions" within the meaning of 10 U.S.C. § 2304(g) so as to impose the concomitant obligation on the Government to conduct negotiations with all other offerors within the competitive range.

(2) Evaluation Criteria. In order to obtain maximum practical competition contemplated by the statutes and regulations, the Comptroller General has consistently held that the criteria to be used in making the award must be clearly set forth in the solicitation. The CICA codifies this in 10 U.S.C. § 2305(a)(2)(A)-(B). The requirement to disclose evaluation criteria has been extended by the Comptroller General to include the relative weights as between the various evaluation factors. In addition, a failure to follow the criteria set forth, or the substitution of new criteria without informing all potential offerors will result in an improperly negotiated procurement.

(3) Price and Other Factors. The courts have overturned an award made where only one of five offerors who submitted otherwise acceptable proposals was asked his price. Complete failure to require price has been held to constitute an abuse of discretion for which the courts will grant relief. *Schoenbrod, Trustee, v. U.S.*, 410 F.2d 400 (Ct.Cl., 1969).

7-5. In summary, what constitutes the "competitive range" and significant factors is within the broad discretion vested in the Contracting Officer. These concepts require careful analysis, and sound judgment, exercised under the particular circumstances of the procurement involved. The definitions of these concepts should be flexible within the overriding consideration that the Government's best interest be served, price and other factors considered. A summary posture of the Comptroller General may well be expressed thusly: all evaluation factors that are uniform and reasonable will be upheld in making an award.

8. TWO-STEP SEALED BIDS

8-1. The two-step procedure is an exception to the usual method of sealed bidding. It is used when definitive design and/or performance specifications are not presently available and is used to promote maximum effective competition. The procedure involves two steps: (1) a request for submission, evaluation, and if necessary, discussion of a technical proposal without pricing, to determine the acceptability of the supplies or services offered; and (2) sealed bidding solicitation confined to those offerors who have submitted acceptable proposals in the first step.

8-2. Two-step sealed bidding is limited as to use. The regulatory authorization permits the use of this procedure where: (1) available specifications or purchase descriptions are not sufficient or complete to permit full and open competition without technical evaluation; (2) definite criteria exist for evaluation of technical proposals; (3) more than one technically qualified source is expected to submit a proposal; (4) a firm fixed-price type of contract will be used; and (5) sufficient time will be available for use of the two-step method.

8-3. After receipt of the proposal, a technical evaluation of the proposal is made. Sources whose technical proposals are not acceptable are notified of that fact, and are notified in general terms of the basis for the determination. Technical proposals that are marginal are given special consideration so as to bring them up to an acceptable status, if possible, by discussion. This would be appropriate, particularly in cases where only one or two contractors responded.

8-4. Requests for Sealed Bids are issued only to those sources whose technical proposals have been evaluated and determined to be acceptable under step one.

8-5. Some fundamental rules apply to the two-step sealed bidding procedure. They are: (1) in order to be responsive, bids must conform in all material respects both as to method and timeliness; (2) a late bid is considered for award only if it is received before award and acceptance is authorized by one of the circumstances set forth in FAR 14.304-3; (3) only those bidders whose technical proposals were acceptable after step one are to be solicited for price quotations in step two; and (4) in step two, the low bid must be accepted even though another bidder's proposal may appear more desirable, at a very slightly higher bid price.

CHAPTER 6

FUNDING CONTRACTS

History shows that Government fiscal management has been subject to constant change. As a consequence, care must be exercised by examining thoroughly any reference relating to this subject for current applicability. Therefore, this chapter will discuss in a general way the various legal facets of fiscal management and funding for the purpose of pointing out problems involved and the means that may be used in solving them.

1. OVERVIEW

1-1. The appropriation of public funds by the Congress and the use of such funds by the Departments of Government for the procurement of supplies and services under contract, points out an interesting relationship. the separation of powers between two branches of the Government--the Legislative and the Executive. This concept of "checks and balances" emphasizes the relationship of these two branches and shows the controls exercised by one over the other to prevent unauthorized expansion of authority and power. Congress authorizes the Departments of Government to expend specific amounts of money for specific purposes and appropriates funds for those purposes. The Departments obligate and expend these funds within the authorizations and limitations imposed by the Congress. The General Accounting Office, responsible to Congress, watches over expenditures to insure compliance with the restrictions placed by Congress on the use of the funds.

1-2. It is not uncommon for Congress to attach "riders" to appropriations acts restricting the use of money appropriated. In addition to establishing specific restraints on how appropriated money will be spent, Congress establishes some of the policies on how Government contractors may receive financial assistance on contracts. The effect of such aid can be the expansion of production capability, increase of competition and faster performance.

1-3. The Impoundment Control Act of 1974, 2 U.S.C. § 681 adds another fiscal control by requiring the President to spend the money appropriated for the purpose appropriated He may not impound the money and cancel the project without the express consent of Congress. This Act brought to an end the idea that the Executive branch could refuse projects insisted upon by the Congress by the simple expedient of not spending the money. The Act provides detailed procedures for the President to follow to obtain the consent of Congress for not spending appropriated funds.

2. PROGRAMMING AND BUDGETING

2-1. **The Budget and Accounting Act of 1921.** On June 19, 1921, the Congress created two agencies for establishing fiscal control in Government. One of these was the Office of Management and Budget (until 1970 the Bureau of the Budget), which reports directly to the President and assists him in developing the National budget; often referred to as "The President's Budget." The other agency is the General Accounting Office (*GAO*), which monitors the expenditure of public funds. The GAO is in the Legislative Branch of the Government and reports to the Congress. These two major agencies of the Government are primarily concerned with budgeting, programming, investigating, reporting, auditing management and funding procedures of the Government.

2-2. **Office of Management and Budget.** The 1921 Act has been amended many times to allow organizations and functions to keep pace with rapid changes in national interests, events, and requirements. This Act was amended on July 1, 1970 to delete the Office of the Bureau of the Budget and replace it with the Office of Management and Budget (*OMB*). This was established by 1970 Reorganization Plan No. 2, effective July 1, 1970, 35 F.R., 7959, 84 Stat. 2085. Executive Order No. 11541, dated July 1, 1970, 35 F.R. 10737, further prescribes the duties of the OMB pursuant to Reorganization Plan No. 2. On March 2, 1974, the Act of 1921 was further modified to require the consent of the Senate before the President's appointment of the Director and Deputy Director of OMB would become effective. (P L. 93-250, 88 Stat 11).

2-3. The Director of the OMB is directly responsible to the President. The Act, as

amended and revised by Executive Order, also outlines the organization of the Office. When directed by the President, the Office makes detailed studies of the departments and other Governmental establishments to enable the President to obtain greater economy and efficiency in organization, activities, appropriations, assignments, and regrouping of services.

2-4. The OMB, under such rules and regulations as the President may prescribe, prepares the Budget and any proposed supplemental or deficiency appropriations; and to this end has the authority to assemble, correlate, revise, reduce, or increase the requests for appropriations of the various Departments or establishments. (31 U.S.C. § 1104).

2-5. **The General Accounting Office (GAO).** Congress established the General Accounting Office as an agency through which it might determine whether public funds were being spent in accordance with the Congressional constraints which had been imposed. The investigative and reporting powers, as well as the decisions the GAO renders, have strongly influenced the fiscal and procurement policies of the Government.

2-6. The Comptroller General and the Deputy Comptroller General are appointed by the President with the advice and consent of the Senate. They serve for fifteen years, subject to retirement at age seventy (whichever comes first). The Comptroller General may not be reappointed.

2-7. The General Accounting Office, under the direction and control of the Comptroller General, is charged with the audit and settlement of the accounts of the Government. It determines the validity and legality of expenditures so that the accounts of the fiscal officers can be settled. Under his statutory authority to settle claims by and against the United States, the Comptroller General may enter into an "accord and satisfaction" with a claimant which is binding upon the parties to the contract.

2-8 Certain functions of the General Accounting Office have a direct impact on Government contracting. They are: the investigation of all matters pertaining to the receipt, disbursement, and application of public funds, the recommendation to the President and to Congress of legislation necessary to improve the fiscal management of the Government, the investigation of governmental activities especially ordered by Congress, and reports to Congress of departmental expenditures or contracts that are in violation of the law.

2-9. The Comptroller General may render advisory rulings to disbursing officers and to the heads of executive agencies. He also responds to procurement officers on their submission of questions affecting the award of a public contract "when the prompt resolution of such questions is necessary or desirable as a prerequisite to the making of an award." Frequently, the Comptroller General directly advises bidders who have protested awards to others.

2-10. On the recommendation of the head of a Federal agency, the Comptroller General may remit the whole, or any part, of liquidated damages assessed for delay in performing a contract when he considers such action to be just and equitable. This authority is extraordinary and is exercised by the Comptroller General with caution. It requires strong and persuasive equities on behalf of the claimant before action favorable to him will be taken.

2-11. Because the General Accounting Officer may ultimately pass upon the validity of a Government contract, and procedures leading to its execution, any discussion of the law applicable to contracts must consider the opinions rendered by the Comptroller General.

3. THE MILITARY BUDGET

3-1. Problems of national defense have given the role of programs, budgets and accounting a prominence that makes front page news. They are now the focal point of public interest in the formation of a policy to build up and maintain current military strength. In 1949, Congress made the "performance budget" mandatory for the entire Department of Defense, and within three years following that date all of the military services had reconstructed their budgetary methods. Prior to this time it was virtually impossible to interpret expenditures in terms of defense objectives or to put a dollar sign on defense programs. The performance budget provided a means of analyzing the objectives of national defense in terms of the money necessary to accomplish such objectives. It also provided a means to relate costs to program effectiveness.

3-2. In order to understand the system, one must be aware of the "break out" of major military programs. Appropriations for the Department of Defense in the 1949 program covered

five broad functional categories. These were personnel, maintenance and operations, major procurement, research and development, and acquisition and construction of real property.

3-3. In order to bridge the gap between long range military planning and formulation of annual budget requests, the Department of Defense in 1970 reorganized the defense effort into ten (10) major military programs. This programming system correlates all planning, programming, resources, material and financial management systems within all Department of Defense components. Briefly, these major military programs are: (1) Strategic Forces, (2) General Purpose Forces, (3) Intelligence and Communication, (4) Airlift and Sealift Forces, (5) Guard and Reserve Forces, (6) Research and Development, (7) Central Supply and Maintenance, (8) Training, Medical, and other General Personnel Activities. (9) Administration and Associated Activities, and (10) Military Assistance. These programs are further broken down into program elements and program costs. Allocations of appropriated funds are made by DOD to its agencies by programs, and all programs and elements are identified to the related appropriation function.

3-4. A program element is an integrated force or activity. It is a combination of men, equipment and facilities. For example, the B-52 aircraft together with all the supplies, bases, weapons, and manpower needed to make it effective, is an element. All the costs associated with research and development, initial investment, and operation of the B-52 are pulled together within the logistics system. It is readily seen that this is no small task and it requires a reporting system which starts at the lowest cost-generating level and feeds information to all control and management elements.

3-5. Public funds may not be used for procurement of supplies and services without authorization from and appropriation by Congress. The U.S. Constitution (Article I, Sec 9, Clause 7) states: "No money shall be drawn from the Treasury, but in consequence of Appropriations made by Law . . . " The Authorization Statute (31 U.S.C. § 1301) states: "No Act of Congress passed after June 30, 1906, shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such act shall in specific terms declare an appropriation to be made or that a contract may be executed."

3-6. The budget process, therefore, provides the information (programs and dollars) on which the Congress bases its authorization by statutory action. Subsequent appropriation of funds by the Congress and their apportionment to Government agencies by the Office of Management and Budget (OMB) provides the money required to buy the needed supplies and services.

3-7. Before submitting the Department of Defense budget, the various Departments do a considerable amount of preliminary work in planning, programming, coordinating and review. In September or October of each year, examiners from the Department of Defense and the Office of Management and Budget conduct intensive reviews of the estimates submitted by the Military Departments and Defense Logistics Agency (*DLA*). The consolidated requirements of the Department of Defense are placed into budget categories. These requirements are usually "cut and fit" to an amount which, based upon economic and political considerations, can be expected to gain approval.

3-8. In the review and enactment phase, there are four major procedural steps. These are: review and adjustment, presentation to Congress, execution and records keeping.

3-9. The joint review team (DOD-OMB), which also considers requests for reconsideration by the Services, balances the requirements within the framework of dollars expected to be approved. Then, the budget is submitted to the OMB which can make further revision and then prepares a Consolidated Federal Budget.

3-10. In January of each year, the President presents the total Consolidated Federal Budget to a joint session of Congress. The House and Senate assign the budget to committees and subcommittees for review. A series of formal hearings are then conducted at which each DOD Department presents testimony in support of its budget. When both Appropriations Committees (House and Senate) approve the budget, appropriations bills are drawn up.

3-11. Differences between the House and Senate are resolved by Committees from each group. A Compromise Appropriations Bill is then presented to the President for his signature. When the President signs this bill, it becomes the Appropriations Act for the fiscal year.

3-12. **Execution** is the phase of the budget cycle which is concerned with controlling the funds which Congress has made available. This control involves financial plans, apportionment, budget authorizations and allocations, budget administration, and maintenance of records. These substantially represent the slicing up of the pie among the DOD Services and the further subdividing of each slice to major Department elements. The administration of funds through records constitutes the comptrollers' reviews and analyses to insure that the money is used for the purposes intended.

3-13. Finally, records on allocations and obligations are kept. Records of obligations incurred are continuously compared to money allocated to insure that the Department does not spend more than it has.

3-14. **Financial Control.** Control of the funds made available by the Congress starts with the OMB and permeates the Services to the office which ultimately makes a payment from these funds. Even after an appropriation act has been passed by Congress and signed by the President, funds are not available to a Government agency, such as DOD, until it has obtained a release in the form of an "apportionment" from the OMB. This is the Office's distribution of amounts available in an appropriation of fund account. It is an executive-level budgetary control made on a periodic basis. Even after an apportionment is made by OMB to DOD, no obligation may be incurred by a Military Department until the Secretary of Defense has first approved the Department's scheduled rate of obligations.

3-15. After the scheduled rate of obligation has been approved, the DOD comptroller then divides it into allocations to make the funds available to Military Departments who in turn make the funds available by allotment to their subdivisions such as the Navy Commands, Army Commands, and Air Force Commands. Depending on how much control is to be exercised, the Departmental subdivisions may make allocations directly available for obligation and spending, or they may further subdivide them into allotments and suballotments.

4. OBLIGATION OF FUNDS

4-1. An "obligation" is a Government liability resulting from a contract, purchase order or similar document. Legal duty is incurred to pay the amount due. When a contractor has delivered the supplies or services and the Government has accepted them, the obligation is liquidated by payment to the contractor. A "commitment" is an administrative reservation of funds against a future obligation on a contract.

4-2. **Limitations on Obligating Funds.** The discussion of the OMB, GAO, and the budget was designed to give the reader a casual acquaintance with the constitutional authority, the separation of powers concept, and with the mechanics of appropriation and obligation. It is in this area of obligations and funding that the contracting officer may find himself directly involved. It is important, therefore, that he understand the limitations which the funding process may impose upon him.

4-3. **Anti-Deficiency Act.** This Act provides that no Government officer or employee shall authorize or create any obligation, or make any expenditure, in excess of an apportionment or administrative subdivision of appropriated funds. It also requires that executive agencies prescribe regulations for fixing responsibility in the event of a violation. For violations, the law provides:

> *"An officer or employee of the United States Government or of the District of Columbia government violating section 1341(a) or 1342 of this title shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office. * * *
>
> An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. § 1349, 1350.*

4-4. **Time Limitations.** Congressional limitations are placed on the use of appropriated funds by either time or subject-matter restrictions. Time restrictions limit the time during which funds may be obligated or expended, or both.

4-5. Appropriated funds are classified as annual funds, multiyear funds or no-year funds. Annual funds must be obligated during the year for which they are appropriated or else they are lost for purposes of obligation; that is, they expire. Multiyear funds are appropriated for a longer period, but have time constraints limiting them to no more than five years. No-year funds

have no "built-in" time limitation. However, subsequent appropriation acts may--and very frequently do--impose time constraints for funds which have been previously appropriated.

4-6. Although these time limits define the varying periods available for making an obligation, the funds carried in the annual appropriation act are one-year appropriations unless the act specifically provides otherwise. This is provided by statute which reads:

> *(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.*
>
> *(b) A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance. 31 U.S.C. § 1502.*

4-7. Congress has provided some of the funds for the military departments in the form of no-year appropriations. Annual appropriations force the Services to award their contracts on a fiscal year basis. This causes gaps at the end of each fiscal year while the following fiscal year funds are being made available; therefore, continuing programs can be interrupted. No-year appropriations make it possible for the Services to conduct expanded programs with continuity over a several year period.

4-8. Annual appropriations are provided by Congress for such things as pay and allowances for military personnel, maintenance and operation, and for subsistence and normal items of supply that can be delivered within two years after that fiscal year ends. No-year appropriations can be provided for research and development weapons systems procurements, long lead time construction, and similar long range projects.

4-9. **Subject Matter Restrictions.** Subject matter restrictions limit the use to which money may be put for accomplishing specific purposes, such as a program or project. Congress specifies in its appropriation acts the purpose for which funds are appropriated. In order to provide for the adherence to these purposes, the law states:

> *Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.*

(31 U.S.C. § 1301).

4-10. Specific items accomplished under subject matter restrictions have included such things as building a post office at a specific location, or erecting a dam or building a ship. The appropriation specified by name the particular project and the specific amount of money. Execution of the project required strict administration with no latitude on the use of the funds. Since 1949, the DOD has been required by law to prepare its budget estimate and to administer its program so that the cost of performance of identifiable programs can be shown. This has resulted in a "performance type" budget wherein general categories of functions are established and the appropriation act authorizes funds for these functions. Major categories of functions in 1949 were personnel, maintenance and operation, major procurement, research and development, and construction. By eliminating specific item by item listings and using those general categories instead, the Military Departments have far greater flexibility for programming and reprogramming within the general appropriations. Since 1970, ten major categories (set forth under the heading "The Military Program" in this chapter) are being used.

4-11. **Multiyear Procurement.** Multiyear procurement is a method for competitive contracting for a period of several years (not over five) even though the total funds ultimately to be obligated by the contract are not available to the contracting officer at the time the contract is entered into. Typically under a multiyear contract, funds are appropriated annually for a single year's requirements. The contract is subject to being cancelled or terminated by the Government. Cancellation would occur if, at the completion of a fiscal year, the Government did not continue the contract for subsequent fiscal years due to a lack of funding. Termination would also occur if during the course of the fiscal year the Government elected to terminate the remaining portion of the contract for that year. The termination liability would include both termination charges for the year and cancellation charges for the remaining years. The contractor is protected from loss in this event by contractual provisions

allowing reimbursement for unrecovered, nonrecurring cost included in prices for cancelled items. It is noted, however, that a ceiling has been placed on the cancellation amount which can normally be given to a contractor. Public Law 97-86, Dec 1, 1981, Section 909(b)(3) amends § 2306(h)(3) of title 10, United States Code, to state:

> *Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling in excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Committees on Armed Services and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification."*

4-12. Multiyear contracting can result in significant savings for the Government. The most immediate savings is the potential for reducing start-up and other nonrecurring costs such as special tooling and special test equipment, plant rearrangement costs, preproduction engineering, specialized work force training, and so on. Under multiyear contracting the contractor can spread or amortize these costs over the full contract quantity rather than only over a single year's quantity. In addition, recurring costs--production costs that vary with the quantity being ordered, such as material and labor--can be reduced by using multiyear contracting. The contractor can order materials, parts and components in economic lots for the full production quantity. Also, learning curve economies and economies resulting from a stable work force are potential benefits of multiyear contracting.

4-13. The major disadvantages of multiyear contracting compared to annual contracting is the greater risk to the Government resulting from the longer contract. If funds are not made available for the full contract period or if the design features of the item are changed, the Government may find itself with useless parts and with an obligation to reimburse the contractor for its unamortized costs. Multiyear contracting should be used selectively. It makes no sense to use multiyear contracting when the requirements are subject to change, when the prospects of future funding are bleak, or when the cost benefits are minimal.

4-14. A contracting agency may not use multiyear contracting for procurement financed with annual year funds in the absence of specific statutory authorization. Such funds are made available to a contracting agency only for the needs of the fiscal year and they must be obligated by the end of the fiscal year or returned to the Treasury. There are some statutory exceptions. Congress has authorized the Department of Defense to enter into multiyear contracts with annual year funds for base maintenance and certain other services (and related supplies) to be performed *outside* the continental 48 states, provided specified conditions are met. (10 U.S.C. § 2306(g)). DOD is also authorized to enter into contracts for periods of up to 4 years for supplies and services required for the maintenance and operation of family housing, using funds which would otherwise be available only within the fiscal year for which appropriated. (PL 91-1 and 2, Sec. 512). Statutory exceptions aside, multiyear contracting is conducted by using funds which are made available for an obligation for 2 to 5 year periods of time. If funds are not made available for future year requirements, the contract is then cancelled and the contractor is entitled to be paid a cancellation charge, not to exceed a ceiling established in the contract, for unamortized costs.

4-15. As stated above, the cancellation ceiling for multiyear procurement may not exceed $100 million unless statutory authorization is obtained for a higher ceiling. (PL 97-86, Dec 1, 1981). As a result, DOD cannot use multiyear contracting for a major acquisition unless Congressional authorization is obtained to exceed the $100 million limit. A $100 million cancellation ceiling is still considered too low by many industry and government people for major acquisitions. Another restriction on the use of multiyear contracting pertains to the type of costs which the contractor may recover under the cancellation clause. Under the multiyear regulation (FAR 17.1), the cancellation charge is based only on start-up or other nonrecurring costs. Any costs incurred by the contractor for the performance of future year requirements (recurring costs) are not generally recoverable. Thus a contractor wanting to purchase material for the entire multiyear requirements in advance, must assume the risk that the contract will not be cancelled. Many contractors do not want to assume this risk. It is possible that future Congressional action may remove these prob-

lems. The contractor can be protected from loss in this event by contractual provisions allowing reimbursement for these unrecovered, recurring costs included in prices for cancelled items. It should be noted, however, that the inclusion of recurring costs in cancellation ceilings is an exception to normal contract financial arrangements and requires approval by the agency head or his designee. (FAR 17.102-3(d)(3)).

4-16. **No Year Procurement.** No-year funding and contracts which are entered into with no specific time limitation will provide for notice, in writing, to the contractor of the availability of incremental funding. In the event such notice is not given, the contract provides for "cancellation" of the contract and for certain payments to be made to the contractor, but with a fixed "cancellation ceiling" cost to the Government.

4-17. **Validity of Obligations.** As previously discussed, Congress may impose either time or subject-matter restrictions, or both, on appropriated funds. These restrictions must be complied with for a valid obligation of funds, hence the Department of Defense (DOD) places strong reliance on controlling the use of appropriations through proper recording and reporting of obligations. In order to determine the validity of obligations, criteria have been established by law and by decisions of the Comptroller General. Several of these criteria or "tests for validity" are discussed below.

(A). **Availability of Funds.** This test includes both time and subject-matter restrictions. Annual funds may be obligated (by placing a contract, for example) only during the fiscal year covered by the Appropriation Act. If such funds are not obligated during the period, they "expire" and are lost to the Department, so far as new obligations are concerned. However, obligated but unexpended balances from contracts of a specific fiscal year may be used to pay off obligations resulting from other contracts of that same specific fiscal year.

(B). **Definite and Certain Contract Terms.** An additional test of the validity of a contract as an obligation is that its terms shall be definite and specific. A contract that is indefinite is either void or voidable; therefore, an indefinite contract, or one in which the amount of the Government's obligation is uncertain at the time of entering into the contract, is not enforceable. Hence, it does not serve to establish an obligation.

(C). **Bonafide Need Rule.** With regard to annual funds, the third test of validity is that the supplies and services contracted for are intended to serve a bonafide need of the fiscal year in which the need arises or to replace stock used in that fiscal year. In the case of changes to "inseverable" projects which are contracted for out of annual funds but which extend over into another fiscal period, payments from the appropriation may continue to be made. That is to say, changes which are provided for by a contractual provision (and which are inseverable to the rest of the contract) are funded out of the same annual appropriation which supports the basic contract, even though the change occurs during a subsequent fiscal period.

(D). **Obligation Functions.** In executing his administration functions, the Administrative Contracting Officer (*ACO*) will frequently be called upon to sign and issue obligating documents; this act will obligate the Government for payments to a contractor. Such obligation actions must, of course, be within the ACO's authority and within the applicable budget allotment and commitment. Also, in administering cost reimbursable types of contracts, although the contract contains payment limitations, the ACO must always be alert to contractor expenditures to insure that spending does not exceed obligations or available funds.

4-18. **Various Types of Contracts**

(A). **Basic Ordering Agreements** (*BOA*). It should be noted that the Basic Ordering Agreement (BOA) is not a contract and that the individual orders placed against a BOA are in themselves contracts which obligate funds. Although these orders are usually placed by the Procuring Contracting Officer (*PCO*), authority is frequently contained in the BOA for the ACO to place orders when requested by the PCO. Orders may be priced or unpriced. If unpriced, funds in an estimated amount are nevertheless obligated on the order and become the payment limitation. In a BOA arrangement, then, the ACO must perform specific actions relating to funds. Controls by the ACO of BOA orders are essential. These should include a control on both overall fund status and on the ordering arrangement. Extreme care must be exercised on fund control because each order contains its own combination of fund limitations. Frequent coordination with the corresponding comptroller com-

ponent to obtain agreement on records insures against over- obligation. For order control, an order control register is maintained to keep track of events on each order placed by PCO or ACO.

(B). **Indefinite Delivery and Quantity Contract.** Regulations authorize various types of indefinite delivery contracts when quantity requirement or delivery schedule are not known. Orders placed under indefinite delivery contracts must comply with the terms and conditions of the basic contract, but supplies or services are not specifically ordered by the basic contract. ACO action to be taken on contract review and management controls are basically the same as on a BOA. The indefinite delivery contract should also contain minimum and maximum amounts to be obligated and expended.

(C). **Maintenance, Overhaul and Repair Contracts.** This type of contract is difficult to administer because of the many determinations and actions required of the ACO. Services required under these contracts are difficult to define because of the great number of differences in the types of contracts used. One may find BOAs, Indefinite Delivery Contracts, Time and Material Contracts, Labor-Hour Contracts, Fixed-Price Contracts, or variations or combinations of these. As in the previous types discussed, the ACO will actually be involved in obligating funds. The judgments and controls exercised by an ACO are more numerous and exacting.

(1). The scope of work must be fully understood. Study of the contract should cover the same items as those in BOAs and Indefinite Delivery Contracts. However, in Maintenance Overhaul and Repair Contracts, one will find separate funds cited for labor, materials and parts. Parts may even be further broken out by contractor manufactured parts and contractor purchased parts. Management controls on funds status and on order control registers are maintained, as on BOAs. The obligation actions on these contracts will largely involve the issue of work requests (orders).

(2). Although the ACO will find fixed prices in the contract for defined work. the actual performance of work may result in variations in the price. The fixed-price portion may include different methods of coverage of work to be performed. It may cover the total price of repair or servicing of the complete article or subassembly; price per task performed; or any other method which defines the scope of work included in the fixed-price. It may establish only an hourly rate, and the number of labor hours, and prices of materials and parts are negotiated. For the input of defined work, the ACO issues a "work order." Although funds are already obligated for this item on the basic contract, the ACO must keep an accurate record of dollars used on each work order to prevent expenditures in excess of the total obligated amount.

(3). Frequently, work is required which is "over and above" the work contemplated by the fixed price. This will occur as the result of contractor tear down and inspection of the item to be serviced. When an "over and above" requirement occurs, the Contracting Officer will negotiate the price. He must make many determinations in arriving at this price prior to issuing a work order, which becomes the obligating document. In all cases, he must assure himself that sufficient funds are available for each category required (labor, materials, parts) and that appropriate citations are included in the work order.

(D). **Spares, Special Tools and Test Equipment Contracts.** Any end item of military equipment requires support and maintenance. For a new item, spares and spare parts, special tools, test equipment and support equipment are included as a contract requirement to cover an initial period of operation of the end item. This process of determining the range and quantity of items is called "provisioning." These items and quantities are not firm at the time production starts; therefore, the lists of spare parts with estimated unit prices are provided by the contractor for Government approval as early as possible to insure that support items will be available with delivery of the end item. Orders to proceed with the manufacture of spare parts are placed by the PCO through the ACO, or the ACO may be authorized to issue these orders directly. These orders obligate funds based on estimated prices. Priced exhibits which include specific items, quantities and unit prices are later submitted by the contractor at least 60 days prior to the first scheduled delivery of spares. Unless the responsibility is specifically withheld by the PCO, the ACO will negotiate firm prices based on the priced exhibits and issue supplemental agreements which incorporate the orders issued.

(1). It should be recognized that the ACO may take two obligating actions in the provisioning cycle; one when he issues the production order and the other when he issues the sup-

plemental agreement. This latter action will only add (or conceivably, in some cases, delete) to the subsequently negotiated price. But in both actions, the ACO may not issue any obligating document unless funds are available. If additional funds are needed, he requests the PCO to furnish the funds required.

(E). **Cost-Reimbursement Contract.** This type of contract requires special attention to funds control. Although obligation actions are performed by the PCO, current knowledge of the status of a contractor's costs, contract limitations of cost, and control of overruns are areas requiring significant ACO action. A cost overrun occurs when actual costs exceed the target estimate of total costs.

(1). In a cost-reimbursement type of contract, it is important that any tendency toward cost overruns be controlled. A cost overrun condition exists when the contractor is unable to complete the work covered by the contract within the estimated amount obligated. The ACO continuously evaluates and controls contract funding in relation to contractor progress and costs incurred and forecasted. This control may be exercised through contractor periodic reports. Evaluation and analysis of these reports will indicate cost trends which are out of line with work accomplishment, indicating a possible overrun or underrun. An underrun exists when actual costs are less than estimated costs. An overrun situation will require additional funds if work is to be completed; an underrun requires contractual action to release excess funds.

(2). The limitation of cost clause, contained in every cost- reimbursement type of contract, requires contractor notification to the contracting officer when the contractor anticipates that costs incurred or to be incurred within the next sixty days will equal or exceed a stated percentage of the estimated costs provided by the contract. (For example, seventy-five percent).

(3). When a cost overrun is anticipated or has occurred, there are various courses of action open to the Government: terminate the balance of the work and recoup obligated funds not yet expended, provide additional funds to complete the work, or permit the contract work to expire within the estimated costs. The ACO must make his recommendations to the PCO and closely coordinate all subsequent actions. Whether the overrun is to be funded is discretionary with the PCO, who notifies the contractor in writing if an overrun is authorized. The purpose of the Limitation of Cost clause is to prevent Government liability for unauthorized overruns. Even so, if the contractor could not possibly have anticipated the overrun and the Government arbitrarily refuses to pay, the Government may be held liable. This appears to be the trend of recent court decisions which seem to emphasize the word "unforeseeable". Also, overruns have been ordered paid when the Government gave informal rather than formal consent to the overrun. The requirement of a writing was said to have been waived.

4-19. **Recording Obligations.** The methods by which obligations are created against appropriated funds as well as the restrictions and limitations placed on these obligations, have been discussed. Now that the funds have been appropriated, apportioned, allocated, allotted, and suballotted, controls are needed to protect against over-obligation as well as to provide figures of unobligated balances.

4-20. A distinction should be made between the obligation and the recording of an obligation. Only a contracting officer may contractually obligate the Government. Generally, the obligation occurs when both parties have signed the contract. The recording of this obligation is made by a comptroller element as part of the obligation- appropriations control system. These controls basically involve the examination of obligation records and comparison of dollars available. The method of recording obligations becomes a rather important procedure for the exercise of adequate control. The recording of obligations becomes the basis for the expenditures of one-year and multiple year appropriations. Against one-year appropriations, obligations represent the extent to which those appropriations have been used at the time additional funds are requested from the Congress. Let us examine some of the general rules that have been laid down by statute or by Comptroller General decisions.

4-21. Section 1311 of the Supplemental Appropriations Act of 1955 provides rules for recording an obligation. (31 U.S.C. § 1501). An obligation must be supported by documentary evidence of a binding agreement, in writing, between the Government and a contractor. The agreement must call for specific goods to be delivered, real property to be purchased or leased, or work and services to be performed.

For this purpose, orders for supplies and services placed by one military Department against another Government department are placed on the same footing for recording obligations as contracts between the Government and private parties, (41 U.S.C. § 23; 31 U.S.C. § 1535). Although the criteria established by statute are clear enough, application of these criteria to specific types of contracts can become quite involved.

4-22. **Form of Contract.** As the result of departmental rules and Comptroller General decisions, specific treatment is afforded to certain types of contracts. These may be summarized as follows:

(1) **Indefinite Quantity Contracts.** The total estimated amount cannot be recorded as an obligation when the document is issued. Recording is made only as each call or order is placed, because each call itself contributes the specific obligation.

(2) **Cost-Plus-Fixed-Fee and Letter Contracts.** Only the fund limitation included in the contract may be recorded as obligations.

(3) **Incentive and Price-Redetermination Contracts.** The amount of the target or billing price in the case of incentive and the fixed- price in the case of Price-Redetermination may be recorded as obligations.

(4) **Spare Parts.** The price or the amount set aside may be recorded as an obligation when (a) a specific order is placed with the contractor, (b) a production list approval with estimated prices has been issued, (c) a priced spare parts list is included in the contract, or (d) a contract formula contains an automatic determination of spare parts requirements.

(5) **Change Orders.** When a contract provides for the Government's unilateral issuance of change orders which increase price, the obligation must be recorded.

(6) **Purchase Orders.** These orders of $10,000 or less will be recorded as an obligation when issued.

5. REVOLVING FUNDS

5-1. One method of funding Department of Defense operations which does not depend on annual appropriations by Congress, but is intended to be furnished on a one-time basis, is the establishment of working capital funds. This funding method was authorized by the Secretary of Defense in an effort to improve financial management within the Department of Defense. The funds are described as either stock funds or industrial funds.

5-2. **Stock Funds.** Stock funds are used to finance inventories of stores, supplies, materials, and equipment designated by the Secretary. For example, originally two stock funds were established for the Defense Logistics Agency (*DLA*); one provided the capital necessary for DLA to buy initial stocks of food for commissaries and for subsistence in the armed services, the other provided stock funds for DLA clothing, textiles, medical supplies, chemicals and similar items common to all military departments.

5-3. **Industrial Funds.** Industrial funds are used to finance industrial types of operations for services rather than supplies. For example, the DLA has been allocated industrial funds to finance the operation of clothing factories. The USAF Military Airlift Command operates its military airlift of people and cargo on an industrial fund basis. Military GOGO plants (Government-owned, Government- operated) are industrial plants which manufacture or perform maintenance and overhaul of common equipment.

5-4. Each stock fund or industrial fund operation establishes a supplier-customer relationship. The customer determines what, where, and when it wants an item, and the supplier determines how much to buy, to stock, or produce, and to distribute. The customer pays the supplier for the supplies or services, thus reimbursing the fund and providing the capital for continuing operations.

6. NONAPPROPRIATED FUNDS

6-1. Nonappropriated funds are funds not appropriated by Congress and consequently the expenditure of these funds does not involve the use of taxpayers' money. For example, within the Department of Defense (*DOD*), these funds are generated by military and civilian personnel and their dependents. They are used to provide a comprehensive, morale building, welfare, religious, educational, and recreational program designed to improve the well-being of military and civilian personnel and their dependents. Property is purchased with these funds by post exchanges, ship-stores, officer and non-commissioned officer clubs as well as religious, welfare or recreational activities.

6-2. The nonappropriated funds are derived primarily from the sale of goods and services to DOD military and civilian personnel and their dependents. A distinguishing characteristic of these funds is that there is no accountability for them in the fiscal records of the Treasury of the United States. (Department of Defense Instruction - DODI 34-3). Regulations have been implemented by the various Services to regulate nonappropriated fund activities. (AFR 34-3).

6-3. While a non-appropriated fund activity is an instrumentality of the United States Government, it is not generally subject to the statutes and regulations governing procurement from appropriated funds. This conclusion is based on the wording of the Armed Services Procurement Act of 1947, as amended (10 U.S.C. § 2303), which restricts its coverage of purchases or contracts for which payment is to be made from appropriated funds.

6-4. There is a question of the extent of the Government's liability on contracts received by a nonappropriated fund activity within DOD By the July 23, 1970 amendment to the Tucker Act (28 U.S.C. § 1346(a)(2), P.L. 91-350), the Act was amended to bind the United States on contracts made with all service post exchanges. The Act states:

> *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.*

The coverage of the amended statute does not extend beyond post exchanges to another type of nonappropriated fund activity, such as a guest house for relatives visiting patients at an Army hospital. *(Swift-Train Co. v. United States,* 443 F. 2d 1140 - 5th Cir. 1971).

7. FRAUD, WASTE AND ABUSE

7-1. There is an increasing awareness of "white collar crime" in the United States. Because of this awareness, greater attention is being paid to this type of crime with respect to contractors doing business with the Federal Government. As the world's largest purchaser of goods and services, the Federal Government may be attractive to business concerns engaging in illegal practices. The common perception of unlimited funds within various Government agencies creates an atmosphere which may tempt unscrupulous contractors to attempt abuses on the Government Procurement System. There are a number of Federal Statutes, and methods to implement those statutes, that the Government can use in prosecuting Government Contractors who may be engaged in illegal practices related to Government contracting.

7-2. **False, Fictitious or Fraudulent Claims Statute,** (18 U.S.C. § 287). This is a criminal statute which states that:

> *Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years or both.*

7-3. Federal courts have interpreted this statute to cover almost any fraudulent claim paid from the Treasury of the United States to a Government Contractor. Payment is considered to have taken place when the Government issues a voucher authorizing disbursement of funds. Subcontractors are also held to this statute when they seek payment illegally from a prime contractor who is in turn reimbursed by the Government. It is interesting to note that the amount claimed is not relevant to the offense. A contractor who submits a series of small fraudulent claims, rather than one large fraudulent claim, can be prosecuted for each of these small claims.

7-4. **Fraud and False Statements** (Statements or Entries, Generally), (18 U.S.C. § 1001). This statute is also criminal in nature and states:

> *Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . .*

7-5. The courts have broadly interpreted this statute. A criminal false statement may be oral or in writing. In some circumstances, concealment of a material fact which results in

misinterpretation of the total situation by the Government can be interpreted as being a false statement.

7-6. One area that could expose contractors to the False Statement is the possibility of "buying in." A contractor may occasionally be allowed to submit a below cost bid with the understanding that taking a loss on a specific contract may be an expedient business decision. However, if the contractor submits a below-cost proposal with an intent not to perform at the proposed price, he could be exposed to false claims liability under this Act.

7-7. There are a number of situations where a contractor has to certify that cost and pricing data are accurate, complete, and current as of the submission date. If the contractor misrepresents this data, the Department of Justice would have grounds to seek a criminal indictment under 18 U.S.C. § 1001 for the contractor's knowing falsification of a material fact or for making false statements in connection with obtaining a contract.

7-8. **Bribery of Public Officials** (18 U.S.C. § 201). A statute which may be used in situations where contractors seek to bribe public officials is 18 U.S.C. § 201:

> *Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent --*
>
> *(1) To influence any official act; or*
>
> *(2) to influence such public official or person who has been selected to be a public official to commit or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or*
>
> *(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty. . . .*
>
> *Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.*

Another section of this statute sets forth the same penalty for public officials who accept a bribe.

7-9. It should be noted that the bribery offense is criminal in nature and is distinguished from accepting insignificant gratuities. Various Government agencies have regulations which define the difference between significant and insignificant gratuities. For example, Department of Defense Directive 5500.7 forbids gifts valued at more than $5.00. Consult your counsel. Generally, Government employees should not accept meals or lodging from a contractor unless it is impractical to obtain these items at Government expense. The value of the bribe is not material if it is proven that the contractor intended to influence the Government official. It may be difficult to prove intent, however, in a criminal proceeding.

7-10. Conspiracy to Commit Offense or to Defraud United States, (18 U.S.C. § 371). This statute deals with conspiracy against the United States and can be used to prosecute a contractor who agrees to act in conjunction with one or more other parties in the commission of an illegal act. The Act states:

> *If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.*

7-11. Conspiracy is a separate offense which is distinct from the actual offense being plotted against the United States. Therefore, the contractor could theoretically be prosecuted simultaneously for both conspiracy and the actual underlying offense that was committed. Thus, the conspiracy statute permits the Government to charge a contractor not only with violating a substantive criminal statute on fraud, but also with conspiring to defraud. Proof of conspiracy to defraud under this act does not require any showing of monetary or property loss.

7-12. **False Claims Act,** (31 U.S.C. § 3729). This Act is the civil counterpart to the criminal fraud statute. It is a separate civil cause of action which may be taken in addition to a criminal fraud conviction. The contractor, thus, can be charged under both the criminal and civil statutes for false or fraudulent claims. The Act, as amended by "The False Claims Amendments Act of 1986," states:

Liability for Certain Acts.— Any person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

As noted above, the False Claims Act imposes a penalty of not less $5,000 and not more than $10,000, plus three times the amount of the damages the Government sustains. Violators can, however, reduce their civil liability to twice the amount of damages the Government suffered by assisting in the investigation or exposure of any false claim.

7-13. The False Claims Act was passed during the Civil War to protect the public treasury from false claims by contractors. It was expansive as originally passed and the 1986 amendments further broadened its already expansive provisions based on the perception by Congress that contract fraud was dramatically increasing. The Act is used against contractors who bill the Government for nonexistent or worthless goods or through fraudulent deceit by omissions of material facts relied on by the Government. Under the Act, a contractor must "knowingly" file a false claim. Knowledge is defined as an actual, deliberate, or reckless disregard of the truth or falsity of a claim. The Government has to prove the falsity of the claim only by a preponderance of the evidence.

7-14. The False Claims Amendments Act also reformed many other aspects of the False Claims process. The amendments refined the "qui tam" or private party plaintiff provisions so that the government may intervene more easily and assume the primary responsibility for prosecuting the action. The private party plaintiff is still entitled to 15-25% of the proceeds, reasonable costs, and attorney's fees. If the Government doesn't intervene, the *qui tam* plaintiff is entitled to 25-30% of any recovery. Another change installs protection for "whistleblowers" against any retaliation or harassment which results from their participation in fraud actions against their employer. The Act now provides for reinstatement with two times the amount of their backpay with interest, litigation costs, and attorney's fees.

7-15. Government action against a contractor under this Act falls under a six-year statute of limitations, (31 U.S.C. § 3731 and 28 U.S.C. § 2415). This is one year longer than the five year criminal statute of limitations for fraud (18 U.S.C. § 287). Thus it can be seen that the Government still has an opportunity to sue the contractor on civil grounds between the fifth and sixth year after the right to sue under criminal grounds has expired.

7-16. **Fraudulent Claims Under the Contract Disputes Act of 1978,** (41 U.S.C. § 601). Section 5 of the Contracts Disputes Act of 1978 directly relates to Contractor fraudulent claims and states:

Fraudulent Claims

SEC 5. If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of his claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within 6 years of the commission of such misrepresentation of fact or fraud.

7-17. The consequences of Section 5 of the Disputes Act of 1978, at first blush, would seem to impose additional liabilities on a contractor when he certifies (in claims over $50,000, Sec 6(c)(1) of the Act) to the accuracy and completeness of his claim. However, this requirement is considered by many contractors as creating no greater risk than previously had existed under the civil or criminal provisions of the Civil False Claims Act (31 U.S.C. § 3729) or False Statement Act (18 U.S.C. § 1001). It should be noted, however, the penalty for misrepresentation under the Disputes Act can be greater than that of the Civil False Claims Act. Contracting Officers are increasingly becoming a source of referrals to the Justice Department where fraud is suspected under the contract. Because of Section 6(a) of the Disputes Act, agencies are not authorized "to settle, compromise, pay or otherwise adjust any claim involving fraud." This Section does not allow Contracting Officers to negotiate further with the contractor. They are given no choice but must refer such matters for further investiga-

tion. Consequently, when fraud is suspected and the matter is taken out of the Agency's hands, final resolution will probably be made by the Justice Department. At this stage of investigation, the contractor (if he has not already done so) should seek advice from his attorney.

7-18. **The Program Fraud Civil Remedies Act of 1986.** (H.R. 5300, Pub.L. 99-509). This Act provides the DOD, among other agencies, with an administrative remedy for handling fraud cases of $150,000 or less. The entire investigative and resolution process is handled before agency administrative law judges, due process and hearings concerns are provided for, and the administrative law judge's decision may be appealed to the appropriate district court. In order to establish contractor liability, the government must prove that the contractor had actual knowledge of the falsity of the claim or deliberately acted in reckless disregard or ignorance of the truth. The Government does not have to prove the specific intent to defraud. All actions under the Program Civil Fraud Remedies Act based on false claims or false statements must be brought within six years of the date of the false statement or claim. All civil actions to recover penalties or assessments must be initiated within three years of the date of the administrative fraud determination. Contractors ultimately found to have submitted a fraudulent claim may be penalized $5,000 and twice the amount falsely claimed.

7-19. **The Department of Justice.** If a Government agency suspects that a contractor may be defrauding the Government, the facts involved are transmitted to the Justice Department for review and a determination on what to do. The Justice Department will handle any subsequent prosecution of a criminal charge against the contractor, under the direction of the Attorney General, (28 U.S.C. § 516).

7-20. The Criminal Division of the Justice Department was reorganized in 1977 to improve prosecution of white collar crime. A Government Fraud Branch was established within the Criminal Division Fraud Section for the specific purpose of monitoring prosecutions for fraud against the Government. The Department of Justice Fraud Branch is responsible for implementing the criminal statutes discussed previously. They operate under the premise that taxpayers' money should not be spent paying for fraudulent or inflated claims or for inferior quality products which the Government didn't bargain for.

7-21. Conduct that is merely unethical in the private sector can be criminal under Federal Statutes when dealing with the Government. Some items the Justice Department might investigate to show an intent to defraud are:

- alterations of Records,

- use of a "holding account" to enable a contractor to perform an "after the fact" reconstruction of costs,

- failure to disclose material facts before bidding,

- failure to disclose material facts to auditors,

- a deliberate attempt by a contractor to remain ignorant about the facts which might have an adverse impact on his claim,

- deceptive or unresponsive answers to questions posed by auditors,

- substitution of used products for new products,

- bribing Government personnel.

7-22. **"Hot Line" Information Gathering.** In January 1979, the General Accounting Office (*GAO*) established a national "Hot Line" for private citizens and Government employees to report incidents of fraud, waste, abuse or mismanagement in Government programs. During the first six months, 10,000 telephone calls were received. About one-third of these calls merited some further investigation. These "Hot Line" calls are taken by members of the GAO Fraud Task Force. "Hot Line" tips concerning the Department of Defense are referred to the Defense Investigative Service; which may then forward them to an appropriate military investigation service. In addition to the GAO, the Office of Management and Budget (*OMB*), DOD and various other Government agencies also have "Hot Lines" established within their organizations.

7-23. **Inspector General Act of 1978 (P.L. 95-452).** The Inspector General Act (IG Act) of 1978 creates independent Offices of Inspector General (*IG*) in twelve major civilian procurement agencies. It should be noted, however, that the Department of Defense was not required to establish an IG office under this Act. The IG has a duty to investigate the agency's programs and operations. By law, IG investigations are to be separated from Agency influence. Potential criminal matters must be referred to the Justice

Department for prosecution. Each IG Office reports to Congress twice a year. Although not required to establish an IG Office, DOD must also submit semiannual reports to Congress on its investigations and criminal referrals.

7-24. The IG Act created IG Offices in the following twelve agencies:

(1) General Services Administration (*GSA*),

(2) Department of Agriculture,

(3) Commerce,

(4) Housing and Urban Development,

(5) Interior,

(6) Labor,

(7) Transportation,

(8) Environmental Protection Agency,

(9) Community Services Administration,

(10) National Aeronautics and Space Administration,

(11) Small Business Administration,

(12) Veterans Administration.

These IG offices joined the previously established offices in the Department of Health, Education and Welfare, 1976, (42 U.S.C. § 3521), and the Department of Energy, 1977, (42 U.S.C. § 7138). In September 1982, Public Law 97-252 modified the IG Act of 1978 to also include an IG Office for the Department of Defense. It also stated that no member of the Armed Forces, active or reserve, shall be appointed Inspector General of DOD.

7-25. Inspectors General are under the general supervision of their Agency head. The IG Act, however, gives them a mandate to investigate their Agencies' operations and programs free from direct supervision. They have access to all records available to the Agency relating to its programs and operations. This has an impact on Government contractors, since the Audit and Records clause in most Government contracts allows examination of their books and records by the Government. Consequently, the IG can also request to review this contractor data.

7-26. **Investigative Elements of the Department of Defense (DOD).** Suspected fraud cases within the Department of Defense are generally referred to one of four DOD investigative services; Army Criminal Investigation Division (*CID*); Air Force Office of Special Investigations (*OSI*); Naval Investigative Service (*NIS*); and the Defense Investigative Service (*DIS*). In addition, the IG for Intelligence may investigate suspected fraud in intelligence related procurements. These investigative services have personnel trained for administrative, civil and criminal investigations.

7-27. **Defense Investigative Service (*DIS*).** DIS is the most recent DOD investigative agency and is the only one that does not support a specific military service. It was founded in 1972 and began criminal investigations in 1974. In January 1978, DIS was placed under the DOD General Counsel's direct authority in order to protect its independence and provide more effective liaison with the Department of Justice. DIS provides investigative support for the Joint Chiefs of Staff, DLA, and all other DOD Agencies. A substantial portion of its employees are assigned to fraud investigation.

7-28. **Air Force Office of Special Investigations (*OSI*).** The OSI is considered the most successful DOD Agency investigating white collar crime. OSI has trained its agents since 1950 to investigate fraud matters. It operates under staff supervision of the Air Force Inspector General. The Director of OSI also serves on the Air Staff. All criminal actions which the OSI investigators discover in their investigation of a Government contractor are referred to the OSI Commander in Washington, D.C. He is the only Air Force Officer permitted to refer these allegations to the Justice Department.

(A). The Air Force is working diligently to eliminate fraud, waste and abuse from its operations. The Air Force Secretary, Verne Orr, stated in 1982 that the Air Force recognized the need for a coordinated, structured approach to the problem. Consequently, an Audit, Inspection, and Investigation Council was established. The Council is composed of the Air Force Auditor General, the Commander of the Air Force Inspection and Safety Center and the Commander of the Air Force Office of Special Investigations. The Inspector General was designated by the Secretary as the Air Force focal point in its combat against fraud, waste and abuse.

(B). The Council has developed a "Fraud Indicators Handbook". This Handbook was provided to commanders and resource managers throughout the Air Force "for the primary purpose of heightening awareness of the potential for fraud and providing managers with examples of this type of fraud."

7-29. **Army Criminal Investigation Command (CID).** The United States Army Criminal Investigation Command is the oldest military investigation service and is the sole agency within the Army responsible for investigating felonies. (It is interesting to note that in 1977 the Army abandoned an attempt to change the widely used "CID" acronym to "CIC" because of the wide public acceptance of the name "CID.") CID elements are generally located at Army installations and provide investigative support to Army commanders. To aid in ferreting out fraud in Government contracting, the CID has set up a training program for its investigators for specialized procurement investigations. Upon completion of a CID investigation of Contractor fraud, CID Headquarters will provide the Justice Department with a full report of the violation. In practice, however, it is not unusual for local offices of the CID to refer smaller fraud matters directly to local FBI agents.

7-30. **Naval Investigative Service (NIS).** The Naval Investigative Service is the Navy agency responsible for investigating major criminal offenses, including that of a Government Contractor making false claims, false statements, or conspiracy to defraud the United States. It maintains a worldwide organization supporting both Navy and Marine Corps commanders. NIS is commanded by a Director who reports to the Commander, Naval Intelligence Command; who in turn is responsible to the Chief of Naval Operations. Naval and Marine Commanders must refer all suspected major criminal activities by a Government contractor to the NIS.

7-31. **Summary.** It can be seen that the United States Government has a variety of methods to combat "white collar" crime of Fraud, Waste, and Abuse in Government Acquisition. A number of Federal Laws, both civil and criminal, can be used to fight this kind of crime. Investigation and surveillance of this type of crime is performed by members of the Department of Justice, Inspectors General of Government agencies, public and Government employee participation by use of the "Hot Line", and DOD investigative elements (DIS, OSI, CID, NIS).

7-32. The Government Contractor faces many potential legal consequences in doing business with the Government. The executives of a contracting company, in order to protect themselves, should impress upon their employees the importance of dealing fairly with the Government; and when providing information, to be accurate, complete and current. These normal "arms length" dealings between the contractor and the Government will provide an environment which should be mutually beneficial to both parties and ultimately reduce and eventually eliminate most of the fraud, waste, and abuse in the arena of Government Contracting.

CHAPTER 7

FINANCIAL AID AND ASSISTANCE TO CONTRACTORS

Financial aid to contractors may assist in expanding production capacity, increasing competition, speeding performance and furthering the Government's Small Business Program. To obtain these benefits, it is Government policy to help finance contracts if this is likely to make performance more prompt and efficient. The purpose of this chapter is to touch upon the law and procedures which relate to this important aspect of Government Contract Law.

2. To minimize the need for financial assistance, the Government emphasizes prompt payment on all contracts to its prime contractors and also in payments by the prime contractors to their subcontractors. Government administrative policy is designed to encourage this promptness of payment.

1. THE NEED FOR FINANCING

1-1. A situation may arise in defense contracting in which a contractor must be chosen and it is evident that financial assistance will be required. Inadequate finances or credit can harm contract performance as much as can the lack of production facilities, manpower, or knowledge and skill. Financial strength of a prospective contractor, therefore, is an important but not necessarily a controlling factor in contract placement. To be considered for an award, a contractor must have adequate financial resources or be able to obtain them; it does not handicap a prospective contractor who needs and seeks Government financial assistance, if he is otherwise qualified.

1-2. It is the objective of the Department of Defense to deal with responsible contractors only. Contract awards to concerns of marginal capability often lead to delays and failure in obtaining delivery of needed items or services, and to increasing costs.

1-3. Determining the advisability of entering into a contract financing program can be difficult because the Government is acting simultaneously as a procurement agent and as a banker. In almost every marginal case, the decision must be made by a determination as to how unstable a contractor must be before the Government will deliberately refuse to accept the risks of financing.

2. PARTIAL PAYMENT TO CONTRACTORS

2-1. Contract clauses are provided in Federal Acquisition Regulations (*FAR*) to permit partial payment to contractors before all supplies or services are completed and delivered. These clauses can be used in fixed-price, cost-type and time and materials contracts. Payment clauses vary with the purpose of the particular contract under consideration. Partial payments should not be confused with progress payments, however.

2-2. **Fixed-Price Contracts.** There are different ways whereby a contractor is paid for a contract that has a fixed price. The payment may be paid in full, or there may be partial payments of the total contract.

2-3. **Supply Contracts.** The applicable clause dealing with partial payment (FAR 52.232-1), provides that the contractor will be paid as he delivers acceptable goods. The disbursing office receives contractor invoices certified by cognizant Government personnel; and on the basis of these, it makes payments. The clause is not usually invoked unless a minimum payment is due; this procedure reduces the cost of processing many invoices for small sums. FAR 52.232-1 sets the minimum payment so as to: "equal or exceed either $1,000 or fifty percent of the total amount of this contract."

2-4. **Research and Development Contracts.** The Payments clause for fixed-price research and development contracts (FAR 52.232-2) provides that payment will be made for accepted work. However, unless the contract states otherwise, the contractor can only receive payment on parts of the work for which a price is separately stated in the contract.

2-5. **Personal Services Contracts.** Payment on these contracts is made for services rendered over a specified period, or for deliveries of specific material. The contract schedule describes the rates. At the end of specified periods or on completion of described units of work, the contractor submits invoices and time statements, and he is then entitled to payment, (FAR 52.232-3).

2-6. **Incentive and Redeterminable Contracts.** Firm unit prices on fixed-price incentive

and redeterminable contracts are not known prior to post-award pricing. Until then, payments are based on billing prices. The target price (target cost plus target profit) sets the initial billing price for fixed-price incentive contracts. For redeterminable contracts, the stated price before redetermination is used.

2-7. **Cost-Reimbursement Contracts.** Payments of cost and fee are made on cost-reimbursement contracts as the contractor incurs costs. In a cost-reimbursement type supply contract, however, payments will not be made more frequently than bi-weekly, in amounts approved by the Contracting Officer, (FAR 52.216-7 thru -12 and 32.504). These payments serve much the same purpose as partial and progress payments on fixed-price contracts, and are made after the contractor submits periodic vouchers (or invoices) which are supported by statements as to the incurred costs the contractor claims are allowable. The interim payments may be adjusted later for any audited amounts the Contracting Officer finds unallowable.

(A) The Cost Accounting Standards Board, pursuant to 50 U.S.C. App. § 2168 promulgated Cost Accounting Standards for the DOD, defense contractors and other agencies purchasing for DOD. The statute provides for mandatory coverage, exemptions and waivers. Part 30 - DOD FAR SUPP and Appendix O incorporate these standards into Government operations. Even though the Board no longer exists, the standards are still in effect.

2-8. **Time and Materials and Labor Hour Contracts.** Payments are computed by multiplying the hourly rate by the number of direct labor- hours performed. Payments on vouchers submitted are made monthly, or even more frequently, if approved by the Contracting Officer.

3. FINANCIAL ASSISTANCE TO CONTRACTORS

3-1. The five methods of financing Government contracts, in order of Government preference are: Private financing, customary progress payments, guaranteed loans, unusual progress payments, and advance payments. With private financing, the contractor is able to assign his right to payment as security to a lender under certain conditions, (41 U.S.C. § 15). However, since many defense procurements require large amounts of working capital, private financing alone may not suffice. Large as well as small contractors may require some financial assistance from the Government. Progress payments in customary amounts (customary progress payments) are the preferred way to supplement private financing, and may be granted upon the request of the contractor when the contract has a relatively long production cycle and is a specified dollar amount. Guaranteed loans are private loans which the Government guarantees. They are suitable in helping a contractor who has several defense contracts or subcontracts. The contractor and lender may, at times, prefer them to customary progress payments. Advance payments are least preferred by the Government since they usually involve greater risk to the Government than other types of financing and hence require closer supervision.

3-2. Progress and advance payments may be granted on foreign procurements as well as on domestic contracts. Guaranteed loans, however, are generally not feasible for foreign contracts, as difficulties in loan administration often arise. If guaranteed loans are used in such situations, legal advice should be obtained about the proper contract clause, since enforcement in a foreign jurisdiction may be dependent upon the law of the foreign country.

3-3. **Private Financing.** Generally, private financing takes one of three forms: the customary type of commercial loan; a commercial loan obtained by the contractor but guaranteed by the Government; and a commercial loan with the contractor executing an assignment to the lending bank of all the money due or to become due to him under the contract.

3-4. **Customary Commercial Loans.** The usual type of commercial loan is one obtained by the contractor from a private financial institution. The form that the loan takes could be either an immediate transfer of money for a specific contract, or the establishment of a line of credit which the contractor can use as the need arises. This type of financial aid does not directly involve the Government.

3-5. **Guaranteed Loans.** Under this form of financial assistance, the Military Departments act as "guarantor" to private financial institutions which lend money to defense contractors, or subcontractors, for working capital purposes. No Federal funds are expended unless the borrower defaults on his loan or the lending institution demands purchase by the Government of all or part of the guaranteed percentage of the unpaid

principal on the loan. These are commonly called "V" loans, after Regulation V of the Board of Governors of the Federal Reserve System.

(A) The prospective borrower makes application for a loan to a private financial institution in the usual manner. The procedure is as follows:

(1) If the financing institution is willing to lend the money, but for some reason desires a guarantee, it makes application to its district Federal Reserve Bank for guarantee.

(2) The Federal Reserve Bank acts as the fiscal agent for the Government in the transaction. It submits a copy of the application to the applicable agency (in this instance, the Military Department having the preponderance of defense business with a specific contractor) which must make a decision as to the guarantee.

(3) The Federal Reserve Bank also submits a copy of the application to the cognizant Contracting Officer, who then makes a determination as to the eligibility of the contractor. The Contracting Officer submits a report of his findings, including a Certificate of Eligibility, when appropriate, to the central procurement office or contract finance office within the guaranteeing agency.

(4) While eligibility is being determined, the Federal Reserve Bank makes a credit or other financial investigation and then submits its reports to the guaranteeing agency.

(5) The guaranteeing agency reviews the reports of the Contracting Officer and the Federal Reserve Bank and approves or disapproves the guarantee. If approved, the agency authorizes the Federal Reserve Bank to execute the guarantee. This process can be accomplished in a period of from 30 to 45 days.

(6) The financing institution then makes the loan to the borrower.

3-6. **Assignment of Claims.** An assignment of money due under a contract is a widely used means of transferring financial interests from one person to another in ordinary commercial contracts. In the case of Government contracts, contractors having a contract providing for payments aggregating $1,000 or more, may assign the rights to the moneys due under the contract to a bank, trust company, or other financing institution, including any Federal lending agency, (31 U.S.C 3727 - Assignment of Claims Act of 1940). This assignment provides security for a loan and makes it easier for the contractor to borrow money. The standard Assignment of Claims clause used in fixed price supply contracts is FAR 32.802-3-4-5 and 52.232-23.

(A) In time of war or national emergency, the provisions of the Assignment of Claims clause give additional protection to the institution which loans the money on the basis of the assignment. The Government is prevented from withholding payments due under the contract to satisfy an indebtedness of the contractor when that debt to the Government arose independently of the contract.

3-7. **Direct Loans.** In addition to the assistance of guaranteeing loans, the Government furnishes financial assistance in a more direct manner to contractors who are in need of such assistance, i.e., by direct loans. The business loan program of the Small Business Administration (*SBA*) is designed to provide needed financing credit to worthy small businesses when loans are not available to them on reasonable terms from other sources. The primary purpose of this financial assistance is to provide small firms with funds to purchase equipment and materials, to expand and modernize operations, or to use as working capital.

(A) The SBA's loans are of two types, "participation" and "direct." In a participation loan, the Agency joins with a bank in a loan to a small business concern. In a direct loan there is no participation by a private lender--the loan is made entirely and directly by the SBA to the borrower; but by law the SBA may not make a direct loan if a participation loan with a bank or other leading institution can be arranged.

(B) The SBA's participation may be either under a loan guaranty plan (deferred guarantee basis) or on an immediate basis. On a guaranty basis, SBA agrees that upon default of the loan as to principal or interest, it will purchase from the lender its guaranteed portion of the outstanding balance of the loan. In agreements to participate in loans on a deferred basis, the SBA shall not commit itself in excess of 90 percent of the balance of the the loan outstanding at the time of disbursement, (15 U.S.C § 636). On an immediate basis, SBA purchases from the bank a fixed percentage of the original principal balance of the loan. An immediate participation may not be entered into, if it can be done on a deferred guaranty basis.

(C) It should be emphasized that the SBA has specific limitations and circumstances under which loans will not be granted. These circumstances are primarily concerned with the type of applicant, the purpose of the loan, and the availability of loans from other sources.

(D) By law, the maximum amount SBA may have outstanding to any one borrower is $350,000. There is an exception to the $350,000 limitation; the Pool Loan of $250,000 multiplied by the number of small businesses participating in the group corporation loan (15 U.S.C. § 636).

(E) SBA Loans generally are repayable monthly, and include interest on the unpaid balance. SBA's loans must be of such sound value, or so secured, that repayment will reasonably be assured.

3-8. **Customary Progress Payments.** Progress payments are made to a contractor as work progresses under a contract, even though supplies or services have not been delivered. They are based on either costs incurred, percentage of completion, or a particular stage of completion. They are used only with fixed-price contracts and fixed-price subcontracts under cost-reimbursement prime contracts, providing funds in advance of delivery to help finance long-lead-time procurements. For most procurements, progress payments are based on incurred costs. However, construction, shipbuilding, ship repair, and ship conversion contracts usually use other criteria, such as the percentage of work completed, or the phase or stage of completion. In October 1986, the Congress lowered the progress payment rate to 75 percent of total costs for large firms and 80 percent for small ones. Payments are to be made monthly.

3-9. Progress payments ordinarily are liquidated by the contractor as items are delivered or work is performed and accepted. Of course, these payments are a general debt to the Government; the contractor must repay them from other assets if the contract work is not performed. To secure progress payments, the Government obtains title to all work-in-process and to materials allocated to the contract. Progress Payment clauses require the contractor to mark or segregate all property acquired by the payments. Also, they set maximum limits on the amount of outstanding progress payments, and prescribe the method for liquidating them.

3-10. Customary Progress Payments are used when a fixed-price contract has a long lead-time, generally considered to be six months or more for the first delivery, or when cash outlay for production will impact sharply on a contractor's working funds. Customary progress payments are granted as a matter of course under these conditions, if a competent contractor has an adequate and approved accounting system and is financially responsible.

3-11. Progress payments are not generally used on relatively small contracts with the stronger and larger contractors. For this purpose, contracts under one million dollars are considered small. Contract size, however, has no bearing on payments to small business concerns when the contract otherwise meets the standard for such payments.

3-12. In sealed bids contracts, provision for progress payments shall be made in Requests for Sealed Bids (*RSBs*) whenever the Contracting Officer considers that the period between the beginning of work and completion of work will exceed four months for small business concerns, and six months for other firms; and he also considers that progress payments will be useful or necessary. Also, this will be done when the procurement will involve $100,000 or more and bids will likely be submitted by one or more small business firms, or when the procurement is for other than quick turn-over items.

3-13. Prime contractors are encouraged to make progress payments to subcontractors as the prime receives them from the Government. The Government then reimburses the prime. Progress payments may also be made under a cost-reimbursement prime contract if the subcontract has a fixed-price. These payments are simply reimbursed in the interim payments to the prime.

3-14. The subcontract provisions covering progress payments should be essentially the same as those in the prime contact. No interest should be charged. As security, the Government obtains title to property allocated to the subcontract. The payment percentage should be no higher than 80 percent of total costs. In the case of small business subcontractors, the rate may be 5 percent higher. As might be expected, unusual progress payments, including "flexible" progress payments, can also be made to a subcontractor under the same standards that apply to the prime's need.

3-15. It should be remembered, however, that just as the Government has the right to reduce or suspend progress payments when lack

of progress in the work jeopardizes the Government's investment, or when the contractor is in default, the Government also has a right to liquidate outstanding payments at a faster than normal rate. Since these payments are vitally important to the contractor, any decision to reduce or suspend payments, or step up their rate of liquidation, should be made only after careful consideration, and only if allowed by the contract terms. The Government must balance the risk of its investment against the effect on the contractor's performance caused by curtailed payments.

3-16. Progress payments may sometimes be granted after contract placement if the contractor asks for them. Though this is not usual, some circumstances may justify it. The actual period between start of work and first delivery, for instance, may greatly exceed the estimated lead time, or unexpected predelivery costs may have a serious impact on the contractor's working funds.

3-17. Adding a progress payments amendment to an existing contract requires some further consideration from the contractor. This may be a price reduction or some equivalent non-monetary benefit. Its value should approximate what the reduction in contract price would have been if progress payments had been provided in the first place. This can be estimated as roughly equal to the expected cost of private financing that Government financing eliminated.

3-18. If the Government's investment is in danger, a number of remedies may apply. Administrative control can be tightened or the Government may be able to acquire special protective agreements from the contractor. These may include personal or corporate guarantees, subordination of other indebtedness to the Government's claim, or special bank accounts to make sure that progress payments will be used properly. Firmer physical controls may be applied to property to which the Government has a security title or, as mentioned, progress payments may be reduced or suspended, but this is an extreme measure. It is used only as a last resort, when further payments are likely to increase the Government's probable loss.

3-19. **Unusual Progress Payments.** Progress Payments which are other than the customary type mentioned are termed "unusual" and require special review. These include cases where the payments exceed the standard percentage for customary type progress payments, where lead time is less than six months and may require predelivery expenditures that will have a material impact on the contractor's working funds, and/or where the contractor's finances are impaired or overextended. In review, full weight is given to the Government's preference for private financing. The contractor must prove actual need. If approved, the payments should provide only the minimum amount that, with other sources of funds, will meet contract needs.

Unusual progress payments require approval by the departmental contract financing office and, if over $25,000,000, the Deputy Under Secretary of Defense (Research and Engineering). (DFAR 32.501-2)

3-20. **Advance Payments.** Advance payments are advances of money made by the Government to a contractor without relation to "progress" or the receipt of supplies or services. The authority for such advances is legislation (10 U.S.C. § 2307 and 50 U.S.C. §§ 1431-35) that countermands the prohibition concerning the advance of public money expressed by 31 U.S.C. § 3324. Advance payments, except to non-profit institutions, are the least preferred way to assist a contractor because they impose the greatest risk and administrative burden on the Government. When they are suitable, they may be granted either at time of award or later. They may be used in addition to progress payments and guaranteed loans when deemed desirable.

(A) Advance payments may be made when it is determined that they are in the public interest, or the payments may be made to facilitate the national defense. This determination is made by the Secretary, Undersecretary, or his Deputy, of a Military Department.

(B) Where advance payments are made, the Government deposits the required funds in a special contractor bank account. The advances are normally secured in two ways: the Government takes a lien on the contract work, and also maintains some control over the special account. Other security, too, may be negotiated with the contractor.

(C) As previously stated, advance payments are made in anticipation of performance by a prime contractor. Such payments are considered useful and appropriate for specific types of contracts, such as contracts with non-profit educational and research institutions; contracts for acquisition of facilities at cost and for

Government ownership; contracts for management of Government-owned facilities; highly classified contracts which preclude the assignment of claims; rare but essential contracts of unusually weak contractors; and for exceptional cases that are beneficial to the Government.

(D) Advance payments are not authorized when another contractor is able to furnish the desired supplies or services upon terms equally satisfactory to the Government and without provision for advance payments. Nor are advance payments authorized when another means of adequate financing is available to the contractor. However, non-profit Research and Development Contracts with educational institutions, and contracts for management and operation of Government-owned facilities are excepted.

(E) Under advance payments procedure, requests for payments are submitted periodically; usually every 90 days. Included with the request is a cash budget flow showing the contractor's need for such money. These are reviewed and payment recommended by the ACO. After further examination and review of the request. disbursements are made to a special bank account supervised by an administrative Contracting Officer. The Government thereby exerts financial control over the account and the accounting record by having the ACO countersign all withdrawals, after ensuring that the money will be allocated to specific work.

(F) As the contractor actually performs or delivers a portion of the work under the contract and becomes entitled to contract payments, the advance payments are liquidated at the percentage specified in the contract. The contractor usually pays interest on the unliquidated portion of the advance payments. Unlike progress payments, the Government does not take title to any property generated by the contractor in the performance of the contract as security for advance payments. Instead the Government uses a conventional primary lien on the funds remaining in the special bank account, or a paramount lien on property generated by the contract, or a security-type mortgage on property owned by the contractor.

3-21. **The Prompt Payment Act** (31 U.S.C. § 3901 et seq.), Pub. L. 97-258, 1982. In recognition of the importance of liquidity -- especially to small business contractors -- the Prompt Payment Act requires that the Government pay it debts in a timely fashion. The Act generally imposes an interest penalty on agencies that don't pay for goods or services under supply or service contracts within thirty days of acceptance. Interest is computed from the day after the date of required payment -- either the date of invoice or the date found in the contract document -- to the date of actual payment at the Treasury rate. Section 3904 of the Act additionally prevents agencies from taking prompt payment discounts after the expiration of the prompt payment period. Section 3906 of the Act allows the contractor to treat nonpayment of interest penalties as a dispute under the Contract Disputes Act.

3-22. The Act's 15-day grace period -- in the opinion of many DOD contractors -- has been abused. An interim DOD policy required that DOD organizations utilize the 15-day grace period whenever possible in settling contract debts -- thereby theoretically saving the government millions of dollars in interest debt. Proposed amendments would clarify the definition of an invoice, explicitly require interest on late payments, gradually eliminate the 15-day grace period, apply the act to construction contracts, prohibit the Government from taking non-timely payment discounts, and require implementing instructions in the FAR.

CHAPTER 8

SPECIFICATIONS AND WORK STATEMENTS

The work statement, specifications, drawings, and item description formulate the very heart of any procurement. Whether a contract will be successfully performed is quite often determined not at the time the contract is negotiated or the award is made, but rather at the time the purchase or performance description is written. The need for clarity and preciseness of expression is perhaps greater in contracts than in any other form of communication. The extent to which this is or is not accomplished will have a direct bearing on the ultimate outcome of a contract. The greatest care, therefore, is required in formulating descriptions of desired products or services. A job well done results in savings in time, money, effort and administrative headaches.

2. This chapter covers, in moderate detail, the more important aspects of specifications and their impact on Government contracts.

1. DEFINITION OF SPECIFICATIONS

1-1. Before any invitation for bids or request for proposals can be used or any contract entered into, it is necessary to define the item or service that is to be the subject of the invitation, proposal or contract. The definitive or descriptive words identifying the subject matter are called specifications. Identification of the subject matter is the heart of each procurement and it is the basis upon which bids are made, proposals offered, negotiations concluded and contracts perfected. The use of specifications accomplishes two purposes: (1) requirements for an item, material, process or service, and its preservation, packaging, packing and marking; and (2) criteria by which the Government can determine whether or not contract requirements have been met.

2. CLASSIFICATION OF SPECIFICATIONS

2-1. Specifications can be classified as Federal Specifications and Military Specifications. A Federal Specification, when published, supersedes all antecedent specifications for the same material, product or service, and its use is mandatory where applicable. Military Specifications are developed to cover materials, products or services of primary interest to military activities. These specifications, when published, also supersede all antecedent specifications for the same material, product, or service. When applicable, their use is mandatory upon the military departments. Both classes of specifications are listed (if unclassified) in the Department of Defense Index of Specifications and Standards (DODISS).

2-2. These basic specifications generally are not applicable, and there is, therefore, no obligation to use them, when purchase is a small purchase, or when the Government is purchasing for authorized resale, or when the purchase is required under a public exigency, or is for use overseas and acquired overseas, or for construction or new installations of equipment where nationally recognized industry or technical source specifications and standards are available.

2-3. Where no applicable detailed specification exists, purchase descriptions can be used by the Government procuring agencies. A purchase description sets forth the essential characteristics and functions of the item desired. In the case of services, it outlines to the greatest degree practicable the specific services the Government wants the contractor to perform.

3. SPECIFICATION CATEGORIES

3-1. There are different categories by which the Government characterizes products. Generally, these products are characterized by function, design, performance or a combination of these mentioned traits.

3-2. **Functional Specification.** This means a description of the essential physical characteristics and functions required to meet minimum needs. The minimum acceptable purchase description is the identification of a requirement by use of a brand name followed by the words "or equal." This is used only as a last resort when a more detailed description cannot be made available in the time for the procurement at hand and when more than one brand is indicated. The words "or equal" are not added when only a particular sole source product will meet the essential needs of the Government.

3-3. **Design Specification.** A design specification spells out, in detail, the materials to be used, their sizes and shapes, and how the item

is to be fabricated and built. It provides a completely defined item capable of manufacture by a competent manufacturer in the industry.

3-4. **Performance Specification.** Performance specifications express requirements in terms of ranges of acceptance characteristics, or of minimum acceptable standards, as capacity, function, or operation of equipment. In this type of specification the details of design, fabrication and internal structure are left to the option of the contractor, except that certain features or parts may specifically be required.

3-5. **Mixed Specification.** The Government rarely uses a pure form of any type of specification. Rarely is a specification either a 100-percent design specification, functional specification or completely a performance specification. Nearly every specification contains some elements of each type. Characterization of a specification as "design", "performance" or "functional" therefore merely reflects which category predominates.

4. SPECIFICATIONS POLICY

4-1. DOD Specifications policy is set forth in 10 U.S.C. 2305, as amended and in Part 10 of FAR and DOD FAR SUPP and requires DOD personnel to: (1) state only actual minimum need and (2) describe needs so as to stimulate full and open competition, and (3) avoid unnecessary restrictive features. The first precept seems self-explanatory. It means that the specification must describe what is needed, not what may be desired. The second precept is to use the kind of specification which will generate maximum competition. There are occasions when the use of a design specification will accomplish this result as, for example, where the item was developed for the Government and can be exactly reproduced by any capable manufacturer without further development. On other occasions, the use of performance specifications may better assure competition being obtained as, for example, where the Government requirement can be met by any one of a number of commercially designed and available products. But, as we noted earlier, there are some instances when competition is just not available. An example would be where only one source exists. The third precept also serves to broaden the procurement base and foster competition.

4-2. Some products, such as specialized military electronic equipment, are not available on the commercial market. Such equipment is especially developed and designed for military use, frequently a time-consuming process. Thereafter, when the Government wishes to buy such equipment in quantity, a design specification is used to tell prospective contractors precisely how the item should be made. This makes it possible to avoid duplication of development time, theoretically permits wide competition by firms which do not have the scientific or engineering staffs to do the development, and results in the delivery to the Government of relatively standardized equipment from various suppliers.

4-3. On the other hand, many items of equipment, such as tractors, earth-moving equipment, laundry equipment, etc., are available on the commercial market. Such items are commercially designed and each manufacturer's design may differ markedly from his competitor's. Each manufacturer is tooled up to make equipment to his own design and it would be very expensive to require him to construct equipment to some competitor's or to Government design. In these cases, the Government uses performance specifications so that competition can be obtained from every firm which regularly makes a suitable commercial product. Such a specification fosters competition and avoids favoritism which would occur by the adoption of one company's design or a Government design which was more nearly like the design of one company than of others. Such a specification also avoids special retooling and production starting costs and, hence, results in lower prices to the Government.

4-4. Performance specifications are frequently used when no suitable commercial item is available and when there is no standardized Government design. In such cases where, in the opinion of the buying activity, the design problem is well within the capacities of a number of competent firms having design staffs, purchase will be made against a performance specification and the design details left to the contractor. In this way it is possible to get competition for items of specialized usage, but such competition is necessarily confined to firms which are competent to design and build equipment meeting the agency's performance requirement. It is also obvious that research and development contracts are performed against what are basically performance specifications.

4-5. The Congress further set policy in the Defense Acquisition Act of 1986, codified in 10

U.S.C. § 2325 which provides:

(a) PREFERENCE. -- The Secretary of Defense shall ensure that, to the maximum extent practicable --

(1) requirements of the Department of Defense with respect to a procurement of supplies are stated in terms of --

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that nondevelopmental items may be procured to fulfill such requirements; and

(3) such requirements are fulfilled through the procurement of nondevelopmental items.

5. SPECIFICATIONS IN SEALED BID CONTRACTING

5-1. The necessity for definitive specifications is clearly one of the most fundamental criteria for sealed bids. A sufficiently detailed and complete description of what the Government intends to buy is essential.

5-2. All bidders must understand what is being bought, without need for further clarification, in order that the product offered will comply with the specifications and will fulfill the Government's need. Thus, any critical dimensions must be spelled out in detail. Any necessary quality requirement must be fully described. At the same time, however, the Government must avoid imposing unnecessary conditions which would result in disqualifying an otherwise acceptable product because it fails to meet the essential condition. In short, it is imperative that the essential features of the contemplated contract be spelled out in the invitation for bids, so that all prospective suppliers may compete on an equal basis. In practice, this is a most difficult requirement to meet.

5-3. **Need for Clarity.** The real problem in writing specifications, for technical items and to a lesser extent for standard items, which are suitable and adequate for use in sealed bids is to convey complete and accurate understanding of what is required. The same word or expression is subject to varying interpretations by different people. The prospective bidder in sealed bid contracting will invariably interpret the specification requirement to his own advantage. It is essential that he do this; otherwise, he will lose out in the fierce price competition. A specification is essentially the transfer of knowledge between minds. Each mind will test the words of a specification against its own experience. In sealed bids, the prospective bidder must make his own interpretations in advance with no assistance from the Government.

5-4. **Need for Preciseness.** Specifications for use in sealed bids must be much more precise than those used for negotiation. This is so because in advertised procurement there can be no opportunity, after the opening of bids, to discuss various possible interpretations to assure mutual agreement. Also, because competition in sealed bidding is usually limited to price, bidders are likely to offer the minimum quality item which will be responsive. This means that the specifications must be immune to degradation by bidders which might result in the Government's getting an inferior product.

6. PRINCIPLES RELATING TO SPECIFICATIONS

6-1. There are several general principles with which the Government and the contractor must comply in order for both parties to fully understand the specifications of the contract. Compliance with these principles is important in defining the contracting responsibilities of both parties.

6-2. **Contract Must be Read in Its Entirety.** It is a basic tenet of law that a contract must be read as a whole, and in its entirety. It is equally elementary that meaning must, if possible, be given to all the language employed. An accepted rule of interpretation is that no word in a contract is to be rejected or treated as a redundancy, or as meaningless, if any meaning which is reasonable and consistent with the other parts can be given to it, or if the contract is capable of being construed with the word or words left in.

6-3. Thus, in determining the responsibilities of the contracting parties, and the performance that may be demanded of a contractor, a review solely of the "statement of work" or item description is not sufficient. In accordance with this rule, all parts of the contract should be read and considered in determining what is required.

6-4. "All parts of the contract" includes not only the contract document itself, but also matters referenced or incorporated by reference.

This, of course, includes any referenced specifications and drawings even if they are not recited *in toto* in the contract document or appended thereto.

6-5. **Right to Require Compliance.** Generally, a contracting party has the right to strict compliance with the specification by the other party. Therefore, a contractor who deviates from the specifications, as written, does so at his peril.

6-6. However, where the Government, as a result of misinterpretation of the provisions of the contract, requires a contractor to perform work not called for under its terms, the order to perform is a "change order" entitling the contractor to an equitable adjustment in price in accordance with the "Changes" article in the contract.

6-7. **Ambiguities.** If the contract is considered to be ambiguous, the ambiguity must be construed against the drafter of the language. This too is a fundamental legal principle and is equally applicable to the Government as well as the contractor. Thus, the Government is the "drafter," and any ambiguities will be construed against the Government. Obvious ambiguity, however, places on the other party a duty to seek clarification. Failure to do so will undermine later claims based on the ambiguous language.

6-8. **Presumption of Adequacy of Government Specifications.** Where the Government furnishes design specifications which control work under the contract, there is a presumption that the specifications are adequate for the purposes intended and that, if followed, the desired result will be obtained. There is, in effect, an "implied warranty" that the specifications are adequate.

6-9. **Effect of Contractor's Knowledge of Defective Specifications.** The precedent is also well-established that where a contractor is required to proceed under specifications which are defective or incomplete or which make the contract impossible to perform, such situations form a basis for price adjustment under the "Changes" clause, together with necessary time extensions to delivery schedules, even though the unattainable requirement is ultimately relaxed to permit performance.

6-10. However, if the contractor knows, or perhaps from his experience should know, that the desired result cannot be obtained, he cannot make a useless thing and expect to be able to charge for it. Where the contractor knows, or should have known, that the specifications are defective, he is under a duty to apprise the Government of this. He discharges his obligation by making the defect known to the Government. The Government then has a duty to act. Additionally, where specifications are defective on their face, or obviously unsuitable, the contractor has a duty to inquire; if he fails to so inquire, he cannot successfully advance a claim of excusability.

6-11. **Workmanlike Performance.** Strict compliance with the specifications is not the contractor's only responsibility. He is also under a basic duty to perform in the best and most workmanlike manner. This requires a performance standard equal to that of a qualified, careful and efficient person performing similar work. This is so, even if the standard is not set forth in the contract. When the contract does not contain detailed specifications. a test of "skillful and workmanlike" performance is good industry practice.

6-12. **Order of Precedence.** Sometimes conflicts appear between the basic contract and the specifications or drawings, or between the specifications and the drawings. Generally speaking, when there is a conflict between the contract and the specifications or drawings, the terms of the contract will prevail; if the conflict exists between the specifications and the drawings, the specifications will prevail. However, if the document of precedence is silent on the matter and the matter is not in conflict with some other provision, the "lesser" document will prevail. For example, if the drawings provide for something which is not in the specification, and it is not in conflict with the specifications or the basic contract document, the drawing would prevail to that extent. This is necessarily so, under the rule above, that the contract must be read as a whole.

6-13. **Impossibility of Performance.** Generally, when a contractor undertakes to perform under a performance specification, he assumes the risk that he can, in fact, accomplish the end result. When he agrees to so perform, it is presumed that he knows the "state of the art". Furthermore, the parties are presumed to have contracted in the belief that the state of the art was such that performance was possible.

6-14. When performance requirements cannot be met, contractors, on occasion, advance

the argument that the specifications were impossible of performance. Generally, when the performance specifications are those of the Government and are impossible to perform, the contractor will be relieved of compliance.

6-15. The real question at issue in these instances is whether the level of performance called for is beyond the reach of any contractor in the field or is merely beyond the capacity of the contractor concerned. If the latter, an impossibility of performance situation would not exist. When the contractor is a leader in its field, the argument of "impossibility" is considerably weakened and the position much more difficult to maintain.

6-16. **Alternate Methods of Performance.** Where alternate methods of performance are permitted by the specifications, the contractor has the freedom of choice. However, if one method is either impossible to perform, illegal, or more costly, the contractor is expected to follow the other method.

7. GENERAL RULES APPLICABLE TO PERFORMANCE UNDER SPECIFICATIONS

7-1. The following are general rules applied to questions involving performance and specifications. It should be noted that individual circumstances can alter their application:

(1) When the Government provides complete design information there is an implied warranty that an acceptable product will result if specifications are met.

(2) If frustration is encountered in determining the meaning of conflicting or ambiguous specifications, interpretation will be in favor of the contractor if the language were written by the Government.

(3) The Government is entitled to strict compliance with quantitative specifications although substantial compliance may be held to be sufficient (e.g., 2,000 r.p.m.)

(4) Qualitative specifications are interpreted in the light of custom and usage in the particular trade or profession (e.g. watertight).

(5) Process information supplied by the Government on a permissive or information basis does not warrant commercial practicability.

(6) If a contractor's proposal is included as a part of the specifications, there is a possibility that the contractor may be held to the performance suggested by the proposal (technical message as opposed to marketing message).

(7) A contractor may not sit back and rely on a patent ambiguity in specifications and then demand a compensable change. He has an obligation to address such ambiguity to the attention of the contracting officer prior to bid submission.

(8) Requiring either a greater or lesser performance than called for by contract is a "constructive change" entitling the contractor or the Government to an equitable adjustment under the Changes clause.

(9) Research and development contracts usually do not contain design specifications since the contractor is generally required to design and build the item to meet performance specifications.

(10) In the event of a discrepancy between design specifications and performance specifications, the performance specifications generally control.

(11) Most contracts provide that in addition to what is shown on the plans and what is spelled out in the specifications, the contractor shall be compelled to furnish and do whatever is necessary to provide a complete system or do a complete job. The test is: what should a reasonable contractor deduce from the plans and specifications?

(12) Where the language of the specification is indefinite, ambiguous, or of doubtful construction, the practical interpretations of the parties, as evidenced by usage or course of dealing, controls.

CHAPTER 9

INSPECTION, CORRECTION OF DEFECTS, DELIVERY, ACCEPTANCE, AND WARRANTIES

The problem of quality is of prime importance in Government contract law. Many disputes concern either difficulties with the specifications or with whether the items or services delivered meet the required specifications. In this chapter, inspection, delivery, acceptance and warranties are examined with a view toward interpreting and defining contract compliance with respect to quality.

I. INSPECTION

1-1. When a contract is awarded by the Government, the contractor assumes responsibility for timely delivery and satisfactory performance. Performance includes furnishing the quality and quantity of items which the contractor has agreed to deliver. Inspection requirements are included in every contract.

1-2. **Definition of Inspection.** FAR defines inspection as ". . . examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements." (FAR 46.101)

1-3. **Purpose of Inspection.** The purpose of inspection is to determine whether the product or service conforms exactly to what the Government has ordered. The extent of inspection varies with the dollar value of the contract and with the type of product. For example, a contract for "off-the-shelf" items under small purchase procedures may require minimum inspection after the items are received at their destinations. Such inspection may be limited to counting items, determining damage in transit, and verifying that the items are what was ordered. On the other hand, a contract for sophisticated aircraft or missile parts or assemblies will require a detailed inspection system which starts with the raw materials, continues through production, and ends with the completed item. Faulty inspection of one part during production could result in acceptance of a poor quality end item, which could cause aborted missions and loss of life.

1-4. Basic Government contract policy concerning quality is that contractors are responsible for controlling product quality and for offering only those items which conform to contract requirements. The inspection clauses contained in Acquisition Regulations establish contractor inspection responsibilities and vest in the Government certain rights. Improper application of the procedures (of inspection, waivers, corrections or replacements, and final acceptance) may jeopardize the Government's legal rights.

1-5. **Terms and Conditions of Inspection and Control of Quality.** The contract itself will contain the specifications or the description of the supplies or services and, when appropriate, the terms and conditions concerning inspection and control of quality. These terms and conditions are called contract quality requirements.

1-6. **Types of Quality Requirements.** There are three basic types of quality requirements which obligate a contractor to perform inspection and control of the quality of his product. (FAR 46.202). These requirements also establish the basis for Government inspection of supplies and services. For each procurement situation, the contract quality requirement should clearly define contractor responsibility in a document that is enforceable and that can be administered. Contracts which contain ambiguous terms, inadequate inspection/ acceptance criteria and omissions only jeopardize the Government's ability to obtain a quality product.

(A) **Government Reliance Upon Inspection By Contractor.** Under the FAR, the Government shall rely on the Contractor to accomplish all inspection and testing to ensure that supplies or services procured under small purchases procedures conform to contract quality requirements. An exception exists, however, where the Contracting Officer determines that there is a need for the Government to test the supplies or services prior to tender for acceptance, or to pass upon the adequacy of the contractor's work processes. (FAR 46.202-1) Where the Contracting Officer has not made such determinations, the "Contractor Inspection Requirements" clause (FAR 52.246-1) may be used to specify contractor responsibility for performance of all inspection and testing necessary for the supplies or ser-

vices to conform to contract requirements.

(B) **Standard Inspection Requirement.** The standard inspection requirement in the contract requires the contractor to establish and maintain an inspection system not otherwise defined except that it shall be acceptable to the Government. Included in the usual "boiler plate" contract inspection clause is contractor liability for latent (hidden) defects, fraud, and gross mistakes that amount to fraud. In substance, the standard inspection requirement actually is the foundation upon which all other Government inspection specifications are based. When the supplies are standard parts (commercial or military) of simple design produced by a manufacturer, it should not be necessary for the Government to spell out the precise details of how the desired quality will be obtained or measured. In combination, the commodity specification or purchase description and the standard inspection clause are sufficient to establish the supplier responsibility for the quality of contract items tendered to the Government. (Ref. FAR 46.302 thru 46.308; and 46.310)

(C) **Higher-Level Contract Quality Requirements.** Such requirements are appropriate in the acquisition of complex and critical items. Technical requirements of a contract may require closer control of work processes or operations or attention to such factors as planning organizations and control. Where higher-level contract quality requirements apply, the contract shall require compliance with Government-specified inspection or quality control specifications (e.g. MIL-I-45208; MIL-Q-9858). A clause entitled "Higher-Level Contract Quality Requirement (Government Specification)" (FAR 52.246-11) requires the Contractor to comply with the required specifications.

1-7. **Extent of Inspection.** The basic responsibility for inspection and quality is the contractor's. He is responsible for controlling product quality and for offering to the Government only those supplies and services that conform to contract requirements, and for maintaining and furnishing evidence of this conformance. The Government's role is to determine how much it should inspect to insure the effectiveness of a contractor's procedure. The more inspecting the Government does, the more the contractor is relieved of his responsibility. The determination is usually made after considering several factors:

(1) Integrity and reliability of the contractor as a quality producer;

(2) The adequacy of the contractor's inspection system which would include incoming material, lab testing, in-process inspection, end item inspection, packaging, packing, crating and marking;

(3) Previous Government experience with the contractor;

(4) The nature and value of the item involved.

1-8. **Methods of Inspection.** Methods of inspection involve the way that the production process is examined as well as points in the process at which examination occurs. There are several ways of performing examinations. The most commonly used are: (a) visual and dimensional checks, and (b) conducting or witnessing physical or performance tests.

(A) Visual checks are done by eyesight; and the inspector exercises a great amount of personal judgment. This kind of examination, for example, reveals surface defects, missing pieces, and parts out of alignment. The dimensional check is made with gauges and micrometers.

(B) Conducting or witnessing physical or performance tests involves more objectivity. Seeing a motor run or an aircraft fly or a submarine submerge are examples of this kind of examination. Chemical tests to determine chemical composition and physical tests to determine hardness are also in this category of examination.

1-9. **Points at Which Inspection May be Performed.** Inspection may be performed at several points along the production route.

(A) **Materials.** The quality and type of raw materials used may affect the quality of the end product. Properties of materials such as hardness, brittleness, malleability, and machinability may change with succeeding operations. When raw material properties contribute to the functioning of the end product, examinations of these materials are made either at the subcontractor's plant or at the receiving point in the prime contractor's facility.

(B) **Manufacturing Process.** Some quality characteristics cannot be verified by means of end product inspection. Therefore, an inspection of the manufacturing process itself will reveal whether these special characteristics are adequately controlled. Examples of these processes are heat-treating, electro-plating, forging, casting

and welding.

(C) **Subassemblies.** When subassemblies can be changed or damaged before they are incorporated into the end item, inspection is made at accessible points of the in-process assembly of parts.

(D) **End Item.** Inspection of completed supplies is necessary to assure that contract requirements have been met. The responsibility of the contractor for inspection of completed supplies requires that he complete all examinations and tests set forth in the specifications. As the first step, the contractor will verify that all previous inspection operations have been performed. The inspections and tests performed must provide sufficient evidence of complete compliance with contract requirements.

1-10. Now that we have had a brief exposure as to what inspection is and how it is used, we shall examine the FAR inspection clause which establishes inspection requirements for DOD contracts. The basic clause for firm fixed price supply contracts, FAR 52.246-2, serves as the basis for inspection clauses for other contract situations. Let us look at the basic clause as set forth in Appendix D and discuss its requirements and legal ramifications.

1-11. **The Government's Right to Inspect.** The Inspection Clause set forth in FAR 52 246-2(c) states:

> *The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. . . .*

This section of the clause, then, gives the Government the right to inspect all materials and workmanship at any time and any place where work on a contract is being performed. Although the following examples place test requirements and responsibility on the contractor, the Government reserves the right to perform any tests and inspections necessary to assure that the contractor is doing what is required. Let us examine several typical "time/place" sit ions.

1-12. **First Article Approval.** This inspection, test and evaluation of a "first article" is designed to assure a satisfactory product. A first article may be pre-production models, initial production samples, test samples, first lots, pilot models, or pilot lots. Approval involves testing and evaluating the first article for conformance with contract requirements before or in the initial stage of production.

(A) First article approval tends to minimize risks for the contractor and for the Government. It says to the contractor, "manufacture the additional articles just like this one." To the Government it says, "chances are in favor of a quality product on time."

(B) A first article approval clause is appropriate when the Government wants assurance that a product is satisfactory when it has not been previously furnished to the Government by the contractor; or it has been previously furnished by the contractor, but many specification changes have occurred; or a performance specification is applied. This clause is also used when the approved article is to serve as a manufacturing standard.

1-13. **Pre-Production Testing.** Assurance of quality must start early. Therefore, a considerable amount of pre-production testing effort is exerted.

(A) **Measuring and Testing Equipment.** The contractor must provide gauges and other measuring and testing devices to assure that supplies and materials meet the contract specifications. Inspection of these devices by the contractor is necessary to insure that they are calibrated according to specific national standards. The testing and, if necessary, adjustment and calibration of the instruments is done at specified intervals prior to and during production. The prime contractor must also assure that subcontracts follow the same procedure.

(B) **Production Tooling.** When production jigs, fixtures, tooling masters, templates, patterns and such devices are used as media of inspection, they must be proved for accuracy prior to use. The devices are also inspected at specific intervals during their use so that adjustment, replacement or repair is done before inaccuracies develop.

(C) **Materials.** All suppliers' and vendors' materials are inspected upon receipt to assure conformance with technical requirements. Raw materials are laboratory tested as necessary to assure that materials conform to the necessary physical, chemical or other technical requirements. Subcontractors and suppliers must exercise equivalent control over raw materials used in the production of parts and items that they supply to the contractor.

1-14. **During Manufacture.** This inspection process is perhaps the most complex and time consuming of all. It is during this time and place that quality is controlled most closely.

(A) **Controlled Conditions.** The contractor must assure that all machining, wiring, batching, shaping and all basic production operations of any type together with all processing and fabricating of any type, are accomplished under controlled conditions. Controlled conditions include documented work instructions, adequate production equipment, and any special working environment. These controlled conditions must also be used during physical examinations, tests, or measurements of the materials or products processed through each work operation.

(B) **Processed Materials.** Inspection and monitoring of processed materials or products must be accomplished in any suitable, systematic manner selected by the contractor. This selection may include inspection by machine operators, automated inspection gauges, moving line or lot sampling, setup or first piece approval, or production line inspection employed in any combination desired by the contractor which will adequately and efficiently protect product quality and the integrity of processing.

(C) **Complex Processes.** Certain chemical, metallurgical, biological, sonic, electronic, and radiological processes are of such a complex and specialized nature that much more than ordinary work instructions are needed. For these special processes, the contractor must assure that the process control procedures or specifications provide for special inspections, authorization, and monitoring to the standard necessary for this ultra precise and supercomplex work function.

1-15. **Prior to Shipment.** Government inspection of the completed item is often performed at a contractor's plant prior to shipment of the supplies; however, the terms of the contract will specify where final inspection as well as acceptance will be made. Final inspection and testing of completed products will provide a measure of the overall quality of the completed product. Inspection will also be performed on preservation, packaging and shipping methods to protect the products and prevent damage, loss and deterioration. These specifications are described in the contract and strict conformance is vital.

1-16. **At Destination.** If origin inspection is called for in the contract, a check at the destination will also be made (to determine any damage in transit, verify quantities, and spot-check for possible substitution or fraud). If destination inspection is called for in a contract, such inspection is usually limited to low dollar-value shipments of nontechnical items with a noncritical end-use. Destination inspections are also performed in situations where the required test equipment is located only at the destination. In the case of the Government purchase for resale of brand name items, or purchase of perishables, inspection is performed at destination.

1-17. **The Contractor Provides Facilities.** After establishing the Government's right to inspect, the clause further states:

> *If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge all reasonable facilities and assistance for the safe and convenient performance of these duties.*

The contractor may also be responsible for furnishing labor to assist the Government inspectors.

1-18. When the Government performs inspection at locations other than the contractor's (or subcontractor's) premises, the inspections are at the Government's expense. The clause states:

> *Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises;*

1-19. The basic inspection clause also states: *The Government shall perform inspections and tests in a manner that will not unduly delay the work.* Thus, if the contract specified a test schedule, i.e., a number of days after submission of an item for test, and the Government unreasonably delays the test, the contractor may either obtain a delivery time extension or recover additional costs caused by the delay or both. If the contract is silent on a test schedule, the Government is expected to complete its tests within a reasonable length of time.

1-20. The Government may charge to the contractor any additional costs for contractor-caused delays or for Government reinspection of rejected items. The FAR clause provides:

> *When supplies are not ready at the time specified by the contractor for inspection or test, the Con-*

tracting Officer may charge to the contractor the additional cost of inspection or test. ...The Contracting Officer may also charge the contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(FAR 52.246-2(e)(1) and (2)).

The inspection clause gives the Government the right to reject any defective material or workmanship, or to require its correction. The method used to identify corrected items, the impact of inspection on contractor responsibility, and the handling of ambiguous specifications will not be considered.

1-21. When submitting a corrected item for inspection, the contractor must disclose to the Government the identity of the corrected item or why it was corrected. The clause states

The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

1-22. The Government may, at any time prior to acceptance, reject any item for defects even though prior Government inspections and tests had not rejected the items. "Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies." It must be remembered that the inspection clause is for the Government's benefit; therefore, continuing inspection is contemplated during production. Even when a Government inspector has approved specific components, they may be rejected if found defective prior to acceptance. After an item has been approved and later correction is required, the contractor cannot recover the additional costs of correction. However, some interesting exceptions are worth noting.

1-23. If a Government inspector approved an item based on an extremely sloppy inspection (grossly indifferent inspection), subsequent reinspection and rejection may entitle the contractor to a contract time extension equal to the delay. Unreasonable interference by a Government inspector with a contractor's production will warrant relief to a contractor by an extension of time or additional dollars, or both. Unreasonable interference may occur when repeated inspections result in rejection of previously approved items.

1-24. **Contractor Failure to Correct Defects.** The inspection clause provides for specific measures to be taken in the event that a contractor fails to correct a defective item. If the contractor fails promptly to remove such supplies, or lots of supplies, which are required to be removed, or promptly to replace or correct such supplies or lack of supplies, the Government may replace or correct them at the contractor's expense, terminate the contract for default, or require delivery at equitably reduced prices. If the contractor fails to agree to the reduced price, it shall be considered to be a dispute concerning a question of fact under the Disputes clause.

1-25. **Replace or Correct.** The Government may award a new contract for a replacement item and charge the cost to the first contractor; or the Government may use its own resources to correct the defective items. It would then charge the contractor with reasonable costs of direct labor, equipment and overhead.

1-26. The preferred remedy would include the correction of the item in place. If time is a problem (system continuity) the contract should include correction within a certain time after a defect is found. Whether the items are replaced or corrected, the corrected or new item should be similar to the original requirement in functional, mechanical and design characteristics. We do not want to obtain "gold-plated" versions of the basic requirement.

1-27. **Default Termination.** The Government may choose to terminate the contract for default rather than replace or correct items through this "last resort" type of action. In this case, the contractor will not be paid for any costs incurred, and will also be required to pay the Government any increase in price as the result of reprocurement action.

1-28. **Price Reduction.** When the rejected material is urgently needed and it is not feasible to replace or correct a nonconforming item, the Government may choose to use this material at a reduction in price. The extent of adjustment is determined by the Contracting Officer. Normally the adjustment will not exceed the reasonable value to the Government after considering the possible cost of correcting the item. The price, however, should be low enough to discourage similar errors in the future. However, the Contracting Officer cannot reduce it in an amount that would constitute a penalty, but only in the

amount of dollar damages that the Government can prove. The price adjustment is done by a formal contract change. If the Contracting Officer and contractor do not agree on what is an equitable price, this failure to agree may be considered a dispute over a question of fact under the Disputes Article.

1-29. **Contractor's Inspection System.** One additional inspection clause feature imposes on a contractor a requirement to use an acceptable inspection system.

> *The Contractor shall provide and maintain an inspection system acceptable to the Government, covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterward as the contract requires.*

1-30. The contractor's records of inspection will be available for the Government inspector and copies of individual records will be provided upon request. As a minimum requirement, the inspection and testing records must indicate the nature of the observations, the number of observations made, and the number and type of deficiencies found. Records will also indicate the acceptability of work or products and the action taken in connection with deficiencies.

1-31. **Expanded Contract Responsibility.** In addition to the standard inspection clause requirement for an acceptable contract inspection system, the contract may also contain clauses requiring additional contractor effort to assure acceptable quality. When the technical requirements of a contract are such as to require control of quality by in-process as well as end item inspection, DOD uses a military specification, MIL-I-45208, in addition to the prescribed inspection clause. The in-process inspections control measuring and testing equipment, drawings and changes, documentation and records.

1-32. When the technical production requirements of complex supplies, components, equipments and systems require additional controls above those of MIL-I-45208 (inspection system), DOD uses the prescribed inspection clause with another military specification, MIL-Q-9858, which sets out functional criteria for a complex, complete quality assurance system. When MIL-Q-9858 is used, MIL-I-45208 is not used. In addition to in-process controls, this "MIL SPEC" includes organization, planning, work instructions, documentation control, work operations and manufacturing processes. "The purpose of this control is not only to assure that particular units of hardware conform to contractual requirements, but also to assure interface compatability among these units of hardware when they collectively comprise major equipment, subsystems and systems."

1-33. **Comparison of Inspection Clauses.** It was stated earlier that the inspection clause in firm fixed-price supply contracts served as a basis for inspection clauses of other types of contracts. A brief review of these other types of clauses and concomitant comparisons with supply contracts will illustrate this basis.

1-34. **Fixed Price Construction.** An example of the clause used in fixed-price construction contracts is contained in FAR 52.246-12. The differences from the Supply clause are:

(1) Inspection and test are performed in such manner as not to unnecessarily delay the work. This is similar to the supply contract clause except that since construction contracts usually contain a "Suspension of Work" clause, the contractor may be compensated for unreasonable Government delays in inspection or testing.

(2) Before acceptance, the Government can require the removal or tear out of the completed work. If work is defective, the contractor pays for the inspection cost and rework. If work is acceptable, the contractor is compensated for the inspection time and for the reconstruction of the work.

(3) Acceptance is similar to that of the supply contract except that if any other warranty is applicable, acceptance by the Government is not conclusive.

1-35. **Fixed-Price Research and Development.** An example of the applicable clause in fixed-price research and development contracts is contained in FAR 52.246-7. When the contract objective is end items rather than drawings and reports, this clause may be used. The Contracting Officer may determine that the clause is impracticable and use a short-form clause

instead, as written in FAR 52.246-9. The short form clause merely gives the Government the right to inspect, and requires the contractor to make facilities available to the inspectors. A significant (a) clause (long form) difference from the basic inspection clause is that if the contractor fails to replace or correct defective work, the Contracting Officer may accept such work at an equitable reduction in price. This is the only relief offered to the Government in an R & D fixed-price contract inspection clause. All other long-form inspection conditions are similar to those in a firm fixed-price supply contract.

1-36. **Cost-Reimbursement Supply and Research and Development.** The features of both types of cost-reimbursement contracts are the same and will be described at the same time. The titles of the clauses differ. For Cost-Reimbursement Supply contracts, DOD uses the FAR 52.246-3 "Inspection of Supplies-Cost Reimbursement." For Research and Development contracts, FAR 52.246-8, "Inspection of Research and Development-Cost-Reimbursement" is used. These clauses have the same basic provisions as the fixed-price supply clause with the exception that in the cost reimbursement contract:

(1) Unless otherwise provided or unless acceptance has already occurred, acceptance shall be deemed to have occurred not later than 60 days after delivery for the supply clause and 90 days for the R & D clause.

(2) Where correction or replacement of defective or nonconforming supplies is required, the Contractor shall be entitled to its costs but no fee will be paid.

(3) Contractor has no continuing obligation for correction of latent defects.

1-37. **Fixed-Price Incentive.** The FAR Fixed-Price Incentive provision (FAR 52.246-2, Alternate I) used in fixed-price incentive contracts is the same as the basic fixed price supply contract clause except for paragraphs (g), (h) and (i), which provide for necessary adjustments to the total final negotiated cost, target price, and the total final price of the incentive contract.

1-38. **Fixed-Price Redeterminable.** An inspection clause similar to the fixed-price incentive is used in price redeterminable contracts and treats costs of replacement and correction in the same manner. See FAR 52.246-2, Alternate II.

2. ACCEPTANCE

2-1. Acceptance is the act of an authorized agent of the Government by which the Government agrees that the supplies or services submitted by a contractor conform to all requirements of the contract. This includes quality, quantity, and the condition of the supplies. The contract itself will include the time and place of acceptance. The acceptance procedure is important because at the time and place of acceptance, title passes from the contractor to the Government. The contract also states that acceptance is final except for latent defects, fraud, or such gross mistakes as amount to fraud. Because of the finality of the act of acceptance, an understanding of the procedure is important.

2-2. The contract terms control where items will be accepted. These points of acceptance may be either at the contractor's plant or at destination or somewhere else by mutual agreement. Normally, when a contract requires Government quality assurance actions at a plant, acceptance will be at the plant. When quality assurance actions are performed at destination, acceptance will ordinarily be at destination.

2-3. After delivery is made, a reasonable period of time is allowed for Government acceptance or rejection. Although the Government may not have formally accepted items, acceptance may be implied by either the Government's conduct, or by the Government's delay.

2-4. The contract inspection clause states: "The Government shall accept or reject supplies as promptly as practicable after delivery, . . ." If items are rejected, it is important that a notice of rejection be furnished the contractor promptly, because if timely notice of rejection is not furnished, acceptance may in certain cases be implied as a matter of law. In cost-reimbursement contracts, supplies shall be deemed accepted 60 days after delivery (Supply contracts) or 90 days after delivery (R & D contracts).

2-5. Although formal acceptance is not accomplished, specific actions by the Government may be considered to imply acceptance. For example, if the Government consumes part or all of the defective items delivered, an acceptance of the consumed portion is generally considered to have been accomplished. Government alteration or use of the items prior to rejection constitutes an acceptance.

2-6. **Ownership** (title) transfers to the Government upon acceptance. The significance of this transfer is that any damage or loss to the products involved is borne by the owner. Therefore, regardless of the point of inspection and time of delivery, Government acceptance assumes title, ownership, and responsibility for the contract items.

2-7. **Procedure.** The Material Inspection and Receiving Report, DD Form 250, is the DOD document which accomplishes the formal acceptance of supplies or services on a Government contract. The Government agent authorized to make acceptance signs the document which later serves as the authorization for payment to the contractor. Since acceptance could be at the contractor's plant or at destination, delivery may be accomplished either through a Government Bill of Lading (*GBL*) or a Commercial Bill of Lading (*CBL*).

2-8. A Bill of Lading serves several purposes:

(1) It is a receipt for goods received by a carrier for transportation;

(2) It is a contract of carriage;

(3) It serves as documentary evidence of title to the goods in case of dispute or controversy;

(4) In the case of a Government Bill of Lading, it serves as the document by which a carrier is paid for the transportation service rendered.

2-9. When a carrier receives goods from a shipper, it must, according to the law, issue a bill of lading showing in detail the information necessary to properly classify and transport the commodity as well as collect for the services performed.

2-10. **The Government Bill of Lading** (*GBL*). In practice, the Government rather than the carrier, issues the Government Bill of Lading. When acceptance is accomplished at the contractor's plant, title is automatically transferred to the Government. Therefore, the contractor ships on a GBL since the property belongs to the Government. For any damage or loss in shipment, the Government files and asserts a claim against the carrier.

2-11. **The Contractor Bill Of Lading** (*CBL*). When acceptance is at destination, the contractor retains title to the items until accepted. The contractor retains ownership during shipment and ships on a Contractor Bill of Lading. In the event of damage or loss, the carrier is responsible to the contractor.

2-12. **Certificate of Conformance** (*COC*). Any discussion of inspection and acceptance would not be complete without describing the Certificate of Conformance (COC). At the discretion of the Contracting Officer, a clause may be inserted in a contract which requires the contractor to certify that supplies or services comply with contract requirements. This clause may serve one of two purposes. It may be used as the sole basis for Government acceptance and payment of contractor invoices without Government inspection (without prejudice to the Government's right to inspect at a different point in time or place). The COC can also be used to obtain additional assurance that supplies conform to contract requirements prior to acceptance.

2-13. **Contractor Responsibility After Acceptance.** The Government's acceptance is conclusive except for latent defects, fraud, or such gross mistakes as amount to fraud. Therefore, if any of these conditions are proved to exist, even after final payment is made, the contractor is still responsible. The remedies to the Government are considered to be the same as those available when the items are found to be defective before acceptance. Also, damage to items in shipment may require correction by the contractor, even though the Government owned the item at time of shipment.

2-14. A latent defect is a defect that existed at the time of Government acceptance but could not be discovered by a reasonable inspection. Determination of "latent" then becomes a matter of what is reasonable. If the inspection is reasonable and the defect is not discovered, the defect is latent. If a reasonable examination of an article would reveal a defect, and the examination is not made, the defect is not latent.

2-15. A reasonable inspection is one that would normally be performed as a custom of the trade. In the examination of shoes, for example, a visual inspection would suffice and an X-ray would not be expected; however, in the examination of welding done on structural steel, an X-ray inspection would be reasonably expected.

2-16. The burden of proof is upon the Government, which must prove that defective material and workmanship is the probable cause of the failure of a product when considered with reference to other possible causes. Under the

standard inspection clauses, the contractor is responsible for latent defects discovered at any time after final acceptance; however, the extent of his liability is prorated over the useful life of the item. Note that latent defects applies not only to supplies and services but also to design. Therefore, where a contractor has a contract for design and manufacture and the design is defective in an "undiscoverable" manner, but the product is manufactured properly in keeping with that design, the contractor must repair or replace the product free of additional charge. It should be noted that when a design is defective in a cost reimbursement contract, the "fix" has virtually no economic effect on the contractor since he will be paid all of his out-of-pocket costs.

2-17. A further problem arises as to latent defects: Is the so-called defect really latent, or is the defect caused by a fact that was beyond the knowledge and state of the art when the product was designed and/or manufactured? If it were beyond the state of the art, clearly the contractor will get full costs and profit when he improves the product's design or manufacture or both.

2-18. Fraud and Gross Mistakes are the additional exceptions to the conclusiveness of acceptance contained in the inspection clauses. The contractor is responsible during the life of the product for any defects found because of fraud or gross mistakes. To obtain relief for a defective item, the Government must prove fraud, which means it is necessary to show intent to deceive by the contractor in that he misrepresented a material fact and that the Government relied on the misrepresentation to its detriment. To establish a gross mistake that amounts to fraud, it is necessary to prove that the error was so gross that it should be considered as fraud; however, it is not necessary to prove intent to deceive. It is difficult to prove intent; thus, proof of fraud is unlikely.

2-19. If the contract provides for delivery and acceptance at origin, the contractor will ship on a Government Bill of Lading. Yet, when subsequent damage to the supplies can be traced back to faulty packing and loading, the contractor can be held liable.

2-20. **Additional Responsibilities.** There are other responsibilities which regulate the contract agreements between the Government and the contractor.

2-21. **The Contractor's Responsibility.** The Responsibility for Supplies clause (FAR 52.246-16) states that, unless otherwise provided for in the contract, (1) title shall pass to the Government upon formal acceptance regardless of when or where the Government takes physical possession, and (2) risk of loss or damage remains with the contractor until (a) delivery of supplies to a carrier, if transportation is f.o.b. origin, (b) acceptance by the Government or delivery of possession to the Government at the destination specified, whichever is later if transportation is f.o.b. destination. Notwithstanding these provisions, the risk of loss or damage to supplies that are so nonconforming as to give the Government the right of rejection remains with the contractor until cure or acceptance. Further, the contractor is not liable for any loss or damage caused by the negligence of the officers, agents, or employees of the Government acting within the scope of their employment.

2-22. **The Government's Responsibility.** Just as the contractor has specific responsibilities under the inspection clause, the Government, too, must also fulfill its responsibilities. When its agents do not properly execute their responsibilities, the Government gives up certain legal rights.

2-23. Progress payments may be made to contractors when a long lead time is required between beginning of work and first delivery, or for payments as work progresses. As security for these payments, the Government substantially assumes ownership of the contract supplies. The clause provides that the Government obtain, "title to all parts, materials, inventories, work in process, special tooling, special test equipment, tools, jigs, dies, fixtures and other similar manufacturing aids.

2-24. It would appear that the Government then would assume the responsibility for loss or destruction of these before acceptance since the Government owns them. However, the progress payments clause also provides:

> *Before delivery to and acceptance by the Government, the Contractor shall bear the risk of loss for property, the title to which vests in the Government under this clause, except to the extent the Government expressly assumes the risk. The Contractor shall repay the Government an amount equal to the unliquidated progress payments that are based on costs allocable to property that is damaged, lost, stolen, or destroyed.*

2-25. When the Government inspector conducts an inspection according to the contract specifications, his rejection of supplies cannot be overturned by another test method, even though the other test shows that the supplies met the specifications of the contract. On the other hand, if a contractor produced an item according to a Government-furnished sample, the Government inspector's rejection may be overturned by the contractor because the contractor has complied with the contract (even though he may be making a product that absolutely will not work).

2-26. If the contractor can show that a Government inspector is inexperienced or incompetent, the inspection is improper and any rejected supplies may later be accepted. Delays caused by such inspections are considered reasonable. If the negligence of a Government agent causes damages to a contractor, the Government becomes liable for the contractor's costs to repair the damages.

2-27. **Inherent Destruction.** Inspection and test may require that samples be destroyed or damaged. This may be necessary to determine a rupture point, or destruction point. If the Government arbitrarily destroys or uses unnecessary destructive tests, the contractor may be compensated for the damage. In addition, a delivery delay caused by degrading or damaging an item because of Government tests may be considered an excusable delay. Thus, the contractor will be provided with enough time to rework or repair the damaged item before delivery.

3. WARRANTIES

3-1. Many items procured by Government agencies are covered by warranties which permit a course of action to correct defects appearing after acceptance by the Government. These warranties may cover specification performance or fitness for a particular purpose. Any such warranty in writing is an express warranty. However, in the absence of a written warranty, the Government may fall back on an implied warranty.

3-2. **Implied Warranty.** The Uniform Commercial Code (*UCC*) is our source of law on this subject. Although the Code is binding in the commercial contracting world as to goods sold in trade, it is employed in government contract law mainly to fill gaps *(Reeves Soundcraft Corp.,* ASBCA Nos. 9030 and 9130 (1964). Since the implied warranty provisions of the Code protect buyers rather than sellers, the Government has willingly espoused these legal rules for Government contracts. Several provisions of the UCC should provide an illustration of the protection given by implied warranties.

3-3. **Merchantability and Usage of Trade** (UCC 2-314). Unless excluded or modified, a warranty that the goods shall be merchantable is implied if the seller is a merchant with respect to goods of that kind.

3-4. "Goods to be merchantable must:

(a) pass without objection in the trade under the contract description; and in the case of fungible goods, (fungible goods are those where all units are identical, i.e., grains of corn) are of fair average quality within the description; and

(b) be fit for the ordinary purposes for which such goods are used; and

(c) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and

(d) be adequately contained, packaged, and labeled as the agreement may require; and

(e) conform to the promises or affirmations of fact made on the container or label, if any."

3-5. **Fitness for Purpose** (UCC 2-315).

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section, an implied warranty that the goods shall be fit for such purpose.

3-6. **Implied Warranty Exclusions** (UCC 2-316). Although implied warranties provide protection to buyers, an implied warranty may be specifically excluded by calling the buyer's attention, in understandable language, to the fact that warranties are excluded and that there is no implied warranty. In addition, an implied warranty is excluded when a buyer has examined the goods, sample or model as fully as he wanted to (prior to entering into the contract) or when he has refused to examine the goods. Also by agreement of seller and buyer, the extent of remedies can be restricted or limited.

3-7. Once a buyer accepts the goods, he must pay for them. Once he accepts, he may not reject; however, he may still seek other remedies. In order to seek remedy for an

alleged breach, the buyer must notify the seller within a reasonable time after the "breach" is discovered, or should have been discovered. The burden of proof, of course, is on the buyer.

3-8. There are situations, however, where a buyer may revoke acceptance of goods. If the buyer accepted on a reasonable assumption that the defect would be cured, and it was not, or if before acceptance, the defect was difficult to detect, or if he were induced by the seller's assurance, the buyer may revoke his acceptance if the nonconformity or defect substantially impairs its value to him. In this case, the buyer's rights are the same as if he had initially rejected the products.

3-9. **Remedies for Breach of Implied Warranty** (UCC 2-711 thru 2-718). The UCC provides remedies to the buyer in the event of a breach of an implied warranty. It is interesting to note that these remedies bear a strong resemblance to the remedies available to the Government under the fixed price supply inspection clause. The following list is a very brief description of the UCC provisions:

(a) Where the buyer rejects goods or properly revokes acceptance, he may cancel the contract, recover the price paid, and may either "cover" and recover damages for the goods affected, or recover damages for nondelivery.

(b) "Cover" involves buying goods to substitute for those due from the seller. The damages to be recovered are equal to the difference between the cost of repurchase (cover) and the contract price, plus "incidental and consequential" damages, less expenses saved as a result of the seller's breach.

(c) Damages from nondelivery equals the difference between the market price and the contract price.

(d) "Incidental" damages are those expenses which are reasonable charges, expenses, or commissions in connection with repurchase. "Consequential" damages include losses resulting from requirements and needs of which the seller had reason to know at the time of contracting and which the buyer could not reasonably avoid, and injuries to person and property resulting from breaches of warranty.

(e) The contract between the buyer and seller may provide remedies other than those in the UCC and it may also change the amount of damages recoverable.

3-10. **Implied Warranties in Government Procurement.** Before acceptance, the inspection clause of the contract protects the Government's interests. What protection is there after acceptance? If the Government accepts contract items and later claims that the contractor has breached an implied warranty, does the acceptance eliminate any implied warranties? Examination of the contract inspection clauses suggests the answer: It depends on the type of contract.

(A) **Cost-Reimbursement Contracts.** For both Supply and Research and Development contracts (as well as Time and Material and Labor-Hour), the inspection clauses generally provide that, except as otherwise provided in the contract, the Contractor shall have no obligation or liability to correct or replace articles which at the time of delivery are defective in material or workmanship or otherwise not in conformity with the requirements of the contract. Implied warranties do not apply.

(B) **Fixed-Price Contracts for Supplies or Services.** For fixed-price supply contracts (as well as Research and Development, Incentive and Price Redetermination) the inspection clauses provide that except as otherwise provided in the contract, acceptance shall be conclusive except as regards latent defects, fraud or such gross mistakes as amount to fraud." This conclusive acceptance, then, kills any implied warranty.

(C) **Fixed-Price Contracts for Construction.** The inspection clause in this type of contract states, "Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud or the Government's rights under any warranty or guarantee." Thus, implied warranties may apply, at least as to equipment supplied by the contractor. *(Federal Pacific Electric Co.,* IBCA, 1964 BCA para. 4494); also, as to subcontractors under the FAR 52.246-21, "Warranty of Construction" clause, as to work and materials. Broader protection appears to be provided under the latent defects provision.

3-11. **Express Warranties.** Warranty, as used in the FAR, means a promise or affirmation given by a contractor to the Government regarding the nature, usefulness, or condition of the supplies or performance of services furnished under the contract. (FAR 46.701).

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyers which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any descriptions of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warranty" or "guarantee" or that he have a specific intention to make a warranty; but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

3-12. **Purpose.** The purpose of using a warranty clause is to increase the Government's latitude in exercising (within a specified period of time after acceptance) the right to have the contractor correct a deficiency in a contract item, or accept a reduction in price or provide other remedies.

3-13. A warranty clause is used when it is found to be in the best interest of the Government after an analysis of pertinent factors.

3-14. This additional period of time may begin at the time of delivery, or at the occurrence of a particular event, and may run for a number of days or months until the occurrence of another specified event.

3-15. A warranty is a provision giving the Government a contractual right to assert claims regarding the deficiency of supplies or services furnished notwithstanding any other contractual provision pertaining to acceptance by the Government. Warranties normally "shall" be used when it is found to be in the best interest of the Government. Provisions are also included for marking of warranted items so that those who store, stock, and use the items may advise the Contracting Officer of any defects.

3-16. Except for commercial, technical data, and Federal, Military, or construction guide specification warranty clauses, the decision to use a warranty is reserved for the Head of a Contracting Activity because warranties must be used only if economically feasible and administratively practical. Remember that warranties are not free; therefore, we must weigh cost against risk. FAR enumerates specific factors which must be considered in deciding whether to use a warranty clause. These factors include:

(a) nature of the item and its end use;

(b) cost of the warranty and degree of price competition as it may affect this cost;

(c) criticality of achieving specified performance capabilities and design specifications;

(d) cost of correction or replacement either by the contractor or another source, in the absence of a warranty;

(e) administrative costs and difficulty of enforcing the warranty;

(f) ability to take advantage of the warranty, as conditioned by storage time, distance of the using agency from the source, or other factors;

(g) operation of the warranty as a deterrent against the furnishing of defective or nonconforming supplies;

(h) the extent to which Government acceptance is to be based upon contractor inspection or quality control;

(i) whether because of the nature of the items the Government inspection would not be likely to provide adequate protection without a warranty;

(j) whether the contractor's present quality program is reliable enough to provide adequate protection without a warranty, or, if not, whether a warranty would cause the contractor to institute an effective and reliable quality program;

(k) reliance on "brand-name" integrity;

(l) whether a warranty is regularly given for a commercial component of a more complex end item;

(m) criticality of item for protection of personnel, e.g., for safety in flight;

(n) the stage of development of the item and the state of the art; and

(o) customary trade practices.

3-17. Warranty clauses are not used in Cost-Reimbursement contracts because the inspection clause for those contracts has sufficient built-in warranty provisions. Although protection ceases after a specified date contained in a warranty clause, the contractor's liability for

latent defects under the standard inspection clause continues after the expiration of a warranty clause period.

3-18. **Kinds of Warranties.** FAR Subpart 46.7 outlines the policy for the use of warranties. FAR 52.246-17 thru FAR 52.246-21 illustrate warranty clauses which are used for different situations. Where the clauses are examples only, they may be tailored to fit any particular procurement situation. In general, there are five basic types of warranties with, of course, numerous variations.

(A) **Failure-Free Warranty.** This type is sometimes referred to as a hardware guarantee. Under this arrangement, the contractor accepts the responsibility to correct any failure or defect which occurs during a specific time or measured amount of operation. Extreme care should be exercised before this warranty is used because the cost may be high in both contract price and in the administrative cost of maintaining records and controls over these items.

(B) **Correction of Deficiencies.** Under this type of warranty the contractor agrees to correct any design, material or workmanship deficiencies which become apparent during test or early operation and which result in the specific item performing below specification and contractual requirements. Such clauses in a weapon systems contract usually also apply to spare parts and any other supplies included in the contract.

(C) **Supply Warranty.** Under this warranty the contractor is obligated to replace or reperform work on contract items if defects in material or workmanship existed at the time of acceptance. This clause usually gives the Government a specified period of time in which to discover the defect. Normally, there is very little increase in item price for this kind of warranty. It should be quite easy to make a positive determination that a defect existed at time of acceptance if it is found when the item is drawn from supply for initial use. It will be much more difficult to determine that the defect existed at time of original acceptance if the item has been installed and operating for some appreciable period of service and is then found defective.

(D) **Service Warranty.** Under such a warranty, the contractor agrees to reperform defective services, if defects in workmanship existed at time of acceptance and are discovered within a specified time period. Here again, little is paid for this warranty because, unless the Government spots defective workmanship soon after return of overhauled or repaired items to service, it will be extremely difficult to conclude that the defect existed at time of acceptance. It may also be difficult to prove that the contractor performed the defective work.

(E) **Construction Warranty.** This warranty requires the contractor to remedy, at his own expense, any nonconformance of work to the contract specifications and any defect of material, workmanship and contractor design.

3-19. **Time of Defect.** The Government assumes the burden of proving the liability of a contractor; therefore, it also has the burden of proving the existence of a defect within the time stated in the warranty clause. The clause usually provides that the contractor is liable for defects which either existed at the time of delivery to the Government, or which develop within a specified period of time (such as a specified number of days after delivery) or which developed after the occurrence of an event (such as a number of hours of operation).

3-20. If design specifications are emphasized in the contract (e.g., precision, materials, tolerances, and test requirements), the contractor's liability under a warranty clause should be limited to defects existing at time of delivery. If performance specifications are contained in the contract, the contractor's liability for defects in the warranty clause should extend to a period beyond delivery.

3-21. **Duration of the Warranty.** How long should the warranty run? The starting point is normally the time of delivery. However, if items are delivered for storage and later use, the warranty usually provides for a starting time after delivery. Also, a later starting time would be required if actual use of the items is the only way to determine conformance with specifications. In any event, the length of the warranty period must be specified. For example, one year after delivery, or completion, or commencement of use, etc.

3-22. If there is a breach of warranty by a contractor, the Government must so advise the contractor before the notice period in the clause expires. Notice must be in writing and must indicate that the Government's rights have been violated. It is not necessary that the defect be specifically identified if the result or consequence of the defect is stated.

3-23. If a contractor breaches a warranty, there are several alternative actions which may be taken and the Contracting Officer has complete authority over the course of action chosen.

3-24. The Contracting Officer may require the contractor to correct or replace the nonconforming or defective supplies, or he may choose to keep the defective supplies and have the contractor repay a portion of the contract price.

3-25. If returning an item is impractical, the Government may correct the item or require the contractor to correct it in place. Either would be at the contractor's expense. Provision for this arrangement should be included in the contract.

3-26. When items are returned to the contractor, he is liable for [illegible] incident to transportation to his plant and return to the Government delivery point. Also, if the contractor refuses or fails to correct or replace defective items within a period specified in the contract, the Government may correct or replace the defective items with similar items at the contractor's expense. If the contractor does not furnish timely instructions regarding the disposition of the defective supplies, the Government may dispose of them and be reimbursed from the sale of the items for any expenses associated with the care and disposition of the items, plus excess costs of reprocurement.

3-27. The clause used in fixed price incentive contracts is similar to the suggested Supply Warranty clause except that an additional paragraph is used. The addition authorizes the inclusion of all warranty associated costs in the negotiated final price of the contract. However, after the establishment of the total final price, the contractor's compliance with the warranty clause is at his own expense.

3-28. **Warranty of Systems and Equipment Under Performance Specifications or Design Criteria Clause.** This clause was formerly known as the "Correction of Deficiencies" clause. It may be used in fixed price supply and service, and research and development contracts for systems and equipment where performance specifications or design are of major importance. (FAR 52.246-19).

3-29. Its provisions cover contract-caused deficiencies discovered by either party within a specific time period. This period could be, for example, a number of months after delivery or acceptance, or after a number of hours of use, depending upon what is included in the contract.

3-30. If a deficiency is discovered by the Government after acceptance, and it is still within the allowed time period, written notice is given to the contractor who must then submit recommendations for corrections to the Contracting Officer. If the contractor detects a deficiency before Government acceptance, he must either correct it at his own expense or recommend corrections to the Contracting Officer.

3-31. After receiving a contractor's recommendations, the Contracting Officer must act within the time period included in the clause. He may give the contractor notice in writing to fully correct, partially correct, or not correct the deficiency. Corrections are at the contractor's expense. For partial or no corrections, the contract price is adjusted by negotiation.

3-32. Performance delays on the contract which are caused by correction of deficiencies are not an excusable delay; however, as in other contracts, the Government may grant a time extension for a consideration. Also, the contractor pays the transportation expenses and assumes responsibility for defective items in transit.

3-33. If a contractor does not submit recommendations for correction or comply with the Government's order to correct deficiencies, the Contracting Officer so advises the contractor in writing and establishes a time limit for contractor compliance. If the contractor does not "cure" the failure within the specified time, the Contracting Officer may obtain recommendations elsewhere, correct or replace the items, and obtain the necessary data. All of the expense involved will be charged to the contractor.

3-34. **Comparison of Supply Warranty and Correction of Deficiencies Clause.** A comparison of the Supply Warranty and the Warranty of Systems and Equipment clauses is interesting. The Supply Warranty is authorized for insertion into fixed price and fixed price incentive supply contracts. In it the contractor warrants that the supplies furnished will conform to contract specifications and be free from defects in material and workmanship.

3-35. Where performance is the major concern, the contractor necessarily must warrant against defects which arise after delivery. The UCC most frequently makes its appearance in the arguments of counsel during litigation concerning the Supply Warranty. This is not surprising, since the subject matter of a fixed price sup-

ply contract (e.g., spare parts) falls squarely within the definition of "goods" provided in UCC 2-105(1).

3-36. The "Warranty of Systems and Equipment" clause, on the other hand, is specifically authorized for insertion into both fixed price and fixed price incentive supply and service contracts, and research and development contracts when performance specifications or design are of major importance." However, it is actually applicable to almost every large dollar contract where the Supply Warranty clause could be used. As with the Supply Warranty, the contractor warrants that any supplies or services furnished by him will be in compliance with the requirements of the contract. Aside from this basic similarity, however, the clauses differ in a number of significant respects.

3-37. Under the Supply Warranty the burden is on the Government to find and prove a breach of warranty, while in the "Warranty of Systems and Equipment" clause, the contractor places himself under a positive duty to "promptly" report any discovered noncompliance of goods or services with contract requirements. This duty, it should be noted, extends to all goods and services regardless of whether they have been accepted under inspection and acceptance provisions.

3-38. Once a breach has been discovered under the Supply Warranty, the Contracting Officer may require either the "prompt correction or replacement" of nonconforming supplies, or retain the supplies and request an equitable adjustment in the contract price. These remedies are also available in the Warranty of Systems and Equipment clause. However, the Contracting Officer has more flexibility under the latter clause since he has expressly reserved the option to require only partial correction of a deficiency and to seek a corresponding reduction in price.

CHAPTER 10

MODIFICATION OF CONTRACTS

The purpose of this chapter is to discuss the general topic of the modification of Government contracts. Typically, modification in government contracts takes the form of application of the "changes" clause to post-award contract relationships. Considerable coverage is given to the changes clauses used in various types of Government contracts, as well as other clauses and doctrines used where contract modification becomes necessary or desirable.

1. MODIFICATION OF GOVERNMENT CONTRACTS

1-1. A modification (amendment) is a new agreement and contains terms different from those which were agreed upon in the original contract. The definitized contract, though it is presumed to represent the intent of the parties, may be modified by them. The Contracting Officer with authority to enter into a contract for the Government by implication has the power to modify such a contract. Rather than rewrite the original document, a supplemental agreement is used for spelling out the modifications. For the supplemental agreement to be legally enforceable, it must contain the essential elements of a contract discussed earlier, such as offer, acceptance, consideration, etc. Thus, care must be used in entering into such arrangements. The supplemental agreement is a bilateral document. That is, it is agreed to and executed by both the Government and the contractor. It may be used to enlarge or diminish the obligations of the parties and new procurement authority may be necessary where the scope of the contract is increased. The supplemental agreement is employed whenever it is necessary or desirable to have the contractor's consent to a modification of the contract.

2. CHANGES AND CHANGE ORDERS

2-1. Contracts may be modified through the use of changes or change orders. As we shall see in this section, there is a clear distinction between change and authorized change orders.

2-2. **Definitions.** A change is any alteration within the scope of the contract, in the specifications, drawings, design, method of packing, shipment, time or place of delivery, or type of Government- furnished material, and in a cost reimbursement contract, in the estimated cost or fixed fee, if any. Further, in a fixed-price construction, time for performance may be decelerated. A change order is a written order signed by the Contracting Officer directing the contractor to make changes which the Changes clause of the contract authorizes the Contracting Officer to order without the consent of the contractor.

2-3. **The Nature of Change.** Most contract modifications come about unilaterally by action of the Contracting Officer. Although at common law one party to a contract cannot unilaterally change the obligations of both parties, the Government contract, by agreement of the parties, contains a Changes clause, pursuant to which the Contracting Officer may order modifications not only in the administrative details of Government contract administration, such as the cognizant financing office or the name of the Contracting Officer, but also in the important substantive matters of design and manufacturing methods, construction details, and place of delivery and packaging. The clause permits the Government to range widely in varying the technical aspects of the work statement, often with drastic effect on the contractor's production schedules, materials purchases, engineering effort and utilization of personnel. Drastic financial impact usually accompanies drastic changes. Of course, an equitable adjustment of the contract price is provided for in the clause.

2-4. Justification for such an unusual power is found in the need of the Government for flexibility in meeting the changing military needs of our country. In this way, new technology may be incorporated into the contractor's effort during contract performance. Amended shipping instructions and packaging requirements add further flexibility, and permit quick response to changed or unanticipated circumstances. Without this right, procurement response to military requirements would be severely hampered.

2-5. **Contract Clauses.** The entire concept of changes rests upon the advance agreement between the Government and the successful contractor in the original contract, manifested by a Changes clause. It is only through contract

agreement, therefore, that the unilateral action by the Contracting Officer is authorized. The particular Changes clause inserted in a contract varies with the type of contract entered into by the Government and a contractor. In other words the Changes clause in a fixed-price supply contract will differ slightly from the Changes clause in a cost-reimbursement supply contract. Notwithstanding, there is a common thread running through all changes clauses. The essential (and common) elements of a Changes clause include the requirements that (1) a change must be within the scope of the contract, (2) the order to change must be in writing, and (3) the ordered change must be at the order of an authorized Government officer.

2-6. **Types of Contracts and Changes Clauses.** An analysis of the several Changes clauses now in use discloses a wide variety of legal ramifications. The words embodied in the clauses have evolved through considerable years of use and have been extensively interpreted by the administrative and judicial tribunals. An analysis of the clauses relative to changes in various types of Government contracts will illustrate the current application of the clauses.

2-7. **Fixed-Price Supply Contract Clause.** The clause presently included in fixed-price supply contracts (a required clause) is as follows (FAR 52.243-1):

CHANGES - FIXED PRICE (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the contractor from proceeding with the contract as changed.

This basic fixed-price changes clause has five alternate provisions, covering architect-engineer services, other professional services, transportation services, and R&D contracts. For the full text of these alternate provisions see FAR 52.243-1, Alternates I through V.

2-8. **Analysis of Provisions of the Clause.** This section briefly covers the areas that are likely to be discussed by contracting parties when changes are introduced into a contract. There are seven major analysis points discussed below.

2-9. **"The Contracting Officer".** Changes under the clause are effected by the Contracting Officer, who is defined in the definitions portion of the contract. The definition as set out in the supply contract is:

"Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer. (FAR 52.202-1(b)).

2-10. It is important for the contractor to realize that not every Government official who appears at his plant or on a construction project is an authorized representative of the Contracting Officer for the purpose of directing changes. The contractor should beware of an overzealous engineer or inspector. When the contractor discovers that a Government representative with whom he made an agreement, or upon the basis of whose order he affected a change, was not authorized to do so, the contractor can contact the Contracting Officer who would have been authorized to make the change or agreement and who still has such authority and have him com-

mence action to ratify the unauthorized act. The ratification relates back to the date of the transaction ratified. It should be noted that there is no requirement that the Contracting Officer ratify any order or agreement effected by an unauthorized Government representative. It should also be noted that ratification authority may be controlled by local regulation, and, in fact, be restricted to levels of authority above the Contracting Officer.

2-11. **"By Written Order".** In a leading case, *Plumley v. United States,* 226 US 545 (1913), the Court held that there was a failure to reduce an oral change order to writing and that although substantial extra work was performed the contractor could not recover as the extra work was not agreed upon in the manner set out in the contract. The requirement that change must be by the written order of the Contracting Officer has been strictly enforced in numerous other Court of Claims and administrative tribunal decisions.

2-12. However, the Court of Claims in the case of *Armstrong & Co. v. United States,* 98 Ct. Cl. 519 (1943) decided that performance of work without a written change order gave rise to an "implied contract to pay" when the Government received the benefit of the work and the change was performed at the oral direction of a responsible officer. The Court of Claims has held also that a change ordered by an unauthorized representative and later overruled by the responsible officer after the work was completed should be paid for by the Government under the theory of an "implied in fact" contract.

2-13. The administrative appeal boards have, under the circumstances of the case being considered, decided that the Contracting Officer has in fact issued an oral change order, and his refusal to put it in writing was an administrative error which the board was empowered to correct. They have also advanced the theory that they will regard as done that which should have been done, thereby giving the effect of a written order. This is sometimes referred to as the "constructive changes" doctrine. This doctrine has not been extended to the contractor who voluntarily performs work beyond that required by the contract without any direction by a representative of the Government.

2-14. **"Without Notice to the Sureties".** The revision *without notice to the sureties* is in accordance with the performance bond under which the surety waives notice of modifications of the contract. The words are inserted to preserve full obligations of the surety under the performance bond even though notice of the change is not provided to the surety.

2-15. **"Make Changes if Within the General Scope of this Contract".** The general scope of the contract has been defined by the Supreme Court as what should be regarded as fairly and reasonably within the contemplation of the parties when the contract was entered into. The determination of what is within and what is without the "general scope" is a difficult one; dependent on the circumstances of the individual contract. A change involving a relatively high increase in cost required to accomplish it may, nevertheless, be within the scope of the contract.

2-16. If the change ordered is within the scope of the contract, it is a change contemplated by the parties and thus binding upon the contractor. If, however, the change is not within the scope of work contemplated by the parties, it is extra work which the contractor could legally decline to perform. If the work requested is beyond the scope of the contract, both parties should insure that funds are available for the extra work, that the requisites of formal advertising are met or authority for negotiation is obtained, and that any changes in required contract clauses are included in the agreement for additional work.

2-17. It has been held that the number of change orders is not nearly so important as the criteria of magnitude and quality in deciding whether a change comes within the scope of the contract.

2-18. The addition or deletion of units, i.e., the increase or decrease of a complete building in a construction contract has been held to be beyond the scope of the Changes clause. The elimination of a building has been described as a "cardinal change," and should be treated as a partial termination of the contract rather than eliminated by change order. The same rule applies generally when the scope of the contract is increased by the addition of one or more units.

2-19. The fixed-price supply contract Changes clause limits changes (1) to drawings, designs, or specifications where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (2) to the method of shipping and packing; and (3) to the place of delivery.

2-20. These limitations affect changes which might be made to special items. It is not anticipated the changes to off-the-shelf items will include a change in drawings, designs, or specifications.

2-21. "If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment." This clause defines the scope of costs which are to be considered in the computation of the equitable adjustment for a change to a supply contract. Note that the clause embodied in the supply contract includes the words, "whether or not changed by the [*change*] order."

2-22. *United States v. Rice,* 317 US 61. (1942), has been considered the authority for limiting consideration of costs to the part of the contract which has been changed. This would relieve the Government from responsibility for additional costs relative to the unchanged portion of the contract. The words "whether or not changed by the [*change*] order," negate this rule.

2-23. The determination of an equitable adjustment has not been reduced to a science. The remuneration to the contractor should be equated to value of the goods and services obtained from the contractor as opposed to the actual costs incurred by the contractor. A full discussion of this subject is found in this text.

2-24. "The contractor must submit any proposal for adjustment . . . under this clause within 30 days from the date of receipt of the written order." When claims are filed by the contractor after the 30-day period, they will generally be considered by the courts and administrative boards when Government rights are not prejudiced. In certain situations where the Contracting Officer has considered the contractor's request for additional costs after the deadline date and then rejected the claim, his consideration of the claim has given new life to it. The Contracting Officer has exercised the permissive action granted to him in the Changes clause. After giving due consideration to, and then refusing the claim, he cannot argue in an appeal to the administrative appeals board that the contractor's claim was filed on an untimely basis. His actions have in effect reinstated the claim.

2-25. The situation differs, however, when a change order has been accepted and the adjustment, if any, agreed to by both parties. If neither party is able to show that agreement was obtained by fraud, duress, collusion or mutual mistake, the agreement is binding as to both the contractor and the Government.

2-26. Even the Contracting Officer has the limitation under the clause that precludes consideration of claims after final payment. Final payment refers to payment under the entire contract. There is some support for the theory that final payment has not been made until claims can no longer be asserted under the contract. If the claim had not been stopped by a release or an accord and satisfaction, then the statute of limitations would finally eliminate the possibility of a claim.

2-27. "Failure to agree to any adjustment shall be a dispute under the Disputes Clause." The contractor's refusal to proceed under a change order would be a breach of contract if the change is within the general scope of the contract. A contractor could validly refuse to proceed if the change ordered was not within the scope of the contract. It would seem risky procedure on the part of the contractor to refuse to proceed even though damages might be enhanced if he could prove a breach of contract.

2-28. **Cost-Reimbursement Supply Contract Clause.** The clause presently in use (FAR 52.243-2) is mandatory and reads as follows:

CHANGES-COST REIMBURSEMENT
(APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specifically manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract

accordingly.

(c) The contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

This clause also has five alternates, similar to those for the fixed-price supply contract clause but with the addition of an alternate for facilities contracts. Again, for the full text of these alternates see FAR 52.243-2, Aiternates I through V.

2-29. **Analysis of Provisions in the Cost-Reimbursement Supply Contract Clause.** You will note that the areas subject to change and the method of effecting changes are the same here as for fixed-price supply contracts. However, since the cost-reimbursement contracts are priced and funded on the basis of estimated costs, with or without a fee, the clause reflects this in the provisions for equitable adjustment. The clause provides that if the change causes and increase or decrease in the "estimated" cost or "otherwise affects any other provision vision of this contract," an equitable adjustment shall be made. The fixed-price contract clause provides for adjustment only to contract price or delivery schedule, or both. This clause provides for adjustment to the estimated cost, delivery schedule, amount of fee and such other provisions of the contract as may be affected.

2-30. The provision in the fixed-price contract clause for the Contracting Officer to prescribe the manner of disposition of property made obsolete or excess as a result of a change is not considered necessary in a cost-reimbursement contract. The costs of such property would have already been charged to the contract.

2-31. The addition of paragraph (e) to the clause is necessary because all cost-reimbursement type supply contracts that are fully funded are required to use a Limitation of Cost clause and all that are incrementally funded are required to use a Limitation of Funds clause. These clauses place restrictions on the Government's obligation to reimburse the contractor and on the contractor's obligation to perform beyond the limitation set forth in the contract schedule. To avoid possible work stoppages, adjustments in estimated cost or fund allocations should be made without undue delay after a change is ordered.

2-32. **Research and Development Contracts.** The previous R & D clauses have been incorporated as alternate provisions to the basic clauses. See, for example, Alternate V to the fixed-price supply contract changes clause (FAR 52.243-1) and Alternate V to the cost- reimbursement supply contract (FAR 52.243-2). Both clauses have been rewritten without major change in substance.

2-33. **Analysis of the Clauses.** The Changes clauses for Research and Development contracts are identified as "additional" clauses and not necessarily required. They may be inserted in accordance with Departmental procedures where the nature of the work justifies and lends itself to such change control. In many cases the "Description of Work" is not sufficiently definitive to provide a base upon which a change might be effected.

2-34. The requirement in supply contracts that drawing, design or specification changes be applicable only to supplies "specially manufactured for the Government" is not applicable to R&D contracts where the work involved is on a Government program. Also, there is seldom any substantial production of supplies on a Research and Development contract; therefore, the Research and Development Changes clauses need not include the *specially manufactured for the Government* provision. One other feature of the Research and Development Changes clauses is that changes are permitted in the place of inspection and acceptance as well as the place of delivery.

2-35. **Time-and-Materials or Labor-Hour Contracts.** Where a time-and-materials or labor-hour contract is contemplated, the following clause shall be inserted (FAR 52.243-3):

CHANGES-TIME AND MATERIALS OR LABOR HOURS (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(4) Amount of Government-furnished property.

(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) ceiling price, (2) hourly rates, (3) delivery schedule, and (4) other affected terms, and shall modify the contract accordingly.

(c) The contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the contractor from proceeding with the contract as changed

Note that the 30-day period may be varied in accordance with agency procedures.

2-36. **Construction Contracts.** In construction, demolition and dismantling contracts, the Contracting Officer may make certain changes within the contract. These changes and the conditions under which they may be made are outlined below.

2-37. **Current Changes Clause.** The clause presently in use (FAR 52.243-4) follows:

CHANGES (APR 1984)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the Government-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" (hereafter referred to as proposal) based on defective specifications, no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with the defective specifications.

(e) The contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph (b) above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

2-38. **Analysis of the Changes Clause.** Analysis of the Construction contract clause as used in fixed-price contracts may best be made on a paragraph by paragraph basis.

2-39. Paragraph (a), like a counterpart provision in the clause in fixed price supply contracts, establishes the authority of the Contracting Officer to make changes within the general scope of the work. The clause makes it clear, however, that the change may relate to any aspect of the work to be performed under the contract. To effect this clarification, the clause sets forth illustrative categories for the making of changes, which embrace changes not only in the drawings, designs and specifications, but also changes in the method and manner of performance, in the provision of sites and services, or requiring acceleration in performance. These categories are intended to be descriptive of the kind of change actions which historically have been accommodated under the Changes clauses. Deceleration actions not related to a change or unreasonable delay in the issuance of a change order were intentionally omitted since they are in the nature of a suspension, delay, or interruption covered by the Suspension of Work clause, which is a mandatory clause. Hence, it is not intended that the Changes clauses cover actions which (1) are clearly denoted as a suspension order or (2) have as a primary purpose the effecting of a suspension, delay, or interruption of the work. While the Contracting Officer is authorized to make changes in any aspect of the work itself, the clause does not authorize him to alter any of the collateral aspects of contract performance, such as are covered by the payment and so-called boilerplate clauses.

2-40. Paragraph (b) of the clause (for which there is no counterpart provision in the clause in fixed-price supply contracts) concerns "constructive changes." This paragraph provides that other written or oral orders (including directions, instructions, interpretations, or determinations) from the Contracting Officer which causes a change within the general scope of the work will be treated as changes under the clause. However, as a prerequisite to the consideration of a claim based on a constructive change, the contractor must notify the Contracting Officer that he considers such order to be one directing a change in the work to be performed.

2-41. Paragraph (c) of the clause, (for which there is no counterpart provision in the clause in fixed-price supply contracts) provides that no order, statement, or conduct of the Contracting Officer shall be treated as a change, except as specifically provided for in the clause itself. With respect to constructive changes, accordingly, only those provided for in paragraph (b) may be considered under the Changes clause. This paragraph does not, of course, preclude the contractor from seeking such administrative relief as may be available under another clause contained in the contract, such as the Suspension of Work or a Government-furnished property clause. Likewise, it does not preclude the contractor from seeking judicial relief for breach of contract.

2-42. Paragraph (d), like a counterpart provision in the clause in fixed-price supply contracts, establishes the contractor's right to an equitable adjustment in situations involving the making of changes. More specifically, the paragraph states that if any change effected under the clause causes an increase in the cost of, or in the time required for, the performance of any part of the work, "whether or not changed by any such order," an equitable adjustment is to be made.

2-43. A significant revision in the clause is the adoption of an additional text designed to eliminate the application of the "Rice" doctrine and has been accomplished primarily by adding the phrases "any part of the work" and "whether or not changed". (The *Rice* doctrine is the rule derived from the case *United States v. Rice*, 317 US 61 (1942) which limited consideration of costs to the part of the contract which had been changed.) These phrases now appear in the Changes clause of the general provisions for standard supply contracts. An equitable adjustment clearly encompasses the effect of a change order upon any part of the work, including delay expense; provided, of course, that such effect was the necessary, reasonable, and foreseeable result of the change.

2-44. Except for defective specifications, the Changes clause will continue to have no application to any delay prior to the issuance of a change order. An adjustment for such types of delay, if appropriate, will be considered under the provisions of the Suspension of Work clause.

2-45. A further revision in the equitable adjustment provision in paragraph (d) has been made by reason of the recognition in the clause of constructive changes under paragraph (b). Under this revision, a contractor who seeks relief in a constructive change situation not involving

defective specifications cannot recover for any costs arising more than 20 days prior to his furnishing notice as prescribed under paragraph (b). Accordingly, a cost limitation which has heretofore been prescribed for suspensions arising under the Suspension of Work clause will also be prescribed for constructive changes arising under the Changes clause. The 20 day limitation is not waivable, and costs may not be recovered contrary to this limitation.

2-46. Notwithstanding the inapplicability of the 20 day incurrence limitation to constructive change orders involving defective specification, the notice required by paragraph (b) must be given. Moreover, paragraph (d) also limits the equitable adjustment to costs reasonably incurred in attempting to comply with defective specifications. Thus, the time of the notice in relation to when the contractor becomes aware of the defect could be a factor in determining reasonableness of costs. Of course, no adjustment is intended to be allowed in connection with defective specifications unless the Government is responsible.

2-47. Paragraph (e) requires the contractor to submit to the Contracting Officer a statement setting forth the general nature and monetary extent of his claim for an equitable adjustment within 30 days after the receipt of a written change order issued under paragraph (a) or within 30 days after the furnishing to the Contracting Officer of a notice pursuant to paragraph (b). The 30-day period may be varied according to agency procedures. The paragraph also indicates that in a constructive change situation, arising under paragraph (b), the contractor may include his claim statement with this notice.

2-48. Paragraph (f) states that a claim for an equitable adjustment under the clause must be asserted prior to final payment.

2-49. Note that, curiously, the disputes provision does not appear in the fixed-price demolition, dismantling or construction contract changes clause while is retained in other fixed-price contract changes clauses. The existence of an administrative or judicial remedy is established by the Disputes Act and implementing disputes clauses. Accordingly, there is no need to reiterate in clauses covering particular aspects of the contractual agreement the availability of that remedy. It must be emphasized that deletion of a separate disputes provision from the Changes clause (or from the Differing Site Conditions clause or the Suspension of Work clause) does not alter or diminish in any respect the applicability of the Disputes clause or the jurisdiction of administrative boards or courts, which will continue to be subject to the limitations imposed by the Disputes Act.

2-50. **Differing Site Conditions Clause.** The clause presently in use (FAR 52.236-2) is required in fixed-price construction, demolition, dismantling and "removal of improvements" contracts exceeding small purchase limitations and, at the Contracting Officer's discretion, permissive within such limitations. It reads as follows:

DIFFERING SITE CONDITIONS

As prescribed in 36.502, insert the following clause in solicitations and contracts when a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The Contracting Officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

DIFFERING SITE CONDITIONS (APR 1984)

(a) The contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice

may be extended by the Contracting Officer.

(d) No request by the contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

2-51. A clause of this type is considered necessary in fixed price construction contracts where the contractor may encounter unknown and unanticipated physical conditions at the site of the project which may either delay performance or increase the costs, or both. One of the purposes of the clause is to eliminate the tendency of contractors to submit inflated bid prices based on the worst physical conditions that might be encountered, by providing simple and quick relief for changed conditions. To assure close pricing and truly competitive bids, the Government assumes liability for what is described as naturally different or unknown physical conditions.

2-52. Other than the change in title, the major difference in this clause and a previous "Changed Conditions" clause is the addition of the phrases, "any part of the work" and "whether or not changed." These phrases were added to conform with similar provisions of the revised Changes clause for construction contracts. This clause also provides for downward as well as upward adjustment in contract price and completion time, a point often overlooked.

2-53. **Examples of changes.** At this point perhaps a brief treatment of some typical situations in which change or at least the question of change invokes the application of a Changes clause is in order.

2-54. **Changes in Specifications or Drawings.** The question in each case is whether the change ordered by the Contracting Officer falls inside or outside the scope of the Changes clause. If the change is outside the scope of the contract clause then, of course, the contractor will not receive the benefit of the equitable adjustment provided for by the clause. Some specification changes are so obvious that it is a mystery how a question as to compensability for the change could arise. Where additional work on a building is called for by the Government and the work called for was not required by the contract, such a specifications change would be within the scope of the Changes clause and compensable. Also, where the specifications provide for alternative methods of performance and after approval of one method the Government insists on the alternative method, such an order is a change falling within the scope of the Changes clause.

2-55. Some changes in specifications and drawings, however, are not so obviously within the scope of the clause. In the situation where an honest misinterpretation of the meaning or extent of the specifications occurs, the insistence by the Government on specifications not contained in the contract presents a problem. Ordinarily, where the misinterpretation is by the Government, the requirement that the contractor proceed on different specifications than those contained in the contract places the changes within the scope of the Changes clause and any additional cost to the contract is compensable. On the other hand, where the contractor misinterprets the specifications, a different result usually follows and the change is not compensable under the equitable adjustment provision of the Changes clause. An exception is frequently made where the contractor's misinterpretation is reasonable under the circumstances.

2-56. Frequently the change in the specifications occurs when material or procedures are substituted. In the vast majority of cases, a change in either materials or procedures is a change falling within the scope of the Changes clauses and is compensable where equity requires adjustment. It probably goes without saying that where the contractor requests a deviation in either material supply or procedure, an approval by an authorized Government representative is a change under the Changes clause.

2-57. **Changes in Performance.** Government orders to change either the method of packing or shipping items supplied under the contract are such changes where the contractor sustains increased costs. The same reasoning would apply where the place of delivery is changed by Government order and the contractor suffers additional expense.

2-58. **Constructive Changes.** A constructive change is also called a "change by implication" and occurs when the Government, by its actions, changes the contract without specifically going through the "Changes" clause formalities. A constructive change order has been defined as an oral or written act or omission by the Contracting Officer or other authorized Government official which is of such a nature that it is construed or inferred to have the same effect as a

formal written change order under the Changes clause.

2-59. In Government contract law, the concept of constructive changes is well established. FAR Part 43 and the concomitant Notification of Changes clause (52.243-7) are the most recent manifestations of recognition of such concept.

2-60. Board decisions have recognized that an informal requirement for performance of additional work, for example, is substantially equivalent to a formal requirement and must be governed by similar principles. The significance of constructive changes as a responsibility of the Government representative, and as a form of relief to the contractor, should be recognized and understood by both parties so that they may be able to better identify conduct and actions which may be interpreted as constructive change orders.

2-61. The 1968 revision to the Changes Clause for Construction Contracts included a provision expressly designed to cover constructive changes, and was the first standard clause to do so. The present FAR provision continues this recognition. After identifying normally authorized changes to be made under the clause, a paragraph is added which provides that other written or oral orders including directions, instructions, interpretations, or determinations from the Contracting Officer which cause a change within the general scope of work will be treated as changes under the clause. As a prerequisite to the consideration of a claim based on a constructive change, however, the contractor must notify the Contracting Officer that he considers such an order to be one directing a change in the work to be performed.

2-62. Erroneous interpretations by the Contracting Officer, or his representative, may lead to actions which constitute constructive changes. The insistence by an inspector that the contractor perform to a higher standard of quality than that called out in the contract specification has been held to be a change. The inspector was considered to have acted as a representative of the Contracting Officer. An interpretation of the contract language by the Contracting Officer, either voluntarily or at the request of the contractor, may be construed as a change if the interpretation calls for something more than the contract requires.

2-63. Defective specifications may lead to a finding of constructive change if the defect should have been corrected by a change. There is an implied warranty that if the Government's specifications are followed, the item produced will meet the contract requirements. Specifications may be considered defective because of simple error, inadequate detail, practical impossibility of performance, or a combination of these.

2-64. Since the Contracting Officer or his authorized representative has authority to issue change orders, it should not be too difficult for the Government to avoid most constructive changes if these individuals understand the problem and are alert to the implication of their actions. The prudent contractor, if he complies with directions from other Government representatives, will confirm such direction with the Contracting Officer. The Contracting Officer, on the other hand, should see that all Government personnel having contact with the contractor, recognize the limitations on authority and thus avoid wrongfully committing the Government. Furthermore, the Contracting Officer should recognize that the courts are likely to hold that silence on his part constitutes acquiescence to the change if it can be shown that he had knowledge of the directions or interpretations given to the contractor.

3. MODIFICATIONS OTHER THAN UNDER CHANGES CLAUSES

3-1. Although most modifications fall under the category of Changes, many are generated under other contract clauses, including "Differing Site Conditions," already discussed. Also, discussed *infra* are modifications arising from "Government Furnished Property" matters, the Default clause, partial termination for convenience of the Government and the settlement of disputes by agreement. Many other types of modifications occur. Some of these modifications are presented in the following sections.

3-2. **Delays and Suspension of Work.** Government contracting, as with any commercial undertaking, may experience delays and suspension of work prior to accomplishing a contract objective. This section discusses how these problems may come about and how they may be treated once they are recognized.

3-3. **The Problem of Delays.** A difficult problem in Government contracts is concerned with those delays in contract performance resulting from some act or failure to act on the part of

the Government and its relationship to contract modifications. Some of these delays are the result of the Government's failure to take timely action, such as delays in furnishing drawings and specifications, delays in ordering changes, or delays in furnishing Government property. Other delays may be directed by the Government in such cases as "Suspension of Work" or "Stop Work Orders".

3-4. There are many clauses in Government contracts that treat the problem of delays. Most of them recognize and provide for a time adjustment or an extension of time for performance of the contract work as a result of Government-caused delays. Not all of these clauses provide for a monetary adjustment because of such delays. If there is no remedy for delayed performance or increased cost of performance under the terms of the contract, the contractor must look to the courts for the relief. In general, however, the courts have held that the Government is not liable for increased costs from delays to the contractor's performance unless there was an element of negligence on the part of the Government or unless the delays were unreasonable.

3-5. An example of a court ruling on delays can be seen in *Magoba Construction Co. v. United States*, 99 Ct. Cl. 662 (1943) where the court held that the Government had delayed the contractor in the process of ordering a number of changes but that the delay was reasonable under the terms of the Changes clause and hence there was no breach of contract. In *Chouteau v. United States*, 95 US 61 (1877), the court interpreted the Changes clause as contemplating some delay in ordering changes on a project when both parties knew there would be changes during the course of performance, and held that the Government was not liable for the increased cost incurred by the contractor because of reasonable delay by the Government in ordering changes.

3-6. The courts have emphasized that the basic question is the reasonableness of the delay and that the reasonableness must be determined on the basis of the facts of each contract. The rule seems to be firmly established now that an unreasonable delay in issuing changes is a breach of contract by the Government. In reviewing cases involving delay or failure to furnish material or Government property the courts have looked primarily to whether the Government has made a reasonable effort to furnish the property. In the cases holding for the contractor, there has been some implication that the Government did not act with proper diligence. This would lead to the conclusion that compensation for delays will be allowed only when due to the fault or negligence of the Government.

3-7. **Government Delay of Work Clause.** This clause is required in fixed-price supply contracts for other than commercial or modified-commercial items. It is optional for fixed-price service contracts, or for commercial or modified-commercial supplies. The clause provides for equitable adjustment for delays and interruptions caused by acts, or failures to act, of the Contracting Officer not otherwise specifically provided for in the contract. The clause charges the Contracting Officer with the affirmative duty to take whatever appropriate action is necessary to end or otherwise dispose of unordered delays or interruptions in the work. It should be noted that the clause does not authorize the Contracting Officer to delay, suspend, or interrupt the work, nor can it be used as a basis for such actions. The clause (FAR 52.212-15) is quoted below:

GOVERNMENT DELAY OF WORK
(APR 1984)

(1)(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the contractor shall have notified the Contracting Officer in writing of the act or failure to act involved, and (2) unless the claim, in an

amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

3-8. **Suspension of Work Clause.** A clause similar to the Government Delay in Work clause is mandatory for fixed-price construction and architect-engineer contracts. A significant difference, however, is that the Suspension of Work clause expressly provides for suspension, delay, or interruption of the work at the Government's convenience as well as providing for constructive suspension, delay, or interruption by the Contracting Officer's failure to act where the contract requires such actions. As in other "delay clauses," the clause establishes machinery for administrative settlement on a fair and speedy basis where the contract does not otherwise specifically provide for equitable adjustment for delays and interruptions. The clause (FAR 52.212-12) is quoted below.

SUSPENSION OF WORK
(APR 1984)

(a) The Contracting Officer may order the contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding Profit) necessarily caused by the unreasonable suspension, delay or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

3-9. The provision for expressly ordering a suspension, delay, or interruption is intended for use under strict supervision, and for as limited a period as practicable. Such orders can result in the Government incurring costs by reason of standby time. If the Contracting Officer orders the contractor to stop work in a situation in which no delay amounting to a breach of contract occurs, the Government has given away one of its rights because the order is very likely to be construed as an actual suspension of work order. If, on the other hand, the Government has a contractual duty to act, failure to act may be construed as a constructive suspension of work. The Government representative must therefore be aware of his rights and duties under the contract and must carefully consider them before taking any action that will affect the contractor's time for performance.

3-10. The interpretation by the courts that reasonable delays are to be expected under the contract creates a dilemma for the Contracting Officer. If he issues an actual order to suspend the work, the contractor may take the order as an admission that the entire period subsequent to the order is unreasonable and that he is entitled to compensation for the full period of the suspension. *E.V. Lane Corp.*, ASBCA No. 7232 (1962). On the other hand, if the Contracting Officer recognizes an actual need for stopping work, he should not allow the contractor to waste Government funds by continuing to work.

3-11. **Concurrent Delays.** A feature of the clause that deserves special mention is that pertaining to concurrent delays. It states that no adjustment shall be made for suspension, delay or interruption to the extent that performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor. The determination of what delays warrant adjustment is a job for both the purchasing officer and the contract administration officer working together. Technical personnel along with production and contracting representatives must assist in deciding which delays should be recognized. Program Evaluation Review Techniques and Critical Path

Charts are useful when a large number of recurring delays are involved.

3-12. **Delays Not Covered by Contract.** Delay claims covered by contract clauses simply provide an administrative handling of what would otherwise be a contractor's claim for breach of contract by the Government. But does the Contracting Officer have authority to settle, by supplemental agreement, delay claims where no such clauses are included in the contract? The Court of Claims in the 1963 case of *Cannon Construction Co. v. U.S.*, 319 F.2d 173, specifically approved a settlement of a breach claim, citing the implied authority of the Contracting Officer to settle claims arising out of performance and stating:

> *Significantly, plaintiffs have cited us no cases where this court has invalidated, on the ground of lack of authority any agreement made by the Contracting Officer in the settlement of a claim for damages for breach of contract. On the contrary we have held on numerous occasions that compromise settlements were valid and binding on both parties.*

The agreement, the court found, was an accord and satisfaction of the claim. This decision was followed by the same court in *Brock & Blevins Co., Inc., v. U.S.*, 170 Ct Cl. 52; 343 F.2d 951 (1965) and has not been overruled. The Comptroller General, however, as recently as December 22, 1964, emphatically stated that Contracting Officers do not have authority to settle breach claims (B-155343), citing *Cramp v. United States*, 216 US 494 (1910) among other cases, which so held, noting also that procurement appropriations are not available to pay damages. The Comptroller General reserves to himself (under the claims settling authority of section 71 of the Budget and Accounting Act of 1921, cited as 31 U.S.C. § 71) the decision as to whether the contractor should be paid under these circumstances. Of course, the contractor could also resort to the courts in a suit for breach of contract. Although, as noted above, the former Court of Claims has upheld supplemental agreements disposing of these claims, the circumspect Contracting Officer will be considerably deterred by the Comptroller General's steadfast refusal to follow these court decisions.

3-13. Another approach would be to retreat to the contract document itself and insert language (with the contractor's approval) calling for administrative disposition of such claims generally, or perhaps insert belatedly a "Government Delay of Work" or "Suspension of Work" clause.

3-14. The Armed Services Board of Contract Appeals (*ASBCA*) has also recognized a letter from the Contracting Officer ordering work stoppage and calling for an equitable adjustment as providing an administrative alternative to suit where no clause was present. *Blount Brothers Construction Co.*, ASBCA NO. 5267, 60-2 BCA 2664.

3-15. **Stop Work Orders.** Since fixed-price supply and research and development contracts no longer require a Suspension of Work clause, an "additional clause" may be used where a work stoppage is desirable for reasons such as realignment of programs or advancements in the state of the art. The use of Stop Work Orders is carefully circumscribed, however. For instance, such an order may be used pending a decision to terminate for convenience but it cannot be used pending a decision to terminate for default. Nor can a Stop Work Order be used in lieu of a termination notice after a decision to terminate has been made. Since Stop Work Orders may result in standby costs, prior approval of their issuance and cancellation is required at a level above the Contracting Officer. The clause as specified, for example, in FAR 52.212-13 is quoted below:

STOP WORK ORDER
(APR 1984)

> *(a) The Contracting Officer may, at any time, by written order to the contractor, require the contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either —*
>
> *(1) Cancel the stop-work order; or*
>
> *(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.*

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if —

(1) The stop-work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The contractor asserts a claim for the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim asserted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

This clause also has an alternate provision, to be used in cost-reimbursement contracts.

3-16. **Acceleration.** Acceleration involves contractual speedups. They may occur in a number of ways, but the most common are (1) by the Government representative requiring delivery in advance of that specified in the contract, or (2) by the Government representative adding something in the way of additional performance, but failing to extend the delivery date in proportion to the additional work to be performed. Orders to speed up performance or perform by an earlier date than that required by the contract are rather unique in that they affect the time of performance rather than the work, and, therefore, are not normal changes to a contract. Also acceleration orders can be classified as being either actual orders or constructive orders.

3-17. **Actual Acceleration Orders.** If the clause specifically provides for changes in the time of completion or delivery, the parties have created the right in the Contracting Officer unilaterally to order an acceleration. Such cases, as might be expected, are comparatively rare.

3-18. Specifications are always subject to change under the Changes clause. If the specifications contain the completion or delivery schedule, an acceleration order may be allowed as a change under the Changes clause. This has occurred principally in construction contracts. Even where the schedule is not in the specification, and the Changes clause does not cover changes in the schedule, the Board of Contract Appeals has allowed acceleration under the Changes clause. In *Ensign-Bickford Co.*, ASBCA NO. 6214, the Board accepted the fact that a direct acceleration order falls within the Changes clause even though the clause contains no such specific provisions. It should be noted, however, in this case, both parties agreed to the order and the dispute was over the amount of the equitable adjustment.

3-19. The obvious answer, in the event an acceleration is required and no provision is present in the Changes clause, is to negotiate a bilateral agreement, adjusting the schedule. This, of course, permits the contractor to refuse to accelerate or to treat the order as a breach of contract. In either case, by unilateral order or bilateral agreement, the contractor is entitled to an equitable adjustment if the acceleration causes an increase in his costs.

3-20. **Constructive Acceleration.** By far the greater number of accelerations involve constructive rather than actual acceleration orders. Probably the most common situation involves an order by the Contracting Officer to meet the original delivery schedule despite the fact there would have been intervening excusable delays. In such cases, the Contracting Officer should have determined a new and current schedule prior to ordering the accelerated effort. If the contractor is not given credit for the excusable delays, the Contracting Officer may be held to have constructively shortened this schedule by the period of the delays. This has the same effect as telling the contractor to reduce his time of performance.

3-21. It is sometimes difficult to identify a request or order of the Contracting Officer as a direct order to accelerate. In one case the Board of Contract Appeals found that a statement by the Contracting Officer that work should proceed and that later consideration would be given to delays was not an acceleration order. The Contracting Officer, by his statement, did not insist upon compliance with the original schedules. In another case the Board found no acceleration when the contractor increased speed because of fear of a termination. The evidence showed no direct threat of termination, but only some indication that the Contracting Officer was anxious to get the job completed. This would

imply, however, that a threat of termination based on the original contract schedule would be construed as an acceleration if the contractor were entitled to a schedule adjustment because of excusable delays.

3-22. In still another case, *Mechanical Utilities, Inc.*, ASBCA No. 7345 (1962), the Board held that there was no acceleration order when the Contracting Officer notified the contractor that he intended to terminate for default because of failure to meet his progress schedule. The contractor was behind schedule but he was entitled to some excusable delays which he had not requested. The Board interpreted the Contracting Officer's notice as a warning to the contractor to either request the excusable delays or catch up on his schedule. It is interesting to note that in this same case, after the contractor had requested the excusable delays, the Board found an order to meet the schedule to be an acceleration order.

3-23. In *Keco Industries, Inc.*, ASBCA No. 8900 (1963) the Board held that a direct refusal to grant an excusable delay was an acceleration in this situation where large liquidated damages would be imposed on the contractor if he failed to meet delivery schedules. In another case the Contracting Officer held his decision in abeyance until the work was completed. In that case the Board found that there was no direct order to accelerate and hence held that there was no acceleration by the Government. From these cases it would appear that for the Board to rule in favor of the contractor, it must be shown that the Contracting Officer knew of the acceleration and that the acceleration was at least related to the Government's refusal to grant excusable delays.

3-24. **Variations in Quantity.** Variations in quantity of items, either a shortage or an overage, may be due to such factors as mass production and machine-packaging of modern manufacture. Thus, in some cases, variations in quantity may be a normal incident of production. The FAR covers several possible variations in quantity.

3-25. The Contracting Officer shall insert the following clause in solicitations and contracts where a fixed-price supply contract or a services contract involving the furnishing of supplies is contemplated (FAR 52.212-9):

VARIATION IN QUANTITY
(APR 1984)

(a) A variation in the quantity of any item called for by this contract will not be accepted unless the variation has been caused by conditions of loading, shipping, or packaging, or allowances in manufacturing processes, and then only to the extent, if any, specified in paragraph (b) below.

(b) The permissible variation shall be limited to:

( ) Percent increase (Contracting Officer insert percentage)

( ) Percent decrease (Contracting Officer insert percentage)

*This increase or decrease shall apply to ( ).**

** Contracting Officer shall insert in the blank the designation(s) to which the percentages apply, such as (1) the total contract quantity, (2) item 1 only, (3) each quantity specified in the delivery schedule, (4) the total item quantity for each destination, or (5) the total quantity of each item without regard to destination.*

3-26. Quantities in excess of contract requirements, including any permissible variation in quantity, will be treated as being delivered for the convenience of the contractor. The Government may retain such excess quantities up to $100 in value without payment therefor and the contractor waives all title or interest therein. Quantities in excess of $100 may be returned at the contractor's expense or retained and paid for at the contract price. FAR 52.212-10, Delivery of Excess Quantities of $100 or Less (APR 1984) covers these circumstances.

3-27. **Variations of Quantity-Construction Contracts.** Where a fixed-price construction contract authorizing a variation in the estimated quantity of unit-priced items is contemplated, the clause at FAR 52.212-11 is mandated:

VARIATION OF QUANTITY
(APR 1984)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity, an equitable adjustment in the contract price shall

be made upon den and of either party. The equitable adjustment . .ll be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the contractor may request, in writing, an extension of time, to be received by the Contracting Officer within 10 days from the beginning of the delay, or within such further period as may be granted by the Contracting Officer before the date of final settlement of the contract. Upon the receipt of a written request for an extension, the Contracting Officer shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the Contracting Officer, is justified.

3-28. **Miscellaneous Modifications.** There are several ways in which a contract may be modified as a result of cost, supplemental agreement, and other factors. The following paragraphs outline some of the modification factors.

3-29. **Options.** An option is a continuing offer. In Government contracts it is an offer by the contractor in the initial contract to sell additional quantities of the items purchased in the initial contract, often at the same price and terms contained in that contract. The duration of this offer is spelled out and the consideration to the contractor for keeping the offer open is included in the price of the original purchase quantities. The option is exercised only if it is determined that the requirement covered by the option fulfills an existing need of the Government, that funds are available, and that the exercise of the option is most advantageous to the Government, price and other factors considered.

3-30. **Initial Provisioning.** When a new item is introduced into the defense inventory, an initial purchase of spare items and spare parts is also made as a part of the initial buy. Actual selection and ordering, however, is implemented by supplemental agreement, the procedure for which is included in the initial contract.

3-31. **Novation Agreements.** Occasionally a defense contractor's business is sold. Although the contractor cannot assign his contracts, the Government recognizes the successor in interest by entering into a novation agreement. When a corporation changes its name, the contract will usually be amended to recognize this fact.

3-32. **Limitation of Costs.** The Limitation of Cost clause, which effects a ceiling on cost-type contract obligations, may be raised by the Contracting Officer. This results in a contract modification on a unilateral basis.

3-33. **Contract Adjustment.** Under authority of PL 85-804, the "Contract Adjustment Act," military services are empowered to modify contracts (as well as recognize other contract claims) on bases not cognizable by Contracting Officers. The Act empowers the President to authorize agencies whose functions are connected with the national defense to enter into, amend, and modify contracts without regard to other provisions of law relating to making, performing, amending or modifying contracts when such action would facilitate the national defense. This authority gives contracting activities broad discretion in three general areas: (1) amending contracts without consideration; (2) correcting mistakes and (3) formalizing informal commitments. FAR Part 50 covers such "Extraordinary Contractual Actions".

3-34. **Value Engineering Changes.** Another form of contract modification achieved by either a change order or supplemental agreement is the Value Engineering change. Where appropriate clauses are included in the contract, the contractor may submit Value Engineering Change Proposals (*VECP's*) which, if accepted by the Procuring Contracting Officer, are implemented into the contract. The details of such provisions may be found, for example, in FAR Part 48.

CHAPTER 11

EQUITABLE ADJUSTMENT

This chapter will address itself to the consideration of various approaches to measuring equitable adjustment. In the absence of an objective standard, the quantum of "equitable adjustment" has been left largely to the discretion of the Contracting Officer. Those cases where agreement respecting adjustment cannot be reached with the contractor furnish the rule, the standard, or the measure with which the bulk of this chapter is concerned.

2. The concept of "equitable adjustment" is one of the larger unresolved issues in Government contracts. Although the phrase appears expressly or implicitly in the "adjustment clauses" e.g., "Changes", "Government Property", "Differering Site Conditions", et al., the determination of what constitutes an equitable adjustment has not been objectively qualified or quantified by the regulation.

3. The term "equitable adjustment" is to be construed in the ordinary meaning, to connote a "fair", "reasonable", "just", or "right" arrangement or settlement. In Government contracts, this involves a determination as to the contract price, the period of performance, or both.

1. HISTORICAL PERSPECTIVE

1-1. Equitable adjustment may be said to be a derivative of two early doctrines which acted as the basis of contract compensation. These early doctrines are explained in the following paragraphs as they relate to equitable adjustment.

1-2. **Common Law Background.** Under the common law, one was compensated for goods sold and delivered or services rendered under the equitable doctrines of *"quantum meruit"* or *"quantum valebat"*.

1-3. **Quantum Meruit.** Literally translated, *quantum meruit* means "as much as he has deserved." The doctrine applied to situations where a person was employed to do work for another without an agreement as to compensation. In such case the law would imply a promise from the employer to the workman that he would pay him "as much as he may merit." Under the common law pleading of *assumpsit* (simple contract), the workman would aver a promise to pay what he reasonably deserved and then aver that his effort was worth a certain sum of money.

1-4. **Quantum Valebat.** *Quantum valebat,* on the other hand, pertained to goods. The term, translated, means "as much as it was worth." When goods were sold without specifying a price, the law implied a promise by the buyer to pay the seller "as much as they were worth." The declaration (pleading) would then aver that the buyer promised to pay as much as the goods were worth, and that the goods were worth a certain sum which the buyer refused to pay.

1-5. These doctrines, it might be noted, have been incorporated into the substantive law, and recovery in equity on the theory of implied contract may still be made under either doctrine in present jurisdictions. Early Government contracts did not contain "Changes" clauses. When changes were ordered by an authorized agent of the Government, acting within the scope of his authority, compensation was due the contractor under the equitable doctrines of the common law.

1-6. The earliest "Changes" clause calling for what is now known as an "equitable adjustment" appeared in a contract for the construction of an iron-clad vessel in 1863. A clause in the contract provided that "alterations" might be made while the vessel was under construction. In straightforward language the clause stipulated that if the alterations "caused extra expense, that should be paid for, if they effected a reduction in cost, that should be subtracted from the contract price." The changes, under the circumstances of those times, were quite inevitable for it can be noted that the Court of Claims had occasion to consider the claims under that contract.

1-7. Various "Changes" clauses used by the Departments of the Government were standardized by the Treasury Department, and since 1921 have been published in standard forms of contracts for use by the Executive Branch. The standard clauses have since that time required an "equitable adjustment" in the event of changes made within the scope of a contract.

1-8. Equitable adjustment is a two-way street. Depending on the circumstances, either the contractor or the Government may be enti-

tled to an adjustment in price, period of performance, or both. It should be noted, also, that both parties may be entitled to some adjustment, depending on the nature of the change. In such case, the party suffering the final detriment, by the preponderance of proof, will be due an adjustment from the party finally benefiting. Or, as it often happens, the interchange of the benefit and detriment of a change may result in a "wash-out", wherein there is neither a gain nor a loss in the respective positions of the parties.

1-9. Entitlement is a prerequisite of equitable adjustment. Before the issue of quantum can arise, the conditions precedent to an equitable adjustment must exist For example, is the change within the scope of the Changes (or other applicable) clause? Was the change made in fact? Were the procedural formalities of the clause observed? Is recovery precluded by "laches" or "estoppel"?

1-10. Where the government fails to meet its contract duties the concept of equitable adjustment closely approximates the legal doctrine of damages. In the case of *Hadley v. Baxendale,* (9 Exchequer 341 (1854)), it was held that damages for breach of contract "such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable breach of it." The law refers to such damages as "direct". Those not arising naturally, or not having been "in the contemplation of both parties", are generally referred to as "consequential" damages. Direct damages are recoverable; consequential damages, as a rule, are not recoverable. The principle of the rule of *Hadley v. Baxendale* has been applied to equitable adjustments in distinguishing the costs arising therefrom, as we shall see later in this chapter.

1-11. Finally, one should at all times bear in mind that there is no ultimate correct technique for pricing-out a change. In the absence of determinative guidelines, the pricing of changes has been a recurrent problem. As a result of various Board of Contract Appeals and court decisions, certain rules have emerged which indicate that, in those particular circumstances, a given method is preferable to another. However, there appears to be no general agreement as to the basic method or approach that is to be used in pricing changes. Two schools of thought exist in this respect: the Reasonable Value or "objective" approach versus the Specific Cost or "subjective" approach. Currently, the prevailing method appears to be a combination of the two.

2. MEASUREMENT

2-1. The incorporation of the word "equitable" in the various Changes clauses purports the connotation of equity to both the Government and the contractor. But what is "equitable" is generally a question of fact, which boils down to being a question of judgment. Judgments are normally substantiated by reference to accepted fundamentals, or by reasoned conclusions based on logical principles. In the absence of fundamental guidelines, the measurement of an equitable adjustment must rely upon the latter method. No preset formula is available to furnish a relatively simple answer to the problem of pricing a change. What constitutes an equitable adjustment remains a question to be decided on the facts of each case.

2-2. At this point, it might be noted that there is no objection to a predetermination of the method to be used to calculate an equitable adjustment. The parties may agree to such preset formula at the time of negotiating the basic contract where there may be reason to believe that fundamental conceptual difficulties may later arise.

2-3. **Approaches to Measuring Equitable Adjustment.** Basically, there are two fundamental concepts, and several approaches, to measuring an equitable adjustment. They can be so identified and so characterized because they are a matter of record, having been the subject of appeals and litigation: (1) the Reasonable Value or "Objective" Concept; (2) the Specific Cost or "Subjective" concept; (3) the Total Cost Approach; (4) the "Jury Verdict" Approach; and (5) the "Bruce Case" Rule.

2-4. **The Reasonable Value Concept.** The proponents of this approach point out that the appeals boards and courts have applied the standard of reasonable value or reasonable worth as the proper measure of compensation to many cases in which Changes clauses were at issue. The rule is that remuneration to the contractor should be equated with the reasonable value of goods or services obtained from the contractor. Restated in another way, the contractor is compensated on the basis of what the change should cost, rather than what it did (actually) cost.

2-5. Admittedly, the ascertainment of value is difficult. It is, for instance, far more difficult than the ascertainment of incurred costs. The term is used in different contexts; it means different things to different people. Its determination involves conjecture, opinion and judgment. It varies with time, place and circumstance.

2-6. In the eyes of the law, value is not equated with cost; the terms have quite different meanings. An itemized repair bill, for instance, is only some evidence of the value of damages suffered in an automobile collision. So it is with Government contracts. Many cases serve to illustrate that value is not tied to cost. For instance, in *S. N. Nielsen Company v. U.S.*, (141 Ct. Cl. 793, 1958) a reduction in the contract price was approved, though the contractor established that the change had increased his costs. Conversely, in *Bruce Construction Corporation* (Eng. BCA 1959) the contractor was entitled to the difference in value of more expensive sand block required by a change order, though the contractor's supplier did not charge for the increased cost of the block over that originally ordered under the contract. (But see the *Bruce Case* rule, *infra,* overturning this decision.)

2-7. The basic premise here is clear. It is that the determination of an equitable adjustment is an objective procedure which involves the determination of the reasonable value (or the reasonable costs of a prudent contractor similarly situated) of the work involved as opposed to the costs actually incurred by the contractor.

2-8. Proponents of the objective theory of equitable adjustment frequently cite the Nielsen Co. decision in support of their position. In that case, an erroneous bid of a subcontractor had misled the contractor into allocating only $22,000 to an item of work on its contract. By change order, the Government substituted a less expensive installation, decreasing the cost of the item of work to $19,000. However, the Government was able to prove that it would have cost the contractor some $60,000 to perform the item of work if it had not been changed. In a series of appeals, the Contracting Officer's contention that the Government was entitled to an equitable adjustment in the form of a price decrease of $41,000 was sustained. (See also, *Keco Industries, Inc., v. U.S.*, 176 Ct. Cl. 983 (1966) and *Pruitt, Inc.*, ASBCA 18344, 73-2 BCA Para. 10580.)

2-9. Such decisions are characterized as an unequivocal vote for the objective or reasonable value approach to a change. In a direct confrontation between the equities of affording the Government the savings which would normally be realized from such change and the contrasting need to spare the contractor a possible serious loss, the reasonable value approach was decisively applied.

2-10. These decisions, briefly summarized, stand for the principle that the determination of an equitable adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed. Therefore, the reasonable cost to the contractor to perform the services had they not been changed, must be computed in order to arrive at a proper equitable adjustment. In such case, the contractor's cost estimates to perform the work as originally specified are subject to scrutiny by the Government. If the original estimates are considered unreasonable, the equitable adjustment will give effect to the difference between a reasonable estimate of the original cost, rather than the contractor's actual original cost estimates.

2-11. We note then, that the determination of an adjustment by the reasonable value approach does not preclude the use of the contractor's cost estimates as a basis, at least for comparison purposes. We might also note, in passing, that the problem of properly computing an equitable adjustment is considerably simplified where the change and the pricing of the change are effected concurrently. There can be no question under this circumstance that the Government and the contractor have bargained for a price on an objective basis, and that the price is the result of the value of the change as opposed to the actual cost of the change. The contractor's estimates have been subjected to a comparison with similar purchases and with, perhaps, the Government's independent estimates. The pricing of a change by this method is, of course, completely acceptable and is not subject to revision even though later cost information reflects that actual costs of the change are substantially lower or higher than the value established by the price negotiation.

2-12. In line with the philosophy of fixed-price contracting, forward-pricing of equitable adjustments is the preferred policy. Such forward-pricing, of course, invokes the best estimates based on known data. In many instances, however, the circumstances may be such as to

preclude a possibility of forward pricing. Equitable adjustments are often determined *ex post facto* when costs relevant to the change have already been incurred. The known costs, then, may be used in the determination of the reasonable value of the adjustment, if such is required.

2-13. It becomes quite apparent that actual costs, as incurred by the contractor, are generally considered to be a primary indicator of the value of the change. Even the proponents of the reasonable value approach to equitable adjustments concede that there is no better single indicator of value than actual costs. Decisions of the Boards and the Courts often refer to "actual cost of repairs" or "actual cost to the contractor." The line of reasoning in the decisions reflects, however, that even while recovery of costs per se is permitted, only those costs which are reasonable, necessary and unavoidable are allowed.

2-14. **The Specific Cost Concept.** In direct contrast with the theory of reasonable value, the subjective theory of "specific cost" propounds that the proper measure of an equitable adjustment is the actual cost of the change to the particular contractor affected. This theory rejects the elusive standard of "reasonable value" and sets up, instead, the standard of actual cost of the change as being the most equitable method of adjustment.

2-15. A pause for reflection at this point will impress upon the student the apparently irreconcilable conflict between the basic approaches. We have seen that the ascertainment of the "value" of a change may be quite difficult, since the legal concept of value is based on theory. To determine value we often look to the contractor's cost estimates or his actual cost of work performed. For example, consider the pricing circumstances involved in a constructive change, or those involved in the so-called "two-part" change order. The latter involves the direction of a change by the Contracting Officer followed by a subsequent determination of the price of the change. In many instances the work is completed prior to the price negotiation, and the contractor comes to the bargaining table armed with his actual costs. Would an acceptance of these costs, and an addition of a "reasonable and customary" profit constitute a cost-plus-percentage- of-cost procurement, a transaction prohibited by 10 U.S.C. § 2306(a)?

2-16. Undoubtedly, some Contracting Officers have been reluctant to use actual costs incurred as a result of a change in the face of the cost-plus-percentage-of-cost prohibition. Would it be more prudent, then, to depart completely from a subjective analysis of the contractor's costs and scrutinize him objectively, comparing him with a manufacturer whose management is, possibly, more skillful or whose labor is more experienced in the same or similar task? Is it equitable to expect that the contract be performed as efficiently as it might be under the optimum conditions which the objective theory suggests?

2-17. The proponents of the subjective theory dispose, first, of the argument concerning possible cost-plus-percentage-of-cost implications. They suggest that the prohibition is directed toward predetermined arrangements granting additional profit in the event additional costs are incurred. After-the-fact pricing, they point out, gives no such guaranteed profit. This argument is sustained by recent decisions of the Boards and the Courts. In *National Electronic Laboratories v. U.S.*, (148 Ct. Cl. 308, 180 F. Supp. 377, 1960) the court ruled that a redeterminable contract priced after the fact was not in violation of the cost-plus-percentage-of-cost prohibition. Hence, the Contracting Officer should use the best evidence available, including the latest costs incurred, when negotiating an equitable adjustment. And in a case involving a "Changed Conditions" clause, the Board clearly reiterated the distinction between an *ex post facto* determination of an equitable adjustment and a CPPC situation by stating:

> *...We think the differences between the allowance of any equitable adjustment and the cost-plus-a-percentage-of-cost system are substantial and obvious. Under the "Changed Conditions" article the contractor has no guarantee that historical costs will be allowed . . . Although profit may be expressed in terms of percentage, the "Changed Conditions" article does not contain a guaranteed percentage and this, too, is determined on the basis of the best evidence available. E.V.Lane Corp., ASBCA Nos. 9741, 9920, and 9933, 65-2 BCA 5076 (1965).*

2-18. The proponents of the subjective approach to equitable adjustments further point out that many of the "Changes" clauses were developed to provide administrative remedies to situations which would otherwise be breach of contract cases before the courts. The approach to administrative settlement should then be patterned after the treatment, generally accorded by

courts, to claims for damages resulting from breach of contract. Therefore, the incurred cost approach, so common in damage claims, should also be followed in equitable adjustment cases.

2-19. Summarizing what we have thus far learned of the basic approaches to equitable adjustment, it can be briefly stated that the differences in theory are as follows: (1) the Reasonable Value Approach defines an equitable adjustment in terms of the objective determination of what it should cost a reasonable and prudent contractor in performing under optimum conditions; (2) the Specific Cost Approach, conversely, defines an equitable adjustment in terms of actual cost incurred by the particular contractor under the circumstances of his contract; and (3) under either theory, the contractor's cost--whether estimated, actual, or historical--may be used in the determination, the fundamental difference being in the probative value or evidentiary weight which each theory assigns to such costs.

2-20. **The Total Cost Approach.** Where actual or historical costs are submitted for the Government's consideration, the burden is upon the contractor to show that they were actually incurred. If he fails to prove this, but does show an entitlement to an equitable adjustment, a determination on quantum can nevertheless be made by either of two methods. The first is the "total cost" method.

2-21. The total cost of the change is the determination of the difference between the original contract price (unchanged) and the actual cost of performing the contract as changed. Simply, it is actual cost versus originally expected cost. This method is universally criticized as being the least preferable approach to an equitable adjustment on at least two grounds: (1) that the total costs include not only the costs properly attributable to the change, but also those which were incurred through the fault of the contractor, and (2) that the cost of performing the unchanged contract is frequently based on unrealistically low bids. The bail-out aspects of this method, therefore, are quite apparent.

2-22. This method has been used when there is no better method available. The Court of Claims, for instance, has stated that the total cost approach has been used only as a last resort. In order to overcome the serious objections inherent in this approach, the Court has been careful to ascertain the contractor's experienced costs resulting from the change, and has reduced those costs by deducting costs attributable to the fault of the contractor. Thus, the first major criticism, *supra,* is eliminated. Next, the Court attempted to avoid the second major criticism by using an average estimate, derived from the estimates of the Government and the other bidders, in order to preclude the possibility of "getting well" on changes after a buy-in. The leading case on the use of the total cost approach is Great *Lakes Dredge and Dock Co. v. U.S.,* 119 Ct. Cl. 504 (1951), cert. denied, 342 U.S. 953 (1952).

2-23. Conversely, the Court of Claims has expressed its distaste for the application of this approach in subsequent decisions. The total-cost basis was specifically rejected in *F.H. McGraw & Co. v. U.S.,* 131 Ct. Cl. 501 (1955) and in *River Construction Corp. v. U.S.,* 159 Ct. Cl. 254 (1962). More recently, while reiterating its distaste for the approach, the court conceded that the total cost basis may be used under appropriate circumstances and when no other method is available. *J.D. Hedin Construction, Inc., v. U.S.,* 171 Ct. Cl. 70 (1965)). The rationale of the Court may be summarized by the following quotations from this case:

> *We are aware that we have on a number of occasions expressed our dislike for this method (total cost) of computing breaches of contract damages, and we do not intend to condone its use as a universal rule. However, we have used this method under proper safeguards where there is no other alternative, since we recognized that the lack of certainty as to the amount of damages should not preclude recovery. Oliver-Finnie Co. v. United States, 150 Ct. Cl. 189 279 F.2d 498 (1960): MacDougald Construction Co. v. United States, 122 Ct. Cl. 210 (1952): The Great Lakes Dredge and Dock Co. v. United States, 119 Ct. Cl. 504, 96 F. Supp. 932 (1951), cert. denied, 342 U.S. 953 (1952). In all these cases the fact of Government responsibility for damages was clearly established; the question was how to compute reasonable damages where no other method was available. River Construction Corp. v. United States, supra, at 271. We think this is such a case.... The only possible method by which these damages can be computed is resort to the total cost method. Under such circumstances, as stated earlier, we think the Government should not be absolved of liability for damages which it has caused, because the precise amount of added costs cannot be determined. (Though the reference in this case is to damages, the same rationalization is used by*

the Court of Claims in computing equitable adjustments.)

2-24. The various Boards of Contract Appeals have exhibited less favor in the use of the total cost method. The ASBCA, for instance, has rejected this approach in substantially denying appeals in *Holly Corporation,* ASBCA No. 3626, 60-2 BCA 2685 (1960), *H.R. Henderson and Co., et al.,* ASBCA No. 5146, 60-1 BCA 2662 (1960), and *Air-A-Plane Corporation,* ASBCA No. 3842, 60-1 BCA 2547 (1960). The Board's views regarding equitable adjustments can be summarized in the following excerpts from the latter case:

> *....We do note that appellant's insistence on the total cost approach (without specifics as to the various changes, and without specifics as to their effect on such matters as direct labor, direct material, engineering, overhead, etc.) in and of itself presents what we believe to be an insurmountable obstacle to the allowance of the claimed equitable adjustment.*
>
> *We have held that the equitable adjustment in price under the changes article should be based on a comparison of the contractor's actual performance with the performance required under the original specifications, if the contractor acted reasonably in its choice of alternative methods of performance. See Appeal of G.M. Co. Manufacturing, Inc., ASBCA No. 2883. See also Appeal of Bostwick-Batterson Company, ASBCA No. 4636. In so holding we have recognized that there are many factors to be considered in determining an equitable adjustment in price for a change order but that by far the most important factor is cost...*
>
> *Citing the Appeal of S.N. Nielsen Company, ASBCA No. 1990, sustained by the Court of Claims in 141 Ct. Cl. 793, the Board has held that a proper adjustment is the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed, and that in order to make a proper equitable adjustment the Board must compute what would have reasonably been the cost to the contractor to perform the contract had it not been changed. See Appeal of Modern Foods, Inc., ASBCA No. 2090.*
>
> *The Board has held that before a conclusion with respect to the proper amount of any equitable adjustment to which a contractor may be entitled can be arrived at either by a Contracting Officer or by the Board, appellant must show some sound basis for a determination of the amount and that such a determination may not be made in a vacuum or based on speculation. See Appeal of Modern Foods, Inc., ASBCA No. 2090 and Allegheny Sportswear Co., ASBCA No 4163.*
>
> *Thus, to arrive at an equitable adjustment the Board needs two figures. First, the actual cost. Second, the cost, but for the changes.*

2-25. In summary, it may be said that the various appeal boards have generally limited the use of the total-cost method to extreme cases when: (1) the contractor is known to be competent, (2) the Government has not developed a reasonable alternative estimate, (3) there is no suggestion that the original price is not reasonable and realistic, (4) the increased costs resulted solely from the changes, (5) costs cannot be allocated to specific changes, and (6) there is no other way to determine an equitable adjustment. (For recent cases illustrating conditions for use of the "Total Cost" approach, see: *Continental Drilling Co.*, ENGBCA 3455, 77-1 BCA, para 12280, 1976; *Perini Corp.*, ENGBCA 3745, 78-1 BCA, para 13191 (1978); *Ingalls Shipbuilding Div., Litton Systems, Inc.*, ASBCA 17579, 78-1 BCA, para 13216 (1978)).

2-26. **The "Jury Verdict" Approach.** Where costs cannot be segregated and identified, both the Government and the contractor may have to approach an equitable adjustment on the basis of estimates alone. In these cases where meaningful comparisons cannot be made from the available cost data, the Court and the Boards have permitted the use of expert opinion to estimate the cost of a change. From all of the evidence, including the opinions of qualified experts (e.g., estimators), the Court or Board then can determine what should be paid in the same manner as would a jury. This method, quite naturally, has become known as the "jury verdict" approach.

2-27. First advanced by the Court of Claims in *Western Contracting Corp. v. U.S.*, 144 Ct. Cl. 318 (1958), the method was later adopted in similar situations by the Boards in *Lake Union Drydock Co.*, ASBCA No. 3073, 59-1 BCA 2229 (1959) and *Henly Construction Co.*, IBCA No. 249, 61-2 BCA 3240 (1961).

2-28. In *Western Contracting,* the Court considered the opinions of qualified estimators regarding the reasonableness of the claimed costs, since they could not be substantiated in detail by the contractor's records, and determined the equitable adjustment on the basis of a "jury verdict". In *Lake Union Drydock,* the BCA

had occasion to consider an adjustment to the contractor due to a delay by the Government in furnishing material for the construction of minesweepers. The following excerpts from the decision reflect the circumstances under which a "jury verdict" approach may be employed.

> *8...The amount of the claim was derived from estimates made by Appellant's experienced shipbuilders. In presenting the claim to the Board, Appellant's principal marine architect and engineer (highly qualified) testified in great detail as to the basis of the estimates and verified exhibits submitted in support thereof. Generally speaking, we find that Appellant's estimators are well qualified to make the estimates upon which this claim is founded and that those estimates were established as being basically sound.*
>
> *9...On the other hand, the Government did not make a separate estimate of the proper price adjustment due to the delay attributable to it. Instead, in presenting the defense in this appeal, counsel for the Government probed into every element of Appellant's estimate... Thus, as presented, we have before us over two thousand pages of transcript of the hearing and over a thousand sheets of exhibits upon which to base a decision which, in most part, is one of the nature of a jury verdict. To discuss the many minor details in controversy seems unnecessary. May it suffice to say here, however, that the measure of the amount of the price adjustment to which appellant is entitled is not an exact science calling for a hard and fast rule, but is a determination based upon the facts and circumstances of this case. See Needles v. United States, 101 Ct. Cl. 535, 618; Fern E. Chalendar v. United States, 127 Ct. Cl. 557, 566; Western Contracting Corporation v. United States, No 344-55 Ct. Cl., decided December 3, 1958.*

2-29. The same approach was used by a different Board in rendering a decision in *Henly Construction Co., supra.* It should be noted that despite the name of this method, a jury as such is not actually used. The expert testimony of both sides is weighed by the judges or by the Board, and the evidence is weighed as if by a trier of fact, (i.e., the jury).

2-30. However, the ASBCA subsequently appeared to place a number of restrictions on the use of this approach. In *Air-A-Plane Corp., supra,* it stated that this theory is applicable only in cases "where each side presents convincing but conflicting evidence as to what the amount of equitable adjustment should be; where, upon consideration of the evidence, neither side is entirely correct, and it is apparent that some allowance by the Board is proper, and where evidence is sufficient to permit the Board to make some reasonable decision as to a proper allowance..." And in *Planetronics, Inc.,* ASBCA No. 7202, 1962 BCA 3356, an additional requirement for "convincing proof of the nature and kinds of increased costs incurred" was added.

2-31. The basic difference between the "total cost" approach and the "jury verdict" approach is that in the latter, costs attributed to the change alone are used while in the former, the total contract costs are used. A severe criticism of the "jury verdict" method remains, in that despite the narrower area of consideration (i.e., the change alone) the computation still involves considerable speculation.

2-32. More recent cases, however, attest that the Court of Claims and the Boards continued to use this approach. For instance, in *J.G. Watts Construction Co. v. U.S.,* 174 Ct. Cl. 1, (1966), the Court reiterated the use of the jury verdict basis where precise measurement of costs is not possible. The Boards, also, pursue the rationale of making their own estimate in a "jury verdict" where "...Even though presented with widely divergent positions by the parties before us, we cannot escape the necessity of bringing an end to the matter and determining a figure as the amount of an equitable adjustment." (For recent cases illustrating the wide discretion exercised by Boards of Contract Appeals in applying "Jury Verdict" techniques, see: *Sovereign Construction Co.,* ASBCA 17792, 75-1 BCA, para 11251 (1975); *Greenwood Construction Co.,* AGBCA 75-127, 78-1 BCA, para 12893 (1977); *J.W. Bateson Co.,* VACAB 1148, 79-1 BCA. para 13573 (1978). For a very liberal Court of Claims approach, see *S.W. Electronics & Mfg. Corp. v. U.S.,* Ct. Cl (July 1981).

2-33. **The *"Bruce Case"* Rule.** As we have seen, the fundamental conceptual difference in the measurement of an equitable adjustment is between the objective (reasonable value) and subjective (actual cost) standards. We have also noted that an important element of a determination under either concept or, as a matter of fact, under the "total cost" and "jury verdict" approaches--is "cost."

2-34. An important recent development in defining this significant element of "cost" and, in effect, narrowing the area of controversy among

the fundamentalists is the series of decisions involving the Bruce Construction Corporation.

2-35. The rule emanating from these cases is that the proper measure of value of an equitable adjustment is the *"contractor's costs, reasonably incurred"*. Emphasis is supplied here to impress the reader with the brevity and simplicity of the rule, despite the magnitude of its pronouncement.

2-36. A second look will reveal that the rule is, in effect, a compromise between the objective and subjective concepts. The rule gives weight to the objective standard in that the costs must be reasonably incurred, but does not otherwise disturb the subjective fundamental of the contractor's costs. This appears to be the prevailing rule, and the *quid pro quo* whereby fundamental differences may be resolved in the interests of a workable standard for "equitable" adjustment.

2-37. The Bruce case involved a fixed-price construction contract for a number of buildings at Homestead Air Force Base, Florida. A fine-textured building block was required by the original specifications. After the contractor had ordered the building block, the requirement was changed to sand block. The sand block was more brittle than the concrete masonry block generally produced in that area, requiring a higher degree of care in its handling, and entailing a higher production cost. However, the contractor's supplier furnished the sand block at the same price as the originally required concrete block.

2-38. The issue arose when the contractor claimed, inter alia, $42,415.98 as the difference between the value of the sand block furnished and the value of the block originally specified, on the grounds that the fair market value of the sand block was greater than the purchase price and that the Government should not benefit from the contractor's bargain.

2-39. The Corps of Engineers accepted the contractor's contention that fair market value should be the measure of an equitable adjustment, and allowed the difference between the current fair market value of the two types of block. Upon appeal, since the Engineering Board of Contract Appeals had denied the larger part of the contractor's overall claim, the ASBCA accepted the fair market value measure, but denied the claim on the basis of failure of proof, i.e., that the contractor had failed to prove that the price paid for the original concrete block was not also the fair market value of the substituted sand block at the time of the transaction. The Board held that the fair market value at the time of purchase, not at some subsequent time, is to be used in considering the validity of the equitable adjustment, and that the fair market value at the time of purchase was not different from that of the substituted block.

2-40. Upon further appeal, the Court of Claims resolved the issue in *Bruce Construction Corp. v. U.S.*, 324 F.2d 516 Ct. Cl. (1963). The Court held that fair market value was not the proper measure of damages, that the proper measure is to be achieved by the application of objectivity (the reasonable cost test) to the contractor's actual or historical costs, and that the contractor's historical costs are presumptively reasonable and the burden of proof rests with the party contending otherwise.

2-41. Consider, for a moment, the implications of this decision in light of what we have thus far learned of equitable adjustments. The language of the Court may assist us in our reflection:

> *...But fair market value is not the measure of damages in this case. This is not to say that in all cases, historical cost is to be the gauge. The more proper measure would seem to be a "reasonable cost". The concept of "reasonable cost" is not new. Indeed it has been defined in the following manner:*
>
> *A cost is reasonable if in its nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business.*

Use of the "reasonable cost" measure does not constitute "an objective and universal procedure, involving the determination of the reasonable value (or reasonable cost of any contractor similarly situated) of the work involved", but determination of reasonable cost required, in and of itself, an objective test. The particular situation in which a contractor found himself at the time the cost was incurred, Appeal of *Wyman-Gordon Co.*, ASBCA 5100 (1959) and the exercise of the contractor's business judgment, *Walsh Construction Co.*, ASBCA 4014 (1957), are but two of the elements that may be examined before ascertaining whether or not a cost was "reasonable." The court in *Bruce* further said:

> *(3) But the standard of reasonable cost* must be viewed in the light of a particular contractor's

costs

(Emphasis added),

> *and not the universal, objective determination of what the cost would have been to other contractors at large.*

2-42. It is clearly apparent that the Court rejected the purely objective "reasonable value" concept, and substituted the new test--a "modified subjective" one--of the application of the objective standard of "reasonableness" to the actual or historical costs under the contractor's particular circumstances (subjective).

2-43. The above statements in themselves would appear to be an accurate reflection of the practicable aspects of equitable adjustment. Viewed in the light of the negotiations that normally accompany the determination of the quantum of a change, and the concessions normally made in the course of the discussions, the application of the standard of reasonableness is not at all strange. The Court's opinion at this point could be considered to be a not-too- distant departure from the practical (as viewed by the subjective and objective theorists) and an affirmation of the practicable (as viewed in light of the usual circumstances of an equitable adjustment).

2-44. The Court further held, however, that the contractor's "historical" costs are presumed reasonable and that the burden of proof rests with the party contending otherwise:

> *To say that "reasonable cost" rather than "historical cost" should be the measure does not depart from the test applied in the past, for the two terms are often synonymous. And where there is an alleged disparity between "historical" and "reasonable" costs, the historical costs are presumed reasonable.*

Since the presumption is that a contractor's claimed cost is reasonable, the Government must carry the very heavy burden of showing that the claimed cost was of such a nature that it should not have been expended, or that the contractor's costs were more than were justified in the particular circumstance.

2-45. Note that, in this case, the burden of proof was upon Bruce, since its allegation was that the actual cost of the sand block was not reasonable. The court disposed of the Bruce Case in the following language:

> *(4) Plaintiffs here have not been able to overcome the presumption that their actual costs were reasonable, hence they may not recover . . . evidence of the fair market value of an item some eighteen months after a transaction involving the item does not rebut the presumption that the cost of the item was reasonable at the time of the transaction.*

2-46. Following the logic of the Bruce Case rule, it is clear that, in the usual controversy, the burden of proof will be on the Government to prove that the contractor's costs were not objectively reasonable. Actual or historical costs are now of prime importance; they are no longer just some evidence of reasonable cost. They are reasonable until the presumption is rebutted. (For an example of the difficulty in providing that the contractor's actual costs are unreasonable, see: *Bromley Constructing Co.*, ASBCA 20271, 77-2 BCA, para 12715 (1977).)

2-47. The Congress in 1985 provided in Title IX of the DOD Authorization Act (P.L. 99-145) that contractors have the burden of proof to establish the reasonableness of indirect costs (para 933). This changes the Bruce Case rule as applied to indirect costs. *J. G. Watts Construction Co.*, ASBCA 9454, 1964 BCA 4325, and *Hayes International Corp.*, ASBCA 9750, 65-1 BCA 4767 (1965). For a case denying the reasonableness of a contractor's actual costs, see *Blauner Construction Co.*, ASBCA 9436, 1964 BCA 4333.

3. TYPES OF INCLUDABLE COSTS

3-1. Now that it is apparently settled that the kind of cost allowable in an equitable adjustment is "actual cost reasonably incurred", one other major issue remains. It concerns the type of cost which will be allowable within this definition.

3-2. The rule in *Hadley v. Baxendale*, we have noted, restricts the recovery to damages which are direct, not consequential. This same distinction has been applied to equitable adjustments. It is settled that where a breach does not arise "naturally", or was not "in the contemplation of both parties at the time they made the contract", the damages (or reasonable costs thereof) are considered consequential and are not recoverable. But when is a cost direct, and when is it consequential?

3-3. **Changed vs. Unchanged Work.** Two important cases merit our consideration at this point. In *Chouteau v. U.S.*, 95 U.S. 61 (1877), the Supreme Court said, in deciding an early case:

For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made.

3-4. The Court quoted and agreed with this statement in a later "landmark" case involving standby costs on construction contracts. This was the case of *U.S. v. Rice*, 317 U.S. 61 (1942), where the contractor alleged standby and other additional costs resulting from changes in specifications over a long period of time. In denying the claim, the Supreme Court stated:

It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration in price, and "an increase or decrease . . . in the time required should be met with alteration of the time allowed, for "increase or decrease of cost" plainly applies to the changes in cost due to structural change required by the altered specifications and not to consequential damages which might flow from delay taken care of in the "difference in time" provisions.

3-5. The language of these two decisions could be interpreted differently; as a result, there was a great deal of confusion as to the type of costs that could be included in an equitable adjustment.

3-6. The impact of the Rice Doctrine was ameliorated in 1957, so far as supply contracts were concerned, by the introduction of appropriate language in the Standard Form 32 "Changes" clause. The addition of the words "whether changed or not changed" would appear to have taken supply contracts out of the operative effect of the doctrine. Subsequent interpretations by the Boards, however, permitted recovery of the cost of delays after a change order was issued but not those incurred before the change order, on the grounds that the new Changes clause still provided for an adjustment in costs caused by the change and that costs incurred prior to a change could not have been caused by the change.

3-7. There are exceptions to this rule, however. For instance, costs incurred before the change order will not be excluded, if it can be proved that they were caused by the change. This distinction is principally involved in the area of defective specifications, where costs incurred before discovery of the defects are regularly included in the equitable adjustment. See *Spencer Explosives, Inc.*, ASBCA 4800, 60-2 BCA (1960); and *R.C. Hedreen Co.*, ASBCA 20599, 77-1 BCA para 12328 (1977).

3-8. In supply and research and development contracts, in summary, the application of the Rice Doctrine generally limited recovery to subsequent delays caused by the change. Recovery for delays prior to the change, except for cases involving defective specifications, had to be affected under Stop Work Orders or Suspension of Work clauses rather than the Changes clause.

3-9. The greatest impact of the Rice Doctrine was in the area of construction contracts. A 1961 revision of Standard Form 23A, the Changes clause for construction contracts, contained substantially the same wording as SF32. However, the similarity did not obviate the operative effect of the doctrine. The omission of the words "any part of work . . . whether changed or not changed by any such order" was fatal. The Rice Doctrine continued to be fully applicable; there could be no adjustment in costs for the effect on other, unchanged work, and the only permissible adjustment was an extension in time.

3-10. This situation was drastically changed by revising the Changes clause to eliminate some of the problems which for years had plagued the administration of construction contracts. The revised clause (e.g. FAR 52.243-4, *Changes*) makes it clear that the change may relate to any aspect of the work to be performed under the contract. It embraces changes not only to drawings, designs and specifications, but also changes in the method and manner of performance, the provision of sites and services, and those requiring acceleration in performance. Significantly, paragraph (b) of the new clause recognizes "constructive changes" by providing that any other written or oral orders from the Contracting Officer, including "direction, instruction, interpretation or determination", which cause a change within the general scope of the work shall be treated as changes under the clause.

3-11. In its provision for equitable adjustment, the revised clause now resembles the supply and research and development Changes clauses in providing that "...If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of *any part of the work* under this contract, *whether or not changed* by any such order, the Contracting Officer shall make an equitable adjustment..." (Emphasis supplied.) This wording, following the construction of the wording in supply and R & D contracts, will

undoubtedly have the effect of eliminating the application of the Rice Doctrine to construction contracts. It appears clear that the contractor may now receive consideration not only for the costs of the changed work, but also for any increased costs in unchanged work incurred as a result of the change.

3-12. The clause also expressly provides for equitable adjustment in the case of defective specifications, removing any question as to the proper inclusion of prior costs which, we noted, had been regularly allowed as in *Spencer Explosives, Inc., supra.*

3-13. Significantly, the clause also provides for possible recovery of costs incurred prior to a change order, other than those resulting from defective specifications. Such recovery of other costs, however, is limited in that, except for claims based on defective specifications, no claim for any change shall be allowed for any costs incurred more than 20 days before the contractor gives written notice.

3-14. **"Impact" Costs; The "Ripple Effect".** One of the most difficult types of claim to resolve is one based upon "impact" costs. The theory here is that a major change, or a number of such changes, have a "ripple effect" upon the remainder of the contract work. Where there is a compression of time or a significant addition of work without a concomitant extension of time, the impact may arise, for example, from a resultant loss of efficiency from abnormally long hours of premium time. This inefficiency may affect management and supervision, as well as, direct labor. Further, when a change compresses the work required on a part of a project, such compression may affect the scheduling of the work on other parts of the project. In other words, a pyramidal effect is encountered, where the disturbance caused by a patent change will cause a "ripple effect" of smaller disturbances, perhaps latent, throughout the contract work. The allegation here is that such changes have a direct effect on costs. Scheduling is disrupted, learning is interrupted, and premium prices must often be paid for labor and materials.

3-15. The issue of whether such "impact" costs are recoverable as direct, rather than consequential, costs has been squarely presented. The contractor has been permitted to recover for loss of efficiency because of an acceleration requirement. In fact, the Court of Claims took judicial notice of the fact that a 12 hour work day and a six day workweek tends to impair the efficiency of a contractor's labor. The ASBCA has also determined that such factors as an interruption to the work sequence, lack of a steady flow of work, and the unavoidable use of unskilled labor may seriously affect a contractor's efficiency. In fact, it appears that the ASBCA uses a figure of 30% as a general experience factor for loss of efficiency during winter weather, with the factor being reduced to 20% where a substantial part of the work is performed indoors. (For an illustrative case involving a method of reaching an equitable adjustment on a claim of loss of efficiency, see *T.C. Bateson Construction Co. v. U.S.*, 177 Ct. Cl. 1094 (1966). However, the cases reiterating claims of loss of efficiency must be supported by proof. Appeal of *Hicks Corp.*, ASBCA 20760, 66-1 BCA 5469 (1966). The Boards appear to be more lenient on the requirement of proof than the courts. Contrast *Joseph Pickard's Sons Co. v. U.S.*, 209 Ct. Cl. 643 (1976) with *California Shipbuilding & Dry Dock Co.*, ASBCA 21394, 78-1 BCA, para 13168 (1978). The many examples of such "impact" costs establish that the trend of the decisions is to afford recognition to the "ripple effect" in treating such costs as being a direct and natural result of certain changes and, therefore, recoverable.

3-16. However, the result has not been the same where the contention was that the number of changes alone should be the criterion for an allowance of "impact" costs. The rule here seems to be that, rather than the number of changes, the important consideration is the effect of these changes, as a whole, upon the contract.

3-17. **Indirect Expenses; Overhead.** Thus far we have been considering "direct" costs in the legal sense. We now encounter the term "direct costs" in accounting terms. Such direct costs (e.g., direct labor, direct material, direct engineering) resulting from changes would normally be no problem. If it is established that they were reasonably incurred (*Bruce Case Rule*) as a direct result of change *(Hadley v. Baxendale),* the costs are recoverable in an equitable adjustment. However, the problem arises in the recovery of "indirect costs", again in accounting terms. These costs are generally referred to as "overhead" or "burden", and include, for example, such items as employee benefits, taxes, insurance, rent, etc. Overhead can further be broken down into costs that are fixed, variable, or semi-variable. Fully variable costs are those which

increase (or decrease) in direct proportion to an increase (or decrease) in production. Fixed costs (e.g., rent or taxes) on the other hand, remain relatively constant regardless of fluctuations in production. It is apparent, for example, that a change may well increase direct labor costs without affecting overhead to any significant degree, since the fixed elements in overhead may not be affected at all.

3-18. What is the proper technique for pricing an equitable adjustment in this circumstance? Quite generally, Contracting Officers accept the contractor's standard accounting practice of applying overhead as a percentage of direct labor, as was done in the basic contract, though the change may have significantly altered the original contract circumstances. One should be aware, then, that the application of such percentage overhead rates could result in an unintended profit (or loss) to the contractor.

3-19. There is apparently no agreement in this area of equitable adjustment, as reflected in BCA decisions. In *J. G. Watts Construction Co.*, ASBCA 9454, 1964 BCA 4171, recovery on the basis of the contractor's normal overhead rate was permitted, despite the Government's contention that the adjustment should include only those costs in overhead that were directly increased by the change. Conversely, in *B. J. Lucarelli Co.*, ASBCA 8768, 65-1 BCA 4655 (1965), the board rejected the contractor's claim of "normal overhead rate" for home office expense, where it was not proved that the added work actually increased such home office expense.

3-20. Since the cases furnish no guideline, a practical approach might be in order. Where minor changes are involved, a continual renegotiation of the overhead rate would be unduly burdensome. In this circumstance, the parties might prefer to consider possible fluctuations in overhead as normal business contingencies and allow any gain or loss to fall where it may. However, where a significant change in overhead is indicated by the large number of direct labor hours involved in the equitable adjustment, the parties should probably negotiate a new rate to preclude the possibility of an unconscionable profit or loss.

4. PROFITS

4-1. The Boards have held that on changed work the contractor is entitled to reasonable additional costs actually incurred, plus overhead applicable thereto, and a fair profit. However before a profit can be allowed as part of an equitable adjustment, it must be clear that the contract permits such an allowance, either expressly or by necessary implication. For example, where the contract limited an equitable adjustment to the payment of costs, the Board denied recovery of profits. The "Suspension of Work" clause (FAR 52.212-12) is an example of a clause specifically excluding profit from any adjustment resulting from a suspension, delay or interruption in work.

4-2. **Amount.** Since it appears settled that profit is allowable, only the question of quantum remains. The situation here is similar to that encountered in the indirect cost area, *supra:* should the existing percentage profit factor be applied, or does the nature of the change require a separate negotiation of profit?

4-3. In computing the profit applicable to an equitable adjustment we find, again, that there is no absolute formula. In the case of minor changes, the pattern seems to be, candidly, the application of the existing percentage profit factor, i.e, that profit percentage contained in the basic contract. In the case of major changes, however, the "Weighted Guidelines" approach, (e.g. FAR Subpart 15.9, *Profit*) would require the determination of profit specifically applicable to the change.

4-4. The better, and prevailing view appears to be, then, that profit is an allowable factor but that the amount of profit will be determined by the facts in each case. Profit, like any other factor in an equitable adjustment, is subject to negotiation and agreement between the parties. The amount of profit will be dependent upon the character of the work involved; each case must be examined in light of its peculiar facts; and the determination of the quantum of profit, therefore, involves a question of fact.

4-5. The profit included in an equitable adjustment need not necessarily be related to that established in the basic contract or in any previous equitable adjustments on that contract. It also follows that the test is not whether the change is additive or deductive, but that the character of the change is the determinative factor.

4-6. Normally, a contractor is not entitled to a higher rate of profit for increased work than he would have received had the work not been

increased. However, where the circumstances so merit, the board has not been averse to awarding a higher profit or fee than existent in the original contract. For instance, in *American Pipe Steel Corp.*, ASBCA 7899, 1964 BCA 4058 the board sustained an increase in fee from 7 percent to 10 percent on the basis that the change required an increase in the level of effort. To reiterate its position that a profit allowance on changed work need not be limited by the profit factor in the original contract, the board allowed 10 percent on changed work when the original contract bore a profit factor of 6.92 percent. (Illustrating its flexibility in matters of profit, the Board in *Carvel Walker,* ENGBCA 3744, 78-1 BCA, para 13005 (1978), allowed a 12% profit factor while commenting that 10% had been customarily used in construction contracts. In another case, the Board merely reaffirmed the profit factors used by the Contracting Officer; *Space Dynamics Corp.,* ASBCA 19118, 78-1 BCA, para 12885 (1978).)

4-7. Conversely, where work is decreased by a change, a profit deduction is proper. The determination of profit on equitable adjustments resulting from changes decreasing work is made in the same manner as in added work, and the same principles used in pricing additive changes are applicable to deductive changes.

4-8. One other important point should be made in this discussion of profit. When the contractor cannot establish entitlement to an equitable adjustment under the terms of the contract, his only alternative for recovery is in a breach of contract action. Traditionally, the courts will allow recovery of anticipatory profit in successful suits for damages for breach of contract. The rationale is that the function of damages is to put the contractor in the position he would have enjoyed -- but for the breach -- to make him "whole", as it were. In the eyes of the law, damages are recoverable for the injury or loss suffered. Making the injured party pecuniarily "whole" includes awarding profit as an element of damages in order to preserve "the benefit of the bargain."

4-9. The fundamental rule of damages is, therefore, of prime importance to both the Government and the contractor when the choice is between equitable adjustment under the contract or a breach of contract claim. Despite entitlement, the appropriate clause of the contract may, by its wording, preclude the recovery of profit as an element of the equitable adjustment. On the other hand, where the contractor may also have grounds for a breach of contract claim, a successful appeal to the courts could enhance his recovery to the extent of anticipatory profits. The possibility of a larger recovery, however, must always be considered in light of the additional time and costs involved. It is to the advantage of both the Government and the contractor to seek an equitable adjustment within the terms of the contract, or to resolve their differences by accord and satisfaction whenever possible. The Contracting Officer should always bear in mind this vital distinction between breach of contract and equitable adjustment.

CHAPTER 12

PATENTS AND DATA

PATENTS

Section 1

Laws permitting patenting and copyrighting were enacted under the authority granted by the Constitution of the United States, Article 1, Section 8, which reads:

> *The Congress shall have power... to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.*

Thus, our laws have given to inventors and authors an incentive toward the acquisition of possible wealth, and to industry a possible improvement of their competitive position. This, in turn, has done much toward stimulating the technological growth of our country. The incentive has been provided by our patent laws which grant to an inventor the privilege of preventing others from making, using, or selling his creation, without his permission.

1. Patents

1-1. A patent is a statutory monopoly granted by the Federal Government for a limited time to an inventor. It implements the right under patent laws to exclude others from making, using or selling the invention claimed in the patent -- and the opportunity to enforce that control by court action against infringers. In return for the grant, the inventor gives the public the right to free and unrestricted use of his invention after the expiration of the life of a patent, which is 17 years. It is noted that a 1984 law allows extension of the patent term for up to five years for pharmaceuticals and other products subject to regulatory review by the Food and Drug administration to compensate for marketing delays resulting from testing. A patent cannot be renewed after its expiration. The inventor who holds the rights to a patent, in effect, holds a property right in his invention. Hence, he has an exclusive right to its use, manufacture, or sale. This exclusive right is effective in the United States and its territories and possessions. In order to obtain protection in foreign countries, the inventor must make application in each country in which he seeks protection. The length of the grant in foreign countries varies from country to country.

1-2. **Basis For a Patent.** Patents are granted on new and useful processes, machines, manufacture or composition of matter or an improvement to one of the above. A distinct and new variety of a plant may also earn a patent. A useless device, printed matter, a method of doing business, or an improvement to an existing device that is obvious to a person skilled in the art, will not warrant issue of a patent. Applications for patents on "Rube Goldberg" devices that provide action and amusement, but add little to man's storehouse of knowledge, are consistently rejected by the U.S. Patent Office.

1-3. The patent document is composed of the grant, an abstract, an introduction, the specifications, the claims and, if the invention can be illustrated, one or more drawings. The specifications and drawings describe the invention and must have sufficient detail so that persons skilled in the art involved will be able to duplicate the invention without excessive experimentation. An invention must be more than an idea. Before a patent is granted, the idea must have been embodied in some physical form (reduced to practice) which becomes a novel and useful device or process. This physical form does not have to be actual finalized hardware. The Patent Office examiner will not grant a patent if it is not obvious to a person skilled in the art how to build the item from the specifications and drawings of the Patent Application. Normally, models and samples of the item are not to be submitted unless requested by the examiner.

1-4. **The Patent Right.** A patent is granted to the inventor only. A company or the Government may not be issued patents; however, the inventor may sell or assign his patent to a company or to the Government. He may grant licenses to manufacture and sell the invention, practice the process, or carry on any other activity in connection with the subject of the

patent for which he can negotiate. This is the method the Government and contractors use in order to obtain title to an invention or obtain rights to use it.

1-5. The patent system does not automatically insure that the inventor will become wealthy once he receives his patent. The possibility of a monetary return depends primarily on how much the invention is needed. For example, a new and useful buggy- whip may not bring large financial rewards because the market for buggy-whips is limited.

1-6. Just as the patent system does not automatically insure a dollar return, it also does not automatically insure protection against infringement. If sued, the law does not provide instant conviction of a patent infringer. The receipt of a patent creates only a presumption of validity, not a guarantee of it. The patent holder must seek an injunction and/or request damages by going to court and in effect asking that court to confirm the validity of the patent as issued by the Patent Office.

1-7. An inventor may promote his invention, or he may turn it over to another person, company, or to the Government. He may do this in several ways. He may license others to use his invention and receive payment in the form of royalties, or he may sell his rights to the patent outright and relinquish ownership.

1-8. **Defensive Publication.** A Patent Office procedure called *defensive publication* was initiated in May 1968. The procedure permits briefs of new inventions to be published in the *United States Patent Office Official Gazette.*

1-9. An inventor choosing this alternative, instead of filing for a patent under regular procedures, will not get full patent rights. He waives his rights to any potential royalties. But he is assured that no one else will get a patent for this invention unless his published statement is successfully challenged within five years by someone else claiming rights to that invention. A large company, not afraid of competition, may find this alternative more desirable than expending the money and effort to obtain a patent.

1-10. **Impact on Patent Policy in Government Contracting by Presidents Kennedy and Nixon.** Patent policy in Government contracting has evolved from many years of controversy between Government and industry, as well as within the Government itself. Historically, an issue to be resolved has concerned the extent of rights to inventions the Government should acquire when it participates in the sponsorship of research and development with patents forthcoming. In its most usual form, the issue involves the question of whether the Government should obtain a license, or obtain title to an invention developed by a contractor under conditions of sponsorship. Obtaining a license would imply that a contractor would be permitted to obtain a patent and market the invention as though it were an ordinary commercial item. At the same time, he would grant the Government a royalty-free *license* to use the invention. On the other hand, by obtaining title to the invention, the Government would own the patent and could make it available to the public.

1-11. On October 12, 1963, President Kennedy issued a memorandum which established the Patent Policy of the Government (28 *Federal Register* 10943). This was revised on August 23, 1971 when President Nixon issued a Statement of Government Patent Policy (36 *Federal Register* 16887, August 26, 1971).

1-12. President Nixon's Memorandum and Statement of Government Patent Policy (August 23, 1971). The policy established by President Nixon's memorandum on Government treatment of patents formulated for inventions made in the course of or under a Government contract is quite specific. It establishes various categories that are afforded different patent rights treatment. These various categories were defined for other than small business firms and nonprofit organizations. They are as follows:

> *A. The Government shall normally acquire or reserve the right to acquire the principal or exclusive rights throughout the world in and to any inventions made in the course of or under a contract when:*
>
> *(1) a principal purpose of the contract is to create, develop or improve products, processes, or methods which are intended for commercial use (or which are otherwise intended to be made available for use) by the general public at home or abroad, or which will be required for use by governmental regulations; or*
>
> *(2) a principal purpose of the contract is for exploration into fields which directly concern the public health, public safety, or public welfare; or*
>
> *(3) the contract is in a field of sci-*

ence or technology in which there has been little significant experience outside of work funded by the Government, or where the Government has been the principal developer of the field, and the retention of exclusive rights at the time of contracting might confer on the contractor a preferred or dominant position; or

(4) the services of the contractor are:

(a) for the operation of a Government-owned research or production facility; or

(b) for coordinating and directing the work of others.

B. In exceptional circumstances the contractor may retain greater rights than a nonexclusive license at the time of contracting when the Secretary or his designee determines that such action will best serve the public interest. Greater rights may also be retained by the contractor after the invention has been identified when it is determined that the retention of such greater rights is consistent with the intent of this paragraph A and is either a necessary incentive to call forth private risk capital and expense to bring the invention to the point of practical application or that the Government's contribution to the invention is small compared to that of the contractor. When an identified invention made in the course of or under the contract is not directly related to a principal purpose of the contract, greater rights may also be retained by the contractor under the criteria of paragraph D below.

C. In other situations, where the purpose of the contract is to build upon existing knowledge or technology to develop information, products, processes, or methods for use by the Government, and the work called for by the contract is in a field of technology in which the contractor has acquired technical competence (demonstrated by factors such as know-how, experience and patent position) directly related to an area in which the contractor has an established nongovernmental commercial position, the contractor shall normally retain the principal or exclusive rights throughout the world in and to any resulting inventions.

D. When the commercial interests of the contractor are not sufficiently established to be covered by the criteria specified in paragraph C above, the allocation of rights shall be made by the Contracting Officer after the invention has been identified, in a manner deemed most likely to serve the public interest as expressed in this policy, taking particularly into account the intentions of the contractor to bring the invention to a point of commercial application and the guidelines of paragraph A above. However, the Secretary or his designee may prescribe, by regulation, special situations where the public interest in the availability of the inventions would best be served by permitting the contractor to retain at the time of contracting greater rights than a nonexclusive license.

E. In the situations specified in paragraphs C and D above, when two or more potential contractors are judged to have presented proposals of equivalent merit, willingness to grant the Government principal or exclusive rights in resulting inventions, will be an additional factor in the evaluation of the proposals.

F. When the principal or exclusive rights in an invention remain in the contractor, he should agree to provide written reports at reasonable intervals, when requested by the Government, on the commercial use that is being made or is intended to be made of inventions made under Government contracts.

G. When the principal or exclusive rights in an invention remain in the contractor, unless the contractor, his licensee, or his assignee has taken effective steps within 3 years after a patent issues on the invention to bring the invention to the point of practical application or has made the invention available for licensing royalty free, or on terms that are reasonable in the circumstances, or can show cause why he should retain the principal or exclusive rights for a further period of time, the Government shall have the right to

require the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable under the circumstances.

H. When the principal or exclusive rights to an invention are retained by the contractor, the Government shall have the right to require the granting of a nonexclusive or exclusive license to a responsible applicant(s) on terms that are reasonable in the circumstances:

(1) to the extent that the invention is required for public use by governmental regulations, or

(2) as may be necessary to fulfill health or safety needs, or

(3) for other public purposes stipulated in the contract.

I. When the principal or exclusive rights to an invention remain in the contractor, the Government shall normally acquire:

(1) at least a nonexclusive, nontransferable, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government of the United States (including any Government agency) and State and domestic municipal governments, unless the Secretary or his designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments; and

(2) the right to sublicense any foreign government pursuant to any existing or future treaty or agreement if the Secretary or his designee determines it would be in the national interest to acquire the right; and

(3) the principal or exclusive rights to the invention in any country in which the contractor does not elect to secure a patent.

J. When the principal or exclusive rights in an invention are acquired by the Government, there normally will be reserved to the contractor a revocable, nonexclusive, royalty free license for the practice of the invention throughout the world, the right to revoke such a license being reserved in order to grant an exclusive license when it is determined that some degree of exclusivity may be necessary to encourage further development and commercialization of the invention. When the Government has a right to acquire the principal or exclusive rights to an invention and does not elect to secure a patent in a foreign country, the contractor may be permitted to retain such rights in any foreign country in which he elects to secure a patent, subject to the Government's rights set forth in paragraph (I) above.

K. Nothing herein shall be construed to confer immunity upon any person from the antitrust laws or from a charge of patent misuse, and no person shall be immune from the operation of State or Federal law by reason of the retention and use of rights set forth herein. DOD and other Federal Agency policy was to generally comply with President Nixon's 1971 memorandum. *In addition, it has been policy to make Government owned patents available to the public in conformance with Section 2 of this* memorandum *which states:*

Section 2. Under regulations prescribed by the Administrator of General Services, Government owned patents shall be made available and the technological advances covered thereby brought into being in the shortest time possible through dedication or licensing, either exclusive or nonexclusive, and shall be listed in official Government publications or otherwise.

1-13. **Patent Rights for Small Business.** In 1980 a new law was issued for Patent Rights Under Contracts Involving Research and Development with Small Business Firms and Nonprofit Organizations. This new law was created with respect to inventions made in the performance of work under a contract or subcontract entered into by or for the benefit of the Government with small business firms and nonprofit organizations. This work was to be performed within the United States under a contract or subcontract for experimental, developmental, or research tasks.

1-14. **Public Law 96-517** (35 U.S.C.§ 200 *et seq.*), December 12, 1980, governs the distribution of rights in inventions made by small business firms and nonprofit organizations under

funding agreements with Federal agencies. It generally gives the small business firms and nonprofit organizations the option to retain the entire right, title, and interest to each invention. Congress provided that this act takes precedence over any other acts which would require a disposition of rights in subject inventions of small business firms or nonprofit organizations in a manner inconsistent with the new act. Additionally, the new act takes precedence over any future act unless the future act cites the new act and provides that it will take precedence. Federal Acquisition Regulation 27.302 implements this act and is applicable to all contracts with small business firms and nonprofit organizations executed on or after December 12, 1980 which are to be performed within the United States.

1-15. Each contract awarded to a small business firm or nonprofit organization, which is to be performed in the United States, its possessions, or Puerto Rico, and has as a purpose the performance of experimental, developmental, or research work, shall contain the Patent Rights clause set forth in FAR 52.227-11 except that the contract may provide otherwise:

(1) when the contract is for the operation of a Federally Funded Research and Development Center or a Government owned production facility;

(2) in exceptional circumstances when it is determined by the Secretary that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of Chapter 38 of Title 35 of the United States Code: or

(3) when it is determined by a Government authority which is authorized by statute or executive order to conduct foreign intelligence or counter intelligence activities that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities. To qualify for FAR clause 52.227-11, a prospective contractor may be required to certify that it is either a small business firm or a nonprofit organization.

1-16. **Patent Rights for Large Business.** On February 18, 1983, President Reagan by a Presidential Memorandum on Government Patent Policy (which was sent to the heads of executive departments and agencies) extended the same Patent Rights Policy to large contractors as Congress, by statute, had extended to small business firms. This policy permits them to retain title to inventions in the same manner as small businesses do under P.L. 96-517.

1-17. **Objectives of Government Patent Policy.** The Patent Rights obtained by Small Business and Large Business, as described above, result in achieving certain objectives sought by Government. A prime objective is to use the patent system to promote the use of inventions conceived under government supported research and development contracts. This should encourage the use of these inventions by the general public, while still retaining for the Government sufficient rights to use these inventions, royalty free. The Government shall normally retain for itself a nonexclusive, nontransferable, irrevocable license throughout the world. In addition, the Government may receive title (full ownership) to a patent under the following conditions:

a. The contractor has not disclosed the invention within the time specified in the contract; or

b. In foreign countries where the contractor fails to retain its rights within the time specified in the contract.

1-18. **Minimum Rights of Contractor.** If under a government contract, the Government acquires rights to an invention (Patent Rights), the contractor will still be allowed certain minimum rights. The Patent Rights clause in FAR 52.227-13 specifies the minimum rights retained by the contractor in inventions. When the Federal Government acquires title to an invention, the contractor will retain a revocable, nonexclusive, royalty free license throughout the world in the subject invention. The contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the contractor is a part and includes the right to grant sublicenses of the same scope to the extent the contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Contracting Officer except when transferred to the successor of that part of the contractor's business to which the invention pertains.

1-19. **Contractor Request For Greater Patent Rights.** If the contract allows government acquisition of patent rights under FAR clause

52.227-13, the contractor may request greater rights to the invention within the period of time allowed in the clause. This request may be granted if the agency head or designee determines the interests of the Government will be better served by doing this. The following is considered by the Government when evaluating the contractor's request:

a. Promoting the use of the invention conceived during a government supported research and development contract.

b. Making sure the invention is used in a manner which promotes full and open competition and free enterprise.

c. The invention is made available to the public.

d. The invention is manufactured by United States industry and labor.

e. The Government retains sufficient rights in the invention to meet its needs and protect the public against non-use or unreasonable use of that invention.

1-20. **Patent Costs.** If the contract calls for the Government to acquire patent rights, various costs incurred by the contractor in compliance with these rights may be allowable to the extent they are incurred as requirements of a government contract. These costs can comprise:

a. Costs of preparing invention disclosures, reports and other documents.

b. Costs for researching the patent art to determine if the invention is new.

c. Costs for filing and prosecution of a patent application where title or royalty free license is to be given to the Government.

1-21. **Mandatory Use of Patents by Contractor.** When the Government gives patent rights to a contractor with respect to inventions made under a Government contract or subcontract, that contractor may be subject to certain conditions in order to maintain his patent rights. The contracting activity may require the contractor to submit periodic reports on the utilization of a subject invention, or on efforts at obtaining utilization, that are being made by the contractor or its licensees or assignees. Non-use of a patent by the contractor may allow the Government to license the use of that patent to a third party in order to obtain public benefit out of that patent. This *March-in Right* of the Government is established by 35 U.S.C. § 203 (FAR 27.3041(g)).

1-22. The *March-in-Right* of the Government will be cautiously exercised. The contractor will first be allowed a reasonable period of time to show why this type of agency action should not be allowed. In addition, the contractor will be given the opportunity to dispute or appeal any Government proposed *March-in* to take away rights the contractor may have in an invention conceived under a government contract.

1-23. **Subcontracts.** The patent rights clause specified in FAR 27.304-4 will be included in all subcontracts, regardless of tier, with subcontractors having as a purpose of the subcontract the conduct of experimental, developmental, or research work within the United States. Contractors will not use their ability to award subcontracts as economic leverage to acquire rights for themselves in the inventions resulting from subcontracts.

1-24. **Publication or Release of Invention Disclosures.** The publication of information disclosing an invention by any party before the filing of a patent application may create a bar to a valid patent. When the contractor intends to file patent applications, the Government should use reasonable efforts to comply with any written request to restrict its publication of information disclosing the invention in order to protect the patent rights in the invention. The contractor must specify the reports and documents to be restricted and the period within which the patent application will be filed. As provided in 35 U.S.C. § 205, Federal agencies are authorized to withhold from disclosure to the public information disclosing any Subject Invention in which the Federal Government owns or may own a right, title, or interest (including a nonexclusive license), for a reasonable time in order for a patent application to be filed.

1-25. **Authorization and Consent.** The Authorization and Consent clause is used to provide *authorization and consent* for a Government contractor to use any invention that was patented by others in the United States.

1-26. Where the Government has used this clause, any suit for infringement of a U.S. patent based on the use or manufacture of the invention by or for the United States by a government contractor (or subcontractor) must be brought against the Government in the U.S. Claims Court. This is in accordance with 28 U.S.C. § 1498. The suit cannot be brought against the

contractor or subcontractor, but only against the Government.

1-27. The Claims Court has no authority to issue an injunction against the Government in this type of suit. Consequently, performance by the contractor or subcontractor (at any tier) on behalf of the Government cannot be stopped by the Court. However, the owner of the patent which is being infringed still retains the right to obtain damages (*compensation*) for the unauthorized use of the patent should his claim be allowed by the Court.

1-28. Thus, it can be seen that to ensure the work by a contractor or subcontractor under a Government contract is not enjoined (*stopped*) by reason of patent infringement, the Government can use the Authorization and Consent clause set forth in FAR 52.227-1. Use of this clause mandates the use of the U.S. Claims Court in a law suit; and as described above, this court has no authority to issue an injunction to stop work under the contract.

1-29. The Standard Authorization and Consent clause for solicitations and contracts is set forth in FAR 52.227-1. If the type of work to be performed involves Research and Development (R&D), the Alternate I portion of the standard clause is used. If the proposed contract involves both R&D work and supplies or services and the R&D work is the primary purpose of the contract, the Alternate I portion of the clause is used. In all other proposed contracts involving both R&D work and supplies and services, the basic clause is used. When a proposed contract involves either R&D or supplies and materials, in addition to construction or architect-engineer work, the basic clause is used. The Authorization and Consent clause is used with its Alternate II provisions when the solicitation or contract is for communication services with a common carrier and the services are unregulated by a government regulatory body.

1-30. **Patent Indemnity.** Authorization and consent to the use of patented inventions does not mean that the Government necessarily accepts final liability for a patent infringement in all cases. Such liability may be shifted to the contractor if a Patent Indemnity clause is included in the contract. This clause provides for the contractor to reimburse the Government for claims paid due to patent infringement. The types of contracts that may include this clause are described in FAR 27.203. Generally, where the contractor performs work or provides supplies which are unique to the Government and not ordinarily supplied to commercial customers, the Government will assume the risk of infringement and omit the Indemnity clause. Conversely, where the items are of a *standard commercial* nature and have normally been sold or offered for sale to the public, the clause is generally included.

1-31. **Patent Indemnity Clauses.**

(a) Sealed Bid Contracts. The standard Patent Indemnity clause used in Sealed Bid contracts is set forth in FAR 52.227-3. In solicitations and contracts that call for specific components, spare parts, or services which normally have been sold on the open market place, the Government may use the basic clause with either Alternate I or Alternate II, as appropriate. Alternate I identifies items excluded from the clause and Alternate II identifies items included in the clause. The Alternate (I or II) which is more convenient to use is the one chosen by the Government. Solicitations and contracts for communication services and facilities by a common carrier which is unregulated by a regulatory body incorporate Alternate III in its Patent Indemnity clause.

(b) Negotiated Contracts. A Patent and Indemnity clause is not required in negotiated contracts, but may be used if the situation warrants it. For example, the Government might forego its use of the clause based on receiving some price consideration from the contractor.

1-32. **Waiver of Indemnity Clause.** In the event that it is desired to waive one or more specified United States patents from the Patent Indemnity clause, written authority must be obtained from the agency head or his authorized representative. The Waiver of Indemnity clause of FAR 52.227-5 is then included in the contract.

1-33. **Notice and Assistance by Contractor Regarding Patent Infringement.** In the event the Government is or may be involved in a patent infringement situation, it is important that the contractor provide information on this matter. The clause in FAR 52.227-2, which is inserted into government contracts over $25,000 in value, requires the contractor to furnish this type of information. Pursuant to this clause, the contractor will notify the Government of all claims of patent infringement that it is aware of in connection with its government contract. When requested, the contractor will provide the

Government with any evidence and information in its possession in connection with any potential infringement suit which may be brought against the Government because of its contract performance.

1-34. **Patent Royalty.** A holder of a patent may grant another person the right to make, use, or sell the patented invention. This grant of *license* is normally paid for in the form of a *royalty.* Government contractors frequently are licensees of patents governing items or processes used by the contractor while performing work on a Government contract. The royalties paid are normally passed on to the Government as part of the price. It is conceivable, however, that the Government may have already acquired a license and other rights to an invention. In this case, payment of royalty charges would be improper or inconsistent. It is also conceivable that excess or exorbitant royalty payments or payments on invalid patents may be charged. Therefore, to control these payments, the Government must determine whether royalties, anticipated or paid, are reasonable and proper in accordance with the Government's rights in the particular invention. This is accomplished through the use of a *Reporting of Royalties* provision in contracts requiring royalty payments.

(1) Sealed Bid Contracts. Royalty information is not normally a requirement in sealed bid contracts. If the Government does ask for this information because of specific needs, the request must first be approved at a level above that of the Contracting Officer.

(2) Negotiated Contracts. A solicitation which may result in a negotiated contract for which royalty information is desired should contain a provision asking for any proposed charge for the royalties on patents which may be used. Information received by the Contracting Officer on proposed payments of royalties is forwarded to the office handling patent matters for the contracting activity. The office handling patent matters usually comprises one or more attorneys specializing in patent law. This office will advise the contracting office on the various legal aspects in payment of patent royalties; for example, whether the Government owns rights to the patent involved or whether the patent is deemed legally valid. The FAR clause inserted into the solicitation for obtaining royalty information is 52.227-6. If the solicitation is for communication services and facilities by a common carrier, Alternate I to that clause is used.

(3) Government as licensee. The Government may have a license agreement with a patent owner to pay a royalty on that patent. If the Government contemplates that the licensed patent may be used in a prospective contract, this information should be provided to the prospective contractor. This information could impact the price negotiated with the contractor; i.e. - increase the price by adding an amount equal to the royalty payment. The information that the Government is a patent licensee is provided to the potential contractor by FAR clause 52.227-7 which is inserted in the solicitation.

(4) Practical Consideration Concerning Patent Royalty Costs. The receipt of a patent creates only a presumption of validity, not a guarantee of it. As a result, every attempt of a patent owner to extract a large royalty from the Government should be met by a thorough search of the patent to establish whether it is valid. Patent examiners are overworked, understaffed and susceptible to the oft times brilliant verbiage put forth by the patent applicant's attorney. As a result, some patents are issued which are not deserving of protection. Study of the Patent Office examiner's files by efficient attorneys may provide the Government with information negating the validity of the patent; or at least reducing its value and, correspondingly, its royalty cost.

1-35. **Invention Disclosures and Reports.** There are several reasons why the Government contractor must submit invention disclosures as well as other notices and reports. First, any inventions made under a Government contract must be identified Second, the Government needs information to decide how to administer its rights. Furthermore, legal and technical documents are needed to confirm Government licenses or to file and prosecute patent applications.

1-36. The Administrative Contracting Officer (*ACO*) is responsible for insuring the submission of these reports by the contractor. The ACO sends any such reports to the Patent Counsel for the procuring activity. If the required reports are not received, the ACO may authorize the disbursing office to withhold payment in accordance with the specific clauses involved.

1-37. **Withholding of Payments Under the Patent Rights Clause.** The Patents Rights clause, FAR 52.227-12(O), permits withholding of payments until the contractor furnishes specified

reports and information. Five percent of the contract amount (or under a cost-reimbursement contract, the estimated cost) or $50,000, whichever is less may be withheld at any time during the contract if the contractor fails to furnish invention disclosures or interim reports of inventions.

38. **Inventions Under Classified Contracts.** Before a patent application is filed by the contractor on subject matter of a contract classified *Confidential, Secret* or higher, the contractor must submit the proposed application to the Contracting Officer. This is done in compliance with FAR clause 52.227-10 which is inserted in all classified solicitations and contracts. The Contracting Officer shall inform the contractor if the patent application is deemed *classified*, or not. If it is classified, the contractor will observe instructions from the Contracting Officer regarding the manner in which the patent application is transmitted to the United States Patent Office. If for reasons of national security, the patent application may be placed under an order of secrecy, sealed in accordance with U.S. Statute 35 U.S.C. § § 181-188, or otherwise delayed, under pertinent statutes or regulations.

2. TECHNICAL DATA

2-1. General. Data is the physical embodiment--the documentation--of technical information. In the area of research and exploratory development, it can be forcibly argued that technical information is the end product of research and development. In addition, data is used to reorder, operate, and maintain equipment, as well as to make it possible for new sources of supply to reproduce a given piece of equipment accurately and in large quantities if necessary. It would not be even remotely possible to carry out any of these operations without full and accurate technical data. Technical data, such as details of design or manufacture, could well be a trade secret and will normally give a contractor a competitive advantage. Public disclosure by the Government would dissipate a contractor's protection of his trade secret under common law; thus jeopardizing his competitive position.

2-2. **Data Defined.** DFAR 27.401 sets forth the following definitions of data and rights in data:

(a) Data means recorded information, regardless of form or characteristic.

(b) *Technical Data* means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work; or be usable or used to define a design or process or to acquire, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design type documents; or computer printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information, and computer software documentation. Technical data does not include computer software or financial, administrative, cost and pricing, and management data, or other information incidental to contract administration.

(c) *Limited Rights* are the rights to use, duplicate, or disclose technical data in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data; be (a) released or disclosed in whole or in part outside the Government, (b) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or (c) used by a party other than the Government, except for:

(1) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, provided that the release or disclosure thereof

outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(2) Release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above.

(d) *Unlimited Rights* are the rights to use, duplicate, or disclose technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

2-3. **Proprietary Data** For many years the concept of *Proprietary Data,* used by industry and the Government, proved difficult to administer. It was a legal concept which required the contracting officer to make legal determinations, as to whether the contractor had the *proprietary rights* that he claimed, and whether it could be supported in the courts. Also, the contractor tended to include a mass of material within his own definitions of proprietary data. Beginning in 1964, The Armed Services Procurement Regulation (ASPR) redefined limited and unlimited rights information. The proprietary data concept was discarded and the private-public expense concept was initiated.

2-4. **Private - Public Expense Concept.** In place of the *proprietary* test, the Government now considers the question of "who has paid for the development cost?" The reasoning behind this is that a contractor financing the cost out of his own funds is not expected to furnish data that will permit someone else to manufacture a similar product using that data, unless he gives his consent and receives compensation. The contractor is therefore protected from being required to furnish to the Government unrestricted rights in design specifications and manufacturing data pertaining to items, components or processes which he developed at his own expense, and which will permit his competitors to turn out a competitive item, unless he elects to do so.

2-5. The private-public expense concept is best applied by asking the question, "has the Government directly paid any of the costs for the development of the item, component or process disclosed by the data?" If the answer is yes, then the Government may negotiate for unlimited use of the data. Data is developed completely at private expense only when the development is completed without any direct contribution whatsoever of money, time or materials (by the Government). For items, components and processes to be developed at private expense, it is necessary that the Government not participate directly in the project's financing, even though there may be some control over how the money is spent. An example might involve a contractor whose total business is with the Government. All his independent research may be indirectly financed by the Government through accounting allowance of costs to overhead or burden accounts. It is Department of Defense policy that the Government acquires no rights in data when the data depicts an item, component or process that was developed under the contractor's independent research and development program even though the cost of the program is paid for at least in part by overhead charges to Government contracts. Where there is cost sharing on a research and development project, the Government negotiates rights since there is a direct injection of Government funds into the project.

2-6. **Department of Defense Objectives.** Rights in data are extremely significant to both the Government and the contractor. The Government desires the use of data to obtain competition among suppliers, ensure logistic support, and document the results of research. However, the contractors may have property rights in data resulting from private investment. This data may have to be protected from unauthorized use and disclosure by the Government in order to avoid jeopardizing the contractor's commercial position.

2-7. There have been many disagreements on how to go about balancing the Government's requirement for data versus the contractor's economic interest in keeping privately financed data. It would appear the varied opinions on rights to a contractor's data, both in and out of the Government, have resulted in decisions on how to define Government data policy in the Federal Acquisition Regulations (FAR). Subpart 27.4 of the FAR comprises only one paragraph which basically states that specific *agency* regulations should be framed to strike a balance between the Government's need and the contractor's economic interest. Consequently, in order to establish how the Department of

Defense (DOD) is handling data policy (and procedures), it is necessary to review the DOD FAR Supplement. This is also known as the DFAR. A number of pertinent data clauses set forth in the DFAR are included in Appendix-D hereto.

2-8. It is the policy of the Department of Defense to attempt to honor the contractor's rights in data resulting from private development and by limiting the demands for such data to only that data which is essential for Government purposes. Section 17.7201-1 of the DFAR specifically states:

> . . . *efforts directed toward permitting full and open competition do not demand or use privately developed data in a manner which is contrary to the policies and procedures established in FAR Part 27.*

The DFAR is much more detailed in what the Department of Defense (DOD) does and how it goes about getting unlimited or limited rights in data.

2-9. **Packard Commission Report on Data Rights** President Reagan's Blue Ribbon Commission on Defense Management (called the *Packard Commission*) had numerous hearings and provided a report on defense management.

2-10. The final Packard Commission Report was issued in June 1986. It states that DOD must recognize the need to maintain a delicate balance between (a) the Government's requirement for data, and (b) the benefit to the nation that comes from protecting the private sector's proprietary rights in such data. This balance, states the Commission, must exist to foster the technological innovation and private investment needed to develop vital defense products.

2-11. Accordingly, the report recommends that DOD adopt a data rights policy which reflects the following principles:

> *(a) If a product has been developed with private funds, the Government should not demand (as a precondition for buying the product) unlimited data rights, even if the Government provides the only market. Instead, the Government should acquire only the data needed to install, operate, and maintain the product.*
>
> *(b) If a product is to be developed with joint private and Government funding, the Government's needs for data should be defined during contract negotiations. The Government's contribution to development funding should not automatically guarantee it rights to all data.*
>
> *(c) If a product is developed entirely with Government funds, the Government owns all the rights to it. Nevertheless, the Government under certain circumstances may make those rights available to the private sector.*

2-12. **Congress Mandates New 1987 Data Policy.** In response to the Packard Commission recommendations, the Congress on October 30, 1986 passed the Defense Acquisition Improvement Act of 1986 as P.L. 99-591. This Act completely re-writes 10 U.S.C. § 2320(a), Rights in Technical Data, and directs the Department of Defense to re-structure its data policy along the following lines:

(1) data developed entirely at contractor expense (private expense) would result in limited rights in the Government; however, this would not prevent release of data to a foreign government, nor for purposes of emergency repair and overhaul; also the restriction would not apply to:

(a) corrections or changes to government data

(b) form, fit, or function data,

(c) operation, maintenance, installation or training data, or

(d) data available to others without restriction.

(2) data developed entirely at Government expense (contract effort) would be treated as unlimited rights data.

(3) data developed partly at private and partly at public expense would be negotiable as to the extent of Government rights, as early as practicable, preferably during negotiations, based upon the following factors:

(a) the statements of policy found in 35 U.S.C. § 200, 15 U.S.C. § 638, and 639;

(b) the interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture; and

(c) the interest of the United States in encouraging contractors to develop at private

expense items for use by the Government.

(4) The Secretary of Defense may:

(a) negotiate and enter into a contract for the acquisition of rights in data where the data was developed exclusively at private expense if necessary to develop alternative sources of supply and manufacture; or

(b) agree to restrict rights of the United States in technical data pertaining to an item or process developed entirely or in part with Federal Funds if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including the purpose of competitive procurement).

(5) The Secretary of Defense shall define the terms "developed" and "private expense" in his regulations.

2-13. A recent Armed Services Board of Contract Appeals (ASBCA) case has ruled on the meaning of the term *At Private Expense.* This case was *Bell Helicopter Textron,* ASBCA No. 21192, 85-3 BCA, Sec. 18,415 (Sep. 23, 1985) and the decision was rendered by Judge Lane. He ruled that "developed at private expense" means entirely funded by the contractor without any direct or indirect (except IR&D (Independent Research and Development)) use of Government funds. Prior to *Bell Helicopter,* it had never been held that development under indirect cost accounts, other than IR&D, abrogates the contractor's right to limit the Government's use of technical data. The Board went on to say that the Government has "unlimited rights" in data pertaining to items, components or processes that were initially developed at "private expense" but were modified through further development under a Government Research and Development (R&D) Contract. The Board ruled that a component which is drastically changed by a subsequent Government contract, in effect, becomes a new component and the Government has "unlimited rights" in data relating to that new component. Under the *Bell Helicopter* decision, a contractor risks surrendering *unlimited rights* to the Government if it adapts a component developed at *private expense* to meet the Government's needs. Thus, any Government funding, including reimbursement of *indirect* production or engineering cost could convert data in which a contractor expended considerable *private funding* to data in which the Government is entitled to acquire *unlimited rights.*

2-14. The contractor, in light of the *Bell Helicopter* decision should be very careful about segregating work and its costs between IR&D and other indirect accounts, such as engineering or general overhead. This may be difficult since it may not be absolutely clear as to what is IR&D or overhead. However, it may become very important for a contractor to accomplish this segregation in order to protect its data rights under the ruling of this case.

2-15. There has been much discussion among attorneys about the *Bell Helicopter* decision. However, unless later cases overrule *Bell Helicopter,* or the Government (specifically DOD), when issuing new regulations, adheres to the definition of *private expense* as meaning developed without *direct* governmental payment, the contractor must be alert as to the potential problem this case could create in the protection of his data rights. Panelists at the American Bar Association Convention, August 10, 1986, outlined strategies to help contractors protect their data. They stated that contractors should develop documentation, or audit trails, to support their claim of development at *private expense.* This may mean putting job numbers on data and software. Also, employees may have to be segregated to assure that those working on independent research and development (IR&D) programs are not also working on Government work.

2-16. **Unlimited Data Rights.** These rights accrue automatically to the Government if data is developed at public expense and identified as a contract requirement. They may also be acquired outright by specific acquisition. What the Government obtains, in either instance, is the right to use the data for any Government purpose whatsoever. The Government is not tied to the creator of the data. This data can be included in follow-on use with other contractors.

2-17. **Limited Data Rights.** The Government may need certain unpublished technical data pertaining to items, components or processes developed by the contractor at private expense. This data may be acquired with limited rights in accordance with DFAR 27.403-2(c). This form of data rights should prove less expensive to purchase and result in lower data costs, since this data is to be kept secret, on a need to know basis by the Government. Consequently, the Government is tied to the contractor, should

the need for a follow-on contract arise.

2-18. **Data Delivery.** Delivery of data shall be scheduled to be in phase with a requirement for a specific and planned use of the technical data. When a delivery date cannot be determined at the time of ordering, delivery shall be deferred. In order to reserve the right to defer delivery of data which have been ordered, the appropriate clause set forth in DFAR 52.227 shall be inserted in all contracts in which the deferred delivery procedure is to be used.

2-19. **Deferred Ordering of Data.** DFAR 27.410-1 provides the Government the procedure for deferring the selection of data specified in a contract until the actual requirements can be determined. This deferred selection procedure is another method of making sure that the Government acquires only needed data. The deferred requisitioning procedure gives the Government an option to specify data to be delivered during contract performance and for two years after termination of the contract or acceptance of all items, other than data and software, whichever is later. Reimbursement to the contractor is either based on a prior contractual arrangement or by a negotiated adjustment.

2-20. **Specific Acquisition of Private Expense Data by the Government.** It is conceivable that for competitive procurement purposes, the Government may want to acquire unlimited rights to a contractor's *private expense* data. DFAR 27.403-2(f) provides a procedure for doing this. It requires that: (a) a clear need for reprocurement exists, (b) no suitable alternative item, component, or process is available, (c) the data to be purchased is adequate for use by other competent manufacturers, (d) the anticipated net savings to the Government from reprocurement will exceed the acquisition cost of the data and of the rights therein.

2-21. It should be noted that the Government and contractor can negotiate a contract providing the Government the right to treat limited rights data as unlimited rights data. This would allow the Government the right to provide this data to other contractors and is specifically authorized in 10 U.S.C. § 2320(G)(i). It is incorporated within the Air Force by Air Force Acquisition Circular (AFAC), dated 18 Feb 1987. This circular provides instructions to Air Force Contracting Officers on obtaining rights to contractor data. It specifies that Contracting Officers may include the clause at Air Force FAR Supplement (AFFARS) 52.227-9000 in solicitations and contracts for programs anticipating the acquisition of supplies and equipment that will require significant numbers of spare parts or large expenditures of funds for spare parts. This threshold is defined as any program anticipating life cycle spare parts requirements of $500,000 or more. The clause shall not normally be included in solicitations and contracts for foreign military sales or prior to a program entering into full scale engineering development (FSED). The clause shall be included in solicitations and contracts for programs in FSED and production and may be implemented as a separate contract line item.

2-22. **Expiration of Limited /Restricted Rights.** AFFARS Clause 52.227-9000. This clause was written by the Air Force to obtain contractor proprietary data after a limited time span to match acquisition objectives and circumstances. For example:

(1) Contracting Officers may negotiate different time periods for different technical data and computer software.

(i) The time period chosen should reflect contractor economic interests in the data with the Government's need for using competition to achieve reasonable spare parts prices and an enhanced defense industrial base.

(ii) For most items, components, processes and computer software, this period should be less than five years. However, where the contractor can substantiate that certain technology requires a longer period of protection, a contracting officer may negotiate a period that shall not exceed seven years. In exceptional circumstances a C. O. may approve equitable periods that exceed seven years.

(2) Contracting Officers may order data pertaining to item configurations that have been previously delivered as well as that currently being produced.

(3) Contracting Officers may not require an offeror, as a condition for obtaining a contract, to provide technical data pertaining to the design, development, and manufacture of existing commercial products or processes unless such data is necessary for the Government to operate or maintain the product or use the process if obtained as an element of performance under a contract. However, contracting officers may negotiate to obtain this technical data and computer software with the right to use and disclose

it at a specified point in time. This is allowed under DFARS 27.403-2(f). Likewise, a contractor's willingness to provide such data and rights may be evaluated as part of a source selection.

2-23. **Protection of Subcontractor-owned Proprietary Data.** DOD FAR Supplement (DFAR) 27.403-2(e) provides that the prime contractor and higher-tier subcontractors will not use their purchasing power as economic levers to acquire proprietary rights in data for themselves. The mechanism for doing this is to use the prime contract data clause, unchanged, in the subcontract, thereby providing rights in data to the Government only. The technique is referred to as the *flow down* procedure. Subcontractors may transmit data that is subject to limited rights directly to the Government. The purpose of this provision is to protect subcontractors from data disclosure to potential competitors.

2-24. **Marking Data with Restrictive Legend.** An authorized restrictive legend shall be placed on proprietary data delivered to the Government with limited rights. The Contracting Officer may permit the contractor to place the restrictive legend on data within six months after delivery of such data, if the contractor can show that the legend was omitted inadvertently, and use of the legend is authorized by the contract. Conversely, if the contractor, or a subcontractor, has affixed an overly restrictive legend to data that should have been delivered with unlimited rights, adjusting action is required. When this appears to have happened, the Government policy is to initially treat this data like that with limited rights. A properly directed inquiry is then sent to the contractor to justify the *restrictive legend.* The contractor must respond and show that the restriction was proper. If this is not done, the Government will obliterate the legend and notify the contractor in writing accordingly (DFAR 27.403-3).

2-25. **Validation of Restrictive Marking on Technical Data.** Rights and procedures pertaining to the validation of restrictive markings (Rights to Data) inserted by contractors and subcontractors on the use, duplication, or disclosure by the Government and others of technical data required to be delivered under contracts or subcontracts for supplies or services are set forth by 10 U.S.C. § 2321 (P.L. 98-525). This statute was further amended by Section 953 (Rights In Technical Data) of the Defense Acquisition Improvement Act of 1986, (P.L. 99-591). DOD implemented 10 U.S.C. § 2321 by regulation, DOD FAR Supplement (DFAR) 27.403-3. The clause to be used in government contracts is provided by DFAR 52.227-7013 (May 1981).

2-26. Whenever the Contracting Officer finds it appropriate to question the validity of restrictive markings on data, he should comply with the procedures provided by DFAR 27.403-3. This regulation provides a formal procedure for challenging restrictive legends on technical data. The contractor must then furnish the Contracting Officer with a written justification for the restrictive markings. This justification by the contractor (or subcontractor) is to be furnished within thirty (30) days (or such longer period authorized in writing by the Contracting Officer) after receipt of the written request from the Contracting Officer.

2-27. After reviewing the contractor's written justification (and any other information available to him) for a restrictive data marking, a decision will be made by the Contracting Officer as to the validity of the marking. This review must be made within three years after either final payment under the contract, or delivery of the data, whichever is later. If, after his review, the Contracting Officer determines that a challenge to the restrictive marking is warranted, he will send a written challenge notice to the contractor (or subcontractor). The Contractor must make a written response, within sixty (60) days after receipt of the written notice, justifying, by clear and convincing evidence, the current validity of the restrictive marking.

2-28. If the contractor fails to respond to the challenge notice, this lack of response will be treated as an agreement by the contractor (or subcontractor) with the Government's action to remove or ignore the restrictive legend marking. Lack of response by the contractor (or subcontractor) to the Government's challenge notice will result in the Contracting Officer issuing a final decision that the restrictive marking is not valid.

2-29. If the contractor responds to the challenge notice and the Contracting Officer determines that the contractor has justified the validity of the restrictive marking, the Contracting Officer will issue a final decision sustaining the validity of the marking. In that event, the Government will continue to be bound by the restrictive marking. If the Contracting Officer does not believe that the contractor has justified

the validity of the markings, he will issue a final decision to the contractor, informing him of this determination. The final decision will be issued within sixty (60) days after the contractor's response (or longer period when required, and the contractor is notified). A negative final decision by the Contracting Officer shall also advise the contractor (or subcontractor) of the rights of appeal under the Contract Disputes Act.

2-30. **Appeal of Contracting Officer's disallowance of restrictive marking.** If the contractor desires to appeal the Contracting Officer's negative final decision, it must provide the Contracting Officer with a notice of intent to file suit in the United States Claims Court. This notice of intent must be provided within ninety (90) days of the final decision. If the contractor fails to appeal to the Armed Services Board of Contract Appeals - (ASBCA), or file suit with the U.S. Claims Court, or provide a notice of intent to file suit within the ninety (90) day period, the Government may cancel or ignore the restrictive markings.

2-31. The Government will normally continue to be bound by restrictive legends during an appeal or lawsuit, or where a notice of intent to file suit is received within ninety (90) days. Any suit in the U.S. Claims court must be filed within one (1) year of the final decision. However, it should be noted that the head of an agency (Secretary) may determine, on a non-delegable basis:

> *(1) the contractor has failed to diligently prosecute its appeal, or*
>
> *(2) that urgent and compelling circumstances will not permit waiting for the decision by a Board of Contract Appeals (BCA) or the U.S. Claims Court.*

2-32. Under these circumstances, cancellation of the restrictive markings without first waiting for a Board or Court decision might be justified by the Secretary. If the contractor ultimately wins before the BCA or U.S. Claims Court, it retains the right to sue for damages in situations where the legend was removed prior to the legal decision.

2-33. **License Agreements For Data By Contractor.** When entering into license agreements with others, a contractor must make sure that his licensees are careful not to assess the Government any royalty or license charges at a later date on other Government contracts for the use of data in which the Government already has rights. This obligation applies to contracts with foreign governments that are funded with money from the United States Government, as well as to U.S. Government contracts and subcontracts.

2-34. **Data Rights Under the Small Business Innovation Research (SBIR) Program.** The *Small Business Innovation Development Act of 1982,* Public Law 97-219, established a Small Business Innovation Research (SBIR) Program. The Act also provided for the retention of rights to the data generated under a Government contract by the small business contractor. The Small Business Administration (SBA), as a result of the Act, recommended that the technical data and computer software generated under this type of Government contract would belong to the contractor for a period of two (2) years from the completion of the contract. After the two (2) year period of time, the Government would have a royalty- free license in the data and software. The contractor, with written permission of the Contracting Officer, could also obtain ownership to a copyright on the data and/or software.

2-35. The Department of Defense has incorporated DOD FAR Supplement (DFAR) clause 52.227-7025 into its regulations to reflect small business contractors' data and software rights under a SBIR Program. It differs from the standard DOD clause pertinent to technical data and computer software, DFAR 52.227-7013, by allowing a new category of rights called *license rights.*

2-36. This new category permits certain technical data and computer software generated under an SBIR program contract to be delivered with a *license rights* legend thereon. The clause thus permits technical data to be acquired under a contract with license rights, unlimited rights, or limited rights; and computer software to be acquired with license rights, unlimited rights or restricted rights. The clause is limited to use solely in contracts awarded under the SBIR program.

2-37. **Withholding Payments For Delinquent Delivery Data.** Failure to receive data in accordance with required schedules can have an adverse effect on logistics, training and other functions for which data are required. Timely delivery is especially important for follow-on competitive procurements. Thus, a withholding of payment clause may be inserted in contracts (DFAR 27.410-4). The Contracting Officer may

withhold up to 10 percent of the contract price until delivery of the data, unless a lesser amount of the withholding is specified in the schedule. It should be recognized that the withholding of payment is a remedy utilized as a lever in order that a contractor in a breaching state may be encouraged to deliver contracted-for data.

2-38. **Limited Usage Of Data Furnished To Support A Proposal.** FAR 15.413 sets forth procedures for data submitted on a restrictive basis in support of a proposal or quotation. Contractors may mark their proprietary proposal data with a legend. This will limit the Government's right to use that data for evaluation purposes only. If a contract is awarded to a contractor that has submitted such restricted-use data with its proposal, the Contracting Officer will determine whether to attempt to acquire such data, and what rights to obtain.

2-39. **Government Usage of Data in an Unsolicited Proposal.** The Government policy is to not use any data, concept, idea, or other part of an unsolicited proposal as the basis, or part of the basis, for a solicitation or in negotiations with any other firm unless the offeror is notified of and agrees to the intended use. However, this prohibition does not preclude using any data, concept, or idea available to the Government from other sources without restriction.

2-40. The Government should not disclose restrictively marked information included in an unsolicited proposal to anyone except government personnel evaluating that proposal. The disclosure of such information concerning trade secrets, processes, operations, style of work, apparatus, and other matters, except as authorized by law, could result in criminal penalties under 18 U.S.C. § 1905.

2-41. An unsolicited proposal may include data that the offeror does not want disclosed for any purpose other than evaluation. If the offeror wishes to restrict the proposal, the title page must be marked with the following legend:

USE AND DISCLOSURE OF DATA

The data in this proposal shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided, that if a contract is awarded to this offeror as a result of or in connection with the submission of these data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtainable from another source without restriction. The data subject to this restriction are contained in Sheets – – – –.

The offeror shall also mark each restricted sheet with the following legend:

Use or disclosure of proposal data is subject to the restriction on the title page of this proposal.

This legend does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction.

2-42. When an agency receives an unsolicited proposal with or without a restrictive legend from other than an educational or nonprofit organization or institution, and evaluation by government personnel outside the agency or by experts outside of the Government is necessary, written permission must be obtained from the offeror before release of the proposal data for evaluation.

2-43. **Release of Proposal Data Prior to Contract Award.** Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision making process and undermine the integrity of the competitive acquisition process. This would adversely affect the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals (except as authorized in agency regulations) is to be disclosed outside the Government before the Government's decision as to the award of a contract.

2-44. Procurement and administrative personnel should do their utmost to generate a proper recognition among all Government employees with respect to their obligation to

contractors submitting confidential information. Whether it is data with limited rights, secret information or disclosures involving pending patents, the contractor ethically and legally is entitled to strictly confidential use by the Government of the documents he submits. Failure to recognize this obligation cannot help but undermine Government objectives.

3. Copyrights

3-1. A copyright is similar to a patent from the standpoint that it is a grant of a monopoly which gives the author or the creator of an artistic work exclusive right to print, reprint, publish, copy and sell the copyrighted work. By statute (Title 17, U.S.C.), the author is protected, as of January 1978, for the life of the author or creator plus 50 years.

3-2. Subject matter which may be copyrighted includes such things as "the writings of an author, books, periodicals, lectures, dramatic and musical compositions, works of art and their reproduction, scientific drawings or plastic works, photographs, prints and motion pictures." The protection given by copyright laws emphasizes encouragement of continued production of literary and artistic works. An author is able to protect his work from unauthorized reproduction, and is therefore encouraged to produce and publish literary, dramatic, musical and artistic works. It should be noted that the protection afforded by a copyright does not give a monopoly to ideas, but only to the expression of ideas. It is the words, or the way in which the words are put together, or the way an idea is embodied that is copyrighted.

3-3. Although a copyright grants an author a property right, the right is not absolute. The courts have long recognized that the public at large is entitled to make *fair use* of a copyrighted work for certain purposes and within reasonable limits. Under this *fair use* doctrine, liberal quotations may be made from a copyrighted work, but substantial portions may not generally be reproduced. One of the tests applied is the measure of commercial harm that may be suffered by the author.

3-4. **Policy.** The Government's copyright policy may best be described in terms of objectives. First, it seeks to avoid any liability for copyright infringement by unauthorized use of copyrighted material. Second, the rights of private creators or proprietors of copyrighted material are to be respected. Third, when the Government pays for the development of the copyrighted material, it should be entitled to at least a royalty-free license for future use of that material.

3-5. These objectives are reflected by DFAR 27.402. Although a contractor may copyright data originated under a Government contract, the Government obtains a royalty-free, nonexclusive and irrevocable license to reproduce, translate, publish and use this data. When data is copyrighted by a third person, the contractor must obtain permission from the owner before this data may be delivered to the Government. The contractor should also report to the Government any notice or claim of copyright infringement on data he provides to the Government.

3-6. Scientists and educators often wish to publish reports of research work performed under Government contracts in books and journals. At times, publishers will not accept such work because they want the exclusive publishing right, at least for a limited time. Since the Government recognizes that publication is vital to scientific advance, it may wish to facilitate such publication. Therefore, it often relinquishes its own publication rights by use of the contract provisions set forth in DFAR 27.407 and 52.227-7013, Alternate II. These provisions state that the contractor must publish the data for sale within a certain number of months specified in the contract schedule. This period may not exceed twenty-four months after final settlement of the contract. The limitation on the Contractor's rights to publish this data for sale lasts only as long as they are protected by copyright and are reasonably available to the public for purchase.

CHAPTER 13

LABOR LAW

The Department of Defense has an annual procurement budget well over $150 billion, which gives its procurement a substantial impact on the national economy. Using this economic power, the Government has the ability to further important national policies such as economic stability by means of the procurement process, and thereby to enhance the national security. These policy considerations are reflected in labor law, the subject of this chapter.

1. BASIC CONSIDERATIONS

1-1. Among the basic issues to be considered when negotiating a contract are wages, fringe benefits, working hours, working conditions, and work shutdowns or strikes. These are just a few of the issues that will be discussed in the negotiations.

1-2. **Labor Policy.** Active administration of a Government contract demands major emphasis from the administration team (contractor as well as Government) on timely delivery of the product or service. A well-structured contract and a best contractor effort may fail to provide the required items when needed if a labor dispute shuts down production.

1-3. Negotiations between labor and management over wages, fringe benefits and working conditions have become a way of life, as the cost of living has risen. When negotiations break down, tempers may flare or disputes erupt. If labor's most effective weapon, the strike, is used, it may delay the contract effort. It is therefore in the Government's best interest to encourage good management-labor relations, in order to avoid strikes where possible and to encourage prompt settlement when they do occur. At all times, however, the limitations of the role of the contract administrator should be remembered.

1-4. **The Role of the Government Contract Administrator.** The Contracting Officer's role of non-intervention in a labor dispute is clearly delineated in the Federal Acquisition Regulation:

> *Agencies shall remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation or arbitration of a labor dispute.*

The agency should, however, act to avoid or minimize the impact of labor disputes on important procurement by ensuring, to the extent practicable, that the parties to the dispute use all available methods for resolving the dispute, including the services of the National Labor Relations Board, Federal Mediation and Conciliation Service, National Mediation Board and other appropriate Federal, state, local, or private agencies. (FAR 22.101-1)

1-5. Perhaps one of the areas where the utmost caution is required is inadvertent involvement. This occurs when a Government employee, attempting to acquire information to assist in settling a dispute, has his actions or statements distorted by one of the parties to serve their own interests. The actions of the individuals may be innocent and well meaning, but nevertheless harmful.

1-6. Contract fulfillment is the primary goal of the Contracting Officer. In the event of a threatened work stoppage due to a labor dispute, the Contracting Officer will assist the designated Department of Defense agency, according to departmental procedures, in obtaining voluntary agreements between management and labor.

1-7. If a work stoppage occurs, not all organizations respond in the same manner. For example, DCAS (Defense Contract Administration Services) provides assistance from the regional office, while certain sensitive organizations have resident experts. Other Departments or Agencies may rely on the Department of Labor.

1-8. Although direct participation by a Government representative in settling a labor dispute is generally prohibited, certain specific actions are required to minimize the impact to the Government. In these actions the Contracting Officer, or administrator, serves as an observer, reporter and staff assistant to the responsible Government agencies.

1-9. This is particularly true in base procurement, where the Contracting Officer or his representative is required to visit the base job site on construction and services contracts. He is required to check to see that safe working condi-

tions are maintained, and prevailing area wage rates are paid, based on the actual job being performed and the hours expended.

1-10. **Determination of Excusable Delay.** The Government should always be alert to contract performance delays caused by a labor dispute. Although a delay may be excusable because of such a dispute, the Contracting Officer must determine if the labor dispute or strike was reasonably avoidable. A question frequently asked is, "Has the contractor or subcontractor made a reasonable effort to prevent or to end the strike?" If the strike involves an unfair labor practice by the union, the contractor should file a charge with the National Labor Relations Board to seek a court injunction to prevent the strike. If the strike has started, the contractor or subcontractor should seek assistance from the appropriate Government agencies or from private organizations for the settlement of disputes. Contractors should never be permitted to create a labor dispute in order to cover up or mask delays or other deficiencies.

1-11. The Government should attempt to determine if the parties do want to bargain legitimately; it is possible that the union called the strike for other reasons, or that the contractor provoked the dispute intentionally. The Contracting Officer must make a careful evaluation of facts to determine whether the strike is legitimate. In all labor disputes, the Contracting Officer should impress upon the contractor that the contractor will be held accountable for all delays that are reasonably avoidable. At the same time, the Contracting Officer is still required to stay aloof on the dispute issues, and to avoid exerting pressure or the appearance of pressure on the contractor.

1-12. **Reporting of Disputes.** Any labor dispute affecting defense procurement should be reported by the Contract Administration Office (*CAO*). The CAO obtains and transmits information relating to potential or actual labor disputes which may interfere with performance of any contract within his cognizance. Labor disputes should be reported on DD Form 1507, *Work Stoppage Report*. An initial report should be submitted when a work stoppage due to a labor dispute is imminent or when a work stoppage occurs, and thereafter when a significant change occurs in the dispute situation. (FAR 22.101-3).

1-13. **Removal of Items from a Plant.** When items in a struck plant are urgently needed by the Government, the Contracting Officer or his representative has an additional duty to perform: removal of the needed items from the plant. The materials affected may be finished items, partially finished items, and raw materials which were produced or obtained for this Government contract. It is Department of Defense policy to avoid the use of force or the appearance of force in removing these items, and to avoid incidents which may antagonize labor or management. FAR 22.101-4 provides specific procedures to be used in removal of items from a plant.

2. GOVERNMENT LABOR POLICY

2-1. Much of American history reflects a struggle to make an economic system of free enterprise work for the benefit of the entire country. One aspect of this struggle has concerned the extent to which the Government should attempt to influence the dynamics of economic forces in the marketplace. This issue has been reflected in legislation designed to establish and implement national policy.

2-2. Two major failures in the nation's economic policy have very strongly affected the relationship between the citizenry and the economic system. First, black people were kidnapped and enslaved, perhaps the ultimate national "cheap labor" policy. Second, the Great Depression featured a downward spiral of wages which deprived workers of money to buy the goods produced; this caused a vicious cycle of excess inventories, further wage reductions, and ultimately extensive unemployment and desperation. Both of these occurrences have had important and long-lasting consequences for national labor policy, including legislation to avoid a repetition of either.

2-3. **Constitution.** The basic authority which supports legislative enactments relating to a national labor policy is the commerce clause of the Federal Constitution. The Supreme Court of the United States has decreed that national labor legislation is constitutional to the extent that such measures bear on the question of the free flow of commerce. In the famous case, *Gibbons v. Ogden* , 22 U.S. 1 (1824), the Supreme Court stated: "The power of Congress over interstate commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution . . ."

2-4. Until 1941, however, the Supreme Court held a narrow view of what constitutes "interstate commerce". In *U.S. v. Darby Lumber Company*, 312 U.S. 100 (1941), the Supreme Court first held that Congress had the power to exclude from interstate commerce goods manufactured by workers receiving less than a legislated minimum wage; thus Congress was able to regulate the wages of workers who worked in *intra*-state commerce, even though the commerce clause refers only to regulation of inter-state commerce. Four years earlier, in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the Supreme Court had held that minimum wage laws for women were not unconstitutional infringements of the right of women to "compete with men for work paying lower wages." These two important decisions were the antecedents of modern national labor policy, including particularly the Civil Rights Act of 1964, discussed *infra*.

3. STATUTORY ENACTMENTS REFLECTING GOVERNMENT LABOR POLICY

3-1. Several Acts provide considerable information concerning Government Labor Policy. These Acts are discussed in some detail and provide insights on management, national labor relations, public contracts and other areas of concern.

3-2. **Enactments of General Applicability.** In order to understand the peace-making machinery at the disposal of the parties to a labor-management dispute, it is helpful to examine various laws regarding labor-management relations and the Government agencies that could become involved in administering these laws.

3-3. **National Labor Relations Act** (Wagner Act, 1935) (29 U.S.C. § 151 *et seq.*). The National Labor Relations Act (NLRA) has been described as the *Magna Carta* of labor. It protects labor's rights to engage in labor organization activity without fear of employer retaliation or discrimination. In addition to encouraging employees to form unions and bargain collectively, the Act specifically prohibits certain unfair labor practices by employers. These practices are summarized as follows:

(1) interference with employee efforts to form or join unions;
(2) domination of a labor organization (company union);
(3) discrimination against union members in hiring;
(4) discrimination for filing charges under the act; and
(5) refusing to bargain collectively.

3-4. The Act established the National Labor Relations Board (*NLRB*) to administer the provisions of the Wagner Act. The Board consists of five members, appointed for five years by the President with the approval of the Senate. More than twenty regional offices are established for convenience of administration. Although violations of the Act are investigated by the Board and orders are issued by the Board, its decisions are not self-executing. Enforcement of Board orders is accomplished by recourse to a Federal court for issuance of an enforcing decree or a restraining (cease and desist) order.

3-5. **Labor Management Relations Act** (Taft-Hartley Act, 1947) (29 U.S.C. § 171 *et seq.*). In the post-World War II period, widespread strikes and labor union activity caused a change in public opinion. Consumers were frustrated in their desire to obtain commodities. Management complained that the NLRA unfairly favored labor. Consequently, in 1947 the Labor Management Relations Act was enacted to amend the Wagner Act. The 1947 Act tended to "equalize" the bargaining power of labor and management.

3-6. The significant changes are summarized as follows: (1) an employee's right to join a labor union was protected, as was his right not to join a union; (2) certain activities of unions were regulated: closed shops became illegal, check-off of dues must have employee's consent, 60 days notice before terminating or renegotiating an agreement (cooling off period), 30-day notice to the Federal Mediation and Conciliation Service, standards were established for union welfare funds; (3) labor unions were not to engage in unfair labor practices, secondary boycotts, or jurisdictional strikes, and attempts to compel an employer to bargain with a non-certified union were forbidden. In addition, excessive union entry fees, feather-bedding, and refusal to engage in collective bargaining were included as unfair labor practices.

3-7. The Taft-Hartley Act also set up the Federal Mediation and Conciliation Service. It is an independent agency completely separated from the Department of Labor. Its functions, as described in the Act, are: ". . . to prevent or

minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties through conciliation and mediation."

The following excerpt from the Act describes its functions:

> *(1) The Service may proffer its services in any labor dispute . . . either upon its motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce.*
>
> *(2) If the Director is not able to bring parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion. . . .*

The Service has no means to compel either party to do anything, and the statute directs the Service to avoid involvement in any dispute which would have only a small effect on interstate commerce, if alternative dispute resolution mechanisms are available to the parties.

3-8. Additional sources of relief are available to labor and management in resolving labor disputes. For example, the labor contract may contain a specific arbitration agreement to break negotiation stalemates, with specific individuals or organizations designated as arbitrators. In the absence of such a clause in the contract, if arbitration is agreed to by both parties, private or public conciliation and mediation services may be called upon to select arbitrators of the dispute.

3-9. If the dispute or grievance involves a contractor's violation of any Federal statute covering hours, wages, working conditions or similar matters, the Contracting Officer notifies the Department of Labor. The Contracting Officer should be alert to the possibility of a default termination in the event of a violation.

3-10. **Enactments Peculiar to Government Contracts.** Knowledge of specific laws concerning contract labor standards is essential. These laws are designed to achieve certain national objectives, using the Government contract as a vehicle.

3-11. **The Davis-Bacon Act (1931), As Amended** (40 U.S.C. § 276(a); 1970). The Davis-Bacon Act relates to minimum wages for laborers and mechanics in construction work. At the onset of the Great Depression it was enacted to maintain wage levels and the economy by requiring payment of prevailing area wage rates to workers employed on Government construction contracts.

3-12. This Act is implemented by FAR 22.400 and provides that all Government contracts over $2,000 for construction, alterations, and/or repair, including painting and decorating, of public buildings or public works to be performed in the United States, shall contain certain provisions:

> *a. All laborers and mechanics employed at the work site shall be paid wages not less than those determined by the Secretary of Labor to be prevailing in the area for the particular types or work involved, as set forth in the contract.*
>
> *b. The required wage payments will be made unconditionally, at least once a week, and without subsequent deductions or rebates.*
>
> *c. The wage scale determined by the Secretary of Labor shall be posted by the contractor in a prominent and easily accessible place at the work site.*
>
> *d. The Contracting Officer has a right to withhold from payments due the contractor any amounts necessary to correct violations. These amounts will then be paid directly to the injured employees by the Comptroller General.*
>
> *e. If the contractor fails to pay the prescribed rates, the Government may terminate for default the contractor's right to proceed with the work, or that part of the work as to which there has been a failure to pay the required wages, and the Government may charge the excess costs of completion to the contractor.*

Breach of any of the contractor's duties may result in the contractor's being placed on the debarred bidders' list, rendering him ineligible to receive Government contracts, for a period of three years.

3-13. The Act may be suspended by the President in the event of a national emergency. In 1971 it was suspended for five weeks by President Nixon, in an effort to fight inflation; construction wages had been increasing faster than manufacturing wages. In 1986 and 1987 proposals have been made to amend the Act to apply only to contracts for at least $1 million, in order to reduce wages, thereby to reduce contract prices, and consequently to reduce the Federal deficit.

3-14. **The Copeland Anti-Kickback Act (1934)** 18 U.S.C. § 874 (1948). This Act is a crim-

inal statute designed to prevent criminal acts from interfering with the orderly operation of the Government in the field of public works. It provides that:

> *Whoever by force, intimidation or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both.*

3-15. **The Anti-Kickback Act of 1986.** (P.L. 99-634). 41 U.S.C. §§ 51-54. This Act prohibits either offering or soliciting kickbacks on any type of Government contract or subcontract and includes a wide range of remedies available to the Government:

(1) up to ten years in prison plus a fine.

(2) civil penalty of twice the kickback amount plus $10,000 for each occurrence, plus

(3) Administrative offset by the Contracting Officer.

In addition, it provides for inspection by the Inspector General with access to books and records, and the inclusion of a contract clause requiring prime contractors to adopt procedures to prevent and detect violations. Contractors must also report violations in writing.

3-16. **Walsh-Healey Public Contracts Act (1936),** 41 U.S.C. §§ 35-45. This Act protects employees of contractors who sell supplies to the Government in contracts exceeding $10,000. It requires that the contractor be a manufacturer or regular dealer of the supplies, pay minimum wages determined by the Secretary of Labor, pay one and one-half times the basic wage rate for work over forty hours per week, employ no minors or convict labor, and allow no work under unsanitary, hazardous, or dangerous conditions. The Act does not apply to subcontractors, however. In addition, the following transactions are exempt from the Act:

(1) purchases of generally available commercial items, negotiated under FAR 15.202 (*Public Exigency*).

(2) purchases of perishables, including dairy, livestock, and nursery products; and,

(3) purchases of agricultural or farm products processed for sale by the original producers.

3-17. The provisions of the Act are made part of the contract by using the clause, "Walsh-Healey Public Contracts Act" (FAR 52.222-20). Violations must be reported to the Department of Labor, the primary enforcing agency. Penalties for violation of the Act may result in: (1) termination for default, with excess charges of repurchase levied against the contractor, (41 U.S.C. § 36); (2) payment of liquidated damages to the Government in the amount of $10.00 per day for each day that the contractor knowingly employs a child or a convict on the contract (41 U.S.C. § 36); and (3) placement of the contractor on the list of Debarred, Ineligible and Suspended Contractors (41 U.S.C. § 37). It should be noted that 41 U.S.C. § 35(d), dealing with convict labor, was amended by Public Law 96-157 in 1979 to allow use of convict labor under certain conditions described at 18 U.S.C. § 1761(b) or (c).

3-18. **Convict Labor Act (1887)** 18 U.S.C. § 436. This Act makes it a crime for Government agents to enter into contracts with any person or corporation to hire out the labor of any prisoners confined for any violation of a law of the United States by a judgment of a State or a municipal court. The prohibition against the use of convict labor does not extend to persons who have been pardoned or paroled or are on probation, and it does not extend to the types of contracts authorized by 18 U.S.C. § 1761.

3-19. **Fair Labor Standards Act (1938) As Amended** 29 U.S.C. §§ 201-219. The Fair Labor Standards Act of 1938 was enacted to improve the economic situation in which the nation found itself during the Depression, by spreading employment opportunities and preventing the payment of substandard wages. The Act is applicable to all contracts of employment and not just Government contracts. In summary, the Act established a minimum wage, maximum working hours with provision for overtime pay, and prevention of oppressive child labor practices. Although the standard Government contract does not contain a clause incorporating this law, it is still applicable to the contract. The Act provides for penalties that include recovery of differences in the required amount to be paid, liquidated damages in an additional amount, and reasonable attorney fees. Willful violations subject the violator to penalties of $10,000, and for a

second offense, fine and imprisonment not to exceed six months.

3-20. **Contract Work Hours and Safety Standards Act (1962).** The purpose of the Act (40 U.S.C. §§ 327-333) was to consolidate various Federal work-hour standards into one comprehensive statute. The Act applies to all Government contracts (and subcontracts) which employ laborers and mechanics; it also extends to construction projects financed in part by the Federal Government, even if the Government itself is not a party to the contract. The Act requires overtime pay to laborers and mechanics at a rate of one and one-half times the basic rate for work in excess of forty hours in one week. The law is implemented by use of the clause, "Contract Work Hours and Safety Standards Act--Overtime Compensation" (FAR 52.222-4).

3-21. Penalties for violation of the Act include:

(1) payment to the employee of the underpayment (40 U.S.C. § 328);

(2) payment to the Government of $10.00 per day for each day of overtime work for which the employee was not fully paid (40 U.S.C. § 328); and

(3) criminal penalty of $1,000 or 6 month imprisonment or both (40 U.S.C. § 332).

3-22. **Service Contract Act (1965)**

41 U.S.C. § 351. This Act applies to workers on Government contracts for basic services. Contractors must observe minimum wage, safety and health standards. Generally, a service worker falls into categories of janitor, gardener, basic craftsman, domestic or manual labor occupations.

3-23. This Act is applicable without regard to the dollar amount of the contract. There is, however, a dividing line which determines the amount of the hourly pay rate. A contractor on a contract for $2,500 or less must pay his employees no less than the currently prevailing minimum wage; contracts for greater amounts require that the workers be paid the prevailing area wage rate. Violations are reported to the Department of Labor for enforcement, with provisions for withholding of appropriate sums by the contracting agency. The Act requires inclusion of an appropriate clause in every contract entered into by Federal agencies in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, except contracts identified in section 7 of the Act or those exempted by the Secretary of Labor under Section 4(b) of the Act. The proper contract clause to be used is specified by FAR 22.1005 and 22.1006.

3-24. **Equal Employment Opportunity / Affirmative Action (*EEO/AA*).** Although the Federal Government's experience with using Federal contracts to implement important national labor policies dates back at least as far as the Davis-Bacon Act more than 50 years ago, it has recently been a matter of some controversy. It has been estimated that 85% of the American population is expressly protected by one or another of various Federally established EEO/AA programs.

3-25. **Veterans.** Perhaps the oldest form of affirmative action established by the Federal Government with respect to employment is the relief historically provided for veterans. In order to offset the competitive disadvantages encountered by many veterans in returning to the civilian workforce, the Government has provided such benefits as education, training, counselling, and special bonus points on civil service examinations. In 1958 the Secretary of Labor was required by statute (38 U.S.C. § 201) to hire a Veterans' Employment Representative for each state, who would promote the interest of employers in hiring veterans, and "assist in every way in improving . . . the advancement of employment of veterans of any war."

3-26. More recent Federal legislation has been designed specifically to assist veterans of the Vietnam War. After the war, there was a high rate of unemployment among veterans. The Vietnam Era Veterans Readjustment Assistance Acts of 1972 and 1974 (38 U.S.C. § 2011 *et seq.*) require Federal Government contractors (and the Government itself) to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era.

3-27. **The Civil Rights Act.** In 1954 the U.S. Supreme Court held, in *Brown v. Board of Education of Topeka*, that it is unconstitutional for a state to segregate white schoolchildren from non-whites. Although the Court had for 50 years approved schools which were "separate but equal," the Court in *Brown* adopted a more sophisticated analysis: segregation usually denotes the inferiority of the minority group, and a feeling of inferiority impairs the minority

child's motivation to learn; when segregation has the force of law, it retards the development of minority children further and denies them some of the benefits of an integrated system. Therefore, segregation deprives the minority children of the equal protection of the laws, in violation of the Fourteenth Amendment.

3-28 Although *Brown* was a landmark case, its impact was limited because the Fourteenth Amendment only protects against discrimination by the State; it does not address segregation of restaurants, discriminatory employment practices, or a wide range of other activities which are essentially private or commercial rather than governmental in nature.

3-29. A decade later, invoking its Constitutional power to regulate interstate commerce, Congress passed the Civil Rights Act of 1964, to prohibit discrimination in a broad range of activities. For example, Title II (42 U.S.C. § 2000a) prohibits discrimination on the basis of race, color, religion or national origin by hotels, restaurants, movie theaters, gas stations, and other places of "public accommodation." Title VII (42 U.S.C. § 2000e) prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex, subject to certain narrow exceptions. In 1972 the coverage of this ban on discrimination in employment was extended to state and local government employees, by the Equal Employment Opportunity Act. Title VII of the Civil Rights Act is enforced by the Equal Employment Opportunity Commission.

3-30. **Executive Order No. 11246.** President Lyndon Johnson implemented the Civil Rights Act of 1964 by issuing Executive Order No. 11246 in 1965. That Executive Order introduced the phrase "affirmative action" to describe the duty of Federal Government contractors to eliminate any discriminatory employment practices. Section 202 of the Executive Order, as amended by Executive Order 11375 in 1967, requires that all Government contracts include the contractor's agreement that:

> *The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.*

These requirements have been implemented by the U.S. Department of Labor, by issuing various regulations to specify the necessary contents of an affirmative action program. The most controversial requirement is that the contractor calculate the "underutilization" of minorities and women in each type of job in its work force, and make a reasonable, good faith effort to eliminate the effect of any (even inadvertent) discriminatory practice. "Underutilization" exists when the employer's workforce does not fairly reflect the percentages of qualified minorities and women available for employment in the particular type of job.

3-31. Where underutilization exists, the contractor is required to establish employment goals for recruiting qualified minorities and women, and timetables within which the goals can reasonably be achieved. Such "goals" are not the same as "quotas", which by definition are fixed quantities that must be achieved. Instead, goals are "reasonably attainable targets" which the contractor is not obligated to meet; the contractor's obligation is to make a reasonable good faith effort to meet the goals, and mere failure to meet the goals is not penalized.

3-32. Other types of affirmative action are also required by the Department of Labor pursuant to Executive Order 11246. Among other things, contractors are expected to review job qualifications, to make sure they are relevant to the job; for example, unnecessary minimum height or weight requirements have been found to exclude women and some minority groups improperly from various jobs.

3-33. **Age Discrimination.** It is a violation of the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 623) for an employer of more than 20 employees to discriminate on the basis of age in hiring or determining terms and conditions of employment. The Act also expressly prohibits segregating or classifying an employee in any way that would "adversely affect his status as an employee, because of such individual's age." This statute initially protected individuals aged 40 through 64; in 1978 the protection was extended through age 69; and in 1986 the upper age limit was removed for most occupations, subject to a phase-in period. The contractor's duty is non-discrimination; the Act identifies no specifically required affirmative action. The enforcement agency is the Equal

Employment Opportunity Commission.

3-34. **Individuals with Handicaps.** Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. § 793) prohibits discrimination by contractors on the basis of a physical or mental handicap which either (a) does not prevent the individual from doing a particular job or (b) would not prevent the individual from doing the job if the contractor made a "reasonable accommodation." The Act protects a qualified "individual with handicaps", defined in 29 U.S.C. § 706 as a person (a) whose impairment "substantially limits one or more of such person's major life activities", or (b) who has a record of such an impairment, or (c) who is regarded as having such an impairment. In 1978 the Act was amended to exclude from protection against discrimination, in an employment context, any person "who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." As amended, the Act would still protect a former alcoholic or drug abuser, or a person who is incorrectly regarded as an alcoholic or drug abuser, and possibly an alcoholic or drug abuser who is not dangerous and can perform the duties assigned.

3-35. In addition to prohibiting discrimination, the Act requires a contractor to take affirmative action to employ and advance in employment qualified individuals with handicaps. As previously suggested, the contractor also has an affirmative duty to make any "reasonable accommodation" in a job to enable a qualified an individual with handicaps to perform the work; whether a particular "accommodation" is "reasonable" depends on all the circumstances, including the cost and any disruption of the contractor's business activities.

4. ADMINISTRATION OF GOVERNMENT LABOR POLICY

4-1. The Secretary of Labor is responsible for administration and enforcement of Executive Order No. 11246, as amended, as well as Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974. In each instance the Secretary has delegated his authority to the Director of the Office of Federal Contract Compliance Programs (*OFCCP*), an office within the Department of Labor. The Labor Department has published certain implementing regulations in Title 41, Chapter 60, of the *Code of Federal Regulations* (*CFR*). Those regulations state when an affirmative action plan is required and describe its necessary contents, audit procedures, appeals, and remedies. One such requirement is the contractor's agreement to insertion in the contract of the Equal Opportunity clause set forth at FAR 52.222-26; it is required in all contracts and solicitations except as provided at FAR 22.807.

4-2. The Assistant Secretary of Defense (Manpower and Reserve Affairs), *ASD(M&RA)*, has been designated Department of Defense Contract Compliance Officer. He is responsible for securing compliance with the provisions of Parts II and III of the Executive Order and the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by the Department of Defense. He is also responsible for exercising overall supervision of Department of Defense policies relating to Contract Compliance operations, for carrying out actions relating to the imposition of sanctions, and for promulgating within the Department of Defense the names of prime contractors and subcontractors who have been declared ineligible for Government contracts by the Director, OFCCP, or by an Agency.

4-3. Heads of Departments or Agencies which award or administer contracts are responsible for assuring that the provisions of these Regulations are carried out within their respective components and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

4-4. **Affirmative Action Procedures.**

(a) *Non-construction Contracts.* Except as provided in FAR 22.807, each prime contractor and each subcontractor with 50 or more employees, and a contract or subcontract of $50,000 or more, is required to develop a written affirmative action program for each of his establishments within 120 days from the commencement of his first such Government contract or subcontract (FAR 22.804-1).

(b) *Construction Contracts.* In accordance with FAR 22.804-2:

(1) Except as provided in FAR 22.807, construction contractors that hold a Government construction contract are required to meet (a) the contract terms and conditions citing affirmative action requirements applicable to

covered geographical areas or projects and (b) applicable affirmative action requirements of 41 CFR 60-1 and 60-4.

(2) Each contracting agency is required to maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for employment of minorities and women in covered construction trades. Information concerning this listing is provided to the principally affected Contracting Officers in accordance with agency procedures. Any Contracting Officer contemplating a construction project in excess of $10,000 within a geographic area not known to be covered by specific affirmative action goals should obtain the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the solicitation.

(3) Contracting Officers are to give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. The required notification includes the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. Upon request by the OFCCP regional office, the Contracting Officer arranges a conference among contractor, contracting activity, and compliance personnel to discuss the contractor's compliance responsibilities.

4-5. **Compliance Reviews and Clearance.** The Contracting Officer is supposed to ask the appropriate OFCCP Regional Office to determine whether a company is in compliance prior to the award of any contract, modification of an existing contract for new effort which would constitute a contract award, issuance of any basic ordering agreement, award of any indefinite delivery contract or letter contract, where the estimated or actual amount is expected to be $1,000,000 or more, or where it would increase the aggregate value of an existing contract to $1,000,000 or more. A pre-award clearance is also to be requested for any first-tier subcontract of the types described above in an estimated or actual amount of $1,000,000 or more when the subcontract requires the Contracting Officer's consent, or would require such consent were it not for an approved purchasing system.

4-6. **Procedures for Requesting Preaward Clearance.**

(1) When the Department of Defense is the compliance agency, the Contracting Officer should request pre-award clearance for the prime contract and all known first-tier subcontracts of $1,000,000 or more from the appropriate regional office of the OFCCP.

(2) When contract work is to be performed outside the United States with employees recruited within the United States, the pre-award review should be requested from the OFCCP regional office serving the area where the contractor's corporate home or branch office is located within the United States, or the corporate location where personnel recruiting is handled, if different. If the proposed contractor has no corporate office or location within the United States, the pre-award action should be based on the location of the recruiting agency, as defined in FAR 22.802.

4-7. **Time Limitations for Requesting Preaward Clearances.**

(1) As soon as the successful contractor can be determined, the Contracting Officer should process a pre-award clearance request in accordance with procedures established at FAR 22.805, assuring, where possible, that the request is submitted to the OFCCP regional office at least 30 calendar days prior to the proposed award date.

(2) If the Director, OFCCP, does not make a final pre-award clearance determination within 30 calendar days from submission of the clearance request, the Contracting Officer is directed by the FAR to withhold award of the contract, for an additional 15 calendar days or until clearance is received, whichever occurs first. If the additional 15 calendar days expire and the Director, OFCCP, has not found the contractor to be in compliance, or made a final written determination declaring the contractor ineligible for reasons of non-compliance, the award may be made to the contractor in question. The Contracting Officer then notifies the regional OFCCP of the award.

(3) When the pre-award clearance procedure would delay award of an urgent and critical contract beyond the time necessary for the Government to make awards, or beyond the time specified in the bid or proposal (or extension of time), the Contracting Officer informs the servicing regional OFCCP of the expiration date of

the bid or proposal, or the required date of award, and requests that clearance be provided prior to that date. If the regional OFCCP advises that a clearance review cannot be completed by the required date, the Contracting Officer submits a written justification for the award to the head of the contracting activity who, after informing the servicing regional OFCCP, may then approve the award without the pre-award clearance. If an award is made in this manner, the Contracting Officer requests a postaward review from the appropriate regional OFCCP.

(4) If a postaward review determines the contractor to be nonawardable, the Director, OFCCP, may authorize the use of the enforcement procedures at FAR 22.809 against the noncomplying contractor.

4-8. **Complaints.** Complaints alleging violation of the Equal Opportunity clause shall be referred immediately by the Contracting Officer to the appropriate regional office of the OFCCP. The complainant will be advised in writing of the referral, but the Contractor shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint or the fact that the complaint was received.

4-9. **Sanctions and Penalties.** At the written direction of the Director, OFCCP, one or more of the following actions, including administrative sanctions and penalties, may be imposed against contractors found to be in violation of Executive Order No. 11246, as amended, the regulations of the Secretary of Labor, or the provisions of FAR 52.222-26:

> *(a) publication of the names of such contractors or their unions;*
>
> *(b) cancellation, termination, or suspension of the contractor's contracts or portions thereof; and*
>
> *(c) debarment from future Government contracts, or extensions or modifications of existing contracts until such contractors have established and carried out personnel and employment policies in compliance with the Executive Order and the regulation of the Secretary of Labor; and*
>
> *(d) referral by the Director, OFCCP, of any matter arising under the Executive Order to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.*

5. MILLER ACT

5-1. In a commercial setting, a contractor or subcontractor who performs construction work but is not paid can protect against loss by means of a "mechanic's lien," a security interest in the structure built by the contractor. Where the work is done in performance of a Government contract, however, no mechanic's lien is available. Further, although the prime contractor can generally be certain of receiving payment, a subcontractor usually lacks the necessary "privity", or legal relationship with the Government, to make a claim directly against the Government if the prime contractor fails to pay the subcontractor.

5-2. When Government contractors during the Depression were unable to pay their creditors, special hardships confronted many of those creditors: subcontractors, individual laborers, and companies which had supplied materials on credit. Collection was impossible if the contractor was bankrupt or had disappeared, and no mechanic's lien was possible.

5-3. In 1935 Congress passed the Miller Act (40 U.S.C. § 270a) to provide protection for "[e]very person who furnished labor or material" for the performance of work on a Government construction contract for more than $2,000. The threshhold amount of the Government contract was raised to $25,000 in 1978, the stated reason being that eliminating the paperwork and other requirements of the Act would reduce the burden on small firms and induce more competition for small Government contracts.

5-4. **Bonding of Contractors.** Under the Miller Act, before any contract exceeding $25,000 is awarded for the construction, alteration, or repair of any public building or public work of the United States, the prospective contractor shall furnish to the United States two types of bonds, which become binding upon the award of the contract:

(a) a *performance bond* with a surety (i.e., bonding company) or sureties satisfactory to the officer awarding the contract, and in an amount he deems adequate for the protection of the United States; and

(b) a *payment bond* with a surety or sureties satisfactory to the officer for the protection of all persons supplying labor and material in the prosecution of the work. Whenever the total amount payable by the terms of the contract does not exceed $1,000,000, the payment bond

shall be equal to one-half the total amount payable. Whenever the total amount payable by the terms of the contract is more than $1,000,000 but not more than $5,000,000, the payment bond shall be equal to 40 percent of the total amount payable. Whenever the total amount payable by the terms of the contract is more than $5,000,000, the payment bond shall be $2,500,000.

5-5. A person who furnishes labor or material in the prosecution of the work pursuant to a contract where a payment bond is furnished under the Miller Act, and who has not been paid in full within ninety days after last performing the labor or supplying the material for which a claim is made, has the right to sue the surety on the payment bond for the amount due. Any person having a direct contractual relationship with a (first-tier) subcontractor, but no direct contractual relationship with the contractor furnishing the payment bond, also has a right of action upon the payment bond. He must first give written notice to the contractor within ninety days from the date on which he performed the last of the labor or supplied the last of the material for which the claim is made, stating the amount claimed and the name of the party to whom the material was supplied, or for whom the labor was performed. This notice must be sent by registered mail to the contractor. Every suit instituted shall be brought in the name of the United States by the person suing, in the United States District Court for any district in which the contract was to be performed. No such suit may be commenced more than one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

5-6. **Bond Requirement in Foreign Country.** The Contracting Officer is authorized to waive the requirement of a performance bond and payment bond for any work to be performed in a foreign country, if he finds that it is impracticable for the contractor to furnish such bonds.

5-7. **Collection of Taxes Withheld by Contractor.** Section (d) of the Miller Act states that every performance bond required under the Act shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract. The Government must give the surety or sureties on the bond written notice of any unpaid taxes attributable to any period, within ninety days after the date when the contractor files a return for that period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code. No suit on the bond for such taxes can be commenced by the United States unless proper notice is given, and no suit can be commenced more than one year after the day on which notice is given.

5-8. The Act has been liberally interpreted in favor of the suppliers of labor and materials to sue contractors and subcontractors in Federal courts for unpaid supplies or services. It was created in order to provide relief for the people furnishing labor or materials, since they cannot avail themselves of their normal remedy in obtaining liens through the state courts. However, its protection extends only to persons furnishing labor or supplies to the prime contractor or a first-tier subcontractor. *J.W. Bateson Co. v. U.S. ex rel. Board of Trustees of the National Automatic Sprinkler Industry Pension Fund,* 434 U.S. 586 (1978). Any legal action involving the Miller Act must be initiated in the Federal District Court which has jurisdiction.

5-9. If a surety on the Miller Act bond is insolvent and unable to pay the money due, the supplier of material or labor may have an "equitable" lien upon money the United States Government has retained from the prime contract and which would normally be paid to the prime contractor. The rights under this "equitable" lien would be decided in the Federal District Court, if legal action is initiated by the supplier.

5-10. Under certain conditions it is possible for the Secretaries of the Army, Navy or Air Force to waive the provisions of the Miller Act (40 U.S.C. § 270e). This can be done if the contract is a cost-plus-fixed-fee or other cost-type contract. Also, a Secretarial waiver may be permitted in Government contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or similar items for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of the contract as to payment or title. In 1970, an amendment was made to 40 U.S.C. § 270f which allowed the Secretary of Transportation to waive the provisions of the Miller Act in contracts for the construction, alteration, or repair of vessels of any kind or nature entered into pursuant to the Merchant

Marine Act of 1937 or the Merchant Ship Sales Act of 1946 (40 U.S.C. § 270f; P.L. 97-31, Aug 6, 1981).

6. BUY AMERICAN ACT.

6-1. The Buy American Act (41 U.S.C. § 10a) generally requires that only raw materials mined or produced in the United States, and only manufactured items which are made in the United States substantially all from materials or items mined, produced or manufactured in the U. S., will be bought by the Federal Government for public use. However, the Act has several important exceptions -- the general requirement is inapplicable if the items to be purchased are not available domestically in commercial quantities of good quality; or if the cost of the domestic items is unreasonable; or if the head of the department otherwise determines it to be in the public interest to waive the requirement. The Department of Defense and NASA have each determined that the public interest requires waiver of the requirement as to certain items they need to obtain from certain other countries, as more fully described in those agencies' own internal regulations (i.e., the DAR and the NASA FAR-SUP).

6-2. The Act further provides that only the same types of items that can be bought by the Government under the Buy American Act for public use can be used by contractors, subcontractors, materialmen or suppliers in performance of a Government construction contract.

6-3. Subpart 25.1 of the FAR implements the Buy American Act, defining when the price of a domestic end product is "unreasonable" and when an item is made "substantially all from" domestic items or materials. It defines a "domestic end product" to include an item "manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." FAR Section 25.101. For the purposes of that calculation, components of foreign origin are treated as if they were domestic if either (a) the agency head has determined that waiver of the Act's application to the foreign component is in the public interest, or (b) the component is not available domestically in commercial quantities of good quality.

6-4. According to the FAR, the price of a domestic end product is unreasonable if it exceeds the price of the lowest acceptable foreign offer, including transportation cost and import duty (even if the duty is waived), by more than 6 percent. If the domestic offer is from a small business or a labor surplus area concern, the domestic price is unreasonable if it exceeds the foreign offer by 12 percent. Far Section 25.105.

6-5. The FAR also identifies items to which the Buy American Act is currently inapplicable, including civil aircraft (Section 25.104), and a list of items both mundane and exotic, from "bananas" to "Venom, cobra."

6-6. Caution should be exercised by the administrator who is coming in contact with the Buy American Act for the first time. Due to the complexities of the law, the advice of experienced administrators and legal staff should be sought before making interpretations of the law.

6-7. **Miscellaneous Laws.** Other laws which might have applicability in certain situations are: Occupational Safety and Health Act (5 U.S.C. § 5108, 15 U.S.C. § 633, 18 U.S.C. § 1114), which provides for safe and sanitary working conditions; Executive Order 11598, which requires the reporting of job openings to state employment agencies to help veterans needing work; Clean Air Act, which deals with contractors not complying with certain ecological regulations (42 U.S.C. § 1857); Economic Stabilization Act (12 U.S.C. § 1904), which requires reports on compliance with wage and price controls; and Defense Manpower Policy No. 4 and Economic Opportunity Act (42 U.S.C. § 2701), by which contracts are to be channeled into areas of economic distress and high unemployment.

CHAPTER 14

GOVERNMENT PROPERTY

Government Property provided to contractors is often important in the performance of a Government Contract. Such property may be provided for use in Government contract performance because of the Government's need for standardization, economy, stabilization of sources, broadening the industrial base and other factors that support the national interest.

2. This chapter covers an understanding of the concept of property, its types, its characteristics, and the methods of transfer and use. It defines title, bailment and fixtures. It also reviews prescribed contract clauses relating to property to show how they operate to refine and shape the legal positions of the parties in relation to the elements of ownership, use and transfer of property.

1. GENERAL CHARACTERISTICS OF PROPERTY

1-1. This section will discuss some aspects of the concept and characteristics of property that are important in relation to Government property used or usable under Government contracts.

1-2. **The Concept.** The idea of property is one of the most difficult of all the notions found in Anglo-American law. It is perhaps for that reason, a subject of law that is characterized by highly technical rules. Yet it is fundamental to the conduct of everyday personal affairs and the affairs of state. A rudimentary understanding of the concept of property and of the principles by which it operates is essential to understanding and effectively managing Government property.

1-3. Property is commonly defined as "a collection or aggregate of rights guaranteed by the Government." This definition is less than useful, as are many such "common-sense" expressions. All legal rights are guaranteed to some extent by the Government, at least in the sense that they are enforced upon request to Government in its capacity as representative of the sovereign entity. The state or sovereign entity is the source of recognition and protection of legal and other rights.

1-4. Anglo-American theories of law include the principle that the highest source of legal rights is basically "natural law" or the "Creator." The only recognized recipient of such rights is the individual. The role of the nation-state in the United States is to hold in trust and to exercise certain rights ceded to it by individuals and to recognize and avoid encroachment upon the portion of such natural rights reserved to the people. The role of Government is simply to carry on the affairs of state. The right of property is clearly one of the basic natural rights of men. It is among the more basic of the rights that we characterize in our Declaration of Independence as "inalienable rights" with which the Creator endowed mankind.

1-5. The distinguishing characteristic of rights properly classifiable as "Property" is that they express relationships. The legal analyst approaches the subject of property in terms of relationships between persons or classes of persons with respect to things, ideas and even other relationships. Reference is made to the property relation more than to the property right.

1-6. The particular relations expressed in the notion of property are exclusionary in nature. The essence of a property right or interest is the right to call upon the Government as an agent of the state to recognize and to exclude other people from holding or interfering with such relationships. The various kinds of relationships to things, places or other relationships and to other people or classes of people with respect to such relationships are classified as "interests" in property. The legal power to use, transfer, destroy, preserve, abandon, control, exert dominion over, or enjoy, where appropriate, a particular thing, idea obligation of another as space on earth, and to prevent other people from doing so is the gravamen of interests recognized and enforced in the property relation.

1-7. If an interest in property is held in common with others, each holder has an interest in only a part of the property. Common examples include property held by an unincorporated association, a consortium, a joint venture or a business trust. The actions of any individual holder is ineffective as to the whole of the pro-

perty interest unless it is joined in by all the other holders of that interest. Property bailed to such an entity is bailed in part to each of the constituents. While in the partnership situation, either partner may be held responsible for the entire value of bailed property which may be misdelivered, lost or destroyed; in a joint venture or association they may be held liable for only a portion of the value.

1-8. Interests in property when classified by time may be either present or future interests. If they are currently exercisable, they are present interests. Future interests may be either reversionary or executory. Executory interests may be either vested or contingent. If vested, all prerequisites to the exercise or enjoyment thereof have been met except the mere passage of time. There can be no necessity to determine who will take the particular interest, when or whether any condition to its exercise remains unfilled. Otherwise the interest is considered contingent.

1-9. A reversionary interest is one which will either certainly or may possibly revert back to the grantor or person who created the interest. The grant of the right to possession of a thing only for so long as it is used for a particular purpose, such as a Government contract, creates a reversionary interest in the possession of that thing, for example. The right to possession reverts back to the grantor when the thing is no longer used for the designated purpose.

1-10. Contingent interests may be either contingent upon conditions precedent or upon conditions subsequent. If subject to a condition precedent, then some intervening event must occur prior to the exercise of the interest. If subject to a condition subsequent, the right to exercise the interest is granted effective sometime in the future but may be lost upon the happening of some event.

1-11. An example of a future interest subject to a condition precedent is the right to modifications, improvements or attachments to equipment bailed to another on condition that such modification, improvements or attachments are inspected and approved by the Government and are then included in allowable costs under the contract. The conditions precedent to exercising the interest in such modification, improvement or attachment include in this example (a) inspection, (b) approval, (c) including the cost thereof in allowable costs under the contract. Unless these conditions are met, the Government obtains no interest in such modifications.

1-12. An example of a future interest subject to a condition subsequent might be a provision to the effect that the Government shall have title to all improvements, modifications or attachments which may be made or installed upon the equipment by the contractor unless, after inspecting the same within a designated period of time, the Government directs that the equipment be restored to its original condition.

1-13. In such event the Government acquires a vested interest in ascertainable property, i.e., such improvements as may be made or installed. The interest may be lost, however, if the Government orders restoration of the equipment.

1-14. **Categories.** Property or more accurately, the subject of property relations is categorized as either Real, Personal or Mixed. Real Property is defined by description i.e., it is land, buildings or other things permanently affixed thereto, or growing thereon. The concept of real property includes the area below the surface of land, even to the center of the earth. It also rises above the land to the limit of the property owner's right to reasonable use of it. The area of uses above the land is called air rights.

1-15. Personal Property is everything else of value in which legal interests may be held. It is further divided into two sub-categories; tangible, and intangible. Tangible personal property has physical existence and can be moved and touched. It includes things such as cars, clothes, furniture, jewelry, and all other kinds, having physical form, other than those that are real property. Intangible personal property may include ideas, creations, or information as well as such as stocks, bonds, copyrights and patents.

1-16. Mixed property is generally a personal property interest that is severed from, but depends for its existence upon, real property. Rentals under a real estate lease, royalties under natural resource leases and contractors' indebtedness to the Government under facilities contracts or property management agreements are examples. Generally, as long as the right or interest involved remains unsevered from the title to realty, it remains real property. When the realty is transferred they go with it. Otherwise they become personalty.

1-17. The real estate lease is an interest in the realty. It is an actual transfer of the realty

for a specified or implied (but fixed or determined) period of time. A conveyance of the underlying interests in realty remains subject to the interests of the leasee and those whose interests are derived from the leasee. The right to receive rentals or profits from the realty is part and parcel of the leasor's overall interests in the realty. On the other hand, the right to receive rents and profits may be severed from the lease by an assignment or conveyance to a third party, such as a creditor, lienholder, or mortgager.

1-18. When interests in property are severed from the bundle of aggregate interests therein, the law recognizes the creation of separate property. In the cases of rents or profits from real estate, once they are severed from the realty itself, they become a property apart from the underlying realty. They can be bought, sold, or attached separately from the underlying realty. Nevertheless, they remain dependent upon the existence of interests in the underlying realty. The deed to the realty and right to rents and profits may be transferred repeatedly to different parties. Nevertheless, the interests represented by the transfer of the deed remain subordinated to the interest of the owner of the rents and profits. If by condemnation or other legal proceedings, interests represented by the deed or title to the realty cease to exist or be held by anyone, the right to rents and profits cease to exist.

1-19. While the interest in rents and profits may be intangible personalty, however, they remain dependent upon the underlying interest in realty.

1-20. The interdependence of realty characteristics and personalty characteristics is the reason for the characterization of such property as mixed.

1-21. The classification of interests in property as real, personal and mixed has important legal consequences. The effective management and protection of the interest of the Government with respect to property may, in some instances, depend upon such distinctions.

1-22. Interests in property are further classified according to whether they are dominant or subordinate. Title represents the dominant interest. Any interest less than title is a subordinate interest. A license for use is, for example, subordinate to a right of possession. Custody may be subordinate in interest to possession. Subordinate interests, while following dominant ones in priority, usually restrict dominant ones in some fashion.

1-23. When subordinate interests are severed from the dominant interest in title, what is left to the title holder is a remainder interest. The interest of the lessor under a real property or chattel lease is a remainder interest. It continues through the term of the leasee's possession during the lease. The Lessor's interest in possession, however, is a revisionary interest. It is actually conveyed to the leasee for the term of the lease. The principal distinction for practical purposes between a reversionary interest and a remainder is whether the particular right ever left the grantor or creator of the subordinate interest.

1-24. Both real and personal property have many legal characteristics. These rights may be absolute or qualified. Some of these rights are: dominion, control, use, consumption, possession, transfer, and abandonment. When one has all of these rights, we say he has title to the property.

1-25. The concept of title expresses recognition that the title holder's claims with respect to the aggregate of interests in property are superior to the claims of all other persons. All subsequent holders of such interests must relate their respective claims back to the recognized claim of superior right of a person who holds or held title to the property. The title holder unassailably may prohibit or grant to others the use, enjoyment, right to transfer, or hold, abandon, change or even to destroy the nature of the "RES" or thing identified as property.

1-26. Title may be either legal or equitable in nature. Legal title is held by a person or class of persons exclusively for their own purposes and benefit. It is unrestricted as to any of the interests represented in the title. Equitable title, on the other hand, recognizes the situation where one person may hold title, but only for the purpose, benefit, use or enjoyment of another person or class of persons. The interest of the persons or class who have the sole right of use, benefit and enjoyment of property but not legal title is called equitable ownership and is indicated by equitable title. A Government contractor, operating a Government facility, who purchases supplies for its own account and the sole purposes of the Government, in the absence of an agreement otherwise, becomes the title holder of such property and the Government the equit-

able owner thereof.

1-27. Equitable title is merely the beneficial use and enjoyment of the property. Use and enjoyment is limited by the nature of the property and the arrangement for its use which is determined by its legal title holder. The equitable owner has no right to dispose of the property since the right is merely of use and possession, unless enlarged by action or agreement of the legal title holder. Ordinarily, when a person "owns" property we mean that he has legal title which also includes equitable title.

2. BAILMENT

2-1. **Definition.** The word "bailment" comes from the French word "bailler", meaning "to deliver." Thus the term bailment relates to the delivery of tangible personal property or "chattels" only. It does not relate to intangible or to real property, neither which can be delivered in a strict sense of the word. A bailment may be defined as a relationship which exists between a person or class of persons having a right to possession of tangible personal property who have conferred, by delivery, a right of possession upon others. This relationship involves the voluntary assumption of an absolute obligation to redeliver the bailed chattel and a duty of reasonable prudence in caring for such chattel until redelivery occurs, along with the right of possession conferred. The person conferring the possessory right is referred to as a "bailor." The person upon whom the right of possession is conferred is referred to as a "bailee." The possessory right or interest conferred upon the bailee is a right or interest severed from the title to the bailed chattel. It exists only for a definite period of time determined by an agreement between bailor and bailee or determined by the demand of the bailor. During its existence, the right of possession is in and of itself "property", defensible by legal proceedings against everyone in the world including the bailor and the title holder. The bailee's duty to redeliver the bailed chattel and duty to exercise reasonable prudence in caring for it are corresponding rights of bailors; similarly enforceable by legal processes. The bailee then holds the interest in possession of the chattel. The bailee's possessory interest is itself property exercisable against everyone including the bailor for a stated or reasonable period of time. The personalty (bailed property) is subject to return or disposal by the bailee at the end of the bailment term or as otherwise determined by agreement with the bailor or upon demand of the bailor.

2-2. The bailed property may be subject to use by the bailee in accordance with an agreement of the parties. Such use must be confined within the limitations of the nature of the chattel or the limitations set by the agreement. Return of the bailed property, if use is permitted, will usually be, subject to reasonable use (wear and tear) in its original form, or altered form, if allowed by the agreement.

2-3. The bailee may not, without strict liability pledge, sell or destroy the bailed property in a typical bailment. The bailee is obligated to use reasonable care to prevent the loss or destruction of bailed property. In some instances the bailee's duty of reasonable care extends to the prevention of loss or destruction by the bailee's employees who may have custody of the bailed property. When there is to be an alteration in the property, the alteration needs to be expressly provided for in the bailment agreement. Thus it occurs that Government property furnished to or acquired by a contractor may be considered bailed property, whether it is delivered under a bailment contract, or more typically delivered in accordance with the appropriate Government Property (GP) clause.

2-4. **Types of Bailment.** Three types of bailment are recognized. The most typical is a mutual benefit bailment, which normally arises in a business or commercial setting. This is the type most often found in a Government contract. The second kind is a bailment for the exclusive benefit of the bailor. The third is a bailment for the exclusive benefit of the bailee. There are two reasons that we need to distinguish among the three kinds of bailments. These reasons are: (1) the difference in consideration needed by each type of bailment and, (2) the level of care that must be exercised by the bailee to prevent loss or destruction is different for each kind of bailment. Note that bailees in all three types of bailments are liable, even if not at fault, if loss of bailed chattels occurs through misdelivery, conversion or destruction of such chattels by the bailee.

2-5. In this type of bailment, the consideration required is the same as that normally found in commerce; the reciprocal promises of the parties. The standard of care is the duty of reasonable care. This means that the bailee, while not an insurer, is liable for his negligence in losing,

damaging or destroying the property bailed to him. Thus, in this situation, a bailee is liable only for his negligence; he is not an insurer. The operator of a common carrier, truck, plane, or train, is a bailee, and since he serves the public at large, is an insurer of the goods he carries. Even when this is true, he is relieved from liability for loss, damage or destruction of the property to the extent that such loss arose from excepted perils, acts of God, the State, or public enemy, or due to an act of the bailor (improper packaging) or the nature of the goods.

2-6. The next type is a bailment for the exclusive benefit of the bailor in which the bailee has only a slight duty of care and the bailor has a heavy duty of care. The remaining type is a bailment for the benefit of the bailee. Here the bailor has slight benefit, and the bailee has great benefit; correspondingly the bailor has a slight duty, and the bailee, because he is getting the greater enjoyment and benefit from it, has the much heavier duty, even more than that of reasonable care.

3. BAILMENTS IN GOVERNMENT CONTRACTS

3-1. **Disposition of Bailed Property.** The ultimate disposition of the property, upon completion of the work on it by the bailee (contractor), should be, and is properly provided for in the contract. For example, will the property be incorporated into an end product, or will it be returned to the Government, or disposed of as scrap, or turned over to another vendor, or even abandoned in place. When the Government bails such property, it has the positive duty, as part of the agreement, to indicate the method of disposition at the end of the term of the bailment.

3-2. **Risk of Loss or Damage.** As earlier indicated, there can be three types of bailments, mutual benefit, exclusive for the benefit of the bailor, or exclusive for the benefit of the bailee. The mutual benefit bailment is the most common. Here a duty of reasonable care is imposed on the bailee-user obliging him to deal with the property in a reasonable and prudent manner. In this type of bailment, the bailee is not an insurer of the item, but is liable for his negligence if he causes loss, damage or destruction to the property. Therefore, if the property is in the bailee's possession and destroyed by an act of God, and he has no insurance on it, he is not liable for that loss. The bailor bears the risk of loss under such a situation. However, if the bailee, through his own negligence, loses, damages or destroys the property, he is liable for the value to the bailor. This is the classical legal pattern of liability in a mutual benefit bailment. Other types of bailments are, of course, those for the exclusive benefit of the bailor or for the exclusive benefit of the bailee. In the first instance, the bailee has a very slight duty to care for the property in his possession, and the converse is true, in the second instance, where it is for the exclusive benefit of the bailee.

3-3. **Ground and Flight Risk.** Sometimes, when the property involved is an aircraft, an additional clause complements the bailment clause. It is the "Ground and Flight Risk" clause. This special additional clause provides for the nature of use, and the determination of an acceptance of liability by the Government for such bailed property, when used within the limits of the clause. This clause requires that the use of bailed property be limited to properly authorized personnel qualified for the type of flight and the type of aircraft involved, and that such contractor personnel operating the aircraft be in a current flight status. It also is needed to absolve the contractor from negligence liability, which is the level of care normal to the bailment. Instead, it relieves the contractor from negligence, and holds him responsible for loss, damage or destruction only if his conduct amounts to: (a) lack of good faith, or (b) willful misconduct, and that this conduct be manifested by his managerial personnel. (For definition and application of this concept, see *Appeal of Fairchild Hiller Corp,* ASBCA No. 14,387 (Dec 71)). [See *Government Contract Law Cases,* Fourth Edition, Ch 9, pg 12.]

3-4. **Bailment Versus Government Property.** Conceptually, Government personal Property in the possession of contractors is simply a form of bailment. In practice, it differs in some respects. Consumption of Government property, rather than return as bailed, is a principal difference. Another is the liability position of the bailee. Risk of loss takes several forms: not just simple negligence. Consumption or loss of identity may occur, so that the Government Property is not always returnable in the same way as bailed property otherwise is; thus the practice in Government contracts of separating discussion of Bailment and Government Furnished Property has developed. Sometimes real estate is furnished to contractors. This is normally done under a "use" or "facilities" agreement. These are a form of

real estate lease.

4. GOVERNMENT PROPERTY

4-1. **Classifications of Government Property.** There are many classifications of property and they are identified by definitions in Part 45 of the FAR. Section 45.301 defines material. Section 45.101 defines special tooling. Section 45.101 defines special test equipment, all of which, as well as military property, are types of personal property. Facilities are defined in FAR 45.301 and facilities can be real estate within the normal context of property law.

4-2. **Authority.** Under the enabling legislation known as the "Federal Property and Administrative Services Act of 1949," 40 U.S.C. 471 *et seq.*, as amended, the General Services Administration has the exclusive right, power and duty to deal with all Government property in the Federal establishment. This authority has, under the law, been redelegated to the Department of Defense as to property in its own operational activities. Thus, all of the property, except for capital ships, is ultimately controlled by the General Services Administration and only, by the Defense Department as a result of the delegation under the law.

4-3. **Policy.** There are several reasons prompting the Government to furnish property to a contractor performing a Government contract. First, the Government may furnish property to a contractor to assist in its performance. Second, the Government will furnish property to ensure proper security. Third, as a device to encourage standardization within the establishment. Fourth, is used as a device to further broaden the industrial base. Fifth, it may be used as a device to increase competition or eliminate the need for large capital investment for materials, tools, or other equipment. Sixth, it is a method for updating improvements in manufacturing processes. Finally, the property may have no other use after the production and therefore the contractor has not economically been able to invest in it, so the Government must provide it.

4-4. Property provided by the Government under the above law is essentially furnished from Government Stores as Government Furnished Property or is acquired by the contractor and becomes Government property when so acquired. In either case an extension of the concept of a bailment applies. More typically it is provided under the appropriate Government Property clauses. These are FAR 52.245-2 for fixed-price contracts and FAR 52.245-5 for cost-type supply contracts. These clauses set out specifics of the relationships between the Government and the contractor. The reason the property is furnished in this manner is that under the above law the Government is not allowed to sell the property to the contractor.

4-5. There are two ways the Government may furnish property to contractors. (1) Directly from its own warehouses or production facilities, or (2) by the contractor acquiring it through his normal purchasing channels and then, introducing it into production. When the Government furnishes it directly from its stores, it is called *GFP* (Government Furnished Property). When it is furnished through the contractor by commercial purchase, it is called contractor-acquired property. When both of these categories are handled together, they are covered under the general heading of "Government Property".

4-6. **Risk of Loss.** Risk of loss is a consideration in this arrangement of providing Government property. In sealed bid or competitive negotiated contracts the contractor is an insurer of the property, as he is liable for all loss or damage except for normal wear and tear and property consumed in contract performance. In all other contracts, the Government acts as a self-insurer of any Government property that is in the possession of contractors. Legally, the contractor as a bailee always remains liable for risk of loss to Government property in its possession. However, in cost-type contracts, except for the perils covered by commercial insurance on the contractor's commercial work, the Government bears most of the risk of loss. To fix liability against the contractor, the Government must prove either:

(a) that the contractor's actions giving rise to loss, damage or destruction were either willful, (not merely negligent), or that his conduct was so grossly indifferent as to amount to willfulness, plus that this behavior can be directly traced to the highest level executives. These executives may be presumed to have acted willfully when deficiencies in management, called to their attention by the Government, are ignored. According to the risk of loss clause, such a presumption is conclusive --

or,

(b) that the contractor actually knew of the particular risk that caused the loss or des-

truction of Government property.

4-7. **Title, When Acquired, How Vested.** In a sealed bid contract without progress payments, normally the Government takes title only to the end product at its point of delivery. In sealed bid contracts with progress payments, negotiated fixed-price, and cost-type contracts, where the contractor himself buys property for which the contractor is reimbursed, title to that property passes to the Government. This occurs in the fixed-price type of contracts either upon issuing the property to production, or on payment of the invoice that in effect pays for the property already received. In a cost-type contract, title is transferred to the Government upon acceptance from the supplier by the Government's contractor. Further, the Government has full rights to acquire title to special tooling or to abandon it by electing to do one or the other at the end of the contract term. While in the negotiated contract with special tooling we can either take title or abandon it. In those cases where special tooling is deliverable as an end item, title automatically vests in the Government. The question of title to property furnished by the Government cannot arise because title is never divested from the Government. Even though the article furnished by the Government to the contractor becomes a part of a larger assembly which is redelivered to the Government, the incorporated component's title remains with the Government.

4-8. **Title When Progress Payments Made.** Under the Progress Payments clause, the legal question has been resolved whether the Government acquired full legal title or only a security interest (lien) in the contract property. In *American Pouch Foods v. U.S.*, 769 F.2d 1190 (1985), the contractor was involved in a Chapter 11 bankruptcy reorganization, with the question arising: "What title did the United States have to combat rations in the possession of the debtor, American Pouch Foods, Inc.?" The title vesting clause of the progress payments part of the contract provided that title to all parts, materials, inventories, work in progress and various other categories immediately vested in the Government. The contractor argued that the above clause only gave the Government a security interest or lien in the contract property and that the priority of the Government's lien would be determined under the *Illinois Commercial Code*. The Court of Appeals for the Seventh Circuit held that progress payments caused full legal title to the goods to vest in the Government under the title vesting paragraph of the Progress Payments clause of the contract.

4-9. Where the contractor furnishes property, which then becomes Government property upon a progress payment, the title that vests in the Government does not cause the Government to have the right to interfere with the contractor's production. The reason is that title is only used to protect the Government's interest against a paramount claim, should the contractor be exposed to hazards of seizure and other similar circumstances. Another reason is that, as the bailee, the contractor has the right to possession of the property and this right to possession is enforceable even against the bailor, the Government. The legal elements of possession are dominion and control. If the Government interferes with the contractor's control of the property, the contractor is divested of possession and the contractor's responsibility as a bailee with respect to the property may thereby be diminished, unless there is an agreement to the contrary.

4-10. Under virtually all clauses, the use of Government Property is limited to the contract under which it is either furnished by the Government or acquired by the contractor. The other aspect of use is the disposition of scrap. In most instances the clauses indicate that the scrap belongs to the Government but that the contractor can sell it and deduct that sale as a charge against the contract, so that the cost to the Government is less than would otherwise be the case.

4-11. If the contractor uses material on a contract, other than the one authorized, the contractor may have thereby committed an act of "conversion" and is therefore liable in law for damages and possibly for return of the goods.

4-12. Contractors use of the Government's production equipment can occur either under a facilities contract or a supply contract. However, to the extent that facilities are furnished, they are limited to being used for the authorized contracts only. Should facilities be used for commercial work, the provisions of FAR 52.245-7 thru 11 provide for payment for such use.

4-13. If the contractor uses the equipment and does not report it, the property administrator can charge him as though it were using it full time in those situations where (a) the contractor was using such property without permission, and (b) where the contractor was not reporting it.

This is true even though the contractor only used it occasionally. The formula for charging the rentals on such facility's items is expressed in FAR 52.245-9.

4-14. The usage rate that entitles the contractor to keep property will be expressed in a given contract or under a rate of use in a facilities contract. By conforming with the provisions of FAR 52.245-7 through 11, he can then keep the equipment on a continuing basis, so long as he meets the minimum use requirement.

4-15. If production equipment becomes idle, the policy is to declare it surplus and forward it to DIPEC either physically or symbolically to be put under its jurisdiction for reutilization. DIPEC stands for the Defense Industrial Plant Equipment Center which is headquartered in Memphis, TN. That organization has responsibility for reutilization of production equipment which is declared surplus by various activities.

4-16. The provisions of the Government Property clause indicate the responsibilities the contractor has for Government Property. In the event the contractor does not conform to these requirements, it has in effect breached the contract. Such a breach gives the Government a right to terminate the contractor for default. While this is legally a right, it is seldom a practical remedy. A default termination is generally considered only as a last resort.

4-17. **Suitability and Timeliness.** In addition to the question of liability for Government Property, there are two other principal legal issues that concern a contractor in the Government's administration of the contract. They are first, the delivery of Government property in a manner that is suitable to be used in the production process of the contractor and secondly, that such property is delivered on time.

4-18. Once delivery is made of GFP to a contractor, he is entitled to presume that it is in usable condition, but he still has a duty to inspect it in enough time before production in order that the Government has the opportunity to either authorize him to repair it, or return it, should it be defective. Defective means that it will not function to the level of performance needed, e.g., an electrical device that has a short circuit in it, or will not operate at full power. A second category of suitability is that the property must be conforming as to type, i.e., as to the three elements of form, fit or function. Nonconformance means that the GFP cannot be used without deviating from the normal manufacturing process then in use.

4-19. **Late Deliveries.** Late deliveries may give rise to a demand by the contractor for equitable adjustment since this may cause a constructive change in the contract. However, this only entitles him to an equitable adjustment should late delivery by the Government impact on his performance. If it caused him no economic or operational impact, he suffered no damages, and therefore is not entitled to any relief, simply because the delivery is late. The same is true of claims related to "suitability".

4-20. **"As Is".** The next legal issue we are faced with is the meaning of the term "as is" when property is furnished in that manner. Essentially, it means that the Government has relieved itself from liability for unknown patent defects in the property which it owns that is to be provided to a contractor. It is up to the contractor to reasonably inspect Government property and discover defects which are not latent. The contractor takes the material, supplies, tooling, data or equipment subject to those defects. This situation usually provides the contractor with some opportunity to inspect. However, should the Government know of defects which may proximately cause delays as added expense in connection with the intended use of Government property, it must advise the contractor of them. In making a firm fixed-price contract, such notice should be included in the offer of Government property in the solicitation. If it is not, it may be unconscionable behavior on the part of the Government to refuse to allow an equitable adjustment for the contractor. *G.W. Galloway,* ASBCA Case No. 16656 (1973). [See *Government Contract Law Cases,* Fifth Ed, pg 9-05]

4-21. Care should be taken to distinguish the rights a obligations of the parties regarding defective Government Property in different situations. It is not clear that the Government is obliged to allow equitable adjustments in the case where the Government property is realty, where the defect is caused by the contractor, where the defect is reasonably discoverable upon inspection by the contractor or where the Government property is acquired by the contractor from its subcontractors. Such rights and obligations may vary according to the law of the place where the property is located, unless it is located at one of the relatively few places where Federal Law is applied exclusively.

4-22. **Special Classifications--Special Tooling.** There are two areas of personal property in the Government Property environment that merit some additional clarification. The first is special tooling acquired as a line item under a fixed-price contract. The second is special test equipment, discussed in 4-23, *infra.* In this instance, it clearly belongs to the Government. However, in the type of contract where Special Tooling is not a line item, the Government considers itself an owner of the property with the right at the completion of the contract to: (1) require the contractor to issue evidence of legal title in the Government thus transferring it to the Government, (2) sell the tools to the contractor at fair market value thus vesting title in the contractor, or (3) have the contractor sell it to reimburse the Government account, thereby reducing the contract price or (4) abandon the tools. If the Government abandons the tools by express act, they then become susceptible to being claimed by the contractor. In any cost-type contract environment the Government completely owns all of the special tooling when the total cost for such items is included as part of the total contract cost.

4-23. **Special Test Equipment.** FAR 45.101. Procured in a cost-type contract Special Test Equipment clearly belongs to the Government. However, in a fixed-price negotiated contract where the contract does not specify any method of title transfer and the Government allows the contractor to buy special test equipment, its title passes to the Government as a function of a normal GFP clause.

4-24. **Residual Inventories.** The last legal issue about personal property in the Government contract arises with respect to residual inventories. In the fixed price negotiated environment, it is the duty of the ACO to claim the Government's ownership of this type of equipment and property if its cost has been a charge against the contract. This is done in the settlement agreement in order to have the price reduced appropriately. If the Government does not claim it, it leaves the question unresolved. The reason it is unresolved is that it cannot be presumed that the Government abandons something without an overt act. Where the Government leaves an item undetermined or unresolved by inaction it does not amount to an abandonment. Thus, the condition of the residual inventory in a contract is clouded.

5. FIXTURES

5-1. **Definition.** A fixture is an item of personal property that loses its identity as personal property, and becomes real property, by being attached in a permanent manner to realty or something already permanently affixed to realty. In order to determine whether an item had become permanently attached to real estate, we must examine: (1) what is the item, (2) how is it attached, and (3) what was the intent of the parties when the attachment was made? This question of intention of the parties is answered by either a presumption or an express term. The presumption is objective in its nature, that is, what would normal people presume to be the result of attachment? It can also be answered by the express terms of the contract which articulate that it is to become part of the real estate.

5-2. An example of a fixture is a boiler that is suitable for permanent attachment. A boiler that generates steam is typically permanently attached by being built into the building. It can objectively be inferred that it was intended to become part of the realty and is therefore a fixture and cannot be removed. We see that by the nature of attachment, certain personal property can and does become real property.

5-3. When a fixture is for the furthering of a trade, it normally remains personal property, not in that it maintained its identity as personal property, but because it is said to further the trade or activity in question. Hence, if it is designed to be unique and to improve the trade of the vendor, it is considered a trade fixture and therefore removable, unless it would destroy the building in the process. However, the attachment which meant to be an improvement of realty, e.g., a chimney, becomes a part of realty, and cannot be removed.

5-4. In the Government contract and the Government furnished property clause, there is a provision that says in effect, that an item of personal property furnished, even though affixed, does not lose its identity as personal property for the purposes of the contract. What this does is make the intent of the parties clear by contract that personal property does not lose its identity by attachment to real property and thus does not become a fixture. Also, when a contract is completed, the Government may remove the article if it chooses to do so. If it chooses to, it may abandon it in place by virtue of another clause which calls for the Government to do something

expressly in order to indicate the abandonment. Normally when the fixture is removed in the commercial environment, the remover has the duty to refurbish and restore the property from which it was removed. Again in a Government contract, by expressed language in the property clause, the Government may abandon property in place. If it does remove it, there is no responsibility to restore the premises to their former condition. Thus, by special clause language, the Government avoids questions as to fixtures, abandonment, and restoration of premises on the removal of what otherwise would be fixtures.

6. FACILITIES

6-1. The last topic in the area of property is that class of property called facilities.

6-2. **Definition.** Facilities as defined in FAR 45.301 means industrial property (other than material, special tooling, military property, and special test equipment) for production, maintenance, research, development, or test, including real property and rights therein, buildings, structures, improvements, and plant equipment and are covered under relationships typically called Facilities Contracts.

6-3. A facilities contract, as a matter of law, is essentially a lease. The lease may be an interest in real estate, depending on the law in the jurisdiction where the property is located. Thus, in a facilities contract, the contractor can literally exclude Government personnel from the premises except to the extent provided for in the lease. Normally, access is provided to check for normal repairs, etc. The reason for this exclusion is that his interest is exclusive and complete for the term of the lease, and he stands in the shoes of the original owner. The Government Facilities Contract expressiy treats all of the important aspects the same way, as does a lease by its express language. Thus, regardless of the name we give this document, the terms conform to the provisions found in a well written lease.

6-4. It is important to recognize the difference between the Facilities items and other property furnished under the Government property clause, because the method of transfer and accountability are handled in a different manner.

CHAPTER 15

PRESCRIBED CONTRACT CLAUSES

Certain clauses included in Government contracts contain prescribed terms and provisions. The particular term or provision reflects statutes, Executive Orders and regulations which either repudiate, confirm or modify the operation of recognized legal concepts or principles. Use of such clauses is compulsory in some circumstances and use of other prescribed clauses is optional in other situations. These distinctions are expressly dealt with in the regulations.

2. It may be appropriate to the achievement of management objectives to seek and obtain waivers of otherwise compulsory provisions in some circumstances. This can be done with departmental approval. In other circumstances it may be desirable to supplement such provisions with other terms drafted for the purpose of a particular transaction. The process also is permissible with policy and legal concurrence. It is possible through other contract provisions, or through conduct, to waive or sever the effectiveness of prescribed clauses; thus diminishing our ability to enforce the government contract.

3. Generally, if a particular clause, or the result obtained by use of a particular clause, is required by statutes, regulations implementing the statute are likely to exist as well. Some such regulations may impose more specific requirements on the contracting parties than others. In such instances, analysis of, and strict compliance with, the regulation is necessary. If regulations compel inclusion of clauses containing prescribed provisions in the contract, no substitution provision may be used unless the regulation expressly permits such substitutions when it is necessary or appropriate to waive, supplement or otherwise deviate from prescribed terms or provisions. Approval is necessary at organizational levels other than at which contracting or purchasing occurs.

4. The legal effect that obtains where a statute by its terms prescribes a particular result, but the application of regulation or other provisions of the contract or interpretation of the conduct of the parties leads to another, is not clear.

5. The termination for convenience clause, incorporated into the contract by law in the celebrated *G. L. Christian* case, was only indirectly based upon statute. The applicable statutory provision generally commends the adoption of regulations for the management of Government purchasing. It does not compel by its term a termination for convenience clause. The Truth in Negotiation Act, for example, specifically requires that contractors be compelled to submit cost or pricing data under certain circumstances and that a provision to effect a contract price reduction in some circumstances be included in the contract. The Board of Contract Appeals, in the *Cutler–Hammer* case, refused to read the omitted clauses into the contract, notwithstanding the contractor's insistence that *Christian* required its inclusion.

6. It appears that inadvertence is the only element which rationally distinguishes the two cases. In *Christian,* omission of the required clause was alleged to have been inadvertent. No such allegations were apparent in *Cutler–Hammer.* It would therefore appear that nonaccidental waiver, substitution or modification of the legal effect of prescribed provisions based upon statute will be ineffective. Inadvertent ones, on the other hand, may be effective. Thus, the Government may be able to accomplish accidentally what it cannot accomplish deliberately.

1. VENDOR COST OR PRICING DATA

1-1. This part examines the prescribed clauses relative to contractor supplied cost or pricing data. It surveys statutes, clauses, certain certificates and compliance standards which relate to cost or pricing data, provided to the Government by contractors. This discussion includes functions of the Contracting Officer, legal problem areas, and some possible remedies.

1-2. **The Truth in Negotiations Act.** (a) Public Law 87-653, 10 U.S.C. § 2306(f) as amended by The Defense Acquisition Improvement Act of 1986 in 10 U.S.C. § 2306a, provides that, under certain circumstances, DOD and NASA prime and subcontractors shall be required to submit cost or pricing data, and to certify that such data are accurate, complete, and current. (b) Civilian agencies have been made subject to identical provisions by the CICA in

1984, 2712 which amends 41 U.S.C. § 254 by adding a new paragraph (d). Now, therefore, both DOD and civilian agencies subject to the Federal Property and Administrative Services Act (FPASA) are subject to identical cost and pricing data requirements requiring the submission of costs or the pricing data scheme. The substance of both acts is that all contracts or changes thereto which require such certification must also... contain a provision that the price ...shall be adjusted to exclude any significant sums by which ...such price was increased because the contractor or any sub- contractor required to furnish such a certificate, furnished cost or pricing data which ...was inaccurate, incomplete or noncurrent.

1-3. The broad rule of law generally determinative of the relative right of the parties with respect to information supplied to buyers by sellers is expressed in the maxim *Caveat Emptor* or let the buyer beware. It was distilled by architects of both the civil law system and the common law system from thousands of years of commerce and jurisprudence experience.

1-4. The institutions of the law have historically operated to distinguish the legal consequences of seller representation concerning the *value* of the product or service offered from the consequence of such representation concerning the *quality* of such goods or services. Though perhaps blurred in modern jurisprudence, the distinction fortunately survives and remains vital in the commercial practice of law today.

1-5. Seller representation or misrepresentation concerning value are, at worst, considered matters of nonfeasance as opposed to misfeasance. The concept of value is perhaps too inherently subjective. Different parties may reasonably hold widely divergent views concerning the value of a particular good or service. Indeed, the same party may attribute different values to a subject under different circumstances. The policy of legal decision makers, with respect to questions of value, is similar to that employed in questions of consideration. It is sufficient to ascertain that there is some value or consideration. No inquiry is made into the adequacy of either value or consideration.

1-6. Seller misrepresentations of quality, on the other hand, have always been actionable. In most instances, sellers fraudulently offering inferior quality were subject to punishment at the hands of public authority, as well as to recovery of private damages. Fraudulent representations of quality were clearly regarded as misfeasance.

1-7. The general rule that buyers are obliged to make their own determinations of value, and have no right to rely upon seller's representations in that regard, should not be ignored. It places responsibility for buyer consumer protection unequivocally upon the buyer. Buyers who choose to place reliance upon modern theories purporting to require some form of truth in dealing on questions of value choose a poor substitute of vigilance in commercial transaction.

1-8. Within the commercial market place the buyer is left to make his own determination of value. There is no general remedy against sellers, where the buyer overestimates value and pays too much. If, on the other hand, a seller overcomes or sufficiently inhibits a buyer's authority to independently determine value, the seller may acquire some obligation to the buyer and the buyer may secure remedies against the seller.

1-9. Misrepresentation by seller of quality which induces a buyer to overestimate value leads to that result. Concealment of material facts, preventing buyer's discovery of such facts, or misrepresentation of such facts under circumstances where the buyer has a right to rely upon such misrepresentation may lead to similar results. Such results generally stem from the law of torts, however, rather than the law of contracts. The torts of deceit and fraud have always been available to protect both wary and unwary buyer. Such tort concepts have frequently been modified to protect the U.S. Federal Government.

1-10. A broad spectrum of remedies is available to protect the Government against fraud, civil fraud, deceit, criminal fraud or, in some instances, mere misrepresentation. For example, 28 U.S.C. § 2514 provides for forfeiture of fraudulent claims against the Government. 28 U.S.C. § 371 provides for fine and imprisonment as a penalty for any conspiracy to defraud the United States Government. 18 U.S.C. § 495 provides for a fine and imprisonment for making any false writing for the purpose of obtaining or receiving any sum of money from the United States Government. 18 U.S.C. § 1001 provides a fine and imprisonment for knowingly or willfully falsifying, concealing, or covering up by any trick, scheme, or device, a

material fact, or for making any false or fictitious representations in any manner within the jurisdiction of any department or agency in the United States. Furthermore, under the common law, and the laws of most states, a contracting party who makes material misrepresentations in the negotiation of a contract may be liable in damages, and the affected contract subject to an action for rescission by the affected party.

1-11. The Truth in Negotiations Act and 41 U.S.C. § 254(d), of the FPASA, are designed to provide a contractual, as distinguished from a legal, remedy in the case of erroneous information provided by seller to the Government; most importantly, negligent or inadvertent failure to make full disclosure of pertinent and significant facts in a proposal or during a negotiation. The statute seems to require something above and beyond the ordinary legal obligation placed upon a seller to disclose information to a prospective buyer. It is the sole basis for any right of the Government to rely upon information supplied by the contractor in determining price or value, except those identified in 1-10, *supra.*

1-12. **Contracts Covered by the Statute.** Coverage of the law extends to several types of contract actions:

(1) negotiated prime contracts over $100,000,

(2) changes and other modifications over $100,000,

(3) subcontracts over $100,000 where the prime and higher tier subcontractors were required to furnish certificates,

(4) changes and other modifications over $100,000, to subcontracts covered by (3) above,

(5) changes and other modifications under $100,000 to prime and subcontractors as prescribed by the Head of the Agency.

1-13. **Contracts Not Covered by the Statute.** The Truth in Negotiations Act does not cover:

(1) prime contracts awarded by sealed bidding procedures,

(2) negotiated prime contracts under $100,000,

(3) subcontracts under $100,000,

(4) changes or modifications under $100,000 not prescribed by the head of the agency as covered (prime and subcontracts),

(5) negotiated prime and subcontracts where the price negotiated is based on:

a. adequate price competition,

b. established catalog or market prices of commercial items sold in substantial quantities to the general public,

c. prices set by law or regulation,

d. exceptional cases where the head of the agency waives coverage.

Although the statute exempts the prime and subcontracts under $100,000 from coverage, FAR extends coverage below the $100,000 floor and should be examined by anyone operating in this area. Even though a contract is exempt from the Act, the Government may require pricing data. The contractor has no right to the exceptions from coverage of the law.

1-14. **The Clauses.** FAR 15.804-6 implements that portion of the statute which requires that certain contracts contain a provision for price reduction for defective pricing data. The rationale for this clause is:

> *Where any price to the Government, including profit or fee and including price adjustments, must be negotiated largely on the basis of cost or pricing data furnished by the contractor, it is essential that all data that might reasonably affect the price negotiations be disclosed and that such data be accurate, complete and current.*

1-15. In order to implement the intent of the law and the Regulations, and to make these provisions binding upon contractors, there was a need to provide enabling contract clauses and require that such clauses be included in appropriate contracts. The first enabling clauses, FAR 52.214-27 and 52.215-22, are the *Price Reduction for Defective Cost or Pricing Data* clauses. Essentially, these clauses provide that the contract price shall be reduced if the Contracting Officer determines that the price was initially increased because the contractor furnished incomplete, inaccurate or noncurrent data. Failure of the Contracting Officer and the contractor to agree on a reduction shall be a dispute concerning a question of fact within the meaning of the Disputes clause of the contract.

1-16. To enable the Government to determine whether the cost or pricing data, as submitted, were accurate, complete and current, the regulations provide for audit clauses. Contracts exempted by the statute from this requirement

include those "where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or by regulation or, in exceptional cases where the head of the agency determines that the requirements. . .may be waived. . .."

1-17. **"Cost or Pricing Data" Defined.** The Act, at § 2306a subsection (g), entitled "Cost Or Pricing Data Defined", states:

> *[T]he term 'cost or pricing data' means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), 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.*

1-18. **Certificate Required.** The Act states at § 2306a(a)(2), that:

> *a person required as an offeror, contractor, or subcontractor to submit cost or pricing data ... shall be required to certify that, to the best of the person's knowledge and belief, the cost or pricing data submitted are accurate, complete, and current.*

FAR 15.804-4 sets forth the form and content of the required certificate of current cost or pricing data. The contractor must furnish this certificate, effective as of the date of agreement on price, affirmatively stating that the cost or pricing data furnished is current, complete, and accurate as of that date. It should also be recognized that failure of the Contracting Officer to obtain this certificate may defeat a price reduction action under the clause.

1-19. **Contractor Compliance.** To comply with the Truth in Negotiations Act, a contractor must:

(1) Submit cost or pricing data to support his proposal. This is normally done on a form SF 1411 (formerly DD Form 633)

(2) Certify that the data submitted are accurate, complete, and current.

(3) Agree to the inclusion in the contract of a provision for price reduction to exclude any significant amounts by which the price was overstated because defective cost or pricing data were used.

(4) Agree to accept audit and subcontractor certification clauses in his contract.

1-20. **Contracting Officer Functions.** To achieve the objectives of the Truth in Negotiations Act, the Contracting Officer must:

(1) utilize the data submitted by the contractor in arriving at a fair and reasonable price;

(2) after negotiation, require the contractor to furnish the required certificate;

(3) place the appropriate clauses in the contract;

(4) document the files to assure "trackability" -- that is, to assure that the record shows that the data the contractor submitted was (or was not) actually relied on by the Contracting Officer in negotiation.

1-21. **Emerging Legal Problem Areas.** As with any statute requiring administration, the Truth in Negotiations Act has resulted in differences of opinion in several areas. The principal questions in controversy are:

1. What is "data?"

2. When is it reasonably "available" to the contract?

3. When has the contractor "submitted" the data?

4. When is a defect "significant" in amount?

5. When is data "relied on" by the Government?

6. Are "set-offs" in errors permitted?

7. What is "complete, current and accurate?"

Since the disputes in this area are submitted on appeal to the Boards of Contract Appeals, a review of the principal decisions by the Boards will reveal the answers furnished.

1-22. **Analysis of Issues.** With a certain degree of logic, the Board in its first decision in this field considered the essential question in the resolution of any factual dispute, "Who has the burden of proof?"

1-23. In *American Bosch Arma,* ASBCA 10305 65-2 BCA para. 5380, the Board clearly held that the burden of proof was on the Government to establish each and every element of the then regulatory, but now statutory, grounds for recoupment.

1-24. As time has gone on, the Board has clearly indicated that it intends to leave this obligation on the Government, even in cases arising after the applicability of the Truth in Negotiation Statute.

In *Defense Electronics,* which was decided by BCA within the framework of a statutory clause, the Board stated: "The Government has the burden of proving every element in the chain of proof necessary to substantiate its claim."

1-25. It is incumbent on the Government to show that the change order price adjustment was overstated because of the contractor's failure to disclose, or its improper disclosure of data. *(Defense Electronics,* 66-1 BCA 5604).

1-26. Later, the Board modified the above rule, to the extent that it held that the burden was not an overwhelming one, and would be satisfied by *prima facie* proof of each element of the statutory basis for recoupment, *(Cutler-Hammer, Inc.,* ASBCA 10,900, 67-2 BCA 6432).

1-27. **The Elements of Proof.** *American Bosch Arma, (supra)* also set forth the elements of proof that must be established by the Government. There is every indication that the same sets of facts must be proven in cases arising under the clause implementing the statute (Cf. *Defense Electronics, supra,* and *Sparton Electronics,* ASBCA 67-2 BCA 6439).

1-28. These elements are: (1) the contractor did in fact fail to furnish accurate, complete or current pricing "data" in connection with the negotiation of the contract at issue; (2) the data furnished or omitted "caused" an increase in the price; (3) the dollar amount of the increase.

1-29. **Causation.** Perhaps the most difficult of the elements to be proven is the fact of "causation." This element may have a direct bearing on proof of the final element; the dollar amount of damage. The Board in *American Bosch Arma, supra,* stated, "This case illustrates the difficulty of establishing that nondisclosure of pricing data concerning a specific cost element caused an increase in the negotiated total price when there was no agreement or understanding with respect to specific cost elements."

1-30. In almost all cases decided in the realm of defective pricing data, the Board has wrestled with this problem. In the absence of affirmative evidence from the Government contract negotiators, the Board has come perilously close to repeating the ancient cliche; "the courts will not write a contract for litigants."

1-31. One of the better statements of the Government's burden in this regard, and of the Board's dilemmas, was enunciated by the Board in *Bell & Howell,* (ASBCA No. 11999, 68-1 BCA 6993, 32, 349, 1968). There the Board stated,

> *In determining the amount of the price reduction, our objective has been to carry out the purpose of the Truth in Negotiation Act by arriving at a fair, reasonable and realistic estimate of the amount by which nondisclosure of the data, viewed in the light of the facts and circumstances existing at the time of the negotiations, can be expected to have increased the negotiated price.*

1-32. There appear to be two inescapable conclusions regarding proof of the elements of causation and dollar damages: (1) contract negotiators should maintain extensive logs or professional diaries regarding the observed realities of each day that they are in the bargaining process. Otherwise they must rely upon the subjective evaluations by the Board as to what a member of the Board would have done had he been a negotiator; (2) absent affirmative evidence as mentioned above, the Board will apply the "reasonable man" test to determine the impact of the nondisclosure.

1-33. The element of causation is closely related to the element of reliance generally essential to cases of misrepresentation or deceit. Analytically it is difficult to establish a causal link between the misrepresentation or omission and the resulting harm, unless it can be shown that the Government in fact relied upon the data submitted in arriving at a price.

1-34. While the statute provides a right to rely in cases, where there is otherwise none, it does not establish a presumption of reliance. In fact, Government non-reliance on defective data can be a valid defense for a contractor or subcontractor. (*See* 15: 1-65) Where Government action is to obtain its own data by pre-award audit to challenge data submitted by the contractor, causation would appear more difficult to

establish.

1-35. **The Omission or Misstatement.** In general, the cases to date have arisen from the failure of the contractor to present to the Government information or data which, in hindsight, the Government believes would have resulted in a lower negotiated price. Therefore, three questions have to be answered by anyone who is called upon to make a decision under the defective pricing clauses:

1. What form of information is a proper object?

2. To whom may this disclosure be made so as to impute knowledge to the negotiators?

3. What are the relevant time frames for this disclosure?

1-36. **Information That Must be Disclosed.** Under the pre-statutory clause, the contractor was required to disclose "significant and reasonably available" cost and pricing data. Under the 1963 edition, a price reduction is possible if the contract was increased by any "significant funds." At first impression it appears as though the older criterion required the determination of older fraud cases, i.e., was the statement or omission of such a nature that a person would change his course of conduct predicated upon a belief in the truth of the statement? Superficially, the criterion set forth in the statutory clause seemed to set up a monetary value scheme, i.e., "the dollar value of the omitted data in relation to the total contract price is determinative of whether a case for recoupment exists."

1-37. The Board however has labored long and hard with this problem and neither of the two hypotheses set forth in the preceding paragraph has been accepted.

1-38. In **American Bosch Arma,** the Board expressly rejected the percentage approach to the significance of an omission and stated, "pricing data is significant if it would have any significant effect for its intended purpose, which (is) as an aid in negotiating."

1-39. The above approach has been followed in *FMC* and *Defense Electronics.* Thus, it has been applied both before and after the effectiveness of the Truth in Negotiations statute. Perhaps the most workable criterion has been supplied in *Bell and Howell, (supra).* There the vice-chairman of the Board (Mr. Shedd) stated in relation to certain undisclosed data, "Under such circumstances it is unrealistic to say that knowledge of these facts could not reasonably be expected to affect negotiations."

1-40. Assuming that Mr. Shedd's statement in *Bell & Howell* is to be taken as to the final view of the Board, it seems reasonable to conclude that presently an omission or a misstatement will be considered significant if reasonable persons of a certain degree of sophistication in the Government contractual field would believe that the knowledge would have affected negotiations.

1-41. Also, *Bell and Howell* leads to the inference that shifts from "significant data", under the 1961 clause, to the concept under the 1963 clause of "increased by any significant sum" will make very little difference in the administrative or legal impact of the clause.

1-42. **Fact vs. Judgment.** The *FMC* decision also brought to the foreground, as a contractor's defense, FAR 15.804-3. That section sets forth, with considerable clarity, certain basic economic procurement data which must be disclosed. It then goes on to exempt from the reporting requirement, "... the accuracy of the contractor judgment as the estimated portion of future costs or projections." It should also be noted that the section goes further and gratuitously states, "This distinction between fact and judgment should be clearly understood."

1-43. In *FMC,* the Government contended that it should have been supplied information on certain in-house experiments that were then in progress at *FMC.*

1-44. The Board recognized that *FMC's* in-house studies might have had a significant effect on the negotiations, had there been an attempt to achieve a target cost of a price-adjustable type of contract, but refused to give this omission any importance in negotiations leading toward a fixed-price contract.

1-45. To a limited extent, it can be said that the Board avoided deciding the distinction between fact and judgment as assiduously as the philosophers of old avoided the debate about the distinction between shadow and substance. The Board did apply a hindsight or pragmatic evaluation, i.e., the end result in that situation was not harmed by the contractor's failure, therefore, from the beginning there was no error.

1-46. In *Bell and Howell,* the appellant sought to avoid the impact of his nondisclosure of certain quotes that had been received from

prospective subcontractors on the basis that it did not, at the time of receipt of the quotations, intend to use those subcontractors. This they contended was a judgmental decision and therefore, exempt from the requirements of the statute. The Board made short shrift of that argument. It held that the quotations were actual data, whose revelation would have had an impact. It was conceded that the determination not to use the would-be subcontractor was judgmental. Here the Government prevailed.

1-47. This decision was essentially followed, in the 1969 *Cutler–Hammer* case, in the Court of Claims. However, in the 1973 ASBCA case of *Chu Associates, Inc.*, (No. 15004), nondisclosure of vendor quotes were excused on the grounds that the contractor did not seriously consider using the undisclosed vendor at the time of certifying, and that only later circumstances caused the contractor to do so. Parts inventory was considered pricing data in *Hardie–Tynes Mfg. Co.*, 76-1 BCA 11,827 (1976), since a definite possibility existed that the parts would be used on the contract, if awarded to them. Whether an estimate or pricing plan is pricing data, within the meaning of the statute and contract, is a question of fact in each case, *E–Systems, Inc.*, ASBCA No. 17557. Pure estimate is not, but factual data in the estimate is, cost or pricing data. The new act attempts to incorporate the logic expressed in the previous cases by defining Cost or Pricing Data as:

> *. . . all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), 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.*

The House and Senate in conference in drafting the new Act were very concerned about creating a clear cut line of demarcation between fact and judgment. They attempted to clarify the distinction by stating that a contractor is not required to:

> *[P]rovide and certify to data relating to judgments, business strategies, plans for the future or estimates. A contractor is required, on the other hand, to disclose any information relating to execution or implementation of any such strategies or plans. For example, a corporate decision to attempt to negotiate a new labor wage rate structure with its employee union, although verifiable, is not cost or pricing data for purposes of this section. If the company has made an offer to the union, the fact that an offer has been made, and the details and status of the offer, on the other hand, is information that should be conveyed to the Government. Finally, this provision was amended to clarify that it applies to contracts and modifications to contracts entered into after the effective date of this Act.*

1-48. **The Time Phases for Disclosure.** The two early cases deciding the time limits for the transference of knowledge from the contractor to the Government were *American Bosch* and *FMC*. Those were decided with the guidelines of the 1961 Defective Pricing Clause. That clause demanded such data as was "significant and reasonably available." Therefore, the Board held that to determine a "cut-in date", it would look to see the earliest date that all data had been made available to an agent of the negotiating team. This included departmental auditors, who had been sent in on pre-award survey. Any data received by those auditors on the date of their examination, or which was available to them, had been disclosed to the Government.

1-49. Those two cases also reached to the determination of a cutoff date. It was recognized that in any organizational structure, information does not flow with the speed of light. Therefore the Board applied a certain presumption of irregularity, or inefficiency factor, and reached back approximately a month behind the contract approval date to establish a cutoff date. The appellants were not held liable for data that entered their systems after those arbitrary cutoff dates. In *FMC*, at least the Board noted that its action, beneficial to the contractor, was predicated upon a lack of affirmative evidence of record. In other words, with evidence the Government could have overcome the presumption of inefficiency.

1-50. The 1963 Clause has been applied in *Defense Electronics*. This old clause provides for recoupment if the data is inaccurate "as of" the date of execution of the contractor's certification. The case is of limited significance from the viewpoint of analyzing the time frame require-

ments under the newer clause, because the Board spent much time berating the abilities of Government auditors to whom the contractor had opened his books. At most it can be said that the concept of a "cut-in date" will be preserved, for the Board held the Government knowledgeable of the data that had been given to the auditor as of the date that he received it. Whether the Board will later establish a cutoff date based upon the "reasonably available" concept remains in doubt. Recent cases such as *Sylvania Electric Products, Inc. v. U.S.*, 202 Ct. Cl. 16 (1973) and *M–R–S Mfg. Co. v. U.S.*, 203 Ct. Cl. 551 (1974) indicate a refusal to allow a "time-lag" in data submission. In *Singer Co.*, ASBCA 17604, 75-2 BCA 11,401, the board held that, since the duty to furnish current data was a statutory one, the Government could not waive this duty by accepting pricing data it knew was non-current.

1-51. One further note should be made in the relationship of time. Few contractors have failed to defend the inaccuracy of data or the omissions of material matter without contending that pressure from the Government to expedite the quotations and allied data created the error. In nearly every case they have prevailed to a degree in this contention that urgency was the condition precedent to the situation.

1-52. **Equitable Off-Set.** Under the pre-statutory clause relating to Defective Pricing, the Board was traveling an extremely sophisticated path in the allowance of off-sets to contractors. These arose out of mistakes that operated in the Government's favor which were alleged as grounds for diminution of the Government's demand for recoupment.

1-53. In *American Bosch*, apparently unrelated off-sets were allowed, but as the Board later noted these were sanctioned primarily because counsel for the Government virtually stipulated that they were applicable. *(Cutler–Hammer*, ASBCA 10900, 67-2 BCA Para. 6432).

1-54. In *Lockheed*, ASBCA No. 10453, 67-1 BCA 6356, the Board refused to allow equitable off-sets on the theory that they were not directly related to the items that were the basis of the claimed recoupment. In the latest of the cases decided under the pre-statutory clause, the Board allowed off-set on the theory that the off-set was simply a mathematical recomputation of the costs of the very item that had been the foundation of the Government's claim. *(Sparton Corporation*, ASBCA 11363, 67-2 BCA 6539, and 68-1 BCA Para. 6730 (Reconsideration). The off-set allowed in *Sparton, supra*, could be justified on the theory that the mistake involved both price and quantity of the same item; i.e., tubes. The contractor had misstated price but had failed to include the cost of a second tube in his cost proposal.

1-55. The *Lockheed* and *Cutler–Hammer* cases were appealed to the Court of Claims. After a detailed examination of the legislative history of Public Law 87-653, the court concluded that there was no reason why off-sets should not be allowed, so long as there was no incentive to the contractor to increase profits by overstating cost. The question of line item relationship was not treated directly in the *Cutler–Hammer* decision. However, *Lockheed* allowed both direct and indirect off-sets, including in that case off-sets of royalty and development cost mistakes against defective subcontract cost data.

1-56. As a result of these cases, FAR is written to allow off-sets of items in the same pricing actions, e.g., initial pricing of the same contract or for pricing the same change order, up to the amount of the Government's claim for overstated cost or pricing data arising out of the same pricing action.

1-57. The 1986 Amendment to the Truth in Negotiations Act at 10 U.S.C. § 2306a both provides for offsets and also limits them, as follows:

> *(4)(A) A contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if —*
>
> *(i) the contractor certifies to the Contracting Officer (or to a designated representative of the Contracting Officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and*
>
> *(ii) the contractor proves that the cost or pricing data were available before the date of the agreement on the price of the contract (or price of the modification) and that the data were not submitted as specified in subsection (a)(3) before such date.*
>
> *(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if —*

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) the United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of the agreement on the price of the contract (or price of the modification), the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

1-58. **Subcontractors.** Nothing in the statute or ante-dating clause precludes a prime contractor from bringing an action before the Board in behalf of one of its subcontractors. In fact the Lockheed decision *(supra)* was based upon such a situation. However, there is nothing in the statute that makes action under the Defective Pricing Clause the exclusive remedy of the Government in an action against a subcontractor. In *Honeywell, Inc.*, ASBCA Nos. 12168, 12169, and 12170, 68-1 BCA, the subcontractor made such a contention, which was rejected by the Board.

1-59. **Inspection.** Obviously the simplest means for a contractor to limit the impact of this statute would be to limit as sharply as possible the scope of the inspection of records by the Comptroller General. One contractor attempted to argue that the Comptroller General had only the right to inspect the books and records dealing solely with the contract. The Ninth Circuit Court held otherwise. The Court found that 10 U.S.C. § 2312(b), which gives the Comptroller General the right to examine the books and records of the recipient of a negotiated contract, was far broader in scope and in fact authorized the examination of data relating to total production costs. *(Hewlett-Packard, et al v. U.S.,* 382 F2 1013, 12 CCF 86,967)

1-60. **Election of Remedies.** As we have seen in these pages, administration of the Truth in Negotiations Act involves numerous decisions and actions on the part of both the Government and the contractor. With this elaborate structure in place, may the Government elect to pursue some other remedy, ignoring its Price-Reduction device?

1-61. In the *Honeywell, Inc.* case *(supra)* the Government did just this, electing to sue the contractor for civil fraud under 31 U.S.C. § 231, the so-called False Claims Act. This act penalizes those who would make false claims against the Government by calling for a forfeiture of $2,000 for each claim, plus triple the amount of the falsification. The Government claimed defective pricing data inflated the contract price and that therefore each voucher was overpriced, and to that extent each was a false claim. Suit was filed against the contractor in the U.S. District Court. In moving to dismiss the suit, the contractor argued that the False Claims Act was never intended to apply to defective pricing situations, whereas the Truth in Negotiations Act specifically applied and should exclusively be followed. The Court rejected this contention, ruling that the False Claims Act was applicable. The case was settled and did not reach trial on the merits. Nevertheless, this important precedent was established. Had the case been tried, the Government would have had to prove that the contractor knew the data was defective when the contract was negotiated. In other words, guilty knowledge of wrongdoing is an essential part of establishing liability under the False Claims Act, whereas the Truth in Negotiations Act permits price reduction, whether or not the contractor knew the data was defective.

1-62. The contractor in this case took his fight to the ASBCA, appealing the refusal of the Contracting Officer to give the contractor a final decision under the Price Reduction for Defective Pricing Data Clause and the Disputes Clause. The Board dismissed the appeal on the grounds that the Government, having two remedies for defective pricing, could elect whichever it cared to and could not be forced to pursue one or the other. This reinforced the court decision and provides a significant, if stringent, alternative to Price Reduction for Defective Pricing Data.

1-63. **Current Trends.** It appears the *Sylvania* and *M-R-S* cases, *supra,* have resulted in stricter duties on the contractor, not only refusing to recognize "time-lag" in data submission, but also increasing data submission duties, deemphasizing the need for proof of "reliance" by the Government and emphasizing the Government's right to pricing data.

1-64. **Time Limits of Defective Pricing Claims.** The ASBCA has ruled that the three-year audit clause provision for audit of contractor record implicitly gives the Government the right to pursue a defective pricing claim during that period, even though the contract has been closed out and final payment made, thus creating an exception to the final payment rule. *(Bailfield*

Industries, Division of A-T-O, Inc., ASBCA No. 19025 (1975)).

1-65. **Significant Effect on Price.** To support a price reduction, the defective data must have significantly increased the contract price. Contractors have defended using mathematics; e.g., that the defect represented a fraction of one percent of the contract price. Judges have rejected this argument, noting that amounts from $30,000 to $1,000,000 in defective pricing were involved and deemed these amounts "significant." Recently, however, a judge held $8,050 insignificant, as it would cost the Government more than that to collect it. *(Conrac Corp. v. U.S.*, 22 CCF 80,403 (Ct Cl. Trial Div.-1976)).

1-66. **Contractor's Defenses and Exceptions to Contractor's Defense.** Under the new statute, in determining downward price adjustment where the contract price was increased because the contractor (or a subcontractor) submitted defective cost or pricing data, it is a defense that the United States did *not rely* on the defective data submitted by the contractor or subcontractor. (§ 2306a(d)(2)). The Act also provides § 2306a(d)(3))that --

> *It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that —*
>
> *(A) the price of the contract would not have been modified even if accurate, complete and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor —*
>
> *(i) was the sole source of the property or services procured; or*
>
> *(ii) otherwise was in a superior bargaining position with respect to the property or services procured;*
>
> *(B) the Contracting Officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the Contracting Officer;*
>
> *(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or*
>
> *(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2)."*

1-67 **Interest and Penalties.** Contractors may also have to pay interest and penalties:

> *(e) Interest And Penalties For Certain Overpayments. —*
>
> *(1) If the United States makes an overpayment to a contractor under a contract with the Department of Defense subject to this section and the overpayment was due to the submission by the contractor of defective cost or pricing data, the contractor shall be liable to the United States —*
>
> *(A) for interest on the amount of such overpayment, to be computed —*
>
> *(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and*
>
> *(ii) at the current rate prescribed by the Secretary of the Treasury under section 6621 of the Internal Revenue Code of 1954; and*
>
> *(B) if the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.*
>
> *(2) Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor's refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.*

1-68. **Government's Right to Examine Contractor Records.** In addition, the new Act provides the Government the right to examine contractor records.

> *(f) Right Of United States To Examine Contractor Records. —*
>
> *(1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an*

employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to —

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(2) The right of the head of an agency under paragraph (1) shall expire three years after final payment under the contract or subcontract.

(3) In this subsection, the term 'records' includes books, documents and other data.

2. SUBCONTRACT CLAUSES

2-1. In the absence of a contractual relationship, the Government has no legal basis, except through the prime contract, to administer or control a subcontractor. The subcontracting effort, however, is essential to the ultimate success of the defense program, and the Government position is that it cannot afford to rely wholly on the prime contractor's effort to guarantee that subcontracted work will satisfy all Government requirements and policies.

2-2. The prime contractor is the party having a direct contractual relationship with the Government. There is no such relationship between the Government and the subcontractor, or as it is usually phrased, there is no privity of contract between the Government and the subcontractor. The fact that the prime contract requires advance Government consent of a subcontract does not remove the subcontractor from the operation of the no-privity rule. It applies, even where the subcontract is subject to all the terms and conditions of the prime contract.

2-3. The type of contract is not important in applying the no-privity rule. The fact that the prime contract is of the cost type should not raise a presumption that there is a direct contractual relationship between the Government and the party supplying the goods and services.

2-4. When the Government enters into a contract with an exclusive sales agent, and the contract expressly names the product of a particular supplier, the latter is still regarded as a subcontractor and has no "standing to sue" the United States for a breach of contract.

2-5. An exception to the no-privity rule can be found in the case where a prime contractor acts as an agent of the Government for the purpose of buying goods or services on behalf of, or in the name of, the Government. There is such a close relationship, contractually, between the vendor and the Government, in this instance, that it is doubtful that the vendor could be classified as a subcontractor.

2-6. An unusual lessening of the effect of the no-privity rule occurred when a prime contractor asserted that, because he had no contract with the second-tier subcontractor, he had no control over the sub and could not be responsible for the default of the subcontractor. The Court of Claims agreed. *(Schweigert, Inc., v. U.S.,* 338 F2d 697 (1967)). The Government quickly plugged the loophole by revising the Default Clause to include subcontractors, at any tier or level, as the responsibility of the prime contractor. Further, subcontractor now even includes materials suppliers.

2-7. The relationship between the Government, the prime contractor and a subcontractor are the same under a subcontract where consent is granted, as under a subcontract not requiring consent. Such problems as subcontract prices that are not fair and reasonable, delays caused by the subcontractor, defective supplies furnished by the subcontractor, or a strike at the subcontractor's plant are treated in the same fashion, regardless of whether the subcontract required and was granted consent. It should be noted, however, that where the contract required consent of a proposed subcontract, any arbitrary or unreasonable delay on the part of the Contracting Officer in granting consent may be regarded as excusable to the contractor.

2-8. Consent by the Contracting Officer does not constitute approval of the terms and conditions of the subcontract. Nevertheless, consent should not be given to provision in the subcontract purporting to give the subcontractor the right of direct appeal to the Boards of Contract Appeals (BCA). The Government is entitled to the management services of the prime contractor in adjusting disputes between himself and the subcontractors. The Contracting Officer should act only in disputes arising under the prime contract, and then only with and through the prime contractor, even if a subcontractor is affected by

the dispute between the Government and the prime contractor.

2-9. The Contracting Officer should not refuse consent to a subcontract merely because it contains a clause giving the subcontractor, if he is affected by a dispute arising under the prime contract, an indirect appeal to the Board through prosecution of such an appeal by the prime contractor on behalf of the subcontractor. However, such a clause must not attempt to obligate the Contracting Officer or the Board to decide questions which do not arise between the Government and the prime contractor, or which are not recognized under the disputes Clause of the prime contract. Further, it must not attempt to obligate the Contracting Officer to notify or deal directly with the subcontractor. Such a clause may appropriately provide that the prime contractor and subcontractor will be equally bound by the Contracting Officer's or the Boards' decision on a dispute. The subcontractor's right to appeal under such a clause is not dependent on the prime contractor agreeing with the sub in the individual dispute. Even though the prime might agree with the Government, the sub can assert the right of appeal in the subcontract. *(Aero Jet–General Corp.,* ASBCA No. 11739 (1967)).

2-10. The prime contractor and his subcontractor may agree to settle disputes by arbitration. The results of such arbitration, and the cost resulting therefrom, however, are no more binding on the Government than are the results of a judicial determination or a voluntary settlement; they are subject to independent review and approval under the prime contract. The Contracting Officer should not consent to provisions in subcontracts purporting to make the results of arbitration (or judicial determinations or voluntary settlements) binding on the Government.

2-11. Although it is the stated policy of the Government that the prime contractor is selected and paid for management ability, it is necessary in some procurement situations to include in the contractual instruments, certain controls by the Government over subcontracting and the decision between make-or-buy. The purchasing activity, with the help of the field contract administration activities, must work through the prime contract to make certain that the appropriate subcontract policies are applied.

2-12. **Subcontract Clause for Fixed-Price Contracts.** In fixed-price contracts the clause set forth in FAR 52.244-1 is inserted (see Appendix D for text). The clause is self-deleting in firm-fixed price and fixed-price-with-escalation contracts. However, the clause does apply to unpriced modifications under such contracts.

2-13. **Subcontract Clause for Cost-Reimbursement Contracts.** The Subcontract Clauses for supply and research and development cost- reimbursement contracts are similar but somewhat more restrictive than the clause quoted above for fixed-price contracts. In cost sharing contracts, when the contractor's share is 25 percent or more, and in cost-plus-incentive fee (CPIF) contracts, in which the cost incentive provides for both a swing from target fee of at least plus or minus 3 percent and a contractor's overall cost share of at least 10 percent, a consent is not required for subcontracts, except subcontracts for research and development, coming under a contractor's procurement system which has been approved.

2-14. Under cost-reimbursement contracts, the contractor must obtain the Contracting Officer's consent to the placement of: (1) all cost-reimbursement, time-and-material, and labor-hours subcontracts; (2) fixed-price subcontracts that exceed $25,000 or 5 percent of the contract price; (3) any subcontract for special tooling in excess of $1,000; (4) any subcontract for facilities; and (5) any subcontract having experimental, developmental, or research work as one of its purposes. However, consent is not required for fixed-price subcontracts or subcontracts for special tooling, if the contractor's purchasing system has been approved in writing, and the subcontract is within the limitations of the approval.

2-15. The subcontract consent requirements enable the Government to review proposed subcontracts and the necessity for subcontracting, the technical capabilities of the prospective subcontractor, reasonableness of the costs, and subcontract terms, type of subcontract, and scope of solicitation. The Contracting Officer's prior written consent is required for the placement of any subcontract for experimental research or development. This provision is unique to Research and Development contracts and does not appear in cost-reimbursement supply contracts. Its twofold purpose is to prevent subcontracting of the work for which the prime contractor was selected and to provide close control over justified subcontracting. With regard to subcontracts for facilities, the requirement for con-

sent of the Contracting Officer does not permit any facilities acquisition to be charged to the Government which is not otherwise specifically authorized. One purpose of the requirement for consent to subcontracts for facilities is to provide an opportunity for the screening of Government facilities and review of necessity where the contract authorizes the contractor to acquire certain facilities on the Government's account.

2-16. **Subcontract Clause for Time and Material and Labor-Hour Contracts.** The FAR 52.244-3 clause establishes requirements for subcontract approval:

> *SUBCONTRACTS (1964 Mar.)*
>
> *(a) . . . The Contractor shall obtain the Contracting Officer's written consent before placing any sub-contract for furnishing any of the work called for in this contract, except for purchase of raw material or commercial stock items.*

2-17. **Failure to Consent to Subcontract.** If, as a result of the contractor program system review, (CPSR), the administrative Contracting Officer determines that the proposed subcontract action is unacceptable to the Government, he should refuse to grant consent, and so notify the prime contractor. Other arrangements must then be made for the proposed work. This may involve altering some of the terms of the subcontract, or it may require the selection of another subcontract source. This will depend, of course, on the particular reasons for denying consent.

2-18. The use of what is considered to be, under the circumstances, an inappropriate contractual instrument may be cause for refusing to grant consent. For example, in the Subcontracts clause in the prime contract, the contractor agrees that "no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis." Obviously, then, a CPPC subcontract would not be approved by the administrative Contracting Officer under any circumstances. On the other hand, cost-reimbursement, time and material, and labor-hour subcontracts may be acceptable in many instances, but the administrative Contracting Officer should be hesitant to consent to repetitive or unduly protracted use of such types of subcontracts. Under those conditions where subcontractor cost or pricing data and certification are required, (FAR 15.804-2), consent to the proposed subcontract should not be granted by the Administrative Contracting Officer unless the required data and the Certificate of Current Cost or Pricing Data is obtained in the prescribed format.

2-19. Subcontracts should contain all clauses required by law and, the prime contract. They should also contain any clauses needed to carry out the requirements of the prime contract, even though there is no specific "flow down" provision in the prime contract. For example, the contract should require that subcontracts provide that title to special tooling and capital items, fully paid for under the subcontract, and remaining in the possession of the subcontractors will pass to the Government, whenever the prime contract provides for the vesting of such title in the Government. Failure of the subcontract to contain such requirements would be a basis for refusal to consent.

2-20. The reasonableness of the subcontract price is determined by the presence of adequate price competition among potential subcontractors, or by price and cost analysis. Although an apparently unreasonable price may not be sufficient reason for the flat refusal to consent to a proposed subcontract, it may cause the Contracting Officer to question the contractor's basis for acceptance.

2-21. If, under the terms of the prime contract, data (as defined in DFAR 52.227-7013) is to be furnished to the Government, no clause of any subcontract thereunder will be consented to which, by its terms, has the effect of restricting whatever use the Government may have of such data under the terms of the prime contract.

2-22. The Administrative Contracting Officer (*ACO*) is responsible for screening the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors to determine if the proposed subcontractor is listed. When a listed firm is proposed as a subcontractor, the administrative Contracting Officer should decline to consent to the subcontract. However, if the Administrative Contracting Officer considers that the placement of the subcontract with the listed firm is in the best interests of the Government, he may make such a recommendation to the Procuring Contracting Officer.

2-23. Determinations concerning prospective subcontractors' responsibility is generally considered a function to be performed by the prime contractor. However, the Contracting Officer in reviewing proposed subcontracts, is expected to make use of all available sources of information in satisfying himself that proposed

contractors are responsible. Knowledge of previous unsatisfactory performance by a proposed subcontractor, or evidence of questionable financial capability, may be sufficient reason to withhold consent, at least until the feasibility of employing alternate sources can be explored. An impending strike at the plant of the proposed subcontractor may also be cause for holding up consent pending a decision on availability of another responsible source.

2-24. Failure to include subcontract provisions for adequate protection and care of Government property that will come into the proposed subcontractor's control, (FAR 45.103), would justify withholding consent until proper provisions are included. Other subcontract deficiencies that might cause the Administrative Contracting Officer to withhold his consent would be the failure to provide suitable implementation of Government requirements for Small Business and Labor Surplus Area programs, Equal Employment Opportunity Program, Buy American Act, Davis-Bacon Act, Copeland Act, and other labor laws and regulations.

2-25. Consent to a subcontract, or relief from the requirement for obtaining consent by virtue of the approval of the contractor's procurement system, does not constitute a determination as to the acceptability of the subcontract price or the allowability of costs. However, it should minimize the requirement for retroactive review of subcontracts, except cost-reimbursement, unless there is some indication that the costs may be unreasonable. In all cases, costs resulting from such subcontracts will be subject to the test of allowability.

2-26. The written notice to the contractor should identify the subcontract and advise the contractor of the Contracting Officer's consent or refusal. In the case of refusal, the justification will be stated. The Contracting Officer may, in his discretion, ratify, in writing, a subcontract already awarded. Such after-the-fact action constitutes the consent required by the Subcontracts clause.

2-27. When submission of information with respect to a prospective contractor's proposed make-or-buy program is required, the solicitation should so state, and should clearly set forth any special factors to be used in evaluating the program. The contractor should consider such factors as capability, capacity, availability of small business and labor surplus area concerns as subcontract sources, contract schedules, integration control, proprietary processes, and technical superiority or exclusiveness. Having considered these factors, the prospective contractor must identify, in his proposed make-or-buy program, that work which he or his affiliates, subsidiaries, or divisions: (1) will perform as "must make", (2) will subcontract as "must buy", and (3) will perform or acquire by subcontract as "can make or buy." The prospective contractor must state the reasons for his recommendations of "must make" or "must buy" in sufficient detail for the Contracting Officer to determine that sound business and technical judgment have been applied to each major element of the program.

2-28. It frequently happens that the design status of the article being procured does not permit accurate precontract identification of major items that should be included in the make-or-buy program. When this is the case and the make-or-buy program is to be incorporated into the contract, the prospective contractor should be notified that such items must be added to the program, when identifiable, under the "Changes to Make-or-Buy Program."

2-29. The contractor has the basic responsibility for make-or-buy decisions; therefore, the contractor's recommendations should be accepted unless they adversely affect the Government's interests or are inconsistent with Government policy. The evaluation of "must make" and "must buy" items should normally be confined to that necessary to assure that the items are properly categorized.

2-30. If the Government directs the placement of a subcontract and the sub fails to perform, the prime is likely to attempt to disavow responsibility, since it had no choice in suppliers and was directed by the Government to the named subcontractor. This argument is successful in court in cases where the Government imposed the sole source situation after award of the contract. However, when the sole source sub is named in the solicitation, the contractor assumes the risk and is not excused from the default of the sub. *(Aerokits, Inc.,* ASBCA No. 12324 (1968)).

3. MISCELLANEOUS CLAUSES

3-1. Among the various clauses of Government contracts, there are several which are classified as miscellaneous. The nature of these clauses range from state, local taxes, and military

security, to contract gratuities and liability insurance. In this section we shall examine some of these clauses in order to gain a better understanding of their importance in contract law.

3-2. **State and Local Taxation Provisions.** The Federal Government may not be taxed by the State and Local subdivisions. Tax problems are essentially legal problems and Contracting Officers should request the assistance of legal counsel with this specialty. The tax provisions used in fixed-price contracts are set forth in FAR Section 29. Broadly speaking, they provide that all applicable Federal, State, and Local taxes be included in the total contract price--except where exemptions are available at the inception of the contract or unless otherwise stated in the contract. The clause provides for issuance of exemption certificates, when appropriate. They also provide procedures to be followed if an included or reimbursable tax is levied, removed, or changed after the effective date of the contract.

3-3. There are ordinarily no tax clauses, as such, in cost- reimbursement contracts. However, under FAR Section 31, "Contract Cost Principles", taxes paid or accrued by the contractor in the performance of the contract and according to generally accepted accounting principles are allowable items of cost--where tax exemptions are not available. Exceptions to this rule include federal income taxes and excess profit taxes; taxes related to financing, refinancing, and refunding operations, special assessments on land representing capital improvements.

3-4. If state tax authorities refuse to allow legitimate tax exemptions, a contractor should immediately report the matter to the Contracting Officer. Instructions by the Contracting Officer usually require a contractor to preserve his administrative and legal remedies by paying the tax under protest or, if necessary, by withholding payment pending disposition of his appeal.

3-5. **Officials Not to Benefit Provisions.** The "Officials Not to Benefit" clause (FAR 52.203-1) is the oldest mandatory contract clause required by statute on this subject (Title 41 U.S.C. § 22). It applies to all Government contracts. The clause provides that no member of, or Delegate to Congress, or any Resident Commissioner, shall receive any benefit from a Government contract. This is designed to prevent "jobbing", seeking private gain through public service, between legislators and Government procurement personnel.

3-6. The clause expressly states that it does not apply to a contract made with a corporation for that corporations' general benefit. This permits the Government to contract with a corporation whose president happens to be a Member of Congress.

3-7. The statute, and the related Title 18 U.S.C. §§ 431 and 432, both have civil and criminal aspects. In case of violation, both parties are subject to fine. Any prohibited agreement between them is void. If procurement personnel find a situation covered by the statute, they should notify the Contracting Officer for further referral of the matter to higher authority.

3-8. **Contract Gratuities Clause.** A gratuities clause is included in Defense contracts, except those for personal services. This clause is required by law (Title 10 U.S.C. § 2207). The clause (FAR 52.203-3) gives the Government special rights to terminate the contract and, special remedies against the contractor. Termination is allowed if it is found, after a hearing, that a contractor offered or gave any gratuity to any employee of the Government to influence the contract process. Gratuities include entertainment and gifts of any type. The clause applies if the intent was to secure favorable treatment in the awarding of the contract, or the making of any determination relating to contract performance. Violation of the Gratuities clause is also a ground for contractor debarment under FAR 9.4.

3-9. If termination is warranted, the Government has the following remedies: (a) breach of Contract (contractor default); (b) exemplary damages (damages in excess of those measured by the actual harm to the Government), from three to ten times the cost of the gratuities to the contract; or (c) any other remedies provided by law or the contract.

3-10. Bribery, graft, and conflict of interest are three matters widely regulated by law. Congress has passed criminal statutes that prohibit a Government employee from: (a) accepting money or anything of value to influence an official act (bribery or graft); (b) participating personally on behalf of the Government in official dealings with a firm in which he has a financial interest; or (c) participating as agent or attorney or receiving payment for prosecuting a claim against the United States.

3-11. Title 18 U.S.C. § 203 bars Government officers and agents from directly or indirectly soliciting, receiving or agreeing to receive any payment for services relating to any Government contract, claim or other matter in which the United States is interested. The penalty is a maximum fine of $10,000, imprisonment for two years, and mandatory disqualification from Federal office. Section 203 does not apply to retired military officers who are not on active duty or otherwise in Government employ.

3-12. Part-time consultants, (special employees who work for the Government not more than 130 days in any period of 365 consecutive days), are treated separately under the section. They are subject to it in two matters only; those in which they have participated personally and substantially in their Government capacities, and those pending in the Department or agency in which they serve. The second restriction does not apply, however, if the part-time employee has served no more than 60 days in the preceding 365-day period.

3-13. Title 18 U.S.C. § 205 prohibits officers and employees from two activities: (1) they must not act as agents or attorneys for, or aid or assist in the prosecution of, any claim against the United States, (2) nor may they represent any person or agent as attorney before the Government in any matter of Government interest.

3-14. Special part-time employees are treated as they are in § 203, above. They are subject to § 205 only in matters in which they have participated personally and substantially in a Government capacity. If the employee has served in his agency more than sixty days during the year, the section covers all matters pending before that agency. There are also provisions for limited waivers of the section for part-time employees, upon certification of the waiver by the head of the agency and publication in the *Federal Register.*

3-15. **Covenant Against Contingent Fee Provisions.** Department of Defense contracts contain a clause entitled "Covenant Against Contingent Fees" (DAR 52.203-4). The clause is intended to prevent the use of purchased influence in obtaining Government contracts. Thus, it requires a warranty from the contractor that he did not employ any person to solicit or secure the contract for a commission, percentage, brokerage, or contingent fee. It is included in contracts, as directed by the Federal Acquisition Regulation, in accordance with Title 10 U.S.C. § 2306(b) and Executive Order 9001. The clause is required in all contracts except those under $25,000 placed by sealed bidding; but it does not apply to bonafide employees or bonafide established commercial or selling agencies maintained by the contractor to secure business. The clause also prohibits contingent fees for information leading to a contract. No matter what the payment is called, any fee falls within the clause, if it depends partly or wholly upon success in getting the contract.

3-16. Appropriate action is taken when a violation is discovered. If discovered before award, the bid or offer may be rejected. During contract performance, the Government can annul the contract without liability, or it can recover the contingent fees paid by the contractor. Violation of the covenant also justifies debarment of a contractor under FAR 9.4. It may warrant referral of the case to the Department of Justice.

3-17. Differences as to whom are bonafide employees and bonafide established commercial or selling agencies have made enforcement difficult at times To promote uniformity, FAR 3.408-2(b) and 3-408-2(c) set forth criteria for deciding the question. Section 3.401 provides that:

> *"Bona Fide Employee" . . . means a person employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts, nor holds out as being able to obtain any Government contract or contracts through improper influence.*

3-18. However, the Federal Acquisition Regulation recognizes that some concerns, especially small business, may employ individuals who represent other concerns and so makes allowances for them. It should be noted that a person may be a bonafide employee, whether his compensation is a fixed salary, a percentage, a commission, or other contingent basis when customary in the trade, but his employment must indicate some continuity. It must not be related to obtaining specific Government contracts.

3-19. Neither an individual nor an agency is a bonafide employer if he or it seeks to obtain a contract through improper influence. Nor is it bonafide if it claims to be able to obtain contracts

in that manner. Improper influence, under the clause, means influence, direct or indirect, that tends to induce a Government employee to consider the award of a contract on other than the merits of the matter.

3-20. Solicitations for bids in sealed bid procurements contain a representation that the bidder must make with regard to contingent fees. Similar representations are obtained from the contractor in negotiated procurements. A form is available for inclusion in the solicitation. It states that the bidder represents that he has, or has not, employed any company or person, other than a full-time bonafide employee working solely for the bidder, to solicit or secure the contract. The form also requires the bidder to state whether he has, or has not, paid or agreed to pay any person other than a full-time bonafide employee working solely for the bidder, any fee or other payment contingent on, or to result from, award of the contract.

3-21. Note that the representation the bidder makes in this form is broader than the coverage of the covenant. As explained above, it is not essential that selling agencies be employed full time to avoid a violation; yet the representation requires an affirmative statement whenever such employment occurs. This is intended to reveal the possibility of a violation. The Contracting Officer can then follow up preliminary information by a request for more detailed data.

3-22. If an offeror or bidder fills in either part of the representation in the affirmative, he is required to submit Standard Form 119, "Statement on Contingent Fees." Submission is usually required only from successful bidders and contractors. Information may also be requested from the contractor, if it is needed, to decide whether the covenant against contingent fees would be violated.

3-23. However, an offeror or bidder who has previously completed the form may be allowed to reaffirm it. He does this by submitting a signed statement telling: (a) when the form was submitted; (b) identifying, by number, the invitation or contract that was involved; and (c) representing that information in the form, as previously submitted, is still true and applicable.

3-24. In sealed bid procurements, contract award need not be delayed pending receipt of Standard Form 119, or the substitute statement. But, in negotiated procurements, it should be delayed unless the Secretary, or his representative, determines that the interests of the Government require otherwise. Delay in furnishing the information is not treated the same as is refusal. Refusal requires rejection of the bid or offer.

3-25. **Military Security Requirements.** A contract with the Government may involve "classified" military information or matter which the contractor must keep safe against unlawful dissemination, duplication or observation in the interest of national security. This includes not only plans and specifications, or any other documents, containing such information, but also oral information and recordings and all physical objects, such as the products and the materials from, or with which they are made, and the processes involved in their manufacture. Hence, all contracts which are classified by a Department as "Confidential" or higher, and any other contracts, the performance of which will require access to classified information or material, must contain a Military Security clause. Pursuant to the provisions thereof, the contractor undertakes to safeguard all classified elements of the contract and to maintain a system of security controls within his own organization, in accordance with Government prescribed standards.

3-26. Representatives of the military departments having security responsibility over the facility and representatives of the contracting military departments have the right to inspect, at reasonable intervals, the procedures, methods, and facilities utilized by the contractor in complying with the security requirements under the contract.

3-27. If, subsequent to the date of the contract, the security classifications or security requirements under the contract are changed by the Government, and the security costs under the contract are thereby increased or decreased, the contract price is subject to an equitable adjustment by reason of such increased or decreased costs. Furthermore, the equitable adjustment is accomplished in the same manner as if such changes were directed under the Changes clause in the contract.

3-28. The contractor is required to insert in all of his subcontracts, which involve access to classified information, provisions which conform substantially to the language of the clause discussed herein. The contractor also agrees to submit for security clearance any subcontractor proposed by him for furnishing supplies and services which will involve access to classified informa-

tion.

3-29. It should be noted that the contract clause permitting "Assignment of Claims" provides that, in no event, shall copies of the contract or of any plans, specifications, or other documents relating to the work under the contract, if marked "Top Secret", "Secret", or "Confidential", be furnished to any assignee thereunder without prior written authorization of the Contracting Officer. Even apart from the contractual obligation, unauthorized disclosure of classified information might subject a contractor to criminal penalties under the Espionage Act.

3-30. **Liability Insurance.** The cost-reimbursement contract contains a provision that the contractor shall procure and maintain such bonds and insurance in such forms, in such amounts, and for such length of time as the Contracting Officer may require, and the contractor will be reimbursed for such bonds and insurance. It also provides that the contractor shall give the Contracting Officer notice of any suit begun, or claim made, against him arising out of the performance of the contract, the cost of which is reimbursable to the contractor, and the risk of which is uninsured; or in which the amount claimed exceeds the limits of the coverage under his insurance policies. The contractor is required to furnish the Government with all pertinent papers received. It further provides that, in certain cases, the contractor will assign to the Government all his rights arising out of the asserted claims, except those against the Government. If required, the contractor will authorize representatives of the Government to settle or defend the claim, and to represent or take charge of any litigation affecting the contractor, to the extent that third party claims against the contractor are covered by insurance. However, in the absence of such insurance, or in the case of excess liability, the settlement of claims of third parties caused by employees of the contractor in the performance of the contract, as well as compensation to employees for industrial injuries or occupational diseases suffered in the performance of the contract, might well be items of allowable costs.

3-31. Normally, in fixed-price contracts, the Government is not concerned about insurance coverage maintained by the contractor or even the lack of it. However, in some cases, where the Government work is separable from the contractor's other activity, the Government assumes the risks, or makes available special insurance policies, in order to eliminate or reduce prohibitively high insurance costs. Examples are (1) the practice of excusing contractors under a Flight Risk clause from responsibility for loss or damage to aircraft resulting from flight testing, and (2) blanket accident insurance covering employees exposed to extra hazards and made available at preferential cost.

3-32. The principle of assumption of risk by the Government can be extended to cover the whole performance of a contract in cases where the contractor is contemplating hazardous work for the Department of Defense, and finds liability and property damage insurance extremely expensive, or impossible to obtain. When the contractor insists on getting a broader indemnification than is permitted by the standard FAR clause referred to above, it is sometimes necessary to resort to special statutory authority.

3-33. Under a cost-reimbursement type contract, it may be stated generally that if a contractor is not chargeable with any breach of his contractual duties and obligations, he may be reimbursed for losses or damages incurred in the performance of the contract as an element of his actual costs.

CHAPTER 16

THE DISPUTES PROCEDURE

This chapter will concern itself with the disputes process in the Government contract context. We will study the nature of the process, both old and new. This is so because the Contract Disputes Act of 1978 (hereafter the *CDA*) has significantly changed the historical disputes procedure by the introduction of a statutory process having major differences for resolving conflicts arising under a Government contract.

1. "DISPUTE" DEFINED

1-1. A "dispute" must be more than a mere disagreement between the contracting parties. To launch the disputes process and to put an end to the discussions concerning the disagreement, a final decision by the Contracting Officer is required.

1-2. Once such final decision is made, we are thereafter engaged in the "verbal controversy" which is the dictionary definition of "dispute". Although another dictionary definition of "dispute" is to "argue irritably or with irritating persistence," the disputes process is intended to put an end to such argument.

1-3. A dispute is an honorable proceeding. Honest disputes over performance and interpretation of contract provisions can arise in even the smoothest contract situations. However, honest differences do not indicate bad faith by the questioning party. Even the clearest contract terms and conditions can give rise to the necessity of interpretation. Resolution by mutual agreement is frequently possible. When agreement is not possible, statutory or regulatory resolution is provided. Such resolution takes the form of administrative or judicial remedies.

1-4. Historically, administrative remedies were provided for by contract provision, e.g., the Disputes Clause. Judicial remedies, provided for by statute, were available in certain cases where the Government waived its sovereign immunity and consented to be sued. The principle that "one must exhaust one's administrative remedies before seeking a judicial remedy" prevailed until the passage of the CDA.

2. THE PRE-CDA DISPUTES CLAUSE

2-1. The standard pre-CDA Disputes Clause was contained in the General Provisions of the fixed-price supply contract. It read as follows:

Disputes

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

2-2. A thorough understanding of this clause is necessary for two reasons: (1) disputes arising prior to the effective date of the CDA (1 March 1979) may still be in the process of resolution under this provision, and (2) the new Disputes Clause under the CDA (which follows, *infra*) presumes knowledge of the disputes process as more clearly defined by the historical provision, above.

2-3. Since this clause is of more than historical significance, a further study of its provisions is in order. An analysis of its provisions follows:

(a) "Except as otherwise provided in this contract. . ." This phrase suggests that other methods of resolution of dispute provided by the contract, *e.g.*, liquidated damages, may be in order.

(b) ". . .any dispute concerning a question of fact arising under this contract which is not disposed of by agreement. . ." This administrative resolution is concerned with the disposition of issues of fact. We also note that disposal of disputes by agreement between the parties is emphasized and encouraged by reference to such disposition.

(c) ". . .shall be decided by the Contracting Officer. . ." At this point, the realities of contracting with the Government strike home. The uninitiated contractor may be shocked to learn that the so-called equal bargaining positions of the parties seem to be contradicted by a provision permitting a unilateral decision by the Government's agent on questions of paramount importance.

(d) ". . .who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the contractor." This is the first element of due process - fair notice. There must be a writing and the writing must be furnished the contractor.

(e) "The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary." This portion of the clause does not mean what it purports to say. The 30-day limitation, though firm in the opinion of the ASBCA *(Maney Aircraft Parts, Inc.*, ASBCA 14363, 70-1 BCA 8076) was considered by the Court of Claims to be contractual, not jurisdictional, and thereby waivable for "good cause" or "justifiable excuse," (Ct. Cl. 191-70, June 20, 1973). Further, appeals addressed to the Contracting Officer were considered proper by virtue of the law of agency whereby notice to the agent is imputed to the principal.

(f) "The decision of the secretary . . . etc. . . ." is probably the most noteworthy portion of the clause since it embodies the *Anti-Wunderlich* Act (see *infra*) grounds for appeal of administrative determinations on questions of fact: ". . .fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence." The student of Administrative Law will recognize these grounds as being in common and general use in the administrative appeals process. Unfortunately, the latest disputes provision (which follows) does not call out these elements, referring only to the CDA which continues to recognize these *Anti-Wunderlich* standards. Of great significance to both the Government and the contractor, the parties are now imputed with knowledge of these standards by operation of law, since they are included in the statute (CDA) even though no longer in the regulation (Disputes Clause).

(g) "In connection with any appeal proceeding under this clause, the contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal." This is the other element of due process: an opportunity to be heard. This portion of the clause is cursory and incomplete. Offering evidence in support of an appeal is only part of the story. Everything required by administrative due process is included, e.g., a fair hearing in a proper forum, a good record, the opportunity to cross-examine, proper rules of procedure, etc.

(h) "Pending final decision of a dispute hereunder, the contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision." Here, again, we squarely face the unilateral authority of the sovereign in making a decision binding the contractor to continued performance, though it may vehemently disagree with such decision. The penalty for failure to continue performance would be a breach of the contract and a total termination by default.

(i) The balance of the clause (subparagraph (b)) reiterates the *Anti-Wunderlich* Act *caveat* that questions of law, though considered in the administrative adjudication, can only be finally resolved under the judicial function.

There we have it - administrative adjudication explained in brief. This "old" clause is still operative in contracts entered into prior to 1 March 1979. It contains elements which the "new" clause omits; it appears to be more definitive and precise in its terminology; it is the fundament for a thorough understanding of the disputes procedure, whether historical or current. It cannot be dismissed as of no further

force and effect, and it must be thoroughly understood and digested by the serious student of administrative procedure.

3. THE DISPUTES PROCESS IN HISTORICAL PERSPECTIVE

3-1. An important part of understanding the disputes process is a study of the major historical events leading up to the CDA of 1978. These significant procedural events follow:

(a) *U.S. v. Wunderlich* (342 U.S. 98, 1951). In this case, the contractor sued in the Court of Claims, following a disagreement with the Contracting Officer's decisions on various disputes during performance of a contract to build a dam. The Court of Claims granted relief on the basis that the departmental decision was "arbitrary," "capricious," and "grossly erroneous." Fraud was neither alleged nor proved. The Supreme Court held that the finality of the department head's decision must be upheld unless it were founded on fraud, alleged and proved. Citing cases upholding the finality of departmental decision-making *(U.S. v. Moorman,* 338 U.S. 457) and the necessity of proving fraud *(U.S. v. Colorado Anthracite Co.,* 225 U.S. 219, 226) or at least gross mistake implying bad faith *(Ripley v. U.S.,* 223 U.S. 695, 704) in order to gain relief, the only ameliorating factor of what otherwise could be considered a harsh anti-contractor position was the Court's statement. "If the standard of fraud that we adhere to is too limited, that is a matter for Congress."

(b) *The Administrative Disputes Act of 1954 (Anti–Wunderlich Act)*, 41 U.S.C. §§ 321 and 322, May 11, 1954. By this Act, Congress acted to ameliorate the impact of the decision in the Wunderlich case. Simply stated, four new grounds for relief from administrative decisions on questions of fact were added to the court-mandated standard of fraud: "capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

(c) *U.S. v. Carlo Bianchi & Co., Inc.,* 373 U.S. 709 (1963). In another construction contract involving the building of a diversionary tunnel, the contractor sought relief under the Changed Conditions (now Differing Site Conditions) article of the contract. Following the denial of its appeal before the Board of Claims and Appeals of the Corps of Engineers (1948), the contractor appealed to the Court of Claims (1954) under the new *Anti–Wunderlich* standards. The Court's Commissioner (now Trial Judge) allowed the introduction of new evidence *(de novo)* despite the Government's position that the review should be made on the administrative record. Citing *Volentine and Littleton v. U.S.,* 136 Ct. Cl. 638, the Court held that trial in the Court of Claims should not be limited to the administrative record, but should be *de novo.* The Government appealed to the U.S. Supreme Court. That Court reversed, with well-reasoned dissents, the majority upholding the principle that appeals shall be made on the administrative record. The contractor, however, was ultimately victorious wherein by Private Law 91-234 (January 2, 1971) its case was reviewed by ENGBCA which decided some 27 years (August 30, 1973) after the contract was initiated that the contractor was entitled to its claim. Knowledgeable contracting personnel still refer to protracted, long- continuing, and still unresolved matters by the epitaph "Shades of Bianchi's ghost!"

(d) *U.S. v. Utah Construction and Mining Co.,* 384 U.S. 394 and *U.S. v. Anthony Grace & Sons Inc.,* 384 U.S. 424 (1966). These cases, both heard on the same day by the Supreme Court, reaffirmed the importance of the administrative remedy and the exhaustion of such remedy before seeking judicial relief. It was reiterated that the record made before the Board was the record upon which an appeal would be made. There would be no trial *de novo* except in certain exceptional situations. Once again, the Supreme Court resoundingly reaffirmed its support for the administrative process.

(e) *S & E Contractors, Inc. v. U.S.,* 406 U.S. 1, (1972). Here again, a construction contractor with the AEC was refused payment for certain claims upon which the parties in privity were agreed. However, the Comptroller General and, later, the Department of Justice refused to recognize the accord and took a position contra both the AEC and S&E. The Government, in fact, was appealing its own decision! Was this a "dispute" within the purview of the Disputes Clause? The matter was resolved when the Supreme Court, in one fell swoop, took the Comptroller General out of the contract appeals process and denied the Department of Justice's claim of the right to represent the Government in appealing a decision of an administrative agency, other than in cases involving fraud. So we see that the attempts to interpret and clarify the provisions of the Administrative Disputes

Act of 1954 (*Anti-Wunderlich Act*) continued, leading to the ultimate resolution in the CDA of 1978.

(f) *The Contract Disputes Act of 1978* (P.L. 95-563; 92 Stat 2383). This Act culminated the long process of interpretation of administrative resolution of contract disputes. We will analyze its provisions below.

4. THE CONTRACT DISPUTES ACT OF 1978

4-1. The Act, following certain reforms proposed by the Commission on Government Procurement (1972), provides for significant changes in Government contract remedies. It in fact "judicializes" the disputes process to a high degree. It provides for procedures that shall be followed in all contracts entered into since 1 March 1979.

4-2. The CDA in its entirety can be found under Chapter 16 of Appendix F in this text. However, a brief summary of its most pertinent provisions is in order:

(1) It confers jurisdiction in Boards of Contract Appeals on "all claims arising under (or related to) the contract." The Boards thereafter have had authority to hear and decide not only the usual, historical disputed claims, (e.g., constructive changes; equitable adjustments), but also claims involving reformation, rescission or breach of contract.

(2) The 30-day appeal period following a Contracting Officer's final decision is now extended to 90 days.

(3) A certification requirement has been added. The contractor must now certify that its claim is accurate and complete to the best of the contractor's knowledge and belief and that the claim is made in good faith.

(4) The Office of Federal Procurement Policy (*OFPP*) gains additional stature by becoming involved in the organization of Boards of Contract Appeals and in issuing rules of procedure in administrative adjudication by such boards.

(5) The contractor now has the option of choosing an administrative or judicial remedy. It may now appeal to a BCA or directly to the U.S. Claims Court.

(6) The Government now can seek judicial review of board decisions *(contra S & E, supra).*

(7) Interest on contractor claims now accrues from the date the claim is received rather than from the date of the Contracting Officer's decision.

(8) Stiff anti-fraud provisions on contractor claims are now operative.

(9) Except for TVA cases, District Courts no longer have jurisdiction over contractor appeals.

(10) BCA personnel are subject to a careful selection process and board status and prestige are further enhanced.

4-3. As a result of the CDA, Boards of Contract Appeals now appear to have the status and jurisdictional authority of "administrative courts". This is not surprising in that the entire history of the administrative process as reviewed in the significant procedural events in the historical perspective of the disputes process, above, has favored the establishment of such adjudicatory bodies.

4-4. In summary, we now have statutory authority supporting the process of settlement of disputes in Government contracts. With the enhancement of the status and jurisdictional authority of Boards of Contract Appeals under the CDA, we can expect continued growth in significant decisions affecting Government contract relationships.

5. THE "NEW" DISPUTES CLAUSE

5-1. The CDA of 1978 was the "enabling" act. It remained for the regulation to implement the Act by incorporating its provisions, in part, in the "new" Disputes Article.

5-2. At least two "temporary" or "interim" disputes clauses were tried and discarded. Implementing the Act by regulatory provisions became no small task. The present clause bears the same type of analysis which we afforded the "old" Disputes Clause earlier in this chapter. First, however, the clause in its entirety follows.

5-3. **DISPUTES** (April 1984)

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim" as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right,

the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the contractor shall be subject to a written decision by the Contracting Officer.

(2) For contractor claims exceeding $50,000, the contractor shall submit with the claim a certification that —

(i) The claim is made in good faith;

(ii) Supporting data are accurate and complete to the best of the contractor's knowledge and belief; and

(iii) The amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(3)(i) If the contractor is an individual, the certification shall be executed by that individual.

(ii) If the contractor is not an individual, the certification shall be executed by—

(A) A senior company official in charge at the contractor's plant or location involved; or

(B) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(e) For contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the contractor, render a decision within 60 days of the request. For contractor-certified claims over $50,000, the Contracting Officer must, within 60 days, decide the claim or notify the contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

(g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim

(h) The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

Alternate I (APR 1984). If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (h) of the basic clause:

(h) The contractor shall proceed diligently with performance of this contract pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

5-4. Following is a brief analysis of the provisions of this new Disputes Clause.

(a) "This Contract is subject to the Contract Disputes Act of 1978." This sentence simply affirms the statutory nature of the disputes process. *Caveat,* however, by this broad, general statement, one involved in Government contracts is presumed to know the content and requirements of the CDA.

(b) "Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause." This broad grant of authority reaffirms that the act applies to *all* disputes on matters "arising under or relating to" the contract. Thus, BCA's now have all of their old authority as well as the new authority to decide disputes "relating to" the contract. The agency boards now have the same powers as the Court of Claims to grant relief in respect to claims arising under the Act. Since relief may be granted in "all disputes," it may extend to cases involving breach of contract and certain kinds of relief formerly available only under P.L. 85-804,

i.e., rescission or reformation for mutual mistake. Note, however, that not all requests for relief under P.L. 85-804 are considered claims under the CDA. Note, also, that contracts with foreign governments, international organizations, or agencies thereof are exempted if the Secretary determines that such exception is in the public interest.

(c) The clause carefully defines certain significant terms in subparagraph (c), e.g., "claim, voucher, invoice, or other routine request for payment. . ." It is interesting to note that the clause states that a written demand by the contractor seeking payment is not a claim until certified under the provision below. Subparagraph (c)(iii) continues to require a writing and a Contracting Officer's decision.

(d) "For contractor claims exceeding $50,000, the contractor shall submit. . . . .a certification. . . ." This subparagraph requires a certification of the contractor's claim. Since the Act specifies penalties for fraudulent claims, the certification cannot be taken lightly by the contracting parties. Mixed views about such certification prevail; what is certain, however, is that certification is here to stay. *Quaere:* After certifying a firm claim, can the contractor accept a lower settlement without becoming vulnerable to charges of fraudulent claim? *Quaere,* further: What impact will this provision have *vis a vis* contractor notification of claims (FAR 43.104) and the economic consequences of early submittal where interest on such claim is concerned?

(e) "For contractor claims of $50,000 or less, the Contracting Officer must. . . .render a decision within 60 days. . . ." Here we have an attempt to "deadline" Contracting Officer's decision-making. It should be understood that the reasonableness of the specified time periods will depend on many relevant factors, e.g., the adequacy of supporting data; the size and complexity of the claim, etc.

(f) "The Contracting Officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act." Once again, the contractor is presumed to know what the Act requires. No longer do the *Anti-Wunderlich* grounds (i.e., fraudulent, or capricious, or arbitrary. . . etc.) appear in the clause, though retained in the Act. The novice contractor, however, will undoubtedly need considerable assistance in prosecuting its appeal under the CDA.

(g) "The Government shall pay interest on the amount found due and unpaid . . . ." Interest on contractors' claims now has a statutory basis. It shall now be paid from the date of receipt of the claim by the Contracting Officer, or from the date payment otherwise would be due until the date payment is made. The interest rate shall be at rates periodically fixed by the Secretary of the Treasury.

(h) The (h) and alternate (h) clauses require the contractor to continue performance pending resolution of any appeal, claim, action or request for relief. Subparagraph (h) deals with such matters "arising under the contract"; alternate (h) extends to action "arising under or related to" the contract. It is clear that the purpose of adjudication under this clause, whether administrative or judicial, is to render relief that is quick, inexpensive and expedient while the parties in privity continue performance, if such remains. Alternate (h) recognizes that performance of some contracts may be so vital to national security or to the public health and welfare that such performance must be guaranteed regardless of the nature of the dispute or claim.

5-5. At this point, a general comment concerning the purpose of the Act is in order. Foremost, the Government's policy continues to be to resolve disputes by mutual agreement. Informal discussions seeking to resolve troublesome issues are encouraged. The Contracting Officer continues to be the central figure in the disputes process and is authorized, within his or her warrant, to decide or settle all claims relating to the contract. However, such authority does not extend to a claim or dispute for penalties or forfeitures which another agency, by statute, is authorized to determine or to any claim involving fraud. It is obvious that the CDA not only enhanced the authority of the BCAs but also that of the Contracting Officer.

6. THE FEDERAL COURTS IMPROVEMENT ACT OF 1982 (HR 4482)

6-1. A new law, of considerable importance in any study of the Disputes procedure, was effective 1 October 1982. Following the "Court of Appeals for the Federal Circuit Act of 1981", which established the Thirteenth (Federal) Circuit, the Court of Claims and the Court of Customs and Patent Appeals were merged into a U.S. Court of Appeals for the Federal Circuit by the Federal Courts Improvement Act of 1982.

6-2. The New Federal Circuit Court has jurisdiction over appeals in contract and patent infringement cases, appeals in certain international trade and tariff matters, and appeals from decisions of the Merit Systems Protection Board.

6-3. The Trial Division of the former U.S. Court of Claims has become the "U.S. Claims Court", and conducts trials in matters within the jurisdiction of the new Federal Circuit Court. It has exclusive jurisdiction to grant injunctive relief, declaratory judgments, and any extraordinary or equitable relief deemed to be proper in pre- contract award matters. Further, this Claims Court is authorized to provide an entire remedy (e.g. restoration to office; correction of records) and may exercise the power to remand in appropriate cases. Specifically in regard to the CDA of 1978, the Claims Court has jurisdiction in "direct access" cases.

6-4. The careful student of Government contracts will note that: (1) the U.S. Court of Appeals for the Federal Circuit will exercise appellate jurisdiction in CDA cases; (2) The U.S. Claims Court will act as trial court, with exclusive jurisdiction in certain pre-award matters, and (3) as of 1 October 1982, the jurisdiction as well as the name of the former U.S. Court of Claims have been significantly altered concurrent with the addition of the new Federal Circuit Court of Appeals.

7. SUMMARY OF CHANGES

7-1. Now that we have dissected the disputes articles, old and new, and have absorbed the administrative adjudicatory process in historical perspective, a summary of changes as a quick-reference is in order.

7-2. The table that follows contains, in columnar format, the action or event (in order of its appearance in the CDA), the result or requirement under the "old" (*pre-CDA*) disputes process, and finally, the result or requirement under the CDA of 1978.

THE DISPUTES PROCESS

	Pre-CDA	CDA of 1978
1. Fraudulent claims	Not covered as such	Contractor liable for amount equal to unsupported part of claims plus costs for up to 6 years from commission.
2. Time limit on Contracting Officer's decisions	Reasonable time	Up to $50,000-60 days Over $50,000-60 days or notice of additional time required.
3. Claims certification	Not required	Required over $50,000
4. Appeal to BCA from C.O.'s decision	30 days	90 days
5. BCAs	Established and regulated by agency	Statutory coverage; OFPP/Agency
6. Accelerated procedure before BCA's	Up to $25,000	Up to $50,000 at Contractor's option; 180 day deadline for decision
7. Appeal of BCA decisions to Court of Appeals for the Federal Circuit (*CAFC*)		
Contractor	6 years	120 days
Government	No right of appeal	120 days with Agency Head and Attorney General approval
8. U.S. District Courts	Juris up to $10,000	No juris. (except in TVA cases)
9. Small claims before BCA's	Covered under accelerated procedure above	Up to $10,000, nonappealable decision required within 120 days

	Pre-CDA	CDA of 1978
10. Direct access to US Claims Court by Contractor	Only on pure questions of law	Up to 12 months from Contracting Officer's decision
11. BCA finality	Only on questions of fact; *Anti–Wunderlich* Act standards apply	Same
12. BCA jurisdiction	Questions of fact arising under the contract	"All claims" arising under (or related to) the contract
13. BCA subpoena power	None	Authorized; enforceable through USDC
14. Interest on Contractor claims	Payable from date of Contracting Officer's Decision	Payable from date Contracting Officer receives claim

CHAPTER 17

REMEDIES OF THE CONTRACTOR

An analysis of contractor remedies, exclusive of those available under the Disputes Clause, is presented in this chapter. Most certainly, disputes between the Government and contractor should be avoided by both parties, but this is possible only if an agreement can be negotiated. The Disputes Clause of the contract provides a framework within which most disputes can be resolved, but there may be some differences which will be determined by reference to other avenues of relief.

1. CLAIMS TO THE COMPTROLLER GENERAL

1-1. The Comptroller General has historically had a large role to play in aiding contractors. Beginning in 1921 at the inception of the General Accounting Office, "settling and adjusting" claims for and against the Government under authority of section 71 of the Budget and Accounting Act of 1921 was a part of Comptroller General's statutory authority. Over the years his decisions regarding contract claims became increasingly numerous.

1-2. Our discussions in Chapter 16, including the Supreme Court decision in *S&E Contractors, Inc., v. U.S.*, followed in 1978 by the Contract Disputes Act, show that these developments have effectively sealed off the post-award Disputes area from Comptroller General consideration. Indeed the Comptroller General in his recent decisions says that he has no authority over claims involving the administration of contracts (84-1 CPD Para 68), nor Labor Department wage determinations (84-1 CPD Para 172), nor Freedom of Information Act disclosures (84-1 CPD Para 7), etc. He refers the contractors to the Contract Disputes Act of 1978.

1-3. **Protests.** If the Comptroller General's authority in government contracting could be summed up in one phrase, it would be "bid protests". These were discussed *supra* in Chapter 4. This is cold comfort to successful bidders, for how many successful bidders would protest the award to themselves? Some have. They have claimed a mistake in bid -- a mutual mistake -- in effect, requesting reformation of contract after award. Of course, they wish to keep the award, but correct the mistake. The Comptroller General, however, noting the reformation authority in the Boards and U.S. Claims Court under the Contract Disputes Act of 1978, has refused to take jurisdiction of such cases. (84-1 CPD Para 65).

1-4. The Comptroller General does have the power to remit liquidated damages assessed against a contractor. This authority stems from the Armed Services Procurement Act of 1947.

2. RELIEF UNDER PUBLIC LAW 85-804

2-1. Public Law 85-804, August 28 1958, as implemented by Executive Order 10789, dated 14 November 1958, and amended by Executive Order 11051, dated 27 September 1962, provides relief to contractors in certain extraordinary situations (50 U.S.C. §§ 1431-1435). The Act empowers the President to permit agencies concerned with national defense to enter into or to modify contracts without regard to other provisions of law. By Executive Order, the President authorizes the Secretaries of the Army, Navy, and Air Force to exercise his authority under the Act. Relief under the Act requires a formal determination that it facilitates the national defense. (FAR Part 50).

2-2. An essential difference exists between the relief made possible by Public Law 85-804 and any action taken under the Disputes Clause. The Disputes Clause provides for settlement of disagreements having to do with the contract as written. Public Law 85-804 authorizes relief outside the provisions of the contract; the original agreement itself may be changed. However, stringent restraints are contained in the law to prevent abuse of this extraordinary remedy.

2-3. **Types of Contract Modification Under the Act.** There are three main types of relief under the Act: amendments without consideration, amendments correcting mutual mistakes, and formalization of informal commitments. (FAR 50.302).

2-4. **Amendments Without Consideration.** Traditionally, no officer or employee of the Government may amend a contract without obtaining some additional contract benefit (consideration) for the Government. Under Public Law 85-804, this principle gives way to the con-

cept that the interests of national defense may justify an amendment without consideration.

2-5. The finding that the national defense will be facilitated by an amendment depends on two factors: (1) an actual or threatened loss of vital supplies or services under a defense contract, or (2) an impairment (caused by such loss) of the productive ability of a contractor whose continued operation is essential to the national defense. Relief is limited to what is actually required to avoid impairment. The anticipated loss cannot be merely a reduction of expected profits; the Act does not afford a method of relieving a contractor from general financial difficulties.

2-6. **Mutual Mistakes.** Mutual mistakes are the second category permitting relief under the Act. Three examples of these are:

> *(1) A mistake or ambiguity consisting of the failure to express (or to express clearly in a written contract) the agreement as both parties understood it.*
>
> *(2) A contractor's mistake so obvious that it was, or should have been, apparent to the Contracting Officer.*
>
> *(3) A mutual mistake about a material fact.*

The concept of mutual mistake usually excludes correction of mistakes caused by faulty business judgment. Thus, if the time or costs of a given contract were underestimated, the contractor may not be entitled to this type of relief; but relief on some other basis (an amendment without consideration, for example) might be granted.

2-7. **Formalization of Informal Commitments.** A written authorization by the Contracting Officer is the only basis for a valid Government contract. Sometimes, however, a contractor may act without formal authorization. For example, he may furnish property or services to the Government following oral instructions from a government official. This may or may not have been done in connection with an existing government contract. In either case, to obtain payment, the contractor may request that the commitment be formalized under Public Law 85-804.

2-8. No informal commitment may be formalized, unless a request for payment has been filed within six months after arranging to furnish, or furnishing, property or services in reliance upon the commitment; and unless it was found that it was impracticable to use normal procurement procedures at the time the commitment was made.

2-9. **Authority to Grant Relief.** The Secretary of each Department has established a Contract Adjustment Board to make decisions under Public Law 85-804. Each Board consists of a chairman and not less than two nor more than six other members. It may approve, authorize, and direct appropriate action in all cases submitted to it. A Board's decision is final, although it may modify, reverse, or correct any of its findings.

2-10. FAR delegates authority to certain other officers and officials to act in Public Law 85-804 cases. Redelegation of this authority may be made with written approval of the appropriate Secretary. However, the law limits this redelegation authority. For example, a Secretary cannot delegate authority to approve actions that would obligate the Government for more than $50,000. FAR 50.201(b).

2-11. The processing of a claim begins when the contractor makes his request for relief in a letter addressed to the Contracting Officer. All pertinent data must accompany the letter. The Contracting Officer then prepares a preliminary record and forwards it through channels to the cognizant office of the approving authority. He does this within thirty days after the close of the month in which the record was prepared.

2-12. In his letter forwarding a case to the Contract Adjustment Board, the Contracting Officer states the nature of the case, the basis for authority to act, and the findings of fact (cross-referenced to any supporting enclosures). He also states conclusions based on the facts and the disposition he recommends. When remedial action is recommended, the Contracting Officer states that the action will facilitate the national defense. He also includes copies of the contractor's request, evidence, endorsements and reports, and comments of cognizant Government officials with this forwarding letter. After the Board has disposed of a case, the chairman signs a Memorandum of Decision approving or denying the request.

2-13. Sometimes a case may interest more than one Department. In this situation, the Department primarily involved with the contractor's request for relief maintains liaison with the others. When appropriate, Departments may take joint action. When funds from other Departments may be involved, the procuring Department does not approve the request for

relief without determining that the other Departments will be able to make the necessary funds available.

2-14. Procurement personnel should make every effort to prevent situations that require this form of relief. It is available only as a last resort and was not intended to create any legal rights in a contractor. Relief under it is purely a matter of grace.

3. JUDICIAL REMEDIES

3-1. In this section we shall review judicial remedies for contract claims from three standpoints: (1) lawsuits against the Government; (2) procedure following board decisions; and (3) statute of limitations on contractor claims.

3-2. **Lawsuits Against the Government.** Contractors may sue the Government in the U.S. Claims Court on contract claims because the Government has consented to this by the Tucker Act (28 U.S.C. § 1491) and the new Contract Disputes Act of 1978. The new Act gives a contractor the option of going directly to court with any claim relating to the contract.

3-3. The only administrative action required is that the contractor first submit his claim in writing to the Contracting Officer, who must formally rule on it. He may then sue in the Claims Court. The U.S. District Courts no longer may entertain contract suits against the Government (except *Tennessee Valley Authority* cases).

3-4. **Procedure Following Board Decisions.** Several choices are open to the parties after a Board decision. The Contracting Officer need take no further action if the Board affirms his decision. The contractor, on the other hand, may wish to appeal to the United States Court of Appeals for the Federal Circuit (*CAFC*) under standards prescribed by the Wunderlich Statute (41 U.S.C. § 321) and the Contract Disputes Act of 1978. Either party may file a motion for reconsideration by the Board within thirty days of notice of the decision. When the Board does not uphold his decision, the Contracting Officer must take action to implement its ruling; he may have to "equitably adjust" the contract, if the Board so directs.

3-5. The agency head, with the prior approval of the Attorney General, may appeal to the Court of Appeals for the Federal Circuit if the Board decision was fraudulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. The contractor may exercise the same right of appeal. Prejudicial error on rulings of law will also furnish a basis for appeal. On appeal to the Court of Appeals, that court will review the Board record, and affirm or reverse the Board, or remand to the Board for further proceedings.

3-6. **Statute of Limitations on Contractor Claims.** Lawsuits must be taken to court within 12 months of the date of receipt by the contractor of the Contracting Officer's decision. If, instead, he appeals to the BCA, he has 90 days to do so. Appeals from Board decisions must be taken within 120 days of his receipt of the Board decision. Agency appeals from Board decisions must also be taken within 120 days.

4. PRIVATE BILLS BY CONGRESS

4-1. When all else fails, the contractor may seek relief by attempting passage of a private bill by Congress. Such a bill may appropriate an amount in full satisfaction of the contractor's claim; it may direct a BCA or the Claims Court to take jurisdiction over the case; or it may direct the Comptroller General to settle and adjust the claim.

5. SUBCONTRACTOR REMEDIES

5-1. The situation of a subcontractor presents a different problem. It is a fundamental legal concept that before one has a cause of action against another in contract there must be privity of contract. This is defined as a contractual relationship which prevents a suit by one party against another unless both are bound together in contract. Ordinarily subcontracts do not have disputes articles or any other provision which would provide a remedy for the subcontractor before a Board of Contract Appeals. Of course, where a subcontract does have a disputes article or where the subcontractor signs the prime contract, the courts have found the necessary privity of contract to enable enforcement of nonjudicial and judicial remedies by the subcontractor.

5-2. The prime contractor may sponsor an appeal on behalf of the subcontractor, but the appeal is taken in the name of the prime contractor. The Court of Claims held in *Severin v. United States*, 99 Ct. Cl. 435, (1943) that a prime contractor in a suit against the Government is restricted to recovery of the damages he himself

has suffered; and cannot recover losses of his subcontractor where the subcontract contains an exculpatory clause absolving the prime contractor from liability to the subcontractor for breaches of contract committed by the Government. Accordingly, if the prime has no legal liability to reimburse the subcontractor, there is no reason for the Government to do so. This rule has not been extended to "equitable adjustment" situations, such as found in Changes, Delay or Suspension of Work clauses, where the prime has not disclaimed a pecuniary interest through an exculpatory clause in the subcontract. *Blount Bros. Construction Co. v. U.S.*, 348 F.2d., 471 (1965).

5-3. If the subcontract contains a Disputes Clause in which the prime agrees to lend its name to subcontractor appeals, or to actively prosecute the appeal, it must do so. The subcontractor could then appeal in the name of the prime. Provisions in subcontracts for direct appeal by the subcontractor in its own name cannot be approved by Contracting Officers.

5-4. The various boards and Courts will not entertain claims arising out of disputes between the prime and sub themselves, regardless of inclusion of a Disputes Clause in the subcontract, because the matter in dispute is one which does not directly involve any obligation of the Government and the Government does not arbitrate such disputes. The subcontractor is left with its common law right to sue for breach of contract in state court or, in some cases, a U.S. District Court on its private contract with the prime contractor.

6. FREEDOM OF INFORMATION

6-1. The 1966 revision of the public information section (Sec. 3) of the Administrative Procedure Act (5 U.S.C. § 552), effective July 4, 1967, is known as the Freedom of Information Act (*FOIA*). It generally provides that Government information be made available to the public with certain exceptions. In November of 1974, Congress enacted Public Law 93-502 which added many new provisions to the Act that are designed to provide fuller and more prompt compliance with its requirements. FAR 24.2 provides guidance in the release of procurement information to the public.

6-2. **Purpose and Scope.**

(a) Public Law 89-487 (as codified by Public Law 90-23 in § 552 of Title 5, United States Code and as amended by Public Law 93-502) provides that information is to be made available to the public either by (a) publication in the *Federal Register*, (b) providing an opportunity to read and copy records at convenient locations, or (c) upon request, providing a copy of a reasonably described record. Materials to be published or made available under (b) and (c) above will be determined in accordance with applicable provisions of FAR Part 24 and implementing Departmental regulations. General policy guidelines and procedures to be followed in responding to public requests for procurement records are contained in FAR Part 24.

(b) The key requirement of the Public Law is the making available of "information" as contained in "records". Accordingly, when a request is received for items not preserved for informational value or as evidence of agency functions, dissemination thereof is not governed by this Section or by FAR Part 24, but by appropriate Directives and Instructions concerning the particular item in question. Examples of such items include formulae, designs, drawings, research data, computer programs, and technical data packages.

(c) While there is no authority in the statutory provisions to disregard a request for access to records not properly addressed in accordance with Departmental procedures, such requests should be sent to the procuring Contracting Officer for records relating to specific contracts or solicitations and to the Head of the Contracting Activity (*HCA*) for multicontract records or for procurement type records not specifically related to a particular contract or group of contracts. When a request for records is received by personnel not in possession of such records, care should be taken to forward the request in accordance with Departmental procedures to the proper person without delay.

6-3. **Release of Records--General Considerations.**

(a) The Act imposes upon the various Government agencies the obligation of making information available to the public to the greatest extent possible while at the same time recognizing the need for providing specific exemptions to protect certain categories of information. The Department of Justice has stated with respect to the passage of this law:

> *This law was initiated by Congress and signed by the President with several key concerns:*

—that disclosure be the general rule, not the exception;

—that all individuals have equal rights of access;

—that the burden be on the Government to justify the withholding of a document, not on the person who requests it;

—that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

—That there be a change in Government policy and attitude.

Accordingly, FAR Part 24 states that it is the policy of the Department of Defense to make the maximum amount of information concerning its operations and activities available to the public.

(b) Procurement records requested and reasonably described by any member of the public must be made available, unless they come within any of the specific categories of matters which are exempt from public disclosure under the act. However, a record which is otherwise exempt from disclosure should nevertheless be made available when (i) disclosure is not inconsistent with statutory requirements, with security classification requirements, or with other requirements of law, and (ii) a competent official charged with this responsibility determines that no significant and legitimate governmental purpose would be served by withholding the record. It should be noted that the person making the request need not have a particular interest in its subject matter nor must he provide justification for the request.

(c) In deciding whether a particular record may be released, the request must be reviewed in accordance with Appendix L to DAR and Departmental implementation thereof to determine whether the document or material requested qualifies as a "record" and, if so, whether it falls within an exemption under agency implementation of these paragraphs. Except for the establishment of procedures for the review of requests, the Departments and their subordinate organizations shall not, pursuant to FAR Part 24 and applicable clauses, 52.224-1 and 52.224-2 1-108 issue instructions or regulations establishing standards for determining the release of procurement records without prior approval of the offices listed in FAR Part 24 and applicable clauses, 52.224-1 and 52.224-2. The integrity of the procurement process requires the Contracting Officer to ensure that the legitimate interests of the Government and contractors are protected, as well as the public's right to procurement records under 5 U.S.C. § 552, as amended. It is therefore essential that action upon requests for procurement records or information derived from them, be taken after consultation with the cognizant procuring activity Contracting Officer. This will ensure that the advice of the Contracting Officer is utilized in determining whether or not a significant and legitimate Government purpose, from a procurement standpoint, will be served by denying release in the circumstances involved in each request.

6-4. **Exemptions.**

(a) The law does not provide an automatic self-executing formula for determining whether a particular record is appropriate for release. Rather, nine general categories of exemptions were established to provide the framework within which judgment must be exercised in deciding whether a particular record is exempt from disclosure.

(b) FAR Part 24 and applicable clauses 52.224-1 and 52.224-2 require that records or reasonably segregable portions of them should be made available upon the request of any member of the public if no significant and legitimate governmental purpose would be served by withholding them under an applicable exemption. However, this is not operable if disclosure is prohibited by Executive Order (see FAR Part 24 and applicable clauses), by a statute, or regulations authorized by, or in implementation of, a statute.

(c) In addition to the general discussion of the following exemptions in FAR Part 24 and applicable clauses, 52.224-1 and 52.224-2, guidelines for the review of requests for procurement documents are set forth below. In determining whether a procurement record not specifically discussed in this paragraph should be released, the Departmental policy regarding the release of information shall govern:

(1) Matters that are "specifically authorized under criteria established by Executive Order to be kept secret in the interest of the national defense or foreign policy and are in fact properly classified pursuant to such an Executive Order." Examples of such matters are those classified pursuant to Executive Order 11652, "Classification and Declassification of National Security Information and Material" and implemented by regulations such as DOD Directive 5200.1, "DOD Information Security Program,"

June 1 1972 and DOD Regulation 5200.1-R, "DOD Information Security Program Regulation," November 15 1973.

(2) Matters that are "related solely to the internal personnel rules and practices of an agency." These matters include materials which are intended for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without prejudice to the proper and efficient performance of an agency function. Examples of such materials are operating rules, guidelines and manuals of procedures for Government investigators and examiners. Other examples are: circumstances under which an unannounced inspection or spot-audit of a transaction will be conducted to determine compliance with regulatory requirements; or negotiating or bargaining techniques, positions or limitations.

(3) Matters that are "specifically exempted from disclosure by statute." Examples of such statutes include 18 U.S.C. § 1905 for trade and financial information provided in confidence to an officer or employee of the Government; Public Law 86-36 (50 U.S.C. § 402) for National Security Agency information; the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2231); and 35 U.S.C. §§ 181-188 (*Patent Secrecy*).

(4) Matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

a. This exemption covers documents containing information which is customarily privileged or confidential and is released to the Government on that basis by an individual, private or public organization, State or local government, foreign government, or international organization. The applicability of this exemption does not depend upon whether the Department obtains the information directly from a person concerned with preserving the confidential nature of the information, such as in the case where a prime contractor submits information from a subcontractor. It may encompass business statistics, inventory and customer lists, scientific and manufacturing processes and developments, and trade secrets. Such information is generally received in confidence in connection with the receipt of bids, loans, contracts, and proposals, solicited or unsolicited, and in the course of negotiations. It would also include statistical data or information concerning contract performance, income, profits, losses and expenditures, if offered and received in confidence from contractors or potential contractors.

b. To receive the protection of the exemption, material must be received in confidence or not made generally available by the party furnishing it to the Government. The following are examples of documents which would normally be exempt under this provision: cost and pricing data submitted by contractors; documents or data appropriate for renegotiation purposes; price analyses based on contractor submitted data; documents supporting advance and progress payments; documents received from contractors relating to compliance with labor policies (e.g., records of compliance checks; payrolls or certified excerpts); settlement proposals; rejected engineering change proposals; inventory reports or disclosures and value engineering proposals.

c. Formulae, designs, drawings and specifications and research data are considered exploitable resources to be utilized in the best interest of all the public and not preserved for informational value or as evidence of agency functions. Their release is governed by other Agency Directives and Departmental regulations.

(5) Matters that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

a. This exemption is intended to recognize that full and frank exchange of opinions would be impossible if all internal communications were required to be made public. The exemption does not contemplate indiscriminate administrative secrecy, and any internal memoranda which would routinely be disclosed to a private party through the discovery process in litigation should be available for release to members of the public.

b. The following are examples of documents and information, part or all of which are not normally available to the public under this exemption: cost and price analyses; procurement management reviews, such as Contract Performance Evaluation Reports; Government price estimates; pre-award surveys and other advisory documents considered by Contracting Officers in determining contractor responsibility for award purposes and other documents containing staff advice preliminary to an award of a contract;

records of Source Selection Boards, Contract Review Boards, etc.; advisory documents regarding termination actions; advisory records concerned with contract administration, such as production surveillance, quality assurance and inspection reports; and renegotiation reports.

c. Records which are received or generated by a department, and which are preliminary to a decision or action, should not be released until such time as disclosure would not be detrimental to the authorized and appropriate purpose for which they are being used. For example, a copy of an IFB intended for public release at a particular time should not be released prematurely, although the document is in final form and ready for distribution. Similarly, advance information on proposed plans to procure, lease, or otherwise acquire or dispose of materials, real estate, facilities, or functions should not be released when such information would provide undue or unfair competitive advantage to private personal interests.

(6) Matters that are "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." A citizen has a right to be secure in his personal affairs when such affairs have no bearing or effect on the general public. This exemption is intended to exclude from disclosure requirements not only personnel and medical files, but also all private, personal, financial or business information contained in other files which, if disclosed to the public, would constitute a clearly unwarranted invasion of personal privacy. An example of such similar files are those compiled to evaluate candidates for security clearance--civilian, military and industrial, or for access to particular sensitive classified information.

(7) Matters that are contained in "investigative records compiled for the purpose of enforcing civil, criminal, or military law, including the implementation of Executive Order or regulations validly adopted pursuant to law", and then only to the extent that their release would:

a. interfere with enforcement proceedings;

b. deprive a person of the right to a fair trial or an impartial adjudication;

c. constitute an unwarranted invasion of personal privacy;

d. disclose the identity of a confidential source;

e. disclose confidential information furnished only from a confidential source obtained by a criminal law enforcement authority in a criminal investigation or by an agency conducting a lawful national security intelligence investigation;

f. disclose investigative techniques and procedures not already in the public domain and requiring protection against public disclosure to insure their effectiveness;

g. endanger the life or physical safety of law enforcement personnel.

1. This exemption would include reports for suspected criminal conduct, noncompetitive practices and other procurement irregularities or reports on identical bids. It would also encompass Inspector General reports on procurement matters, where reports were compiled for possible law enforcement action. These reports are often generated by specific allegations of procurement irregularities on the part of contractors or Government personnel.

2. Examples include:

i. Statements of witnesses and other material developed during the course of the investigation and all materials prepared in connection with related government litigation or adjudicative proceedings.

ii. The identity of firms or individuals suspended from contracting with the Government or being investigated for alleged irregularities when no indictment has been obtained nor any civil action filed against them by the United States.

iii. Information obtained in confidence, express or implied, in the course of:

-a criminal investigation by a criminal law enforcement agency or office within a component; or

-a lawful national security intelligence investigation conducted by an authorized agency or office within a component for the purpose of obtaining:

-A. affirmative or counterintelligence information, or

-B. background investigation information needed to determine suitability for employment or eligibility for access to classified information.

iv. Information received in connection with investigations conducted pursuant to Executive Order 11246 (*Equal Opportunity*).

3. The right of individual litigants to investigative records currently available by law is not diminished.

4. When the party who is the subject of an investigative record is the requester of that record, it may be withheld only in accordance with regulations implementing the Privacy Act of 1974 (Public Law 93-579). The identity of the source of information obtained in confidence may be withheld in accordance with an implied or express promise of confidentiality given prior to 27 September 1975 and in accordance with an express promise of confidentiality after that date. Information from which the confidential source can be deduced may also be withheld.

(8) Matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

(9) Matters involving "geological and geophysical information and data (including maps) concerning wells."

6-5. **Requests for Procurement Records.**

(a) Requests for copies of procurement records shall be reviewed in accordance with Departmental directives and procedures.

(b) Requests for copies, or for the inspection of procurement records should be addressed to the procuring activity, purchasing office or other appropriate activity having cognizance of the information or document desired by the party making the request.

6-6. **Reverse FOIA Suits.** Contractors have sued to prevent the release of material they felt was protected from release under the Act. The U.S. Supreme Court has now declared such suits improper, ruling that exemptions under the Act mean only exemption from mandatory disclosure--that contractors have no right to protection under this act.

6-7. Interestingly, however, the court pointed out that the Trade Secrets Act (18 U.S.C. § 1905) may be used as a basis for preventing disclosure, unless disclosure is authorized by law. *Chrysler Corp. v. Brown, Secretary of Defense,* 441 U.S. 281 (1979).

6-8. **Equal Access to Justice Act** (P.L. 99-80; August 5, 1985). This Act provides contractors with a remedy for collection of costs and attorney fees. The legislation makes permanent the prior provisions of P.L. 98-481. It applies to disputes arising under the Contract disputes arising under the Contract Disputes Act of 1978 but is limited to individuals whose net worth does not exceed $2 million or a small business whose net worth does not exceed $7 million. Thus it is effectively limited to small business litigants. Not only must the contractor have won the appeal, but there must have been no "substantial justification" for the government's resisting the claim. This is determined by looking at the government's position not only at the court or BCA, but also the agency conduct which is the basis for the litigation.

CHAPTER 18

TERMINATION FOR DEFAULT

This chapter discusses the rights of the Government to terminate the contract when the contractor fails to perform. The effect on the contractual relationship with a contractor is also discussed.

1. BREACH OF CONTRACT

1-1. Traditionally and historically when one party to a contract fails to perform, the other party has been permitted the remedy of recovering damages for the breach. Frequently the injured party may elect any of several remedies, including money damages. A common definition of breach is "a nonperformance of any contractual duty of immediate performance." When the contractor has failed to perform, the Government may terminate the contract for default on the basis of the appropriate clause inserted into the contract and may collect damages.

1-2. A breach of the contract may be either actual or anticipatory. Actual breach is a currently existing failure to perform the terms of the contract. Anticipatory breach is a prospective failure to perform the terms of the contract which is manifested by either some expression or conduct of one of the parties to the contract prior to the time set for the performance. Each of these breaches will be discussed.

1-3. **Actual Breach.** When a contractor fails to perform the contract according to its terms, he is in breach and the Government has the right to terminate the contract for default. This remedy had been included in standard provisions in Government contracts which were given the general classification of "default". They are now in FAR clauses with the general designation of "Termination" or "Default" (FAR 52-249-6 through 52.249-10). At common law the same rights were available to the non-breaching party under the theory that there was a non-occurrence of a condition precedent to his performance.

1-4. There are several situations where a breach may not lead to a termination for default. These include those situations where a contractor has an excusable cause for failing to perform the terms of the contract. Another situation is when the contractor has *substantially* performed his contractual obligations. With regard to construction contracts, the doctrine has been held to be applicable when the Government construction project is complete to the point that the Government can use and enjoy the substantially completed facility. This delivery to the Government has been called "Beneficial Occupancy" and is equivalent to the civil law theory of "Substantial Performance".

1-5. In the area of supply contracts the courts and boards have frequently stated that the Government is entitled to "strict compliance" and that failure of the contractor to deliver exactly what is called for by the specifications is a basis for rejection of the tendered item, and of course, the basis for a default termination. The Claims Court has relaxed the harshness of this rule by stating that when a tendered item contains "minor deficiencies" the contractor must be given an opportunity to correct these deficiencies. The deficiencies or defects must be minor in nature and readily correctable. This rule has been extended by the ASBCA to tendered first articles. As stated, this rule is a departure from the established law relating to the delivery of defective supplies. However, the rule is consistent with the remedy available to the Government under the Inspection Clause, to accept nonconforming supplies at a reduced price.

1-6. **Anticipatory Breach.** Generally speaking, a contract is not breached until the time set for performance has arrived. Under modern contract law it is possible that a breach of contract may occur prior to the time set for performance; in which case the breach is called anticipatory. In theory the anticipatory breach gives a remedy to a contract party when the other party has not lived up to his contract obligations. In government contracting there are two types of anticipatory. breach. One is contractual in nature, that is, when the contractor "fails to make progress so as to endanger performance of the contract"; the other arises from the common law and occurs when, by inference from the contractor's words or actions, it becomes obvious that the contractor has no further intention of performing. The second type of anticipatory breach is

also called anticipatory repudiation. Examples include a letter from the contractor that he will not continue work, abandonment of the job by the contractor or the action of filing a voluntary petition in bankruptcy. The purpose underlying this theory is that it is unjust to require a party who is ready, willing and able to perform his obligation under a contract to stand by, perhaps to his detriment, under circumstances where the other party has clearly manifested his intention not to perform.

1-7. The elements constituting an anticipatory repudiation are: (1) a positive intention not to perform; (2) communication of the intent (by word or action) to the other contracting party; and (3) action by the aggrieved party in reliance upon the notice of intent to repudiate. It should also be noted that equivocal statements that the contract "might not" be performed are not sufficient to establish a breach by anticipatory repudiation. In the first type of anticipatory breach, contract provisions require a "ten-day" cure notice and opportunity to repair the breach prior to terminating for default. In the second type, anticipatory breach by repudiation, no "ten-day" notice is required prior to default.

1-8. In order to make the breach complete, the complaining party must act in reliance upon the anticipated breach. Continuing to urge performance is inconsistent with a later claim that the Government relied upon the contractor's repudiation of his obligations under the contract. Further, the anticipatory breach may be repaired by the breaching party any time until the aggrieved party has changed his position.

2. DEFAULT

2-1. It is important to note that the Default clauses in Government contracts are permissive in that the Government may terminate the contract but is not necessarily required to do so. This affords the Government the opportunity to view its contracts from a total concept of what is best in its overall interests.

2-2. **Fixed-Price Supply and Service Contracts.** There are several factors that will be examined in this section on fixed-price supply contracts. These factors deal with defaults, termination of contract variables, notices and other important issues that are pertinent to this type of contract.

2-3. Default termination provisions in Fixed-Price Supply and Service contracts (FAR 52.249-8) permit the Government to terminate all or any part of the contract if (1) the contractor fails to make delivery within the time specified in the contract, (2) the contractor fails to make progress so as to endanger performance of the contract, or (3) fails to perform any other provision of the contract.

2-4. The question arises: If the contractor fails to make delivery, at what point in time may the Government terminate the contract for default and what prior notices of termination action must be given? The general rule is that a contractor already in default is not entitled to any prior notice, unless there is a contract provision requiring such notice, and the contract may be terminated immediately.

2-5. The Government has the right, therefore, to terminate immediately without prior notice if the contractor fails to deliver within the time specified. This is true regardless of how slight the delay might be. This is not to suggest that the Government will terminate immediately; however, it does have the "right" to do so if it so desires. In a leading case, the ASBCA upheld a default termination taken on Monday when the required delivery date was the preceding Friday. *(Nuclear Research Associates, Inc.,* ASBCA 13,563 (1970). Furthermore, it should be noted that the Government has the right to accept goods already shipped but not yet accepted at the time of termination.

2-6. Where the contractor fails to make progress, or fails to perform any other provision of the contract, the question also arises as to when the Government may terminate for default. Under these conditions the clause provides that the contractor must first be given notice of his failure and an opportunity to cure the defect within 10 days, or such longer period as the Contracting Officer may authorize.

2-7. A termination for default action is improper when the "notice" and opportunity to "cure" are required, but not given. An "oral" notice is insufficient and not effective. It must be in writing.

2-8. Should the so-called "cure notice" provide for less than the 10-day minimum, the requirement of the clause may not be satisfied and a termination for default could be improper. It should be noted that if the amount of time remaining for delivery is less than 10 days, the advisability of any notice is questionable. If under these circumstances, a 10-day cure notice

is sent, the Government has in fact extended the contractual delivery date until the end of the 10 days. The notice should never direct the contractor's manner of performance. The cure notice must specify the exact deficiency or failure which the Government feels is present. If not specific, the cure notice is invalid and a subsequent default will be overturned.

2-9. The Armed Services Board of Contract Appeals has repeatedly required the Government to adhere strictly to the notice provision of the clause where the time available prior to delivery is greater than 10 days.

2-10. Although there is a contractual requirement that a cure notice be issued, there are informal ways to communicate the Contracting Officer's concerns. Telephone calls, letters and "show cause" notices may be sent to the contractor. The show cause notice in effect directs the contractor to show why the contractor should not be terminated for default.

2-11. The show cause notice insures that the contractor understands his predicament and his answer can be used in evaluating whether circumstances justify default action. The show cause notice is not mandatory. It is generally considered advisable since the existence of an excusable cause would result in a default termination being changed to a convenience termination. However, a central question in every default situation is, "Is the contractor's delay excusable?" The nature of such "excusable causes" are set forth in paragraph (c) of the fixed-price supply and service contract Default clause.

2-12. Except for either type of anticipatory breach, the Government may not terminate a contract for default on the basis of failure to deliver before the time for performance has expired; if it terminates even one day early, a termination for convenience will apply in lieu of the termination for default.

2-13. If only a portion of the contract has been terminated for default, the contractor must continue performance on the contract to the extent it is not terminated. The Government can require preservation and protection of its property in the possession of the contractor, and further, the Government may require transfer of title and delivery of material which the contractor has produced or acquired to the extent directed by the Contracting Officer. If so, the contractor will be paid a price to be agreed upon. A failure to agree is made subject to the provisions of the "Disputes" clause.

2-14. The contractor has the right to appeal the termination and is entitled to payment at the contract price for items accepted by the Government. The contractor may also question later assessed excess costs or he may appeal the assessment of excess costs and question the propriety of the default at that time.

2-15. One of the principal rights acquired by the Government under the Default clause is the right to repurchase the item elsewhere and charge excess costs to the defaulting contractor. There is a duty imposed upon the Government in general to act reasonably to minimize the damages, otherwise it may lose its right to assess excess costs. Conditions imposed upon repurchase action generally are: (1) repurchase must be made within a reasonable time after termination; (2) repurchased items must be as similar as practicable to the defaulted items in quality, units and specifications; and (3) repurchase contract terms should essentially be the same as the original contract terms. The Contracting Officer has considerable latitude and discretion in effecting the repurchase. Repurchase contracts are not subject to statutory advertising requirements and the Contracting Officer may let contracts by whichever means he deems to be reasonable and in the best interests of the Government. The Contracting Officer is not arbitrarily required to accept the lowest offer received. He may consider time of delivery, qualifications and capacity of the bidder. However, he must not abuse this discretion and must use diligence to obtain the lowest price available.

2-16. Excess costs are generally assessed as the difference between the original contract price and the repurchase price. Other costs are also recoverable. The Comptroller General has ruled that the defaulting contractor becomes liable for whatever reasonable damages were occasioned. The measure is the amount that will compensate for the loss which fulfillment of the contract would have prevented. Some examples of these costs are: (1) moving Government-furnished property to the replacement contractor's place of business, (2) expenses of added inspection and (3) added freight charges.

2-17. The Default Clause (FAR 52.249-8h) provides:

> *The rights and remedies of the Government in this clause are in addition to any other rights and*

remedies provided by law or under this contract.

Consequently, it must be borne in mind that the right to recover excess costs is an inclusive and not an exclusive remedy. The Government may also recover other damages, to the extent that they can be established.

2-18. There are cases wherein a contractor may not be terminated for default when the failure to perform is due to "excusable" causes. These causes are listed in the next section.

2-19. In order to qualify as an excusable cause relating to the prime contractor, the cause must be beyond the control and without the fault or negligence of the contractor. Causes listed in the Default clause as excusable include, but are not restricted to: (1) acts of God or of the public enemy, (2) acts of Government (either sovereign or contractual), (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.

2-20. It is important to emphasize the requirement that in order to constitute an excusable cause it must be "beyond the contractor's control", and "without his negligence". For example, even though a severe and heavy snow storm itself may be beyond the contractor's control, it will not constitute an excusable delay if it did not constitute "unusually" severe weather. If such an occurrence is a common one during certain times of the year in the locale in which the contractor is situated, it would be possible for him to "foresee" this result and make plans accordingly. A preexisting strike, for example, is "foreseeable."

2-21. With respect to failure to perform due to the default of the subcontractor, in order to qualify as an excusable cause, the default must arise out of causes beyond the control and without the fault or negligence of both the prime contractor and the subcontractor. Even if this requirement is met, the cause will not be excusable if the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the contractor to meet the delivery schedule. It should also be noted that the Court of Claims has adopted a very strict interpretation of the term "subcontractor" in Government contracts. "Subcontractor" is defined to include only those in contractual privity with the contractor.

2-22. FAR 52.249-8 provides in paragraph (c) for those instances in which the contractor's termination for default was illegal or where the contractor's breach was excusable. It states:

> *If, after termination, it is determined that the contractor was not in default, or the default was excusable, the rights and obligations of the parties should be the same as if the termination had been issued for the convenience of the Government.*

2-23. Several courses of action in lieu of termination for default are available when it is determined to be in the best interest of the Government. They are: (1) permit the contractor, his surety, or guarantor to continue performance under a revised delivery schedule; (2) permit the contractor to continue performance by means of sub-contract, or other business arrangement with an acceptable third party; or (3) if the requirement for the supplies or services no longer exists and the contractor is not liable to the Government for damages, execute a no-cost termination settlement agreement.

2-24. The provision permitting the contractor to continue performance under an extended delivery schedule generally must be accompanied by some consideration, monetary or otherwise, flowing from the contractor to the Government. This requirement arises out of the general rule that a Government agent, such as a Contracting Officer, is without authority to waive a vested right of the Government without receiving consideration therefor. The right of the Government to require performance, within the period provided in the contract, constitutes such a vested right.

2-25. Another course of action open to the Government in lieu of default termination, where the supplies or services are delivered but are defective, arises out of the Inspection Clause. That clause provides, among other things, that the Government may accept the defective items and require a downward equitable adjustment in price.

2-26. Forbearance and waiver are important concepts in this area. Forbearance is a period of time whereas waiver is an event or implied event. Whereas a waiver may relinquish a right altogether, forbearance does not give up a right but provides time for reflecting on a decision concerning a right. As noted earlier, default action for failure to perform is permissive and not mandatory. It is unusual for the Government to immediately take action to default a contractor upon his failure to perform. Since "termination" causes a cessation of performance, it is usual for the Government to pause and reflect

before taking such drastic action. In so doing it determines whether such action is in its best interest. This period of time, which must be reasonable under all the circumstances, is termed "forbearance". If this period of time becomes unreasonable, then a waiver of the right to default is imputed to the Government. Forbearance periods ranging from one week to over three months have been held not a waiver, while periods of 48 days to four months have been determined to constitute a waiver.

2-27. Many matters must be considered in arriving at a determination of whether to terminate or continue with the contract. Some of these matters are: (1) the existence, if any, of an excusable cause of delay; (2) the nature of the item and its availability from other sources; (3) time constraints based on need of the item; and (4) the contractor's ability to perform if the contract is not terminated. Therefore, the Government frequently takes no immediate action and the contractor often continues to perform even though the original performance period has passed. If the Government does ultimately decide to terminate, it may be faced with a situation where it has effectively "waived" its rights to terminate for default. This "waiver" is sometimes called an "Election" by the Government to allow the contractor to continue performance, notwithstanding the passage of the delivery period.

2-28. In addition to a lapse of time, actions by the Government may constitute a waiver rather than a "forbearance". Actions on the part of the Government which have been determined to constitute a waiver are: (1) urging the contractor to continue, (2) accepting samples and preproduction models; (3) performing an acceptance inspection; (4) accepting deliveries; (5) issuing change orders and supplemental agreements. It is clear that when the Government encourages and induces a contractor to continue performance and in reliance thereon the contractor does continue and incurs further costs, a waiver will be found.

2-29. Actions which have not constituted a waiver are: (1) discussing progress with the contractor; (2) failure to answer the contractor's request for more time; (3) accepting partial delivery; and (4) limited tests by Government inspectors. However, if the action of the Government constitutes a "waiver" of its right to terminate, a new delivery schedule must be established. Such new schedule must be reasonable in light of all the facts.

2-30. **Fixed-Price Construction Contracts.** There are two areas under this subtopic that will be briefly reviewed. These areas will provide you with some insight on the fixed-price construction contract.

2-31. Fixed-price Construction Contract Default Termination Provisions, FAR 52.249-10, permit the Government to terminate the contractor's rights to proceed with the work, or any separable part of the work.

> *If the contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the contractor, terminate the right to proceed with the work (or any separable part of the work) that has been delayed.*

These provisions are closely akin to the "failure to make progress" and "failure to deliver" provisions of the Fixed-Price Supply Contracts.

2-32. Once a construction contract has been terminated, the Government may take over the work and complete it or have it completed by another contractor. In so doing, the Government may take possession of and use any materials, appliances and plant that may be on the worksite and necessary for contract completion. Also, the contractor is liable to the Government for any damages caused by its failure to complete the work on time. This is true whether the contract is terminated or not. The surety may enter into a takeover agreement and complete the contract, whereas in a supply or services contract, such takeover would have to be before default.

2-33. **Fixed-Price Research and Development Contracts.** The default clause for Fixed-Price Research and Development Contracts is located at FAR 52.249-9. Contract default termination provisions permit the Government to terminate for failure to "Perform the work under the contract within the time specified in this contract or any extension; . . . Prosecute the work so as to endanger performance of this contract . . .; or Perform any of the other provisions of this contract . . . ." The Default clause for Fixed-Price Research and Development contracts is quite similar to the Fixed-Price Supply Contract, not only regarding the reasons for default but

also with respect to the 10-day "cure notice", "repurchase and excess costs" and "excusable cause" provisions.

2-34. **Cost-Reimbursement Type Contracts.** Cost-Reimbursement Type Contract default termination provisions permit the Government to terminate the contract in whole or in part, for default and failure to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. A 10-day cure notice is required by the clause. Again, it should be noted that if the delivery is less than 10 days away, the courts have stated that a cure notice of less than 10 days is improper.

2-35. In the event of termination, the contractor shall be reimbursed his allowable costs in accordance with the clause, and an appropriate reduction shall be made in the total fee, if any. No provision is included for recovery of excess costs of reprocurement after termination. However, in those Cost-Reimbursement Supply Contracts which include an "Inspection of Supplies-Cost Reimbursement" clause, FAR 52.246-5, the situation is somewhat different.

2-36. The latter clause provides that at any time within performance, but not later than six months after acceptance, the Government can require correction or replacement of defective supplies. These costs are paid for by the Government. However, if the contractor fails to proceed with reasonable promptness to replace or correct the supplies, the Government may repurchase and charge any excess costs to the contractor, or equitably reduce the fee.

2-37. Excusable causes for failure to perform are recognized to the same extent as in Fixed-Price Supply and Service Contracts with some variation regarding failure of a subcontractor to perform or make progress. If the supplies or services are obtainable from other sources, an excusable cause will still exist unless the Government orders the contractor, in writing, to obtain them from the other source and the contractor fails to reasonably comply with that order. Excusable causes for Cost-Reimbursement Type Contracts are set forth in a special clause titled "Excusable Delays", FAR 52.249-14. It contains a requirement for revision of the delivery schedule to accommodate any excusable delay.

CHAPTER 19

TERMINATION FOR CONVENIENCE

This chapter presents the authority, reasons, procedure and applications of the remedy entitled "Termination for Convenience", with a view toward understanding and justifying such an action in the best interests of the United States.

2. The right to terminate the contract for the convenience of the Government is, simply stated, the right of the Government to refuse to continue with contract performance -- to stop the work and settle with the contractor at the point of termination as set forth in the contract. The word termination ordinarily means ended; but within the context of Government contracts, it has a more restricted meaning. Termination results only from an action by the Contracting Officer.

3. In Government contracts there are two types of terminations -- default and convenience. The difference between the two types of termination can be stated to rest on fault. In a default termination, the action by the Government is taken because of failure on the part of the contractor to live up to his contractual obligations. A termination for convenience promotes the best interests of the Government and does not result from any fault on the part of the contractor.

4. The Government may terminate contracts in whole or part for its convenience at any time during contract performance. This termination authority gives procurement planning an essential flexibility. Changes in military strategic planning -- the development of new weapons -- new attitudes on disarmament, budgeting and funding -- any of these may eliminate the need for part or all of an existing contract. When this happens, termination proceedings work to save the Government's funds. This termination may also be effectively used to relocate vital materials, manpower and facilities.

1. RIGHT TO TERMINATE

1-1. The Government's right to terminate for its convenience is supported by three theories: (1) Inclusion of a termination clause by agreement of the parties; (2) Inclusion of a termination clause "by operation of law"; and (3) breach of contract.

1-2. In Government contracts the right to terminate for convenience (of the Government) arises because the parties to the contract agree to this right through incorporation of the appropriate clause into the contract.

1-3. Even though the required clause under FAR is omitted, the right of termination for convenience may yet bind the parties "by operation of law." In the landmark case of *G. L. Christian and Associates v. United States,* (1963) 312 F.2d 418, heard by the United States Court of Claims with a petition for review *(writ of certiorari)* to the United States Supreme Court denied (375 U.S. 954), the Court so held, finding that: (1) ASPR (predecessor of DAR and FAR) governed the contract, (2) ASPR was promulgated pursuant to law (The Armed Services Procurement Act of 1947, 10 U.S.C. § 2202, (3) ASPR therefore has the force and effect of law, (4) ASPR required the clause, and (5) no authorized deviation was granted. The court therefore concluded that the clause is operative as though physically incorporated in the contract. The import of this decision continues to evolve. It is not to be assumed, however, that such clauses need no longer be incorporated into the contract, or that all clauses whose inclusion is made mandatory by FAR will be incorporated by operation of law into Government contracts. Follow-on decisions have ruled that the Government Furnished Property clause does not fall under the Christian Doctrine. It is probable that only those clauses which approach "the stature of public procurement policy" will be judged by a Court to be incorporated by law if inadvertently omitted from a Government contract.

1-4. Had the court ruled otherwise in the *Christian* case, the Government would have been liable for breach of contract damages, including all lost profits, for terminating with no clause in the contract. It is important to note that, even if the Government had no termination for convenience concept, the Government, as is true of any contracting party, has the power to "walk away" from its contract. Of course, this constitutes a breach of contract, and damages including costs to date plus the entire contract profit (anticipatory profit) must be paid. Under the termination for convenience clause, however, less generous

treatment is found, profits recovery being limited to those profits earned to the date of termination.

1-5. The breach of contract concept is not dependent on statute. In the early case of *United States v. Corliss Steam Engine Company,* 91 U.S. 321 (1875), the U.S. Supreme Court held that the Secretary of the Navy could stop the work, thereby breaching the contract, as no termination clause was present. The court found the Secretary had authority to settle the resulting breach claim as if it were an ordinary commercial contract. It should be remembered that our termination for convenience procedures are an outgrowth of this common law breach concept and are a substitute for it, though some statutory treatment has appeared over the years.

1-6. The Contracting Officer may not terminate arbitrarily under the termination clause but must justify his actions. Practically speaking, however, the contractor would have great difficulty disputing the right to terminate since the grant of authority under the clause is very broad. By comparison, in commercial contracts, termination is normally possible only by mutual consent of the parties or else a breach of contract is present. There is rarely a unilateral right provided as is given to the Government in Government contracts. In general the present state of the law is that the Government may terminate any contract for the convenience of the Government when the Contracting Officer believes that to do so is in the Government's interest. There is a legal presumption that the Contracting Officer acts in good faith, so in order to overturn a termination for convenience the contractor must prove, with "well-nigh irrefragable proof," bad faith on the Contracting Officer's part. A landmark case in 1982 held that the Government may not terminate a contract for convenience when the Government had the intention of later terminating at the time it entered the contract. See *Torncello v. U.S.,* (681 F.2d 756). This case involved a requirements type contract which the Government terminated for convenience in order to secure a more favorable price from a difference source where the Government knew about that price and source at the time it entered into the terminated contract.

2. TERMINATION FOR CONVENIENCE CLAUSES

2-1. The Federal Acquisition Regulation (*FAR*) prescribes various clauses for incorporation in contracts for termination for the convenience of the Government. These clauses are designed to apply to various procurements and are numbered FAR 52.249-1 through 52.249-7 and FAR 52.249-11. Several of these examples are reprinted in Appendix "D" in this text and will not be repeated here.

3. THE DECISION TO TERMINATE

3-1. In this section we shall examine the who, what and how factors in contract termination. The who is explained in terms of the responsibility for termination. The what shows the factors to be considered in termination, and the how is indicated through the implementation of the termination decision.

3-2. The decision to terminate contracts is made by the Contracting Officer with appropriate authority. Communication of the need for termination for convenience often comes from technical and engineering personnel. These persons should continuously review outstanding contracts to make sure that a requirement for the supplies or services involved still exists. If not, a termination for convenience action may be necessary. Postponing this consideration can cause needless expense to the Government.

3-3. As a rule, a termination request (or a similar document) submitted by technical or engineering personnel -- with necessary approvals, provides the authority for termination action by the Contracting Officer. Termination is actually made when the Contracting Officer delivers a notice of termination to the contractor.

3-4. There are a number of factors which the Contracting Officer must consider before effecting a termination. Some of these are: (1) technological advances in the state of the art; (2) budgetary consideration; (3) effect of the termination on subsidiary or related procurements; (4) requirements of other activities and the estimated costs of termination. In addition, consideration should be given to the question of whether the contractor is delinquent in performance. If so, termination for default should be contemplated.

3-5. Making the termination effective involves planning a notice of termination, and certain obligations on the part of the contractor and of the Government.

3-6. Whatever the nature of the program or contract, sound pre-termination planning is essential. Sound planning will ensure that the notice of termination serves its intended pur-

poses. It will also expedite the processing of the termination. It should be noted that after the decision to terminate is made, all necessary administrative action must be completed as soon as possible. In this way there is no delay in issuing the notice of termination. Delay in sending the notice can waste Government funds.

3-7. FAR 49.601 sets forth approved forms of notice of termination. As a rule, notice is first given by telegraph and confirmed thereafter by letter. Letter notice alone may be used. In any case, the notice should clearly state: (1) the effective date of the termination; (2) whether all work is to be stopped; and (3) the specific work to be terminated, if the termination is partial. The notice may also include special instructions about the continuation of certain work, disposition of inventory, or other matters. For example, production of a main equipment item may be completely terminated. The Government, however, may want to order spare parts and other supply support items for delivered equipments. These supply support items are often subject to ordering under special contract provisions (at the option of the Government). Thus, special requirements may be reflected in the notice of termination. In addition, the notice of termination must contain recommended actions that minimize subcontract expenses.

3-8. The Government may also wish to acquire certain inventory items (contractor fabricated components and equipments that are completed or nearing completion, for instance) as well as items of special tooling. Special instructions may identify such property and require its delivery to the Government. However, the Government usually acquires such property through post-termination screening of the contractor's inventory schedules.

3-9. The termination notice drastically affects the contractor's operations. Therefore the notice may not be rescinded or modified without his consent. Provision is also made for the contractor to initiate modification requests to this notice.

3-10. The notice of termination and the terms of the Termination Clause define the contractor's obligations upon termination. In addition, FAR 49.104 lists the duties of the prime contractor after issuance of the termination notice. As soon as he receives the notice the contractor must stop work under the contract, as directed. He continues terminated work beyond the stage authorized by the notice of termination at his own risk. The contractor's obligations also require him to: (1) terminate all unperformed or partially performed subcontracts and purchase orders relating to the terminated portion of the prime contract, and, (2) settle, with the approval of the Contracting Officer, all outstanding liabilities and claims arising from such terminations. As the Contracting Officer directs, the contractor must assign to the Government all interest in the terminated purchase orders and thus, the contractor may take the position that it was impossible for him to stop work immediately. In settling the termination, his actions should nevertheless be reviewed in order to determine whether or not he acted prudently and reasonably under all circumstances.

3-11. The contractor must protect and preserve any property related to the contract in which the Government may acquire an interest. He must also deliver to the Government, to the extent that he is directed to do so, any completed, or partially completed materials produced or acquired in connection with the terminated work. In addition, he must deliver any completed or partially completed plans or drawings that would have been required had the contract been completed. Transfer of title must accompany such delivery. As directed by the Contracting Officer, the contractor must use his best efforts to sell any undelivered property. He must also complete any portion of the contract not terminated. Finally, he must promptly submit his claim for compensation for the terminated work.

3-12. There are several practical problems to be considered in connection with the above. For one, there is the period of time the contractor needs to stop work and terminate subcontracts. This will vary with the nature and complexity of the terminated work and the volume of his other work at the time of termination. He will not, naturally, want to completely stop work on subcontracts and orders that relate to both terminated and continued work. As a result, the contractor may have to screen subcontracts, purchase orders, bills of material, and continuing work requirements before he can issue termination notices. Therefore, it may be impossible for him to discontinue certain costs and expenses at once. But it is usually true that continuation of the work beyond the time specified in the notice of termination is done at the contractor's own risk resulting in the possibility of no compensation being received for this portion. The impact

on the contractor's personnel, if the termination will contribute to a significant reduction of the work force, must be considered.

3-13. FAR 49.105 lists the Contracting Officer's duties after issuance of the termination notice. Among other duties, the Contracting Officer arranges a meeting with the contractor to develop a definite plan for effecting the termination settlement. The discussion covers all topics related to the principles, policies, and procedures governing the settlement. Among these are: the extent of the termination; the status of plans, drawings, and other data; the status of the continuing work; the contractor's termination of subcontracts; the transfer of title to the Government of any materials it requires; interim financing; and the schedule for the contractor's and subcontractors' submission of the settlement proposal, inventory schedules, and accounting data.

3-14. In some Departments, the Contracting Officer has a field representative visit the contractor's plant. This is done promptly after issuance of the termination notice. The field representative determines compliance with the termination notice and reports compliance to the Contracting Officer. No matter how they are organized and scheduled, meetings with the contractor have one common purpose -- protecting the Government's interest in the termination settlement.

4. THE TERMINATION INVENTORY

4-1. This topic will be dealt with in two parts. First, a working definition of termination inventory will be established. Secondly, factors concerning the handling of termination inventory will be reviewed.

4-2. Termination inventory means: any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the terminated contract and properly allocable to the terminated portion of the contract. The term does not include any facilities, special test equipment material, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include contractor-acquired property and Government furnished property as defined in FAR 45.101, 45.301, and 45.601.

4-3. The handling of the termination inventory includes: (1) preparation of inventory schedules by the contractor, (2) verification and screening of the inventory, withdrawal of needed items from the inventory, (3) inventory screening within the Department of Defense and other agencies, (4) plant clearance, and (5) the handling of subcontractor inventories.

4-4. The contractor must submit his termination inventory schedules promptly after termination. Inventory schedules serve many purposes: (1) they support the contractor's termination charges; (2) they provide information for plant clearance; (3) they make it possible to screen the material for use within the Government; and (4) they help with the disposition of items that are surplus to Government requirements.

4-5. FAR Part 45 presents detailed instructions for the preparation, presentation, and acceptance of inventory schedules. The contractor is responsible for the preparation and submission of the required schedules, but the Contracting Officer must review and approve the schedules. Thus, the Contracting Officer sees that the contractor receives all information and advice that will enable him to prepare acceptable ones.

4-6. On fixed-price contract terminations, the contractor must exclude common items of contractor-acquired property from his inventory schedules. Common items are those that he can use without loss on other Government or commercial work. The contractor may receive either Government or commercial work after termination schedules have been prepared (but before final action on the termination inventory) on which he knows the items can be used without loss. In this case, the inventory schedule should be amended to exclude those items. The contractor is expected to make every reasonable effort to return items to suppliers for full credit (minus the supplier's normal restocking charge or 25 percent of cost, whichever is less). The contractor may also exclude and retain, at cost, other termination inventory -- if not directed to transfer it to the Government.

4-7. On termination of a cost-reimbursement contract, all items of termination inventory (including common items previously reimbursed under the contract) must be included in the contractor's inventory schedules. The Contracting Officer (or authorized representative) must approve the exclusion and may require adjustment of previously reimbursed costs. With the exception of this approval

requirement, contractor withdrawal of common items and return of items to suppliers is expected in cost-reimbursement contracts (as it is in fixed-price contracts).

4-8. Upon receipt of the inventory schedules, the Contracting Officer (or authorized representative) notes the date of receipt. He then reviews the schedules to see that: (1) the forms have been prepared in accordance with applicable instructions; (2) the descriptive data are satisfactory for redistribution and disposal purposes; (3) the inventory schedule certificates have been properly signed by the contractor. A schedule which meets the above requirements receives a notation that it is satisfactory in form for redistribution and disposal purposes. Schedules that do not meet these requirements are so designated. They, or unsatisfactory parts thereof, must be returned to the contractor within fifteen days. If this is not done then, the final phase of the plant clearance period begins as of the date the schedules were filed.

4-9. After initial approval, the schedules are screened and verified at the same time. Verification includes review of location, quantities, condition, and allocability of the property. Frequently it is necessary to refer to source documents when determining allocability. These documents include bills of materials, purchase orders, shipping documents, warehouse and storeroom forms, and production and process charts. Verification also includes a review to see that the contractor has excluded common items of inventory. A check is made, as necessary, to insure maximum protection of the Government's interests. After verification, contractors are advised to remove from their claims items of inventory that are unallocable. They must also correct any other deficiencies.

4-10. The Government may not wish to acquire items or material in termination inventory. If it does not, the preferred method of disposition is purchase or retention by the contractor or subcontractor at cost. Withdrawal of inventory items at cost at any time before final disposition is authorized and encouraged so long as procedural requirements governing withdrawal are met. There is, however, the following limiting consideration: withdrawal of items under cost-reimbursement type contracts and of any Government-furnished property is subject to approval by the Contracting Officer. All withdrawals will require adjustments in the schedules and in the settlement proposal. These adjustments can be made without submission of new forms. The Contracting Officer and the disposal activity require immediate notice of the contractor's intention to withdraw items from the inventory schedule. The contractor will often withdraw the items and use them while the withdrawal notice is being proposed or is in transit. The contractor may, for instance, urgently need an item currently being processed for sale by the property disposal activity. The contractor may withdraw this item and use it, notifying the disposal activity. The disposal activity, in turn, will modify the sale prospectus.

4-11. There is another reason why inventory schedules should be submitted promptly; the opportunity it gives to contractors to reappraise their decisions to retain or schedule items in termination inventory. Much time may pass before the final disposition of listed items. During this screening and disposal period, the Government can reassess the allocability of items. And the contractor can withdraw items or include items not originally scheduled. FAR 49.105-1 through 49.105-3 details the Contracting Officer's duty to review inventory schedules after disposition but before final settlement. The disposition of inventory shall not affect the Government's rights, before final settlement, to require additional information, to contest allocability, or to exclude items from the settlement on any proper grounds. The practical application of these rights may involve matters of judgment that are best resolved in the early stages of settlement. Thus these provisions do not minimize the need for careful review and verification of schedules and inventory.

4-12. Screening termination inventory involves checking inventory schedules (before disposal outside the Government activities). Contracting officers shall cause to be verified, to the extent practicable, the physical count and condition of inventories, including Government-furnished property, listed on the contractor's inventory schedules. (FAR 53.245 series). Serviceable or usable property is screened within the procuring or requiring Department which has first priority on retention of desired items. This Department then forwards schedules of the items it has not retained to the General Services Administration. If aeronautical or electronic material is involved within the Department of Defense, copies of the schedules are forwarded also to the other Department of Defense Departments. Certain items, such as work in process,

special tooling or perishable items do not have to be screened by the General Services Administration. All Department of Defense requirements for industrial plant equipment are screened by the Defense Industrial Plant Equipment Center. The Defense Logistics Services Center circulates lists of excess equipment to other activities and foreign countries eligible for military assistance. Special screening considerations exist in the case of construction contracts. FAR 45.608 assigns specific screening responsibility within each of the Military Departments. Furthermore, the Government may take title to a termination inventory by issuing shipping instructions to the contractor, entering into a storage agreement with the contractor, or taking possession of the inventory. (See DOD FAR Supp 45.608-1 *et seq.)*

4-13. Surplus termination inventory within the Department of Defense is disposed of by the following methods: (1) local screening for transfer to Department of Defense activities in the area; (2) sales, including purchase or retention at less than cost by the contractor or subcontractor; (3) donation; and (4) abandonment or destruction. Disposition is subject to limitations imposed by military security requirements.

4-14. Local screening makes sure that no Department of Defense needs are overlooked. Disposition by sale is provided for by the contract terms. The Contract Termination clause requires the contractor to use his best efforts to sell termination inventory, as the Contracting Officer directs. It also permits the contractor to acquire inventory items, under conditions established by the Contracting Officer and at prices approved by him. The contractor conducts the sales under the supervision of the disposal activity. Generally, at least three bids are required. Advance notice of the sale must be given to ensure fair and reasonable prices. Retention by the contractor at less than cost may be authorized when it will help to reach a fair and prompt settlement (provided, as always, that the Government's interests are adequately protected). The Federal Acquisition Regulation also authorizes retention in special cases. For example, retention might be permitted of certain low-value items and scientific equipment on terminated research contracts with educational institutions. The proceeds of any sale or acquisition are deducted from the amount to be paid in settlement of the termination claim. Or they may be credited to the Government in other ways.

4-15. Whenever scrap is purchased from termination inventory, the buyer must give a scrap warranty as discussed in DOD FAR Supp 45.7102-6(b)(7):

> *(a) If any termination inventory is sold as scrap, a scrap warranty shall be obtained.*
>
> *(b) Releases from liability under scrap warranties may be granted on behalf of the Government by the Contracting Officer if, as consideration for the release, the Government is paid the difference between (1) the price for which the material was sold as scrap, and (2) an amount approved by the Contracting Officer, not less than that which the material would bring if it were sold at a fair and reasonable price for purposes other than use as scrap. Such releases shall be granted by the Government and the consideration paid to the Government even though the contract containing the warranty was not made directly with the Government.*
>
> *(c) In the event of resale of any material subject to a scrap warranty, the seller is required to obtain an appropriate scrap warranty from the purchaser thereof. Upon tender of the warranty to the Government, the seller shall be released by the Government from liability under his own warranty.*

4-16. Surplus termination inventory may also be donated to educational, public health, or civil defense programs. This is done by the Department of Health and Human Services (*HHS*) with the approval of the General Services Administration. Each Department within the Department of Defense furnishes to HHS a directory of its activities that maintain files of property eligible for donation. Termination inventory that has no value beyond the costs of handling it (or that constitutes a danger to public health, safety, or welfare) may be destroyed or abandoned. This is carried out as directed by the regulations of the Procuring Department and the General Services Administration. No property should be abandoned on the premises of the contractor without his consent. It should be noted, however, that the Government-Furnished Property (*GFP*) clause of the contract authorizes the abandonment of Government Property at no cost to the Government.

4-17. Each Contracting Activity has one or more Property Disposal Review Boards. These Boards review and authorize disposals exceeding set dollar limitations. They also review sales made without competitive bids; releases from scrap warranties; proposals to abandon or des-

troy property; and determination that property is scrap.

4-18. Most termination clauses include a provision for plant clearances which begins with the effective date of termination and ends ninety days after the contractor submits acceptable inventory schedules. Inventory schedules are considered to be acceptable (for purposes of starting the final phase of the plant clearance period) unless the Contracting Officer notifies the contractor within fifteen days that they are not. At any time after that the contractor may ask the Government to enter into a storage agreement for inventory not covered by disposition instructions. Storage agreements usually provide for contractor storage at a negotiated price.

4-19. Subcontractors at all tiers prepare inventory schedules. The prime contractor and each subcontractor are primarily responsible for the disposition of the termination inventory of their next lower-tier subcontractors, but all such disposals are subject to review by the Contracting Officer (or his representative). Subcontractor inventory schedules are prepared in accordance with FAR 45.614.

5. SETTLEMENT OF TERMINATIONS

5-1. **Methods of Settlement.** (FAR 49.109 *et seq.)* Settlement of cost-reimbursement type contracts and of fixed-price type contracts terminated for convenience may be effected by: (a) negotiated agreement, (b) determination by the Contracting Officer, (c) costing out under proper invoices or vouchers (in the case of costs under cost-reimbursement type contracts), or (d) a combination of these methods. Every effort shall be made to reach a fair and prompt settlement with the contractor. The negotiated agreement is the most expeditious and most satisfactory method of settling termination claims and shall be used whenever feasible. Settlement by determination shall be used only when a termination claim cannot be settled by agreement.

5-2. **Fixed-Price Contract Termination Settlements.** Settlements of fixed-price contracts may be based on either total cost or inventory. While each of the methods of settlement has its advantages, the individual settlement case would dictate the better method to be used. As will be shown in the following paragraphs, both methods include some of the same items of expenses in the settlement claims.

5-3. The inventory basis is preferred unless the particular situation makes it impossible, (FAR 49.206-2). Use of the total-cost basis must be specifically approved by the Contracting Officer in advance. Any other method of settlement (such as percentage of physical completion, is most rare). It requires prior approval of the Secretary concerned or his duly authorized representative. A summary of the settlement methods are:

a. **Inventory Basis.** Under the inventory method of settlement, the contractor lists only costs applicable to the terminated part of the contract. Inventory is priced and listed in the settlement proposal at purchase or manufacturing cost. Other proper charges are added. These include initial costs allocable to the terminated part of the contract (to the extent they are not included in inventory value); general and administrative expenses; settlement expenses; settlements with subcontractors; and profit or adjustment for loss. End items that were completed but not delivered at the time of termination are paid for at contract price. The total of these amounts is the contractor's gross termination claim. Inventory disposal credits and unliquidated progress or advance payments are deducted from this figure.

(1) The inventory basis of settlement has decided advantages. For one thing, only the costs relating to the terminated part of the contract have to be considered. For another, inventory costs lists on the inventory schedule are priced at purchase or manufacturing costs at the time of termination. Any special costs, such as initial costs allocable to the terminated part of the contract, have to be specifically identified as such.

(2) Under the total-cost basis, on the other hand, the entire contract must be reviewed and audited. This may be done in some cases because the contractor's accounting system may not permit segregation of costs applicable to the terminated part of the contract, or the contract may have been in its early stages at the time of termination, with only preparatory costs incurred. Under these circumstances the total cost basis might be the best method of settlement.

b. **Total-Cost Basis.** When the total-cost basis is used under a complete termination, all costs incurred to the date of termination are itemized, plus the costs of settlements with sub-

contractors and applicable settlement expenses. At this point, adjustment is made for profit or loss. The contract price for accepted end items and other known payments and credits are then deducted from this total.

(1) The use of the total-cost basis of settlement on a partial termination requires the contractor to defer submission of his settlement proposal until after completion of the continued portion of the contract. All costs incurred under the contract are then totaled. These include costs applicable to the continued portion. In other respects the settlement is similar to the settlement of a complete termination on a total-cost basis.

(2) The Termination Contracting Officer (*TCO*) must approve the total-cost method before it can be used by a contractor. Situations may be approved by the TCO: (a) if production has not commenced and the accumulated costs represent planning and preproduction of "get ready" expenses; (b) If the contractor's accounting system will not readily lend itself to the establishment of unit costs for work in process and finished; (c) If the contract does not specify unit prices; or (d) If the termination is complete and involves a letter contract.

5-4. The primary objective in negotiating a settlement of a fixed- price contract is to agree on an amount that will compensate the contractor fairly and fully for the work that he has done and the preparation that he has made for the terminated part of the contract. A reasonable allowance for profit is also included. Cost and accounting data provide guides for determining fair compensation. They are not, however, rigid measures. Effective negotiation requires the ability to apply standards of business judgment (as distinguished from strict accounting principles). However, the Contracting Officer should, or course, be guided by standard policy on the types of costs ordinarily considered.

5-5. FAR Section 31 "Contract Cost Principles and Procedures" applies to termination settlements. Costs may be estimated, differences resolved, and questions settled by agreement. The Contracting Officer should use judgment in applying all available data.

5-6 The following discussion of costs is based on FAR Section 31. FAR 31.103 applies to contracts with commercial concerns. FAR 31.104 applies to contracts with educational institutions. FAR 31.105 applies to construction and Architect-Engineer contracts, and FAR 31.106, to Facilities contracts.

5-7. Direct costs include material and labor which are directly allocable to the terminated part of the contract. In certain cases, however, direct costs might also include items that are usually classified as indirect. As was discussed above, common items are excluded from the contractor's settlement claim. And, as mentioned above, the contractor should return as much material as possible to suppliers, and obtain credit for it. The costs of such material, and other items excluded from inventory, are not part of the settlement proposal. However, reasonable restocking charges by suppliers, handling costs, and transportation costs relating to such material may be included in the proposal as "other costs." When the cost proposal is submitted on the inventory basis, direct labor will be included in inventory value. But some elements of direct labor costs may be included in other costs -- such as allocable initial costs. On the total-cost basis, direct labor costs will be set forth as such in the proposal.

5-8. A contractor's settlement proposal will normally include items of indirect cost. They may be submitted as overhead applied to factory or engineering labor. Or, they may be general and administrative expenses applied to all other cost elements. There should, of course, be no duplication of costs, direct or indirect. And certain costs (such as bad debt expense and certain entertainment costs) are not considered.

5-9. The Federal Acquisition Regulation (*FAR*) cost principles give special consideration to initial costs. These include start-up and preparatory costs. When a settlement proposal is being submitted on the inventory basis, unabsorbed initial costs should be segregated. But, they may be allocated on the basis of the total contract end items called for at the time of termination. If it were done another way, the settlement might depend on its ability to spread starting-load costs over a large volume of production. Starting-load costs include one-time labor and material costs and related overhead arising in the early stages of production. These costs are not fully absorbed because of the termination. They may be caused by inexperienced labor, employee training expenses, or idle time resulting from testing and changes in processing methods. Preparatory costs might include costs for plant rearrangement and production planning to perform the terminated contract.

5-10. It is quite likely that costs incurred in continuing work after termination may not be considered. This will apply if they arise because the contractor neglected or deliberately failed to discontinue work as directed. But if termination causes loss of the useful value of special tooling, special machinery or equipment, these costs may be taken into account under certain conditions. So, too, may the rental value of certain unexpired leases. Termination settlement expenses are allowed. They include the costs of the contractor's preparation of the settlement claim, legal and other fees and costs of protecting or disposing of property allocable to the contract. Plant reconversion costs (money spent to restore the contractor's facilities to the condition that existed before the terminated contract) are not usually permitted as part of a settlement. This is consistent with the treatment of preparatory expenses for plant rearrangement mentioned above. Reconversion costs usually have to be charged to succeeding contracts, commercial or military. In effect they are normally treated as consequential damages that are not part of a termination settlement. However, reconversion costs for the removal of Government property are taken into account. So are rehabilitation costs specifically caused by such removal. There may also be special treatment of plant reconversion costs by prior contractual agreement.

5-11. In a termination settlement a contractor should be allowed profit on preparations made and work done for the terminated part of the contract. Anticipatory profits (the expected profit on that terminated part of the contract for which no preparations were made and no work done) are not allowed. Nor may profits include an allowance for post-termination and settlement expenses. These include expenses incurred in protecting termination inventory and in the settlement of subcontracts. There is no hard-and-fast rule for determining the profit that should be allowed, but there are many guides. One is the rate of profit that the parties agreed on or contemplated when the contract was negotiated. Another is the rate that the contractor would have earned if the contract had been completed. But this computation can take a great deal of time and may not be accurate, especially if the contract performance is in the early stages. Usually a fair settlement can be reached more quickly by comparing the work done on the terminated part of the contract to the amount of work contemplated by the entire contract. The comparison should be expressed as a percentage; the percentage shou'd then be applied to the amount of profit co:: :mplated when the contract was written. Cost.. incurred are not by themselves a suitable guide as they often do not accurately reflect the amount or difficulty of the work already performed by the contractor.

5-12. If it appears that the contractor would have suffered a loss on the entire contract, no profit is allowed. (FAR 49.203). Instead, the settlement figure should be adjusted to reflect the indicated rate of loss. On a total cost basis, the actual cost to date (exclusive of settlement expenses) is reduced by multiplying it by the ratio of (1) the total contract price to (2) the contractor's actual costs plus the estimated cost to complete the entire contract. For example, a $10,000 fixed-price contract with $9,000 spent and $3,000 additional required to complete the contract, would result in:

$$\text{Actual Cost} \times \frac{\text{Total K. Price}}{\text{Actual Cost} + \text{Cost to Complete}}$$

$$\$9{,}000 \times \frac{\$10{,}000}{\$9{,}000 + \$3{,}000}$$

$$= \$7{,}500 \text{ Allowable Cost}$$

5-13. This formula is reflected by FAR 49.203. Settlement expenses are usually added to this, however. The regulation is clear in itself. The difficulty lies in deciding whether and how much a loss situation exists. The termination settlement may not be used to compensate the contractor on the basis of a higher contract price than that originally agreed on.

5-14. A subcontractor has no contractual rights against the Government upon the termination of a prime contract. (FAR 49.108). But the Government does have the right, used sparingly, to settle a subcontractor's claim directly. The prime contractor and each subcontractor are responsible for settling with their immediate subcontractors and suppliers. These settlements are included in the settlement with the contractor. They are also subject to approval or ratification by the Contracting Officer (except as noted below). As a general rule, the FAR policies governing termination settlements with prime contractors also apply to the settlements with

subcontractors.

5-15. There is an important exception to the requirement of Contracting Officer approval of settlements with subcontractors. To expedite overall settlement, prime contractors may be delegated authority to settle with subcontractors up to a specified amount (FAR 49.108-4), not in excess of $25,000.

5-16. Virtually all termination settlements are arrived at by negotiation. However, the Government and contractor may fail to agree. In that situation, FAR 52.249-1&2 for fixed-price contracts sets forth procedures for settlement by determination of the Contracting Officer. Generally speaking, the contractor is paid for goods already accepted under the contract. In addition, if the contractor is not in a loss position, profits shall be determined by the Contracting Officer in accordance with the factors set forth in FAR 49.202

5-17. **Cost Reimbursement Type Contract Settlement.** The settling of a cost-reimbursement contract is different from settling a fixed-price type contract. The settlement of cost-type contracts should be easier than that of fixed-type contracts. This is because the contractor in a cost-type contract has been reimbursed on a cost basis from the beginning of the contract.

5-18. Where the contract has been completely terminated, the contractor may continue to voucher out costs incurred after termination -- just as he vouchered out pretermination costs. But he may not continue to voucher out costs after the last day of the sixth month following the month when the termination became effective. He may also elect to discontinue vouchering at any time before the six- month mandatory date (FAR 49.302). Vouchered costs include costs for work done before termination and not previously vouchered and costs relating to termination (expenses of settling subcontracts, the costs of preparing the settlement claim, expenses incurred in protecting and disposing of property allocable to the contract, and so on). As in the case of fixed-price contracts, settlements with subcontractors require review and approval by the Contracting Officer. This is necessary even when the contractor elects to voucher out his costs. If costs are vouchered out, settlement negotiations are limited to adjusting the fee only. If costs are partially vouchered, the termination settlement will include unvouchered costs and fee.

5-19. As a rule, the settlement of a partial termination must be confined to the fee. Costs with respect to the partially terminated work are vouchered out. Costs may be included in the settlement of a partial termination only if the terminated portion of the contract is clearly severable from the rest of the contract. They may also be included if performance of the contract is virtually complete.

5-20. When the contractor discontinues vouchering (as discussed above) he must submit all his claimed unvouchered costs in the form of a settlement proposal including claim for fee, if any. His proposal may not include any vouchered costs that have been finally disallowed, nor any costs that are the subject of a reclaim voucher.

5-21. When the contractor vouchers out his costs, the applicable FAR cost principles are used in ascertaining the allowability of the costs. These principles are also the basis of negotiation when costs are included in the negotiated settlement. But negotiating techniques are applied here; agreement is not necessary on each separate element of cost. However, the overall settlement cannot reimburse the contractor for costs that are clearly not allowable under the provisions of the contract.

5-22. The amount of the negotiated fixed-fee adjustment is based on the percentage of completion of the contract work. This requires consideration of the extent and difficulty of the work done, as compared with the total work required. The most difficult phases of the work may not involve the highest costs. For this reason, the ratio of costs incurred to total estimated costs should not be the only guide. The Contracting Officer should draw on the judgment and experience of all members of the procurement team in determining the percentage of completion.

5-23. There may be an audit of the contract prior to a settlement agreement. Any settlement proposal of a prime contractor to an agency of the Department of Defense in an amount of $25,000 or over must be referred to the cognizant Defense Contract Audit Agency. (FAR 49.107). The DOD FAR Supplement also requires Government accounting review of subcontractors' proposals involving $50,000 or more, or of lesser amounts if the Contracting Officer deems that it is necessary. The Contracting Officer is not bound by the audit report, but

he is expected to give it careful consideration.

5-24. When all approvals have been obtained on a proposed settlement, the next action is the execution of a settlement agreement. Prescribed forms for settlement agreements are set forth in FAR. Under the agreement, the contractor certifies that all termination inventory has been properly accounted for. He assigns to the Government any interest in the subcontract inventory that is not otherwise accounted for. The contractor further certifies to the following facts: (1) all items were properly allocable to the terminated part of the contract; (2) the items were not in excess of requirements; (3) they could not have been used on other work; (4) any large changes in the status of such items between the date of the inventory schedule and the date of the agreement have been reported. Where the contractor has not previously made such payments, he agrees to pay all subcontractors and suppliers within ten days of receipt of the payment provided for by the agreement. FAR 49.111 states that each agency may establish procedures for review of proposed termination settlements.

6. TERMINATION FINANCING

6-1. Termination halts regular payments to the contractor under the contract. Yet the contractor will often have considerable money tied up in finished and unfinished products, materials, and labor. Many of his accounts payable may become due before settlement agreement is reached. So, most termination clauses provide a means of interim financing through partial payments to the contractor.

6-2. In accordance with FAR 49.112-1, the Contracting Officer may make partial payments to a terminated fixed-price contractor or (if the settlement is to include costs) to a cost-type contractor. The contractor may apply for such payments in writing at any time after he submits his interim or final settlement proposals. With the approval of the Contracting Officer, an amount up to 100 percent of the contract unit price may be paid for undelivered acceptable items completed before or after the termination date. A subcontract settlement made by the prime contractor and approved by the Government may also be paid in full. The contractor may receive in partial payment an amount up to 90 percent of the direct cost of termination inventory. This amount includes costs of raw materials, purchased parts, supplies, and direct labor. A reasonable amount (not more than 90 percent) may also be paid for other allocable costs. But no partial payments may be made toward profit or fixed-fee of the terminated portion of the contract, except for finished products.

6-3. Partial payments that might impair or modify any valid assignment of a claim under a contract may not be made without the consent of the parties. As appropriate, adequate security should be obtained to protect the interests of the Government. For example, partial payment may be made for complete articles or termination inventory. The Government's interests are protected by transfer of title, by a lien in its favor, or by other means considered necessary.

6-4. In determining the amount of partial payment, a deduction is made for any unliquidated balance of progress and advance payments (including interest thereon) that have been made to the contractor. A deduction is also made for all credits from the sale or retention of property whose costs are included in the measure of the payments. The total amount of the partial payments should not exceed the total settlement amount due the contractor because of the termination. If partial payments should exceed the final settled claim, the excess must be repaid to the Government on demand. Interest at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (running from the date the excessive payment was made to the date of repayment) is charged for any such overpayment. But no interest is charged if the excess was caused by a reduction in the termination claim because of retention or other disposition of termination inventory. In the latter case, the difference should be repaid to the Government without interest. This must be done within ten days after notice to the contractor that the payments were excessive. If the amount is not repaid within that period, the Government may then demand interest.

7. EQUITABLE ADJUSTMENT ON THE CONTINUED PORTION OF THE CONTRACT

7-1. The standard termination clauses of fixed-price contracts allow the contractor -- in the event of a partial termination -- to file a request for an equitable adjustment of the contract price or prices for the continuing portion of the contract. This adjustment results from termination. It is not part of the termination settlement. Its purpose is to provide any increase in the unit cost of the continued items that have

come about because the quantity of items to be manufactured has decreased. For instance, start-up costs may not have been fully amortized at the time of the termination. Or (with a significant decrease in volume) the average labor hours necessary to produce each unit may have increased because of the learning or efficiency factor. And still other factors may justify an increase in the price of continued items under the contract. It should be noted, though, that a partial termination, like complete termination, is a normal risk of doing business with the Government. The Government is normally not responsible for increased overhead costs incurred by the contractor because his regular facilities have been made idle by the termination.

7-2. The negotiation of any claimed equitable adjustment of the continued portion of the contract should be coordinated with the settlement negotiation. The negotiations overlap, although they result in separate agreements.

8. CONVERSION OF "TERMINATION FOR DEFAULT" TO "TERMINATION FOR CONVENIENCE"

8-1. If a termination for default is made improperly, the termination is converted to a termination for convenience if a termination for convenience clause is contained in the contract. If the contract does not contain a termination for convenience clause, the contract shall be equitably adjusted to compensate for the termination.

CHAPTER 20

REMEDIES OF THE GOVERNMENT

Throughout the life cycle of a contract and even after completion, various remedies are available to the Government contracting officer. These remedies provide the flexibility which is necessary to effect Government procurement. Terminations were covered in the two preceding chapters. This chapter presents some additional actions which may be taken by the Government for its protection.

2. Generally, Government remedies other than terminations can be classified by reference to the activity to which they relate. Some remedies are connected with: (1) debarment, suspension and ineligibility, (2) contract pricing, (3) changes and modifications, (4) warranties and inspection, (5) debt, deductions, offsets and damages, (6) voluntary refunds, (7) renegotiation, (8) mandatory injunctions and (9) unsupported claims. A brief treatment will be given to these remedies.

1. DEBARMENT, SUSPENSION AND INELIGIBILITY

1-1. The regulations governing debarment and suspension are set forth in FAR Part 9, Subpart 9.4. Ineligibility results from violations of statutes, executive orders or regulations other than those listed in Subpart 9.4. These are discretionary actions taken to insure that government contracts are only let to responsible contractors.

1-2. **Debarment.** Firms or individuals may be excluded (debarred) from Government contracting and Government approved subcontracting for a reasonable, specified period, commensurate with the seriousness of the cause, and generally for not more than three years. Reasons for debarment include conviction or civil judgment for fraud, various criminal offenses, antitrust violations, falsifying records or any other offense that indicates a lack of business integrity, willful failure or a history of failure to perform its obligations in one or more Government contracts, or any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor. While debarment is generally a discretionary option of the Government, the DOD requires that contractors be debarred for at least one year when the cause of debarment is based on a felony conviction unless waived in writing by the Secretary concerned.

1-3. **Suspension.** Firms or individuals may be disqualified temporarily from Government contracting and Government approved subcontracting, on the basis of adequate evidence, in the public interest. Reasons for suspension include commission of any of the causes listed for debarment in paragraph 1-2 above. Indictment for any of these offenses is adequate evidence for suspension. However, because of our system's deeply ingrained tenet that a party, even one under indictment, is innocent until proven guilty, the suspending office gives notice and a reasonable opportunity to be heard to the contractor so that the contractor has a chance to make a record justifying modification or withdrawal of the suspension. In no event may a suspension extend beyond eighteen months unless formal legal proceedings have begun against the contractor.

1-4. **Ineligibility.** Firms or individuals may be excluded from Government contracting and Government approved subcontracting for violation of statutory, executive order, or regulatory authority other than those listed in FAR Subpart 9.4. For instance, violations of the Davis-Bacon Act, Buy American Act, EEO Acts and executive orders, etc. may lead directly to ineligibility pursuant to those statutes or orders and their supplemental regulations.

1-5. Pursuant to FAR 9.404 the General Services Administration (*GSA*) is charged with the preparation and distribution of a current, consolidated list of all contractors debarred, suspended or declared ineligible by agencies or by the General Accounting Office (*GAO*). Any contractor listed as debarred or suspended is excluded from receiving Government contracts unless the acquiring agency determines that there is a compelling need for such action. An ineligible contractor, being ineligible by statute or executive order, may not under any circumstances be awarded a contract as no agency has the authority to waive a statutory or executive order provision.

2. CONTRACT PRICING

2-1. The Government utilizes safeguards against various types of negligence, fraud and criminal offenses that may occur in negotiated contracts. These safeguards will be reviewed with reference to specific types of offenses. Offenses constituting fraud, waste, and abuse are discussed at length in Chapter 6 of this text.

2-2. **Truth in Negotiations Act, Public Law 87-653.** In order for negotiation to produce the best results the price of property and services acquired under negotiation must be based on accurate, complete, and current pricing information to be supplied by the contractors. To accomplish this, Public Law 87-653 was passed and became law on September 10, 1962. This Act is also known as the "Truth-in-Negotiations Act", and is found in 10 U.S.C. § 2306a. Price reductions taken pursuant to this Act during contract administration are remedial to the Government and are more fully discussed in Chapter 15.

2-3. **The False Claims Act,** (Titles 31 U.S.C. § 3729, 18 U.S.C. § 287 and § 1001) define and proscribe civil and criminal penalties for making false statements or presenting a false claim for payment and have been utilized in the area of prosecuting falsified pricing data, with each "inflated" voucher considered a separate false claim. The act is broad and not limited to original contract pricing situations.

2-4. Any person making a false claim against the Government under the civil fraud section may be subject to triple damages, plus $10,000. for each false claim, plus forfeiture of payments actually due under the contract.

2-5. Whoever knowingly and willfully makes a false statement or submits a fraudulent document to a Defense agency, knowing it to be so, and is convicted under the criminal fraud section, may be fined not more than $1,000,000 or imprisoned for not more than five years, or both.

2-6. **Price Redetermination.** No discussion of statutory redetermination can be held without a consideration of contractual price redetermination or repricing. Many contracts have provisions which provide for price adjustment under stated conditions. Such a provision works to the benefit of both parties to the contract. Contractual price redetermination applies as follows: (1) redetermination takes place under a contract when the parties have agreed to it in advance, (2) in redetermination, prices may be either increased or decreased, (3) redetermination takes place on individual contracts rather than on an overall fiscal year basis.

3. CHANGES AND MODIFICATIONS

3-1. Contract modifications were dealt with extensively in Chapter 10. A brief reference to the underlying principle should emphasize the remedial nature of these actions.

3-2. The "Changes" clause of the contract gives the Government a remedy for those situations when the item being procured is no longer the exact item or service required to meet the mission requirement. The right to order a change in the contract performance is unilateral to the Government. However, the contractor is protected by that portion of the clause which provides for an "equitable adjustment" of the contract.

3-3. **Stop Work and Suspension of Work Provisions.** Sometimes the Government finds that it must greatly alter a procurement. Realignment of programs and advances in the state of the art often make changes necessary. A change may be so substantial that it may be wasteful to continue work on the original procurement. The Government therefore includes a contract clause permitting the contracting officer to stop work while the matter is being considered. Two standard clauses are authorized -- the Stop Work Order Clause and the Suspension of Work Clause. The former is used in negotiated supply, research and development, or service contracts, both fixed-price and cost-reimbursement. However, its use is restricted to contracts where work stoppages might be necessary for reasons such as advances in the state of the art or production, engineering breakthroughs, or realignment of programs.

3-4. **Stop Work Clauses.** Stop work orders are not permitted unless the contract contains this clause. In fact, their improper use may be a breach of contract by the Government. Even when the contract contains the clause, stop work orders are specifically prohibited when a decision to terminate has been made. Before the order may be issued, prior approval at a level higher than the contracting officer is required. (FAR 12.503 and 52.212-13) While the order is in effect, the contractor must take all reasonable steps to minimize costs. The stop work period may be extended by agreement of the parties. Within the ninety-day period (or any extension thereof), the contracting officer must either (a)

cancel the stop work order or (b) terminate the contract for convenience. If the stop work order is cancelled; the contractor must then resume work.

3-5. **Suspension of Work Provisions.** Work on construction contracts may be suspended under the provisions of the clause set forth in FAR 52.212-12 (Suspension of Work). No limit is placed on the suspension period; however the contractor is entitled to an equitable adjustment, excluding profit, for the unreasonable portion of the period during which work was suspended. The clause is inapplicable to delays recognized by other contract clauses and to delays which are attributable to the contractor. The clause requires the contractor to give notice of any action which he regards as falling within the coverage of the clause, even though no "actual" order has been issued by the Contracting Officer. In these "constructive suspension" situations, the contractor will be barred from recovery of costs incurred more than 20 days prior to the date on which notice was given in writing. In the cases where an actual suspension order is given, or where the contractor has given timely notice of a constructive suspension, the contractor must submit his claim as soon as practicable after termination of the suspension but not later than the date of final payment.

4. WARRANTIES AND INSPECTION

4-1. The Warranties Clause protects the Government from the cost of correcting defects in the supplies it receives from contractors. The Inspection Clause gives the Government the right to reject supplies and services which do not conform to the quality demanded by the contract.

4-2. **Warranties.** A warranty may be defined as a contractual obligation incurred by a manufacturer or vendor in connection with the sale of an item or service whereby the seller agrees to remedy certain defects or failures in the product or service sold for a certain finite period of time extending beyond the date of sale or acceptance by the buyer.

4-3. Either to relieve the Government of the need for extensive and expensive test and inspection or to assure a certain minimum performance and useful life, a warranty provision (Ref. FAR 52.246-17 & 18), extending beyond the contract performance period, may provide a post-contractual remedy of great value. In addition, Section 794 of the FY 1984 Defense Appropriations Act, P.L. 98-212, provides that no funds be obligated or expended for the procurement of a "weapons system" unless the contractor warrants that the system will meet the stated performance requirements.

4-4. It must be recognized in the procurement process that almost all warranties or guarantees cost money since they leave the contractor with a contingent liability for replacement, correction or other adjustment. The warranty cost will not eliminate all Government expense incurred in post delivery failures. Field failures have a ripple effect on total life cycle costs, e.g., electronics installed in an aircraft probably must be removed, replaced (if a spare is available), crated, shipped, documented and then, after repair the item must again flow into the inventory; this is a complex process. It is evident that the administrative costs and some out-of-pocket expense must be borne by the Government despite the warranty provision.

4-5. **Inspection Clause.** To provide a remedy for imperfection in the work effort or finished items, the Inspection Clause of the contract provides the Government with the contractual right to inspect at appropriate times and places (including the contractor's plant) during the manufacturing process and to require correction of defects.

4-6. The right to grant deviations from specifications where there is no material adverse affect on quantity, quality, reliability, interchangeability, maintainability or performance characteristics serves as a remedy for expediting contract performance by eliminating undesirable rework or relieving production scheduling problems.

4-7. **Correction of Deficiencies.** The Correction of Deficiencies Clause provides a remedy for the Government in fixed-price supply and service contracts for systems and equipment when performance specifications or designs are of major importance. The contractor must correct deficiencies either before or after acceptance by the Government at his expense. Transportation costs for the supplies are borne by the contractor, at least up to an amount equaling commercial rates. The clause provides detailed provisions for handling the transaction. This optional clause is found at FAR 46.701 & 52.246-19.

5. DEBTS, DEDUCTIONS, OFFSETS, AND DAMAGES

5-1. **Debts.** There are several types of situations where the Government has the right to collect money from a contractor. Debt to the Government may result from overpayment, default by a contractor, poor performance, downward equitable adjustment, or claims stemming from cost disallowance, breach of warranty, or defective pricing violations.

5-2. When a contractor agrees that it owes the Government some money, the amount owed is either agreed to by both parties (liquidated) or the amount may be disputed by either party (unliquidated).

5-3. If the debt is liquidated and the contractor doesn't pay, the Government has a creditor's right to sue in the appropriate court and upon receiving a judgment, may attach the contractor's property or other assets or may pursue those common law remedies available to any other creditor. Administrative collection of debt is provided for in FAR Subpart 32.6.

5-4. **Deductions.** If the full contract price has not been paid, the Government may deduct the appropriate amount in paying the contractor. This situation generally arises in FFP contracts where the contractual responsibilities of the contractor are only partially met. The theory is that the Government should not pay for goods not delivered nor for services not performed.

5-5. Deductions may arise under the terms of the contract itself. Thus we see actions taken under the Price Reduction for Defective Pricing Clause, Technical Data -- Withholding of Payment Clause to name two examples. Of course, if the Government's claim is contested before the ASBCA or U.S. Claims Court, the Government will be held to prove that its action was correct.

5-6. Although deductions pursuant to contract clauses or other collection procedures are commonly used, the unilateral withholding of contract monies by the contracting officer on unliquidated debts or claims is likely to draw a protest from contractors who assert that they should be paid the full contract price. Although the contracting officer is charged with protecting the interests of the Government under the contract, it is suggested that legal counsel be consulted when unilateral withholding is contemplated.

5-7. **Offsets.** The Debt Collection Act of 1982 (Public Law No. 97-365) amended the Federal Claims Collection Act of 1966 and added procedural requirements to protect the due process rights of creditors. In either liquidated or unliquidated debts or claims, when there is no opportunity to deduct contract monies, the Government still has a remedy if the contractor is owed money under a different contract or account. This remedy is known as administrative offset. However, the Government may not automatically offset funds against the contractor. The new law at 31 U.S.C.A. § 3716 outlines the procedure that must be followed before offset, prescribing notice to the contractor and an opportunity for the contractor to be heard. A formal hearing or informal meeting is required for that purpose. A review of the agency's decision on the claim under the Disputes Clause is mandatory for any unliquidated claim. Failure to comply with these due process procedures precludes the Government from using offset to collect its claim.

5-8. Certain statutes may prohibit offset in any case. An example is the Assignment of Claims Act (studied earlier in Chapter 7) which prohibits offset where the claim arises outside the contract and the contract right to payment was assigned by the contractor in accordance with the Act.

5-9. **Damages.** As discussed in Chapter Eighteen, damages for breach of the contract by the contractor are a Government remedy. Even though no default termination is contemplated, damages may be pursued. Acceptance of contract performance is not a waiver of breach of contract claims. The prudent contracting officer will, however, if such a claim is contemplated, send the contractor a letter referencing receipt and acceptance of supplies but reserving breach claims.

5-10. Damages take two forms: unliquidated and liquidated. Unliquidated damages are those which are not predetermined. That is, there has been no agreement by the parties and no court or board determination has been made. These arise when the contractor fails in some substantial respect to perform the contract as written, and harm to the Government results. In other words, damages "flow from the breach," and are measured by the amount of money necessary to make the Government "whole."

5-11. Measuring damages of this type is a difficult task. If the contractor is late in delivery -- the most common breach -- what harm has been done? If we buy to fill warehouses, what does it matter if schedules are missed? On the other extreme, catastrophic damage claims are also untenable. Such liability, if invoked, could drive substantially all contractors out of Government work. In between, we find yard-sticks to measure damages. The question is: "What loss was suffered?" In construction contracts, loss of the use of buildings may be measured by rental values involved. Administrative handling costs are sometimes recoverable as a consequence of the breach.

5-12. The second form of damages is "liquidated damages", that is, damages which are preset in amount by agreement of the parties, contained in the contract, and contingent on the happening of a named event -- usually late performance by the contractor. The courts favor resolution of disputes, and so uphold such clauses. However, the courts abhor penalty provisions in contracts and will not enforce them. Thus, if the liquidated damages only penalize the contractor rather than compensate the Government for actual damage anticipated, the clause will be unenforceable. The test of reasonableness is not "what damage occurred", but rather, what factors were employed in the selection of the damage figure at the time of negotiation? Were the parties reasonable?

5-13. FAR 12.2 and 12.201-204 express DOD policy on liquidated damages. The approved clause may be used in both formally advertised and negotiated contracts when: (1) the time of delivery or performance is such an important factor that the Government may reasonably expect to suffer damage of the delivery or performance is delinquent, and (2) the extent or amount of such damages would be difficult or impossible to ascertain or prove.

6. VOLUNTARY REFUNDS

6-1. A contractor may voluntarily refund contract monies to the Government. It may be spontaneous or may be solicited by the Government. Legal counsel should be consulted to determine whether other Government rights may be involved. Refunds should be solicited when the Government has been overcharged or inadequately compensated for use of Government-furnished property, or for disposition of contractor inventory. The decision to solicit a voluntary refund must be made by the Secretary involved. Refunds obtained are credited to the applicable appropriation cited in the contract and the contract price reduced accordingly. Checks received should be made payable to the office designated for contract administration and forwarded to the comptroller of the appropriate department.

7. RENEGOTIATION

7-1. Renegotiation is the process of determining what part, if any, of the profits realized from the specified contracts and subcontracts is excessive. Such excessive profits are to be returned to the Government in the form of refunds. The Vinson-Trammel Act, the 1951 Renegotiation Act and many of the earlier Acts prescribed certain factors which were to be taken into consideration in determining the excessiveness of profits, and these Acts directed that all excessive profits so determined be eliminated. All such Acts have expired or been repealed by Congress with the exception of Presidential Authority to act in a period of war or national emergency to invoke limitations on profits in order to eliminate excess profits (10 U.S.C. § 2382).

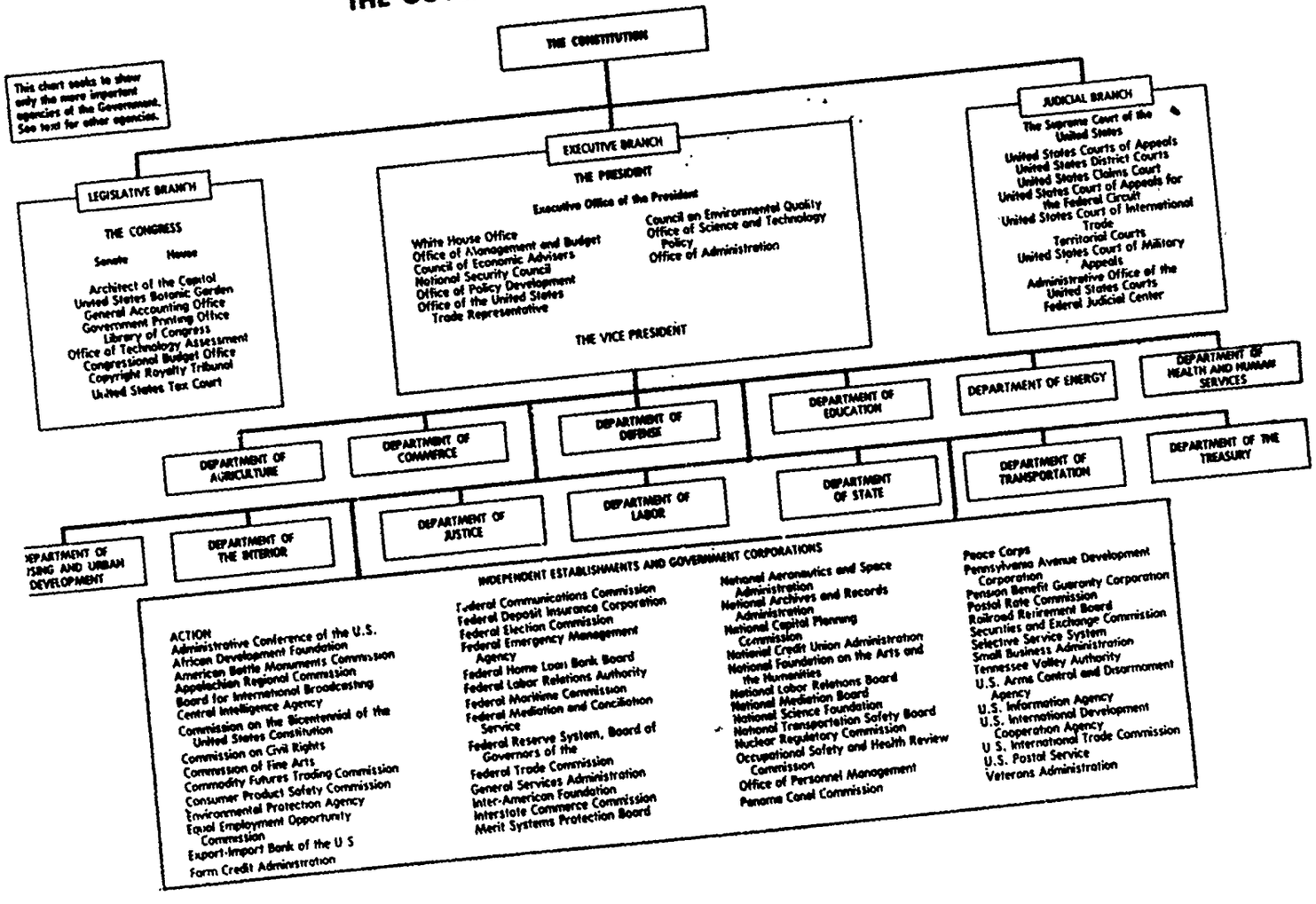
8. MANDATORY INJUNCTION

8-1. In a period of war or national emergency, a U.S. District Court may order a contractor to complete its Government contract under authority of the Defense Production Act of 1950. This most stringent of Government remedies is sought only in rare instances.

9. UNSUPPORTED CONTRACT CLAIMS

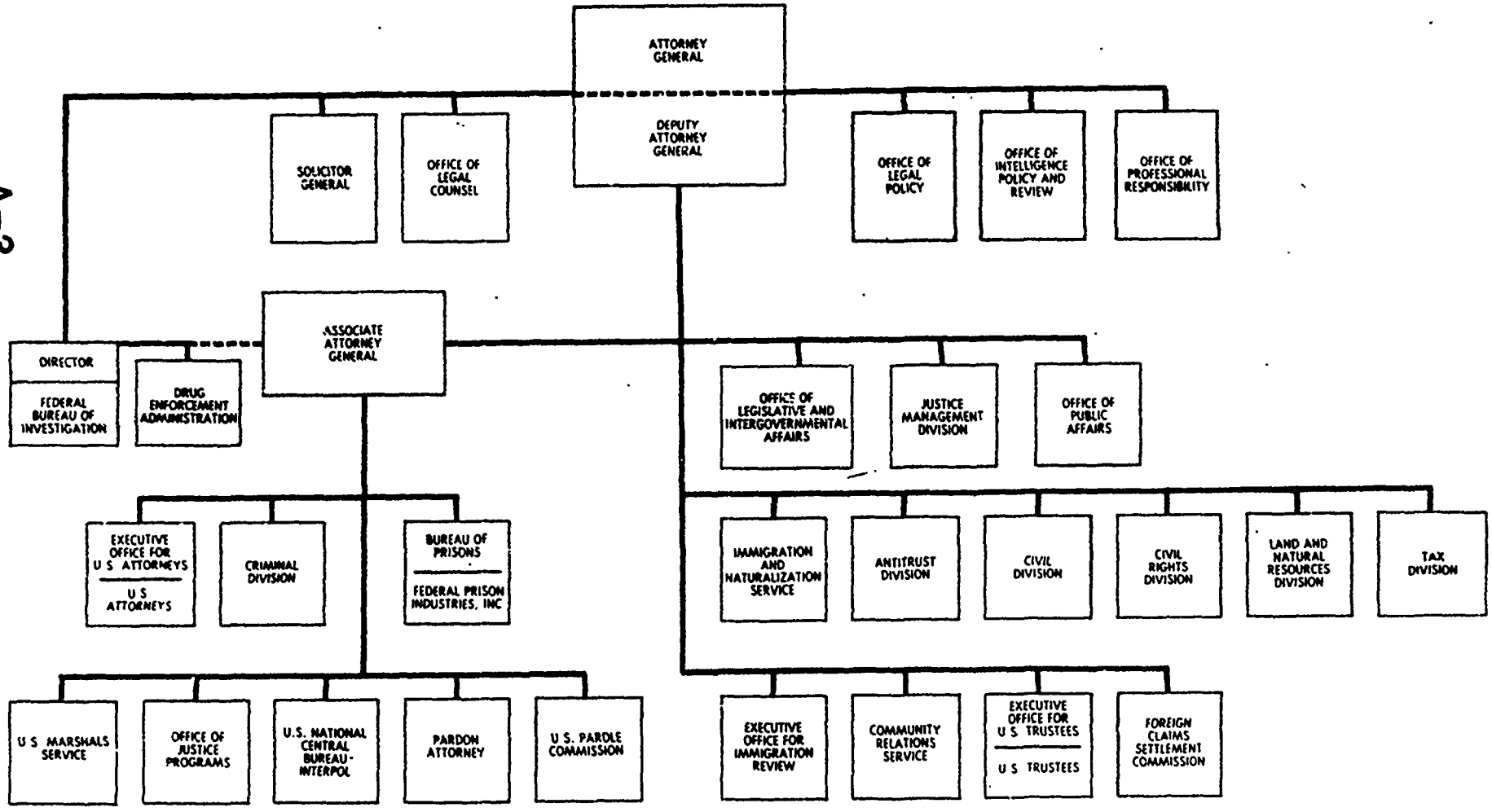
9-1. The new Contract Disputes Act, discussed in Chapters 16 and 17, provides that contractor claims under the contract not supportable due to misrepresentation or fraud will require the contractor to pay the Government an amount equal to the fraudulent claim or fraudulent portion thereof, plus the Government's cost in handling the claim. This Government remedy is aimed at contractors who play "fast and loose" with claims and is intended to stop the practice of deliberate inflation of claims. Determinations under this clause are not made by the Contracting Officer but by the Justice Department, with investigative assistance furnished by departmental investigative agencies and the Federal Bureau of Investigation. In addition, Federal Courts are empowered to assess financial penalties against litigants and/or their lawyers for the filing of frivolous actions resulting from unsupported contract claims.

THE GOVERNMENT OF THE UNITED STATES

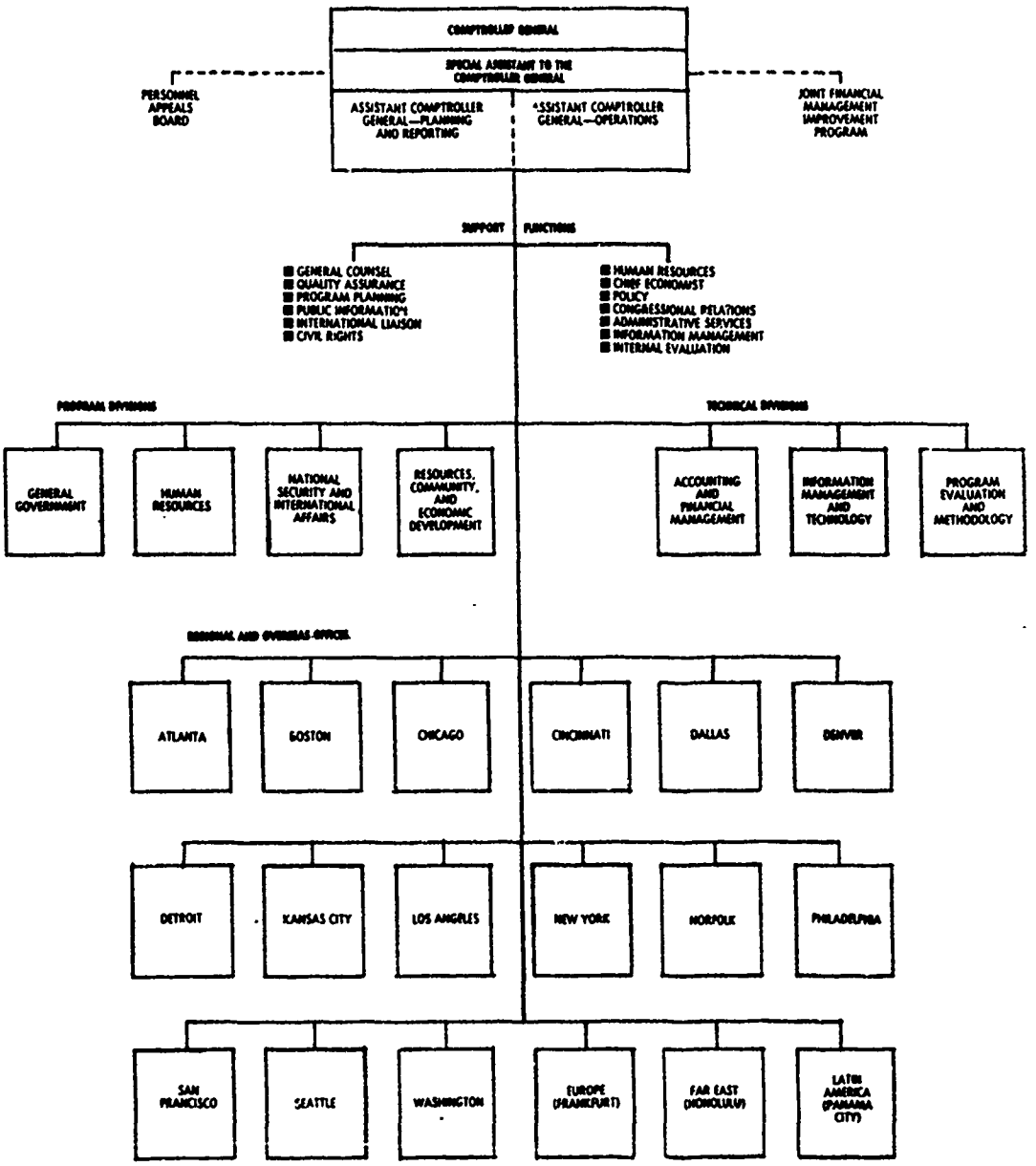


A-3

DEPARTMENT OF JUSTICE



GENERAL ACCOUNTING OFFICE



Appendix B

GLOSSARY OF LEGAL TERMS

GLOSSARY OF LEGAL TERMS

ab initio ..... "from the beginning"

acceptance ..... assent to an offer by the one to whom it was made.

accord and satisfaction ..... agreement as to amount owed and payment thereof.

ACO ..... Administrative Contracting Officer

action ex contractu ..... suit arising out of contract.

action ex delicto ..... suit arising independent of contract resulting from breach of a positive legal duty.

affirm ..... to uphold on appeal the lower court's ruling.

agent ..... one employed to transact business for another.

appellant ..... one who appeals to a higher tibunal the decision of a tribunal.

appellee ..... on appeal, the party prevailing in the lower tribunal.

ASPA ..... Armed Services Procurement Act

bailment contract ..... an agreement for the delivery of personal property in trust for specific purpose, to be returned when the specific purpose is accomplished.

bilateral contract ..... one formed by a "promise for a promise" (offer and acceptance)

breach of contract ..... failure to perform as agreed.

brief ..... written argument submitted on trial or appeal in support of pleadings.

burden of proof ..... the responsibility of proving allegations made.

case in point ..... a case with facts and issues similar to the one in question.

caveat emptor .....let the buyer beware.

certiorari ..... an order by a superior court ordering up a court record of an inferior court.

change order ..... an order by one party to a contract, modifying it pursuant to authority contained in the contract.

CICA ..... Competition in Contracting Act

citation ..... the case number or volume and page number used to identify a case or statute.

civil law ..... law of the Roman Empire-Justinian "corpus juris civilis" 533 A.D.

civil liability ..... liability to be sued for infringing on the rights of other individuals, as opposed to offenses against the public.

COC ..... Certificate of Competency

common law ..... sometimes called the "unwritten law" - based on custom, usage, and reason and reflected in judicial pronouncements (English-US).

consideration ..... sometimes of value exchanged by the parties, making the contract enforceable; the inducement to a contract; the cause, motive, price, or impelling which induces a contracting party to enter into a contract.

contra proferentum ..... against the party who proffers or puts forward a thing.

contract damages ..... financial loss resulting from breach of contract.

counter-offer ..... a counter-proposal made by the offeree to the offeror.

counterclaim ..... a cause of action existing in favor of defendant against plaintiff, which if established, will defeat, qualify, or reduce plaintiff's rights to recover; usually a matter arising out of the same transaction.

CPIF ..... Cost-Plus-Incentive-Fee

CPSR ..... Contractor Programs System Review

criminal liability ..... liability to prosecution for offenses against the public.

D & F ..... Determination and Findings

DFAR ..... Department of Defense Federal Acquisition Regulation Supplement

damnum absque injuria ..... damage without the violation of a legal right.

decision ..... the ruling of the court on a motion or pleading.

defendant ..... one against whom a law suit is instituted.

dictum ..... that part of a judge's opinion other than the ruling or findings.

e.g. ..... for example. (L.*exampli gratia*)

ejusdem generis ..... "of the same kind" - a rule of construction. Where general words follow a designation of particular subjects, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

en banc ..... Fr. - "in bank" - wherein all judges are in attendance, as opposed to hearings by one judge of a court.

equity ..... that portion of remedial justice which is exclusively administered by a court of equity, as distinguished from court of common law. (Law and equity jurisdiction are now combined.)

estoppel ..... precludes a person, due to his past actions, from asserting anything contrary thereto, though true.

et al ..... and others.

et seq ..... and the following (L.*et sequitur*)

ex parte ..... a legal proceeding where only one party is heard.

ex post facto ..... "from past fact" - descriptive of laws given retroactive effect. May not be used to render illegal an act legal when performed.

executed contract ..... a contract completely performed; also, a signed contract.

executory contract ..... a contract not yet performed.

express authority ..... authority expressly conferred upon an agent to bind the principal.

express contract ..... a contract wherein there are express promises to do something or to refrain from doing something.

FAR ..... Federal Acquisition Regulation

FMS ..... Foreign Military Sales

FOIA ..... Freedom of Information Act

FPASA ..... Federal Property and Administration Services Act

GAO ..... General Accounting Office

GATT ..... General Agreement on Trade and Tariffs

GFP ..... Government Furnished Property

grantee ..... one to whom title to real estate is conveyed.

grantor ..... one who conveys title to real estate.

i.e. ..... that is. (L.*id est*)

ibid ..... in the same place (L.*ibidem*)

implied authority ..... authority incidental to express authority necessary to the exercise of the authority actually granted.

implied in fact contract ..... a contract existing by virtue of the actions of the parties rather than express promises.

improper venue ..... suit brought in wrong territorial jurisdiction, e.g., wrong country.

in pari materia ..... descriptive of matters which are related and should be considered together; e.g., two statues bearing on the same situation.

incorporeal heriditament ..... an intangible right collateral to tangible personal property or real estate; e.g., real estate rentals.

infra ..... referenced hereafter.

journal entry ..... the written, signed record of orders of the court.

laches ..... common law defense barring actions not timely initiated.

lack of jurisdiction ..... where the court is without authority to hear the case; goes to subject matter or parties.

law ..... the whole body or system of rules of conduct, including both decisions of courts and legislative acts.

lessee ..... one to whom real estate is leased.

lessor ..... owner of real estate who leases same.

liquidated damages ..... damages established as to liability and amount.

motion ..... the means by which a party requests a particular action by the court in the disposition of a suit.

mutuality of obligation ..... that element of a bilateral contract by virtue of which both of the parties are bound or neither is bound; a duty of each party to do something in consideration of the other party's act or promise.

nudum pactum ..... a naked promise--one not supported by a consideration and therefore unenforceable.

offer ..... a proposal by one person to another which is intended of itself to create legal relations on acceptance by the person to whom it is made.

offeree ..... one to whom an offer is made.

offeror ..... one making an offer.

past consideration ..... value received prior to the present contract--generally insufficient to support a promise.

petition ..... the pleading by which a law suit is initiated.

plaintiff ..... one who institutes a law suit.

precedent ..... prior rulings in similar cases, used as authority for ruling in the case at the bar.

prima facie case ..... evidence sufficient to support a favorable verdict if not rebutted by the other side.

principal ..... adj.--most important, consequential or influential.

principal ..... one who employs an agent to transact business for him.

principle ..... n.--a fundamental law, doctrine or assumption.

privity of contract ..... The relation of contract status and that connection, mutuality of will, and interaction between the parties which they must occupy toward each other in order to form either an express or implied contract.

quantum meruit ..... at common law, an action for the reasonable value of services rendered.

***quasi*-contract** ..... contract implied in law--a creation of the courts to prevent unjust enrichment of one party by another.

quid pro quo ..... "that for this"--descriptive of the requirement of consideration in contracts.

relator ..... one upon whose "relation" a quasi-criminal suit is instituted.

remand ..... to return a matter to a lower court with instructions to that court for further proceedings.

reply ..... plaintiff's response to new matters raised in defendant's answer.

res gestae ..... (law of torts)--peripheral matters so closely connected with a transaction and necessary to a proper understanding of it as to become a part thereof.

res ipsa loquitur ..... "the thing speaks for itself"--(law of torts) descriptive of facts so self-evident as to make a prima facie case.

respondent ..... the "accused" person in a quasi-criminal suit.

reverse ..... to overturn or appeal the lower court's rulings.

set-off ..... reduction of one demand by an opposite one, usually ascertained in amount and unrelated to the original claim.

specious ..... adj.--having a false look of truth or genuineness.

stare decisis ..... "let the decision stand." The principle that prior decisions of court should stand as precedent for future guidance.

statute of frauds ..... requires certain contracts to be in writing to be enforceable.

statute of limitation ..... bars actions commenced beyond a statutory time limit.

supplemental agreement ..... an agreement supplementing the principal contract.

supra ..... referenced above.

syllabus ..... editorial headnote to a reported case, giving the law of the case.

TAA ..... Trade Agreement Act

tort ..... a wrong committed against the person or property of another--one of the two classes of civil actions, the other being contract actions.

trial *de novo* ..... a new trial.

ultra vires contract ..... a contract of a corporation which is not within the express or implied powers conferred upon the corporation by the instrument of its creation.

undisclosed principal ..... a principal whose agent contracts in his own name, without disclosing the fact of his agency, and without the third party's knowledge of the fact.

unilateral contract ..... a contract formed by an offer or a promise on one side for an act to be done on the other, and the doing of the act by the other constitutes acceptance of the offer.

unlawful contract ..... unenforceable because performance violates the law.

unliquidated damages ..... damages not established either as to liability or amount.

vendee ..... buyer.

vendor ..... seller.

void contracts ..... a nullity--of no legal effect, therefore unenforceable.

voidable contract ..... one which may be avoided or disavowed by one of the parties, e.g., contracts by minors.

Appendix C

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Appendix D

FEDERAL ACQUISITION REGULATION CLAUSES

UNITED STATES AIR FORCE
AIR UNIVERSITY
AIR FORCE INSTITUTE OF TECHNOLOGY
SCHOOL OF SYSTEMS AND LOGISTICS
WRIGHT PATTERSON AIR FORCE BASE, OHIO

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INTRODUCTION

This Appendix D contains those FAR clauses that are highlighted in the text.

No references to the textbook are made to the following:

Chapter 1

Chapter 2

Chapter 5

Chapter 11, but see Chapter 10

Chapter 17

Chapter 20

All other chapter references are indicated in accordance with the Table of Contents listed on pages iv and v.

CHAPTER ONE

CHAPTER TWO

No Clauses

CHAPTER THREE

CLAUSES

52.202-1 Definitions.

As prescribed in Subpart 2.2, insert the following clause in solicitations and contracts except when (a) a fixed-price research and development contract that is expected to be $2,500 or less is contemplated or (b) a purchase order is contemplated. Additional definitions may be included; provided, they are consistent with this clause and the Federal Acquisition Regulation.

DEFINITIONS (APR 1984)

(a) "Head of the agency" (also called "agency head") or "Secretary" means the Secretary (or Attorney General, Administrator, Governor, Chairperson, or other chief official, as appropriate) of the agency, including any deputy or assistant chief official of the agency, and, in the Department of Defense, the Undersecretary and any Assistant Secretary of the Departments of the Army, Navy, and Air Force and the Director and Deputy Director of Defense agencies; and the term "authorized representative" means any person, persons, or board (other than the Contracting Officer) authorized to act for the head of the agency or Secretary.

(b) "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes, but is not limited to, purchase orders and changes and modifications to purchase orders under this contract.

(End of Clause)
(R 7-103.1 1979 MAR)
(R 7-203.1)
(R 7-302.1)
(R 7-402.1)
(R 7-901.1)
(R 7-1902.1)
(R 7-1909.1)

Alternate I (APR 1984). If the contract is for personal services; construction; architect-engineer services; or dismantling, demolition, or removal of improvements, delete paragraph (c) of the basic clause.

(R 7-503.1)
(R 7-602.1 JUN 64)
(R 7-605.38)
(R 7.607.1)
(R 7-2101.1)
(R 1-7.602.1)

CHAPTER FOUR

CLAUSES

52.219-8 Utilization of Small Business Concerns and Small Disadvantaged Business Concerns.

As prescribed in 19.708(a), insert the following clause:

UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL DISADVANTAGED BUSINESS CONCERNS (JUN 1985)

(a) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in performing contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The Contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the Contractor's compliance with this clause.

(c) As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern --

(1) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(2) Whose management and daily business operations are controlled by one or more of such individuals.

The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

(d) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

(End of clause)

52.219-13 Utilization of Women-Owned Small Businesses

As prescribed in 19.902, insert the following clause in solicitations and contracts when the contract amount is expected to be over the small purchase threshold unless (a) the contract is to be performed entirely outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands, or (b) a personal services contract is contemplated:

UTILIZATION OF WOMEN-OWNED SMALL BUSINESSES (APR 1984)

(a) "Women-owned small businesses," as used in this clause, means businesses that are at least 51 percent owned by women who are United States citizens and who also control and operate the business.

"Control," as used in this clause, means exercising the power to make policy decisions.

"Operate," as used in this clause, means being actively involved in the day-to-day management of the business.

(b) It is the policy of the United States that women-owned small businesses shall have the maximum practicable opportunity to participate in performing contracts awarded by any Federal agency.

(c) The Contractor agrees to use its best efforts to give women-owned small businesses the maximum practicable opportunity to participate in the subcontracts it awards to the fullest extent consistent with the efficient performance of its contract.

(End of clause)
(7-104.52 1980 AUG)
(FPR Temp. Reg. 54 1980 MAY)

CHAPTER FIVE

No Clauses

CHAPTER SIX

CLAUSES

52.232-20 Limitation of Cost

As prescribed in 32.705-2(a), insert the following clause in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, except those for consolidated facilities, facilities acquisition, or facilities use, whether or not the contract provides for payment of a fee. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. "Task Order" or other appropriate designation may be substituted for "Schedule" wherever that word appears in the clause.

LIMITATION OF COST (APR 1984)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule or (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that --

(1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause --

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(End of clause)
(R 7-203.3(a)1966 OCT)
(R 7-402.2(a) 1966 OCT)
(R 7-402.2(b) 1973 MAY)
(R 1-7.202-3(a))
(R 1-7.402-2(a) & (b))

CLAUSES

52.232-23 Assignment of Claims.

As prescribed in 32.806(a)(1), insert the following clause in solicitations and contracts when the contract amount is expected to be $1,000 or more, unless the contract will prohibit the assignment of claims (see 32.803(b)). The use of this clause is not required for purchase orders. However, the clause may be used in purchase orders for $1,000 or more that are accepted in writing by the contractor, if such use is consistent with agency policies and regulations.

ASSIGNMENT OF CLAIMS (JAN 1986)

(a) The Contractor, under the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. § 15 (hereafter referred to as the "the Act"), may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence.

(b) Any assignment or reassignment authorized under the Act and this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

(c) The Contractor shall not furnish or disclose to any assignee under this contract any classified document (including this contract) or information related to work under this contract until the Contracting Officer authorizes such action in writing.

(End of Clause)

Alternate I (APR 1984). If a no-setoff commitment is to be included in the contract (see 32.801 and 32.803(d)), add the following sentence at the end of paragraph (a) of the basic clause:

Unless otherwise stated in this contract, payments to an assignee of any amounts due or to become due under this contract shall not, to the extent specified in the Act, be subject to reduction or setoff.

(R 7-103.8 1962 FEB)
(R 1-30.703 1976 MAY)

CHAPTER EIGHT

CLAUSES

52.215-18 Order of Precedence

As prescribed in 15.407(f), insert the following provision in all requests for proposals to which the uniform contract format applies:

ORDER OF PRECEDENCE (APR 1984)

Any inconsistency in this solicitation shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications.

(End of provision)
(R 7-2003.41 1973 APR)

See also 52.214-11 "Order of Precedence-Formal Advertising" identical clause as above prescribed in FAR 14.201-6(f)(1).

CHAPTER NINE

CLAUSES

52.246-1 Contractor Inspection Requirements.

As prescribed in 46.301, insert the following clause in solicitations and contracts for supplies or services when the contract amount is expected to be within the small purchase limitation and (a) inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities, or (b) inclusion of the clause is required under agency procedures. The clause shall not be used if the contracting officer has made the determination specified in 46.202-1(b).

CONTRACTOR INSPECTION REQUIREMENTS
(APR 1984)

The Contractor is responsible for performing or having performed all inspections and tests necessary to substantiate that the supplies or services furnished under this contract conform to contract requirements, including any applicable technical requirements for specified manufacturers' parts. This clause takes precedence over any Government inspection and testing required in the contract's specifications, except for specialized inspections or tests specified to be performed solely by the Government.

(End of clause)
(R 7-103.24 1968 SEP)

52.246-2 Inspection of Supplies -- Fixed Price.

As prescribed in 46.302, insert the following clause in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may be inserted in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and inclusion of the clause is in the Government's interest.

INSPECTION OF SUPPLIES -- FIXED-PRICE
(APR 1984)

(a) **Definition.** "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not,

does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; *provided,* that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e)(1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i)(1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time (i) when Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract and (ii) when the supplies will be ready for Government inspection.

(2) The Government request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (f) hereof, the Government, in addition to any other rights and remedies provided by law or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace

the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided,* that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right to contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)
(R 7-103.5(a) 1958 MAY)
(R 7-103.5(d) 1977 SEP)
(R 1-7.102-5)

52.246-21 **Warranty of Construction**

As prescribed in 46.710(e)(1), the contracting officer may insert a clause substantially as follows in solicitations and contracts when a fixed-price construction contract (see 46.705(c)) is contemplated, and the use of a warranty clause has been approved under agency procedures:

WARRANTY OF CONSTRUCTION (APR 1984)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (j) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date the Government takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of --

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, workmanship, or design furnished.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall --

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed, in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government, if directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government nor for the repair of any damage that results from any defect in Government- furnished material or design.

(j) This warranty shall not limit the Government's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of Clause)
(R 7-604.4 1976 JUL)

Alternate I (APR 1984). If the Government specifies in the contract the use of any equipment by "brand name and model", the contracting officer may add a paragraph substantially the same as the following paragraph (k) to the basic clause:

(k) Defects in design or manufacture of equipment specified by the Government on a "brand name and model" basis, shall not be included in this warranty. In this event, the Contractor shall require any subcontractors, manufacturers, or suppliers thereof to execute their warranties, in writing, directly to the Government.

(AV 7-604.4(b) 1976 JUL)

52.270-7000 **Warranty Exclusion and Limitation of Damages.** As prescribed at 70.310(a), insert the following clause:

WARRANTY EXCLUSION AND LIMITATION OF DAMAGES (FEB 1983)

Except as expressly set forth in writing in this agreement, or except as provided in the Contractor Representation clause, if applicable, and except for the implied warranty of merchantability, there are no warranties expressed or implied. In no event will the contractor be liable to the Government for consequential damages as defined in the Uniform Commercial Code, Section 2- 715, in effect in the District of Columbia as of January 1, 1973; i.e., Consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and need of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

(End of Clause)

CHAPTER TEN

CLAUSES

52.243-1 Changes -- Fixed-Price

As prescribed in 43.205(a)(1), insert the following clause in solicitations and contracts when a fixed-price contract for supplies is contemplated. The 30-day period may be varied according to agency procedures.

CHANGES -- FIXED-PRICE (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property..

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of Clause)
(R 7-102.2 1958 JAN)
(R 1-7.102-1)

Alternate I (APR 1984). If the requirement is for services, other than architect-engineer or other professional services, and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc).

(3) Place of performance of the services.

(R 7-1902.2 1971 NOV)

Alternate II (APR 1984). If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc).

(3) Place of performance of the services.

(4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

(R 7-1902.2 1971 NOV)
(R 7-103.2 1958 JAN)
(R 1-7.102.2)

Alternate III (APR 1984). If the requirement is for architect-engineer or other professional services, substitute the following paragraph (a) for paragraph (a) of the basic clause and add the following paragraph (f).

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the services to be performed.

(f) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

(R 7-607.3 1972 APR)

Alternate IV (APR 1984). If the requirement is for transportation services, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Specifications.

(2) Work or services.

(3) Place of origin.

(4) Place of delivery.

(5) Tonnage to be shipped.

(6) Amount of Government-furnished property.

(R 1-7.703-2)

Alternate V (APR 1984). If the requirement is for research and development and it is desired to include this clause, substitute the following subparagraphs (a)(1) and (a)(3) and paragraph (b) for subparagraphs (a)(1) and (a)(3) and paragraph (b) of the basic clause:

(1) Drawings, designs, or specifications.

(3) Place of inspection, delivery, or acceptance.

(b) If any such change causes an increase or decrease in the cost of, or item required for, performing this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in (1) the contract price, the time of performance, or both; and (2) other affected terms of the contract, and shall modify the contract accordingly.

(R 7-304.1 1965 JUN)
(R 1-7.304-1)

NOTE:

Alternate I - For services other than A/E or other professional services; no supplies

Alternate II - For services other than A/E, transportation or R/D; supplies furnished

Alternate III - A/E or other professional services

Alternate IV - For transportation services

Alternate V - For R/D

52.243-2 **Changes -- Cost-Reimbursement**

As prescribed in 43.205(b)(1), insert the following clause in solicitations and contracts when a cost-reimbursement contract for supplies is contemplated. The 30-day period may be varied according to agency procedures.

CHANGES -- COST-REIMBURSEMENT (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.

(c) The Contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under the clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or

Limitation of Funds clause of this contract.

(End of Clause)
(R 7-203.2 1967 APR)
(R 1-7.202-2)

Alternate I (APR 1984). If the requirement is for services and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc).

(3) Place of performance of the services.

(R 7-1909.2 1971 NOV)

Alternate II (APR 1984). If the requirement is for services and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc.).

(3) Place of performance of the services.

(4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

(R 7-1909.2 1971 NOV)
(R 7-103.2 1958 JAN)
(R 1-7.102-2)

Alternate III (APR 1984). If the requirement is for construction, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the plans and specifications or instructions incorporated in the contract.

(R 7-605.2 1967 APR)

Alternate IV (APR 1984). If a facilities contract is contemplated, substitute the following paragraphs (a) and (e) for paragraphs (a) and (e) of the basic clause: (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the facilities or work described in the schedule.

(e) Any related contract with the Contractor may be equitably adjusted if it provides for adjustment and is affected by a change ordered under this clause.

(R 7-702.4 1964 SEP)

Alternate V (APR 1984). If the requirement is for research and development, and it is desired to include the clause, substitute the following subparagraphs (a)(1) and (a)(3) for subparagraphs (a)(1) and (a)(3) of the basic clause.

(1) Drawings, designs, or specifications.

(3) Place of inspection, delivery, or acceptance.

(R 7-404.1 1967 APR)
(R 1-7.404-5)

52.243-4 Changes

As prescribed in 43.205(d), insert the following clause in solicitations and contracts for (a) dismantling, demolition, or removal of improvements; and (b) construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the applicable small purchase limitation in Part 13. The 30-day period may be varied according to agency procedures.

CHANGES (APR 1984)

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes --

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the Government-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; *provided,* that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for a "proposal for adjustment" (hereafter referred to as proposal) based on defective specifications, no proposal for any change under paragraph (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notices as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must submit any proposal under this clause within 30 days after (1) receipt of a written change order under paragraph (a) above or (2) the furnishing of a written notice under paragraph

(b) above, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of Clause)
(AV 7-602.3 1968 FEB)
(AV 1-7.602-3)

52.236-2 **Differing Site Conditions**

As prescribed in 36.502, insert the following clause in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

DIFFERING SITE CONDITIONS (APR 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required, *provided,* that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(End of clause)
(R 7-602.4 1968 FEB)
(R 1-702.602-4)

52.212-12 **Suspension of Work**

As prescribed in 12.505(a), insert the following clause in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

(End of Clause)
(R 7-602.46 1968 FEB)

52.212-13 **Stop-Work Order**

As prescribed in 12.505(b), when contracting by negotiation, the contracting officer may insert the following clause in solicitations and contracts for supplies, services, or research and development. The "90-day" period stated in the clause may be reduced to less than 90 days.

STOP-WORK ORDER (APR 1984)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either --

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be

modified, in writing, accordingly, if --

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts a claim for the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim asserted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop- work order.

(End of Clause)
(AV 7-105.3 1971 APR)

Alternate I (APR 1984). If this clause is inserted in a cost- reimbursement contract, substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

52.212-15 **Government Delay of Work.**

As prescribed in 12.505(d), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial items.

GOVERNMENT DELAY OF WORK (APR 1984)

(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved, and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the

contract.

(End of clause)
(AV 7-104.77 1968 SEP)

CHAPTER ELEVEN

No Clauses

CHAPTER TWELVE

CLAUSES

52.215-12 **Restriction on Disclosure and Use of Data.**

As prescribed in 15.407(c)(8), insert the following provision in requests for proposals and requests for quotations:

RESTRICTION ON DISCLOSURE AND USE OF DATA (APR 1984)

Offerors or quoters who include in their proposals or quotations data that they do not want disclosed to the public for any purpose or used by the Government except for evaluation purposes, shall --

(a) Mark the title page with the following legend:

"This proposal or quotation includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed – in whole or in part – for any purpose other than to evaluate this proposal or quotation. If, however, a contract is awarded to this offeror or quoter as a result of – or in connection with – the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. The restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets]", and

(b) Mark each sheet of data it wishes to restrict with the following legend:

"Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal or quotation."

(End of provision)
(R 3-501(b) Sec L (xxiv))

52.236-7051 **Rights in Shop Drawings.** As prescribed at 36.577, insert the following clause:

RIGHTS IN SHOP DRAWINGS (APR 1966)

(a) Shop drawings, for construction, means drawings submitted to the Government by the Construction Contractor, subcontractor or any lower tier sub contractor pursuant to a construction contract, showing detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

52.227-1 **Authorization and Consent.**

AUTHORIZATION AND CONSENT
(APR 1984)

(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Contractor agrees to include, and require inclusion of, this clause, suitably modified to identify the parties, in all subcontracts at any tier for supplies or services (including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services expected to exceed $25,000; however, omission of this clause from any subcontract, under or over $25,000, does not affect this authorization and consent.

(End of clause) (R 7-103.22 1961 JAN)

Alternate I (APR 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

(R 7-302.21 1964 MAR)

Alternate II (APR 1984). The following is substituted for paragraph (a) of the clause:

(a) The Government authorizes and consents to all use and manufacture in the performance of any order at any tier or subcontract at any tier placed under this contract for communication services and facilities for which rates, charges, and tariffs are not established by a government regulatory body, of any invention described in and covered by a United States patent (1) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract or (2) used in machinery, tools, or methods whose use necessarily results from compliance by the contractor or a subcontractor with specifications or written provisions forming a part of this contract or with specific written instructions given by the Contracting Officer directing the manner of performance.

(R 7-1702.5(a) 1971 APR)

52.227-11 **PATENT RIGHTS -- RETENTION BY THE CONTRACTOR (SHORT FORM)** (Apr 1984) **[Small Business]**

(a) **Definitions.** "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

"Subject invention" means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under this contract.

"Practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

"Made", when used in relation to any invention, means the conception or first actual reduction to practice of such invention.

"Small business firm" means a small domestic business concern as defined at Section 2 of Public Law 85-536 (15 U.S.C. § 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3- 12, respectively, will be used.

"Nonprofit organization" means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. § 501(a)) or any domestic nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(b) **Allocation of principal rights.** The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. § 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) **Invention disclosure, election of title, and filing of patent applications by Contractor.**

(1) The Contractor shall disclose each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to the Contracting Officer shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Contracting Officer, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor shall elect in writing whether or not to retain title to any such invention by notifying the Federal agency within 12 months of disclosure; *provided,* that in any case where publication, on sale, or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period of election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file its initial patent application on an elected invention within 2 years after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and

Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the Contracting Officer, election, and filing may, at the discretion of the funding Federal agency, be granted.

(d) **Conditions when the Government may obtain title.** The Contractor shall convey to the Federal agency, upon written request, title to any subject invention --

(1) If the Contractor fails to disclose or elect the subject invention within the times specified in paragraph (c) above, or elects not to retain title (the agency may only request title within 60-days after learning of the Contractor's failure to report or elect within the specified times);

(2) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) above; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) above, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country; or

(3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) **Minimum rights to contractor.** (1) The Contractor shall retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title except if the Contractor fails to disclose the subject invention within the times specified in paragraph (c) above. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the funding Federal agency except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations and agency licensing regulations (if any). This license shall not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed 30 days (or such other time as may be authorized by the funding Federal agency for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable agency licensing regulations (if any) and the Federal Property Management Regulations concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) **Contractor action to protect the Government's interest.** (1) The Contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and (ii) convey title to the Federal agency when requested under paragraph (d) above, and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a

minimum, the information required by subparagraph (c)(1) above. The Contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Federal agency of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in this invention."

(g) **Subcontracts.** (1) The Contractor shall include this clause (52.227-11 of the Federal Acquisition Regulation (FAR)), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or nonprofit organization. The subcontractor shall retain all rights provided for the Contractor in this clause, and the Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

(h) **Reporting utilization of subject inventions.** The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as the agency may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (j) of this clause. To the extent data or information supplied under this paragraph is considered by the Contractor, its licensee, or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by law, it shall not disclose such information to persons outside the Government.

(i) **Preference for United States industry.** Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) **March-in rights.** (1) The Contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in FAR 27.604-1(g) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines that --

(i) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(ii) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or other licensees;

(iii) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensee, or

(iv) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) **Special provisions for contracts with nonprofit organizations.** If the Contractor is a nonprofit organization, it agrees that --

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions and which is not, itself, engaged in or does not hold a substantial interest in other organizations engaged in the manufacture or sale of products or the use of processes that might utilize the invention or be in competition with embodiments of the invention (provided, that such assignee will be subject to the same provisions as the Contractor);

(2) The Contractor may not grant exclusive licenses under United States patents or patent applications in subject inventions to persons other than small business firms for a period in excess of the earlier of --

(i) Five years from first commercial sale or use of the invention; or

(ii) Eight years from the date of the exclusive license excepting that time before regulatory agencies necessary to obtain premarket clearance, unless on a case-by-case basis, the Federal agency approves a longer exclusive license. If exclusive field-of-use licenses are granted, commercial sale or use in one field of use will not be deemed commercial sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will not be deemed to end the exclusive period to different subsequent products covered by the invention;

(3) The Contractor shall share royalties collected on a subject invention with the inventor, and

(4) The balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions, will be utilized for the support of scientific research or education.

(l) **Communications.** Reserved.

(End of clause) (R 7-302.23(h) 1981 JUL)

Alternate I (APR 1984). Add the following sentence at the end of paragraph (b) of the basic clause:

The license shall include the right of the Government to sublicense foreign governments and international organizations pursuant to the following treaties or international agreements: .....* or pursuant to any future treaties or agreements with foreign governments or international organizations.

(* Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.)

(R 7-302.23(b) 1981 JUL)

As prescribed at 27.303(b), insert the following clause:

52.227-12 PATENT RIGHTS -- RETENTION BY THE CONTRACTOR (LONG FORM) (APR 1984) [LARGE BUSINESS]

(a) Definitions.

"Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

"Subject invention" means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under this contract.

"Practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

"Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

"Small business firm" means a domestic small business concern as defined at Section 2 of Public Law 85-536 (15 U.S.C. § 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3- 12, respectively, will be used.

"Nonprofit organization" means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. § 501(a)) or any domestic nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(b) **Allocation of principal rights.** The Contractor may elect to retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. § 203. With respect to any subject invention in which the Contractor elects to retain title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) **Invention disclosure, election of title, and filing of patent applications by Contractor.**

(1) The Contractor shall disclose each subject invention to the Contracting Officer within 2 months after the inventor discloses in writing to Contractor personnel responsible for patent matters or within 6 months after the Contractor becomes aware that a subject invention has been made, whichever is earlier. The disclosure to the Contracting Officer shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Contracting Officer, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor shall elect in writing whether or not to retain title to any such invention by notifying the Federal agency at the time of disclosure or within 8 months of disclosure, as to those countries (including the United States) in which the Contractor will retain title; provided, that in any case where publication, on sale, or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period of election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file its initial patent application on an elected invention within 1 year after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor shall file patent applications in additional countries (including the European Patent Office and under the Patent Cooperation Treaty) within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the Contracting Officer, election, and filing may at the discretion of the funding Federal agency, be granted, and will normally be granted unless the Contracting Officer has reason to believe that a particular extension would prejudice the Government's interest.

(d) **Conditions when the Government may obtain title.** The contractor shall convey to the Federal agency, upon written request, title to any subject invention --

(1) If the Contractor elects not to retain title to a subject invention;

(2) If the Contractor fails to disclose or elect the subject invention within the times specified in paragraph (c) above (the agency may only request title within 60 days after learning of the Contractor's failure to report or elect within the specified times);

(3) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) above; *provided,* however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) above, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country; or

(4) In any country in which the Contractor decides not to continue the prosecution of any application for, to base the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) **Minimum rights to Contractor.**

(1) The Contractor shall retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title except if the Contractor fails to disclose the subject invention within the times specified in paragraph (c) above. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the funding Federal agency except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations and agency licensing regulations (if any). This license shall not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed 30 days (or such other time as may be authorized by the funding Federal agency for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable agency licensing regulations and the Federal Property Management Regulations concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) **Contractor action to protect the Government's interest.**

(1) The Contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and (ii) convey title to the Federal agency when requested under paragraph (d) above and subparagraph (n)(2) below, and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (c)(1) above. The Contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Federal agency of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in this invention."

(5) The Contractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in performance of work under this contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(6) The Contractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on the subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(7) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and certifying that all subject inventions have been disclosed or that there are no such inventions.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or certifying that there were no such inventions, and listing all subcontracts at any tier containing a patent rights clause or certifying that there were no such subcontracts.

(8) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and no more frequently than annually, a listing of the subcontracts that have been awarded.

(9) In the event of a refusal by a prospective subcontractor to accept one of the clauses in subparagraph (g)(1) or (2) below, the Contractor (i) shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter and (ii) shall not proceed with such subcontracting without the written authorization of the Contracting Officer.

(10) The Contractor shall provide, upon request, the filing date, serial number and title, a copy of the patent application (including an English- language version if filed in a language other than English), and patent number and issue date for any subject invention for which the Contractor has retained title.

(11) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(g) **Subcontracts.** (1) The Contractor shall include the clause at 52.227-11 of the Federal Acquisition Regulation (FAR), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or nonprofit organization. The subcontractor shall retain all rights provided for the Contractor in this clause, and the Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The Contractor shall include this clause (FAR 52.227-12) in all other subcontracts, regardless of tier, for experimental, developmental, or research work.

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

(h) **Reporting utilization of subject inventions.** The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as the agency may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (j) of this clause. To the extent data or information supplied under this paragraph is considered by the Contractor, its licensee or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by law, it shall not disclose such information to persons outside the Government.

(i) **Preference for United States industry.** Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is commercially feasible.

(j) **March-in rights.** The Contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in FAR 27.304-1(g) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines that --

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use:

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees:

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees, or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) **Special provisions for contracts with nonprofit organizations.** Reserved.

(l) **Communications.** Reserved.

(m) **Other inventions.** Nothing contained in this clause shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(n) **Examination of records relating to inventions.**

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first reduction to practice of inventions in the same field of technology as the work under this contract to determine whether --

(i) Any such inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by subparagraphs (f)(2) and (f)(3) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer determines that an inventor has not disclosed a subject invention to the Contractor in accordance with the procedures required by subparagraph (f)(5) of this clause, the Contracting Officer may, within 60 days after the determination, request title in accordance with subparagraphs (d)(2) and (d)(3) of this clause. However, if the Contractor establishes that the failure to disclose did not result from the Contractor's fault or negligence, the Contracting Officer shall not request title.

(3) If the Contracting Officer learns of an unreported Contractor invention which the Contracting Officer believes may be a subject invention, the Contractor may be required to disclose the invention to the agency for a determination of ownership rights.

(4) Any examination of records under this paragraph shall be subject to appropriate conditions to protect the confidentiality of the information involved.

(o) **Withholding of payment (this paragraph does not apply to subcontracts).**

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of the contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to --

(i) Establish, maintain, and follow directive procedures for identifying and disclosing subject inventions pursuant to subparagraph (f)(5) above;

(ii) Disclose any subject invention pursuant to subparagraph (c)(1) above;

(iii) Deliver acceptable interim reports pursuant to subdivision (f)(7)(i) above; or

(iv) Provide the information regarding subcontracts pursuant to subparagraph (f)(6) above.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of subject inventions required by subparagraph (c)(1) above, an acceptable final report pursuant to subdivision (f)(7)(ii) above, and all past due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government right.

(End of clause)

(R 7-302.23(b) 1981 JUL)

Alternate I (APR 1984). Add the following sentence at the end of paragraph (b) of the basic clause:

The license shall include the right of the Government to sublicense foreign governments and international organizations pursuant to the following treaties or international agreements; .....* or pursuant to any future treaties or agreements with foreign governments or international organizations.

(* Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.)

(R 7-302.23(h) 1981 JUL)

52.227-3 **Patent Indemnity**

Insert the following clause as prescribed at 27.203-1(b), 27.203-2(a), or 27.203-4(a)(2) as applicable:

PATENT INDEMNITY (APR 1984)

(a) The Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. § 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to (1) an infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor, (2) an infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance, or (3) a claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction..

(End of clause)(R 7-104.5 1975 JUN)

Alternate I (APR 1984). The following paragraph (c) is added to the clause:

(c) This patent indemnification shall not apply to the following items:

..... [Contracting Officer list and/or identify the items to be excluded from this indemnity]

(R 7-104.5(a) 1965 SEP)

Alternate II (APR 1984). The following paragraph (c) is added to the clause:

(a) This patent indemnification shall cover the following items:

..... [List and/or identify the items to be included under this indemnity]

(R 7-104.5(a) 1964 SEP)

Alternate III (APR 1984). The following paragraph is added to the clause:

( ) As to subcontracts at any tier for communication service, this clause shall apply only to individual communication service authorizations over $5,000 issued under this contract and covering those communications services and facilities (1) that are or have been sold or offered for sale by the Contractor to the public, (2) that can be provided over commercially available equipment, or (3) that involve relatively minor modifications.

(R 7-1701.10 1971 APR)

52.227-4 Patent Indemnity -- Construction Contracts.

As prescribed at 27.203-5, insert the following clause:

PATENT INDEMNITY -- CONSTRUCTION CONTRACTS (APR 1984)

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. § 181) arising out of performing this contract or out of the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause) (R 7-602.16 1964 JUN)

Alternate I (APR 1984) Designate the first paragraph as paragraph (a) and add the following to the basic clause as paragraph (b):

(b) This patent indemnification shall not apply to the following items:

(Contracting Officer specifically identify the item to be excluded)

(R 7-602.16(b) 1966 APR)

NOTE: Exclusion from indemnity of specified, identified patents, as distinguished from items, is the exclusive prerogative of the agency head or designee (See 27.203-6).

52.227-13 Patent Rights -- Acquisition by the Government.

As prescribed at 27.303(c), insert the following clause:

PATENT RIGHTS -- ACQUISITION BY THE GOVERNMENT (APR 1984)

(a) Definitions.

"Invention," as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code.

"Subject invention," as used in this clause, means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under this contract.

"Practical application," as used in this clause, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(b) Allocations of principal rights.

(1) Assignment to the Government. The Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Contractor under subparagraph (b)(2) and paragraph (d) below.

(2) Greater rights determinations

(i) The Contractor, or an employee- inventor after consultation with the Contractor, may retain greater rights than the nonexclusive license provided in paragraph (d) below, in accordance with the procedures of paragraph 27.304-1(a) of the Federal Acquisition Regulation (FAR). A request for a determination of whether the Contractor or the employee-inventor is entitled to retain such greater rights must be submitted to the Head of the Contracting Agency or designee at the time of the first disclosure of the invention pursuant to subparagraph (e)(2) below, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (c) below, and to the reservations and conditions deemed to be appropriate by the Head of the Contracting Agency or designee.

(ii) Upon request, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English- language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(iii) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(c) Minimum rights acquired by the Government.

(1) With respect to each subject invention to which the Contractor retains principal or exclusive rights, the Contractor agrees as follows:

(i) The Contractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(ii) The Contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in FAR 27.304-1(g) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines

that --

(A) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(C) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(D) Such action is necessary because the agreement required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(iii) The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization [words deleted from draft] that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as the agency may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with subdivision (ii) above. To the extent data or information supplied under this section is considered by the Contractor, its licensee, or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

(iv) The Contractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or other wise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(v) The Contractor agrees to provide for the Government's paid-up license pursuant to subdivision (i) above in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subdivision (ii) above, and for the reporting of utilization information as required by subdivision (iii) above, whenever the instrument transfers principal or exclusive rights in a subject invention.

(2) Nothing contained in this paragraph (c) shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(d) **Minimum rights to the Contractor.**

(1) The Contractor is hereby granted a revocable nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in subparagraph (e)(2) below. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the funding Federal agency except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent

the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by the funding Federal agency for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable agency licensing regulations and the Federal Property Management Regulations concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(4) When the Government has the right to receive title, and does not elect to secure a patent in a foreign country, the Contractor may elect to retain such rights in any foreign country in which the Contractor elects to secure a patent, subject to the Government's rights in subparagraph (c)(1) above.

(e) **Invention identification, disclosures, and reports.** (1) The Contractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Contractor shall disclose each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Contractor. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosures shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the Contractor shall promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period, and certifying that all subject inventions have been disclosed (or that there are not such inventions) and that the procedures required by subparagraph (e)(1) above have been followed.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or certifying that there were no such inventions, and listing all subcontracts at any tier containing a patent rights clause or certifying that there were no such subcontracts.

(4) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) above, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (2) above.

(5) The Contractor agrees subject to FAR 27.302(i) that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) **Examination of records relating to inventions.** (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether: --

(i) Any such inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Contractor invention which the Contracting Officer believes may be a subject invention, the Contractor may be required to disclose the invention to the agency for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Withholding of payment (this paragraph does not apply to subcontracts). (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to --

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph (e)(1) above;

(ii) Disclose any subject invention pursuant to subparagraph (e)(2) above;

(iii) Deliver acceptable interim reports pursuant to subdivision (e)(3)(i) above; or

(iv) Provide the information regarding subcontracts pursuant to sub paragraph (h)(4) below.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of subject inventions required by subparagraph (e)(2) above, and acceptable final report pursuant to subdivision (e)(3)(ii) above, and all past due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sum withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government rights.

(h) **Subcontracts.** (1) The Contractor shall include this clause (suitably modified to identify the parties) in all subcontracts, regardless of tier, for experimental, developmental, or research work. The subcontractor shall retain all rights provided for the Contractor in this clause, and the Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept such a clause the Contractor --

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In the case of subcontracts at any tier, the agency, subcontractor, and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and no more frequently than annually, a listing of the subcontracts that have been awarded.

(i) **Preference for United States industry.** Unless provided otherwise, no Contractor that receives title to any subject invention and no assignee of any such Contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(End of clause)(R 7-302.23(a) 1981 JULY)

52.227-7013 **RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (MAY 1981)**

(a) **Definitions.** "Commercial Computer Software", as used in this clause, means computer software which is used regularly for other than Government purposes and is sold, licensed or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this clause, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer Data Base", as used in this clause, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer Program", as used in this clause, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or designed to satisfy the requirements of a particular user.

"Computer Software", as used in this clause, means computer programs and computer data bases.

"Computer Software Documentation", as used in this clause, means technical data, including computer listings and printouts, in human-readable form which (1) documents the design or details of computer software, (2) explains the capabilities of the software, or (3) provides operating instructions for using the software to obtain desired results from a computer.

"Limited Rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party furnishing such technical data be (1) released or disclosed in whole or in part outside the Government, (2) used in whole or in part by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software, or (3) used by a party other than the Government, except for:

(1) Emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure thereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or

(2) Release to a foreign government, as the interest of the United States may require only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above.

"Restricted Rights", as used in this clause, means rights that apply only to computer software, and include, as a minimum, the right to--

(1) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(2) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(3) Copy computer programs for safekeeping (archives) or backup purposes; and

(4) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (1)-(4) above that are listed or described in this contract or described in a license or agreement made a part of this contract.

"Technical Data", as used in this clause, means recorded information, regardless of form or characteristic, of a scientific or technical nature. It may, for example, document research, experimental, developmental or engineering work, or be usable or used to define a design or process or to procure, produce, support, maintain, or operate materiel. The data may be graphic or pictorial delineations in media such as drawings or photographs, text in specifications or related performance or design type documents, or computer printouts. Examples of technical data include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications and related information, and computer software documentation. Technical data does not include computer software or financial, administrative, cost and pricing, and management data or other information incidental to contract administration.

"Unlimited Rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) **Government Rights.**

(1) **Unlimited Rights.** The Government shall have unlimited rights in:

(i) technical data and computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) technical data necessary to enable manufacture of end-items, components, and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components, processes, or computer software developed at private expense (but see subdivision (b)(2)(ii) below);

(v) technical data or computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) technical data pertaining to end-items; components or processes, prepared or required to be delivered under this or any other Government contract or subcontract, for the purpose of identifying sources, size, configuration, mating and attachment characteristics, functional characteristics and performance requirements ("form, fit and function" data, e. g., specification control drawings, catalog sheets, envelope drawings, etc.):

(vii) manuals or instructional materials prepared or required to be delivered under this contract or any subcontract hereunder for installation, operation, maintenance or training purposes;

(viii) technical data or computer software which is in the public domain, or has been or is normally released or disclosed by the Contractor or subcontractor without restriction on further disclosure; and

(ix) technical data or computer software listed or described in an agreement incorporated into the schedule of this contract which the parties have predetermined, on the basis of subparagraphs (i) through (viii) above, and agreed will be furnished with unlimited rights.

(2) **Limited Rights.** The government shall have limited rights in:

(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii) unpublished technical data pertaining to items, components or processes developed at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data as may be included in the data referred to in subdivisions (b)(1)(i), (v), (vi), (vii), and (viii) above. The word *unpublished,* as applied to technical data and computer software documentation, means that which has not been released to the public nor been furnished to others without restriction on further use or disclosure. For the purpose of this definition, delivery of limited rights technical data to or for the Government under a contract does not, in itself, constitute release to the public.

Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted pursuant to subdivisions (2)(i) and (ii) above are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below in which is inserted:

A. the number of the prime contract under which the technical data is to be delivered,

B. the name of the Contractor and any subcontractor by whom the technical data was generated, and

C. an explanation of the method used to identify limited rights data.

LIMITED RIGHTS LEGEND
Contract No. .
Contractor: .
Explanation of Limited Rights Data Identification Method Used

Those portions of this technical data indicated as limited rights data shall not, without the written permission of the above Contractor, be either (A) used, released or disclosed in whole or in part outside the Government, (B) used in whole or in part by the Government for manufacture or, in the case of computer software documentation, for preparing the same or similar computer software, or (c) used by a party other than the Government, except for: (1) emergency repair or overhaul work only, by or for the Government, where the item or process concerned is not otherwise reasonably available to enable timely performance of the work, *provided* that the release or disclosure hereof outside the Government shall be made subject to a prohibition against further use, release or disclosure; or (2) release to a foreign government, as the interest of the United States may require, only for information or evaluation within such government or for emergency repair or overhaul work by or for such government under the conditions of (1) above. This legend, together with the indications of the portions of this data which are subject to

such limitations shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) **Restricted Rights.**

(i) The Government shall have restricted rights in computer software, listed or described in a license or agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights, provided, however, notwithstanding any contrary provision in any such license or agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a) above. Such restricted rights are of no effect unless the computer software is marked by the Contractor with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure is subject to restrictions stated in Contract No. with (Name of Contractor).

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The Contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license or agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to such unmarked software.

(ii) Notwithstanding subdivision (i) above, commercial computer software and related documentation developed at private expense and not in public domain may, if the Contractor so elects, be marked with the following Legend:

RESTRICTED RIGHTS LEGEND

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subdivision (b)(3)(ii) of the Rights in Technical Data and Computer Software clause at 52.227-7013.

(Name of Contractor and Address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the Contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government may already have or obtains without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, *provided,* that the unmodified portions

shall remain subject to these restrictions.

(E) If the Contractor, within sixty (60) days after a written request, fails to substantiate by clear and convincing evidence that computer software and documentation marked with the above Restricted Rights Legend are commercial items and were developed at private expense, or if the Contractor fails to refute evidence which is asserted by the Government as a basis that the software is in the public domain, the Government may cancel or ignore any restrictive markings on such computer software and documentation and may use them with unlimited rights. Such written requests shall be addressed to the contractor as identified in the Restricted Rights Legend.

(4) No legend shall be marked on, nor shall any limitation or restriction on rights of use be asserted as to, any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this paragraph shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(c) **Copyright.**

(1) In addition to the rights granted under the provisions of paragraph (b) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in paragraph (a) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definitions of "limited rights" in paragraph (a) above. With respect to computer software which the parties have agreed in accordance with subparagraph (b)(3) above will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in technical data or computer software prepared for or acquired by the Government under this contract any works of authorship in which copyright is not owned by the Contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified in subparagraph (c)(1).

(3) As between the Contractor and the Government, the Contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authorship under Section 20.1(b) of Title 17, United States Code.

(4) Technical data delivered under this contract which carries a copyright notice shall also include the following statement which shall be placed thereon by the Contractor, or should the Contractor fail, by the Government:

This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at 52.227-7013 (date).

(d) **Removal of Unauthorized Markings.** Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any technical data or computer software furnished hereunder if:

(1) the Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings, or

(2) the Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of limited rights markings by clear and convincing evidence, or of restricted rights markings by identification of the restrictions set forth in the contract.

(e) **Limitation on Charges for Data and Computer Software.** The Contractor recognizes that the Government or a foreign government with funds derived through the Military Assistance Program or

otherwise through the United States Government may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of technical data or computer software on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for data or computer software which the Government has a right to use and disclose to others, which is in the public domain, or which the Government has been given without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproductions, handling, mailing, and similar administrative costs incident to the furnishing of such data or computer software. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts, or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(f) Acquisition of Data and Computer Software from Subcontractors.

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data or computer software which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next-higher tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with limited rights pursuant to subparagraph (b)(2) above, a subcontractor may fulfill such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in technical data or computer software from their subcontractors for themselves.

(End of clause)

52.227-7018 RESTRICTIVE MARKINGS ON TECHNICAL DATA (MAR 1975)

(a) The Contractor shall have, maintain, and follow throughout the performance of this contract, procedures sufficient to assure that restrictive markings are used on technical data required to be delivered hereunder only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. Such procedures shall be in writing. The Contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the Contractor shall maintain (1) records to show how the procedures of paragraph (a) above were applied in determining that the markings are authorized, as well as (2) such records as are reasonably necessary to show pursuant to subparagraph (d)(2) of the "Rights in Technical Data and Computer Software" clause that restrictive markings used in any piece of technical data delivered under this contract are authorized.

(c) The Contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within Contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered under this contract. The Contractor hereby authorizes direct contact between the Government and such person(s) in resolving questions involving restrictive markings. (d) The Contracting Officer may evaluate or verify the Contractor's procedures to determine their effectiveness. Upon request, a copy of such written procedures shall be furnished. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the Contractor of the responsibility for complying with paragraphs (a) and (b) above.

(e)(1) If the Contractor fails to make a good faith effort to institute the procedures of paragraphs (a) and (b) above, any limited rights markings on technical data delivered under this contract may be

cancelled or ignored by the Contracting Officer. The Contracting Officer shall give written notice to the Contractor of the action taken, including identification of the data on which markings have been cancelled or ignored, and thereafter may use such data with unlimited rights.

(2) The Contracting Officer may give written notification to the Contractor of any failure to maintain or follow the established procedures, or of any material deficiency in the procedures, and state a period of time not less than thirty (30) days within which the Contractor shall complete corrective action. If corrective action is not completed within the specified time, restrictive markings on any technical data being prepared for delivery or delivered under this contract during that period shall be presumed to be unauthorized by the terms thereof and the Contracting Officer may cancel or ignore such markings if the Contractor is unable to substantiate the markings in accordance with the procedures of paragraph (d) of the clause at 52.227- 7013, "Rights in Technical Data and Computer Software".

(f) Notwithstanding any provisions of this contract concerning inspection and acceptance, the acceptance by the Government of technical data with restrictive legends shall not be construed as a waiver of any rights accruing to the Government.

(g) This clause, including this paragraph (g), shall be included in each subcontract under which technical data is required to be delivered. When so inserted, "Contractor" shall be changed to "Subcontractor".

(End of clause)

CHAPTER THIRTEEN

CLAUSES

52.222-20 **Walsh-Healey Public Contracts Act**

As prescribed in 22.610(b), insert the following clause in solicitations and contracts covered by the Act:

WALSH-HEALEY PUBLIC CONTRACTS ACT (APR 1984)

If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount that exceeds or may exceed $10,000, and is subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. §§ 35-45), the following terms and conditions apply:

(a) All representations and stipulations required by the Act and regulations issued by the Secretary of Labor (41 CFR Chapter 50) are incorporated by reference. These representations and stipulations are subject to all applicable rulings and interpretations of the Secretary of Labor that are now, or may hereafter, be in effect.

(b) All employees whose work relates to this contract shall be paid not less than the minimum wage prescribed by regulations issued by the Secretary of Labor (41 CFR 50-202.2). Learners, students learners, apprentices, and handicapped workers may be employed at less than the prescribed minimum wage (see 41 CFR 50-202.3) to the same extent that such employment is permitted under Section 14 of the Fair Labor Standards Act (41 U S.C. § 40).

(End of Clause)
(R 7-103.17 1958 JAN)
(R 1-12.605)

52.222-26 **Equal Opportunity.**

As prescribed in 22.810(e), insert the following clause in solicitations and contracts (see 22.802) unless all of the terms of the clause are exempt from the requirements of EO 11246 (see 22.807(a)):

EQUAL OPPORTUNITY (APR 1984)

(a) If, during any 12-month period (including the 12 months preceding the award of this contract, the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of $10,000, the Contractor shall comply with subparagraphs (b)(1) through (11) below. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

(b) During performing this contract, the Contractor agrees as follows:

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin.

(2) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to, (i) employment, (ii) upgrading, (iii) demotion, (iv)

transfer, (v) recruitment or recruitment advertising, (vi) layoff or termination, (vii) rates of pay or other forms of compensation, and (viii) selection for training, including apprenticeship.

(3) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this clause.

(4) The Contractor shall, in all solicitations or advertisement for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(5) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.

(6) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.

(7) The Contractor shall furnish to the contracting agency all information required by Executive Order 11246, as amended and by the rules, regulations, and orders of the Secretary of Labor. Standard Form 100 (EEO-1), or any successor form, is the prescribed form to be filed within 30 days following the award, unless filed within 12 months preceding the date of award.

(8) The Contractor shall permit access to its books, records, and accounts by the contracting agency or the Office of Federal Contract Compliance Programs (OFCCP) for the purposes of investigation to ascertain the Contractor's compliance with the applicable rules, regulations, and orders.

(9) If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.

(10) The Contractor shall include the terms and conditions of subparagraph (b)(1) through (11) of this clause in every subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor.

(11) The Contractor shall take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.

(c) Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1.

(End of clause)
(R 7-103.18 1978 SEP)
(R 1-12.803-2)
(R 7-607.13 1978 SEP)

Alternate I (APR 1984). If one or more, but not all of the terms of the clause are exempt from the requirements of EO 11246 (see 22.807(a)), the contracting officer shall add the following as a preamble to the clause:

Notice. The following terms of this clause are waived for this contract: .....

[Contracting Officer shall list terms].

52.222-41 **Service Contract Act of 1965.**

As prescribed in 22.1006(a), insert the following clause in solicitations and contracts when the contract is subject to the Service Contract Act of 1965 and is (a) for over $2,500 or (b) for an indefinite dollar amount and the contracting officer expects the contract amount will exceed $2,500 during any 12-month period. With respect to Blanket Purchase Agreements and Basic Ordering Agreements, the amount to be compared to the dollar threshold is the total dollar amount of orders reasonably anticipated to be placed in a 1-year period.

SERVICE CONTRACT ACT OF 1965 (APR 1984)

(a) **Definitions.** "Act," as used in this clause, means the Service Contract Act of 1965, as amended (41 U.S.C. §§ 351-358).

"Contractor," as used in this clause, means the prime Contractor or any subcontractor at any tier.

"Service employee," as used in this clause, means any person (other than a person employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR 541) engaged in performing a Government contract not exempted under 41 U.S.C. § 356, the principal purpose of which is to furnish services in the United States, as defined in section 22.1001 of the Federal Acquisition Regulation. It includes all such persons regardless of the actual or alleged contractual relationship between them and a contractor.

(b) **Applicability.** To the extent that the Act applies, this contract is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor (29 CFR 4). All interpretations of the Act in Subpart C of 29 CFR 4 are incorporated in this contract by reference. This clause does not apply to contracts or subcontracts administratively exempted by the Secretary of Labor or exempted by 41 U.S.C. § 356, as interpreted in Subpart C of 29 CFR 4.

(c) **Compensation.** (1) The Contractor shall pay not less than the minimum wage and shall furnish fringe benefits to each service employee under this contract in accordance with the wages and benefits determined by the Secretary of Labor or the Secretary's authorized representative, as specified in any attachment to this contract.

(2) If there is an attachment, the Contractor shall classify any class of service employees not listed in it, but to be employed under this contract. The classification shall provide a reasonable relationship to those listed in the attachment. The Contractor shall pay that class wages and fringe benefits determined by agreement of the interested parties: the contracting agency, the Contractor, and the employees who will perform the contract or their representatives. If the interested parties do not agree, the Contracting Officer shall submit the question, with a recommendation, for final determination by the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration (ESA), Department of Labor. Failure to pay such employees the compensation agreed upon by the interested parties or finally determined by ESA is a contract violation.

(3) If the term of this contract is more than 1 year, the minimum wages and fringe benefits required for service employees under this contract shall be subject to adjustment after 1 year and not less often than once every 2 years, under wage determinations issued by ESA.

(4) The Contractor can discharge the obligation to furnish fringe benefits specified in the attachment or determined under subparagraph (c)(2) above by furnishing any equivalent combinations of bona fide fringe benefits, or by making equivalent or differential cash payments, in accordance with Subparts B and C of 29 CFR 4.

(d) **Minimum wage.** In the absence of a minimum wage attachment for this contract, the Contractor shall not pay any service or other employees performing this contract less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206). Nothing in this clause shall relieve the Contractor of any other legal or contractual obligation to pay a higher wage to any employee.

(e) **Successor contracts.** If this contract succeeds a contract subject to the Act under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, then, in the absence of a minimum wage attachment to this contract, the Contractor may not pay any service employee performing this contract less than the wages and benefits including those accrued and any prospective increases provided for under that agreement. No contractor may be relieved of this obligation unless the limitations of 29 CFR 4.1c(b) apply or unless the Secretary of Labor or the Secretary's authorized representative --

(1) Determines that the agreement under the predecessor contract was not the result of arms-length negotiations; or

(2) Finds, after a hearing under 29 CFR 4.10, that the wages and benefits provided for by that agreement vary substantially from those prevailing for similar services in the locality.

(f) **Notification to employees.** The Contractor shall notify each service employee commencing work on this contract of the minimum wage and any fringe benefits required to be paid, or shall post a notice of these wages and benefits in a prominent and accessible place at the worksite, using such poster as may be provided by the Department of Labor.

(g) **Safe and sanitary working conditions.** The Contractor shall not permit services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the Contractor that are unsanitary, hazardous, or dangerous to the health or safety of service employees. The Contractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(h) **Records.** The Contractor shall maintain for 3 years from the completion of the work, and make available for inspection and transcription by authorized ESA representatives, a record of the following:

(1) For each employee subject to the Act --

(i) Name and address;

(ii) Work classification or classifications, rate or rates of wages and fringe benefits provided, rate or rates of payments in lieu of fringe benefits, and total daily and weekly compensation;

(iii) Daily and weekly hours worked; and

(iv) Any deductions, rebates, or refunds from total daily or weekly compensation.

(2) For those classes of service employees not included in any wage determination attached to this contract, wage rates or fringe benefits determined by the interested parties or by ESA under the terms of paragraph (c) of this clause. A copy of the report required by paragraph (k) of this clause will fulfill this requirement.

(i) **Withhholding of payments and termination of contract.** The Contracting Officer shall withhold from the prime Contractor under this or any other sums the Contracting Officer, or an appropriate officer of the Labor Department, decides may be necessary to pay underpaid employees. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of default.

(j) **Subcontracts.** The Contractor agrees to insert this clause in all subcontracts.

(k) **Contractor's report.** (1) If there is a wage determination attachment to this contract and any classes of service employees not listed on it are to be employed under the contract, the Contractor shall report promptly to the Contracting Officer the wages to be paid and the fringe benefits to be provided each of these classes, when determined under paragraph (c) of this clause.

(2) If wages to be paid or fringe benefits to be furnished any service employees under the contract are covered in a collective bargaining agreement effective at any time when the contract is being performed, the prime Contractor shall provide to the Contracting Officer a copy of the agreement and full information on the application and accrual of wages and benefits (including any prospective increases) to service employees working on the contract. The prime Contractor shall report when contract performance begins, in the case of agreements then in effect, and shall report subsequently effective agreements, provisions, or amendments promptly after they are negotiated.

(l) **Variations, tolerances, and exemptions involving employment.** Notwithstanding any of the provisions in paragraphs (c) through (k) of this clause, the following employees may be employed in

accordance with the following variations, tolerances, and exemptions authorized by the Secretary of Labor:

(1)(i) In accordance with regulations issued under Section 14 of the Fair Labor Standards Act of 1938 by the Administrator of the Wage and Hour Division, ESA (29 CFR 520, 521, 542, and 525), apprentices, student-learners, and workers whose earning capacity is impaired by age or by physical or mental deficiency or injury, may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Service Contract Act, without diminishing any fringe benefits or payments in lieu of these benefits required under section 2(a)(2) of the Act.

(ii) The Administrator will issue certificates under the Act for employing apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages, but without changing requirements concerning fringe benefits or supplementary cash payments in lieu of these benefits.

(iii) The Administrator may also withdraw, annul, or cancel such certificates under 29 CFR 525 and 528.

(2) An employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips may have the amount of these tips credited by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act, in accordance with regulations in 29 CFR 531. However, the amount of credit shall not exceed 40 percent of the minimum rate specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended.

(End of Clause)
(R 7-1903.41(a) 1977 OCT)
(R 1-12.904-1)

52.225-3 **Buy American Act -- Supplies**

As prescribed in 25.109(d), insert the following clause in solicitations and contracts for the acquisition of supplies, or for services involving the furnishing of supplies, for use within the United States, except for acquisitions made under subparagraph (a)(3) of the Trade Agreements Act of 1979, as specified in Subpart 25.4:

BUY AMERICAN ACT -- SUPPLIES (APR 1984)

(a) The Buy American Act (41 U.S.C. § 10) provides that the Government give preference to domestic end products.

"Components," as used in this clause, means those articles, materials, and supplies incorporated directly into the end products.

"Domestic end product," as used in this clause, means (1) an unmanufactured end product mined or produced in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in subparagraphs (b)(2) or (3) of this clause shall be treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

"End products," as used in this clause, means those articles, materials, and supplies to be acquired for public use under this contract.

(b) The Contractor shall deliver only domestic end products, except those --

(1) For use outside the United States;

(2) That the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;

(3) For which the agency determines that domestic preference would be inconsistent with the public interest; or

(4) For which the agency determines the cost to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954, as amended, and Subpart 25.1 of the Federal Acquisition Regulation.)

(End of clause)
(R 7-104.3 1964 MAY)
(R 1-6.104-5)

52.225-5 Buy American Act -- Construction Materials

As prescribed in 25.205, insert the following clause in solicitations and contracts for construction inside the United States:

BUY AMERICAN ACT -- CONSTRUCTION MATERIALS (APR 1984)

(a) The Buy American Act (41 U.S.C. § 10) provides that the Government give preference to domestic construction material.

"Components" as used in this clause, means those articles, materials, and supplies incorporated directly into construction materials.

"Construction materials," as used in this clause, means articles, materials, and supplies brought to the construction site for incorporation into the building or work.

"Domestic construction material," as used in this clause, means (1) an unmanufactured construction material mined or produced in the United States, or (2) a construction material manufactured in the United States, if the cost of its components mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the construction materials determined to be unavailable pursuant to subparagraph 25.202(a)(3) of the Federal Acquisition Regulation (FAR) shall be treated as domestic.

(b) The Contractor agrees that only domestic construction material will be used by the Contractor, subcontractors, materialmen, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in this contract.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954, as amended, and Subpart 25.2 of the FAR).

(End of clause)
(R 7-602.20 1966 OCT)
(R 1-6.104-5)
(R 1-18.605)

CHAPTER FOURTEEN

CLAUSES

52.245-2 Government Property (Fixed-Price Contracts).

As prescribed in 45.106(b)(1), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated, except as provided in 45.106(d) and (e):

GOVERNMENT PROPERTY (FIXED-PRICE CONTRACTS) (APR 1984)

(a) **Government-furnished property.** (1) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the Government-furnished property described in the Schedule or specifications together with any related data and information that the Contractor may request and is reasonably required for the intended use of the property (hereinafter referred to as "Government-furnished property").

(2) The delivery or performance dates for this contract are based upon the expectation that Government-furnished property suitable for use (except for property furnished ("as is") will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.

(3) If Government-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt of it, notify the Contracting Officer, detailing the facts and, as directed by the Contracting Officer and at Government expense, either repair, modify, return, or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(4) If Government-furnished property is not delivered to the Contractor by the required time, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) **Changes in Government-furnished property.** (1) The Contracting Officer may, by written notice, (i) decrease the Government-furnished property provided or to be provided under this contract, or (ii) substitute other Government-furnished property for the property to be provided by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by such notice.

(2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Government has agreed in the Schedule to make the property available for performing this contract and there is any --

(i) Decrease or substitution in this property pursuant to subparagraph (b)(1) above; or

(ii) Withdrawal of authority to use this property, if provided under any other contract or lease.

(c) **Title in Government property.** (1) The Government shall retain title to all Government-furnished property.

(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a special tooling clause) acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

(4) If this contract contains a provision directing the Contractor to purchase material for which the Government will reimburse the Contractor as a direct item of cost under this contract --

(i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and

(ii) Title to all other material shall pass to and vest in the Government upon --

(A) Issuance of the material for use in contract performance;

(B) Commencement of processing of the material or its use in contract performance; or

(C) Reimbursement of the cost of the material by the Government, whichever occurs first.

(d) **Use of Government Property.** The Government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.

(e) **Property administration.** (1) The Contractor shall be responsible and accountable for all Government property provided under this contract and shall comply with Federal Acquisition Regulation (FAR) Subpart 45.5, as in effect on the date of this contract.

(2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of Government property in accordance with sound industrial practice and the applicable provisions of Subpart 45.5 of the FAR.

(3) If damage occurs to Government property, the risk of which has been assumed by the Government under this contract, the Government shall replace the items or the Contractor shall make such repairs as the Government directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which the Government is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(4) The Contractor represents that the contract price does not include any amount for repairs or replacement for which the Government is responsible. Repair or replacement of property for which the Contractor is responsible shall be accomplished by the Contractor at its own expense.

(f) **Access.** The Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

(g) **Risk of loss.** Unless otherwise provided in this contract, the Contractor assumes the risk of, and shall be responsible for, any loss or destruction of, or damage to, Government property upon its delivery to the Contractor or upon passage of title to the Government under paragraph (c) of this clause. However, the Contractor is not responsible for reasonable wear and tear to Government property or for Government property properly consumed in performing this contract.

(h) **Equitable adjustment.** When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for --

(1) Any delay in delivery of Government-furnished property.

(2) Delivery of Government-furnished property in a condition not suitable for its intended use;

(3) A decrease in or substitution of Government- furnished property; or

(4) Failure to repair or replace Government property for which the Government is responsible.

(i) **Final accounting and disposition of Government property.** Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form

acceptable to the Contracting Officer, inventory schedules covering all items of Government property (including any resulting scrap) not consumed in performing this contract or delivered to the Government. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to the Government as the Contracting Officer directs.

(j) **Abandonment and restoration of Contractor's premises.** Unless otherwise provided herein, the Government --

(1) May abandon any Government property in place, at which time all obligations of the Government regarding such abandoned property shall cease; and

(2) Has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or upon contract completion). However, if the Government-furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) **Communications.** All communications under this clause shall be in writing.

(l) **Overseas contracts.** If this contract is to be performed outside of the United States of America, its territories, or possessions, the words "Government" and "Government-furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government-furnished," respectively.

(End of clause)
(R 7-104.24(a) 1968 SEP)
(R 7-104.24(b) 1968 SEP)
(R 7-104.24(d) 1968 SEP)
(R 7-303.7 1972 SEP)
(R 1-7.303-7(a))
(R 1-7.303-7(d))

Alternate I (APR 1984). If the contract is a negotiated fixed-price contract for which prices are not based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, substitute the following paragraph (g) for paragraph (g) of the basic clause:

(g) **Limited risk of loss.** (1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of --

(i) All or substantially all of the Contractor's business.

(ii) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, if an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage) --

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater.

(ii) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

(iii) For which the Contractor is otherwise responsible under the express terms of this contract.

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage --

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of --

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their

charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price and agrees it will not hereafter include in any price to the Government any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

(R 7-104.24(c) 1978 SEP)
(R 1-7.303-7(b))

Alternate II (APR 1984). If the contract is for the conduct of basic or applied research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research, substitute the following paragraphs (c) and (g) for paragraphs (c) and (g) of the basic clause:

(c) **Title in Government property.** (1) The Government shall retain title to all Government-furnished property.

(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to each item of facilities, special test equipment, and special tooling (other than that subject to a special tooling clause) acquired by the Contractor for the Government under this contract shall pass to and vest in the Government when its use in performing this contract commences, or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

(4) Title to equipment purchased with funds available for research and having an acquisition cost of less than $1,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided, that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to equipment purchased with funds available for research and having an acquisition cost of $1,000 or more shall vest as set forth in the contract. If title to equipment vests in the Contractor under this subparagraph (c)(4), the Contractor agrees that no charge will be made to the Government for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all equipment to which title is vested in the Contractor under this subparagraph (c)(4) within ten days following the end of the calendar quarter during which it was received.

(5) Vesting title under this paragraph (c) is subject to civil rights legislation, 42 U.S.C. § 2000d. Before title is vested and by signing this contract, the Contractor accepts and agrees that --

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to equipment)."

(g) Limited risk of loss. (1) The term "Contractor's managerial personnel," as used in this paragraph (g), means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or equivalent representatives who have supervision or direction of --

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant, laboratory, or separate location at which the contract is being performed or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract (or, of an educational or nonprofit organization, for expenses incidental to such loss, destruction, or damage), except as provided in subparagraphs (3) and (4) below.

(3) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage) --

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained, or to the extent of insurance actually purchased and maintained, whichever is greater;

(ii) That results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement.

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from wilful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(4)(i) If the Contractor fails to act as provided in subdivision (g)(3)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) Furthermore, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage --

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(5) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(6) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of --

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(7) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(7) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(8) The Contractor represents that it is not including in the price, and agrees it will not hereafter include in any price to the Government, any charge or reserve for insurance (including any self-insurance fund or reserve) covering loss or destruction of, or damage to, Government property, except to the extent the Contractor may have expressly required the Contractor to carry such insurance under another provision of this contract.

(9) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, the Government property, the Contractor shall use the proceeds to repair, renovate, or replace the lost, destroyed or damaged Government property or shall otherwise credit the proceeds to or equitably reimburse the Government, as directed by the Contracting Officer.

(10) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

(R 7-03.7, clause paragraph (c) 1972 SEP)
(R 1-7.303-7(d), clause paragraph (c))
(R 7-104.24(c) 1978 SEP)
(R 1-.303-7(b))

52.245-5 Government Property (Cost-Reimbursement, Time-and- Material, or Labor-Hour Contracts).

As prescribed in 45.106(f)(1), insert the following clause in solicitations and contracts when a cost-reimbursement, time-and- material, or labor-hour contract is contemplated, except as provided in paragraph (d) of 45.106.

GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIAL, OR LABOR-HOUR CONTRACTS) (APR 1984)

(a) **Government-furnished property.** (1) The term "Contractor's managerial personnel," as used in paragraph (g) of this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of --

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operation at any one plant, or separate location at which the contract is being performed; or

(iii) A separate and complete major industrial operation connected with performing this contract.

(2) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the Government-furnished property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may be reasonably required for the intended use of the property (hereinafter referred to as "Government-furnished property").

(3) The delivery or performance dates for this contract are based upon the expectation that Government-furnished property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet the contract's delivery or performance dates.

(4) If Government-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt, notify the Contracting Officer, detailing the facts, and, as directed by the Contracting Officer and at Government expense, either effect repairs or modification or return or otherwise dispose of the property. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall make an equitable adjustment as provided in paragraph (h) of this clause.

(5) If Government-furnished property is not delivered to the Contractor by the required time or times, the Contracting Officer shall, upon the Contractor's timely written request, make a determination of the delay, if any, caused the Contractor and shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(b) **Changes in Government-furnished property.** (1) The Contracting Officer may, by written notice, (i) decrease the Government-furnished property provided or to be provided under this contract or (ii) substitute other Government-furnished property for the property to be provided by the Government or to be acquired by the Contractor for the Government under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct regarding the removal, shipment, or disposal of the property covered by this notice.

(2) Upon the Contractor's written request, the Contracting Officer shall make an equitable adjustment to the contract in accordance with paragraph (h) of this clause, if the Government has agreed in the Schedule to make such property available for performing this contract and there is any --

(i) Decrease or substitution in this property pursuant to subparagraph (b)(1) above; or

(ii) Withdrawal of authority to use property, if provided under any other contract or lease.

(c) **Title.** (1) The Government shall retain title to all Government-furnished property.

(2) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in the Government upon the vendor's delivery of such property.

(3) Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in the Government upon --

(i) Issuance of the property for use in contract performance;

(ii) Commencement of processing of the property or use in contract performance; or

(iii) Reimbursement of the cost of the property by the Government, whichever occurs first.

(4) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(d) **Use of Government property.** The Government property shall be used only for performing this contract, unless otherwise provided in this contract or approved by the Contracting Officer.

(e) **Property administration.** (1) The Contractor shall be responsible and accountable for all Government property provided under this contract and shall comply with Federal Acquisition Regulation (FAR) Subpart 45.5 as in effect on the date of this contract, and which is hereby incorporated into this contract by reference.

(2) The Contractor shall establish and maintain a program for the use, maintenance, repair, protection, and preservation of Government property in accordance with sound business practice and the applicable provisions of FAR Subpart 45.5.

(3) If damage occurs to Government property, the risk of which has been assumed by the Government under this contract, the Government shall replace the items or the Contractor shall make such repairs as the Government directs. However, if the Contractor cannot effect such repairs within the time required, the Contractor shall dispose of the property as directed by the Contracting Officer. When any property for which the Government is responsible is replaced or repaired, the Contracting Officer shall make an equitable adjustment in accordance with paragraph (h) of this clause.

(f) **Access.** The Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

(g) **Limited risk of loss.** (1) The Contractor shall not be liable for loss or destruction of, or damage to, the Government property provided under this contract or for expenses incidental to such loss, destruction, or damage, except as provided in subparagraphs (2) and (3) below.

(2) The Contractor shall be responsible for loss or destruction of, or damage to, the Government property provided under this contract (including expenses incidental to such loss, destruction, or damage) --

(i) That results from a risk expressly required to be insured under this contract, but only to the extent of the insurance required to be purchased and maintained or to the extent of insurance actually purchased and maintained, whichever is greater,

(ii) That results from a risk that is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement.

(iii) For which the Contractor is otherwise responsible under the express terms of this contract;

(iv) That results from willful misconduct or lack of good faith on the part of the Contractor's managerial personnel; or

(v) That results from a failure on the part of the Contractor, due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel, to establish and administer a program or

system for the control, use, protection, preservation, maintenance, and repair of Government property as required by paragraph (e) of this clause.

(3)(i) If the Contractor fails to act as provided by subdivision (g)(2)(v) above, after being notified (by certified mail addressed to one of the Contractor's managerial personnel) of the Government's disapproval, withdrawal of approval, or nonacceptance of the system or program, it shall be conclusively presumed that such failure was due to willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(ii) In such event, any loss or destruction of, or damage to, the Government property shall be presumed to have resulted from such failure unless the Contractor can establish by clear and convincing evidence that such loss, destruction, or damage --

(A) Did not result from the Contractor's failure to maintain an approved program or system; or

(B) Occurred while an approved program or system was maintained by the Contractor.

(4) If the Contractor transfers Government property to the possession and control of a subcontractor, the transfer shall not affect the liability of the Contractor for loss or destruction of, or damage to, the property as set forth above. However, the Contractor shall require the subcontractor to assume the risk of, and be responsible for, any loss or destruction of, or damage to, the property while in the subcontractor's possession or control, except to the extent that the subcontract, with the advance approval of the Contracting Officer, relieves the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government property in as good condition as when received, except for reasonable wear and tear or for its use in accordance with the provisions of the prime contract.

(5) Upon loss or destruction of, or damage to, Government property provided under this contract, the Contractor shall so notify the Contracting Officer and shall communicate with the loss and salvage organization, if any, designated by the Contracting Officer. With the assistance of any such organization, the Contractor shall take all reasonable action to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the affected Government property in the best possible order, and furnish to the Contracting Officer a statement of --

(i) The lost, destroyed, or damaged Government property;

(ii) The time and origin of the loss, destruction, or damage;

(iii) All known interests in commingled property of which the Government property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

(6) The Contractor shall repair, renovate, and take such other action with respect to damaged Government property as the Contracting Officer directs. If the Government property is destroyed or damaged beyond practical repair, or is damaged and so commingled or combined with property of others (including the Contractor's) that separation is impractical, the Contractor may, with the approval of and subject to any conditions imposed by the Contracting Officer, sell such property for the account of the Government. Such sales may be made in order to minimize the loss to the Government, to permit the resumption of business, or to accomplish a similar purpose. The Contractor shall be entitled to an equitable adjustment in the contract price for the expenditures made in performing the obligations under this subparagraph (g)(6) in accordance with paragraph (h) of this clause. However, the Government may directly reimburse the loss and salvage organization for any of their charges. The Contracting Officer shall give due regard to the Contractor's liability under this paragraph (g) when making any such equitable adjustment.

(7) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or of any reserve covering risk of loss or destruction of, or damage to, Government property; except to the extent that the Government may have expressly required the Contractor to carry such insurance under another provision of this contract.

(8) In the event the Contractor is reimbursed or otherwise compensated for any loss or destruction of, or damage to, Government property, the Contractor shall use the proceeds to repair, renovate, or

replace the lost, destroyed, or damaged Government property or shall otherwise credit the proceeds to, or equitably reimburse the Government, as directed by the Contracting Officer.

(9) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contracting Officer, the Contractor shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of, or damage to, Government property, the Contractor shall enforce for the benefit of the Government the liability of the subcontractor for such loss, destruction, or damage.

(h) **Equitable adjustment.** When this clause specifies an equitable adjustment, it shall be made to any affected contract provision in accordance with the procedures of the Changes clause. When appropriate, the Contracting Officer may initiate an equitable adjustment in favor of the Government. The right to an equitable adjustment shall be the Contractor's exclusive remedy. The Government shall not be liable to suit for breach of contract for --

(1) Any delay in delivery of Government-furnished property;

(2) Delivery of Government-furnished property in a condition not suitable for its intended use;

(3) A decrease in or substitution of Government- furnished property; or

(4) Failure to repair or replace Government property for which the Government is responsible.

(i) **Final accounting and disposition of Government property.** Upon completing this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government property not consumed in performing this contract or delivered to the Government. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of the Government property as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by this contract or paid to the Government as directed by the Contracting Officer. The foregoing provisions shall apply to scrap from Government property; provided, however, that the Contracting Officer may authorize or direct the Contractor to omit from such inventory schedules any scrap consisting of faulty castings or forgings or of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the Contractor's normal practice and account for it as a part of general overhead or other reimbursable costs in accordance with the Contractor's established accounting procedures.

(j) **Abandonment and restoration of Contractor premises.** Unless otherwise provided herein, the Government --

(1) May abandon any Government property in place, at which time all obligations of the Government regarding such abandoned property shall cease; and

(2) Has no obligation to restore or rehabilitate the Contractor's premises under any circumstances (e.g., abandonment, disposition upon completion of need, or contract completion). However, if the Government-furnished property (listed in the Schedule or specifications) is withdrawn or is unsuitable for the intended use, or if other Government property is substituted, then the equitable adjustment under paragraph (h) of this clause may properly include restoration or rehabilitation costs.

(k) **Communications.** All communications under this clause shall be in writing.

(l) **Overseas contracts.** If this contract is to be performed outside the United States of America, its territories, or possessions, the words "Government" and "Government-furnished" (wherever they appear in this clause) shall be construed as "United States Government" and "United States Government- furnished," respectively.

(End of clause)
(R 7-203.21 1970 SEP)
(R 7-402.25, except clause paragraph (c) 1972 SEP)
(R 7-901.5 1970 SEP)
(R 1-7.203-21(a))
(R 1-7.402-25(a))
(R 1-7.402-25(b), except clause paragraph (c))

Alternate I (APR 1984). If the contract is for the conduct of basic or applied research at nonprofit institutions of higher education or at nonprofit organizations whose primary purpose is the conduct of scientific research, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) **Title.** (1) The Government shall retain title to all Government- furnished property.

(2) All Government-furnished property and all property acquired by the Contractor, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this clause. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Government, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

(3) Title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract and that, under the provisions of this contract is to vest in the Government, shall pass to and vest in the Government upon the vendor's delivery of such property. Title to all other property, the cost of which is to be reimbursed to the Contractor under this contract and that under the provisions of this contract is to vest in the Government, shall pass to and vest in the Government upon --

(i) Issuance of the property for use in contract performance;

(ii) Commencement of processing of the property or its use in contract performance; or

(iii) Reimbursement of the cost of the property by the Government, whichever occurs first.

(4) Title to equipment purchased with funds available for research and having an acquisition cost of less than $1,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided, that the Contractor obtained the Contracting Officer's approval before each acquisition. Title to equipment purchased with funds available for research and having an acquisition cost of $1,000 or more shall vest as set forth in the contract. If title to equipment vests in the Contractor under this subparagraph (c)(4), the Contractor agrees that no charge will be made to the Government for any depreciation, amortization, or use under any existing or future Government contract or subcontract thereunder. The Contractor shall furnish the Contracting Officer a list of all equipment to which title is vested in the Contractor under this subparagraph (c)(4) within ten days following the end of the calendar quarter during which it was received.

(5) Vesting title under this paragraph (c) is subject to civil rights legislation, 42 U.S.C. § 2000d. Before title is vested and by signing this contract, the Contractor accepts and agrees that --

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this contemplated financial assistance (title to equipment)."

(R 7-402.25, clause paragraph (c) only 1972 SEP)
(R 1-7.402-25(b), clause paragraph (c) only)

52.245-19 **Government Property Furnished "As Is."**

As prescribed in 45.305(c), insert the following clause in solicitations and contracts when a contract other than a consolidated facilities contract, a facilities acquisition contract, or a facilities use contract is contemplated and Government production and research property is to be furnished "as is." (See 45.106 for additional clauses that may be required):

GOVERNMENT PROPERTY FURNISHED "AS IS" (APR 1984)

(a) The Government makes no warranty whatsoever with respect to Government property furnished "as is," except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation or, if not inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer Any repair or modification of property furnished "as is" shall not affect the title of the Government.

(c) If there is any change in the condition of Government property furnished "as is" from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the Contracting Officer detailing the facts and, as directed by the Contracting Officer, either (1) return such property at the Government's expense or otherwise dispose of the property or (2) effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.

(d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the Government Property clause of this contract.

(End of clause)
(AV7-104.24(e) 1965 APR)

52.228-7001 **Ground and Flight Risk.** As prescribed at 28.306(a)(1), insert the following clause:

GROUND AND FLIGHT RISK (OCT 1975)

(a) Notwithstanding any other provisions of this contract, except as may be specifically provided in the Schedule as an exception to this clause, the Government, subject to the definitions and limitations of this clause, assumes the risk of damage to or loss or destruction of, aircraft "in the open", during "operation", and in "flight", as those terms are defined below, and agrees that the Contractor shall not be liable to the Government for any such damage, loss, or destruction, the risk of which is so assumed by the Government.

(b) For the purpose of this clause:

(i) Unless otherwise specifically provided in the Schedule, the term "aircraft" means --

(A) aircraft (including (I) complete aircraft, and (II) aircraft in the course of being manufactured, disassembled, or reassembled; provided, that an engine or a portion of a wing or a ...ng is attached to a fuselage of such aircraft) to be furnished to the Government under this contract (...nether before or after acceptance by the Government; and

(B) aircraft (regardless of whether in a state of disassembly or reassembly) furnished by the Government to the Contractor under this contract; including all property installed therein, or in the process of installation, or temporarily removed from such aircraft; provided, however, that such aircraft and property are not covered by a separate bailment agreement.

(ii) The term "in the open" means located wholly outside of buildings on the Contractor's premises or at such other places as may be described in the Schedule as being in the open for the purposes of this clause, except that aircraft furnished by the Government shall be deemed to be in the open at all times while in Contractor's possession, care, custody, or control.

(iii) The term "flight" means any flight demonstration, flight test, taxi test, or other flight, made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the . . . . .* With respect to land based aircraft "flight" shall commence with the taxi roll from a flight line on the Contractor's premises, and continue until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises; with respect to seaplanes, "flight" shall commence with the launching from a ramp on the Contractor's premises and continue until the aircraft has completed its landing run upon return and is beached at a ramp on the Contractor's premises; with respect to helicopters, "flight" shall commence upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continue until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged; and with respect to vertical take-off aircraft, "flight" shall commence upon disengagement from any launching platform or device on the Contractor's premises, provided, however, that aircraft off the Contractor's premises shall be deemed to be in flight when on the ground or water only during periods of reasonable duration following emergency landing, other landings made in the performance of this contractor, or landings approved by .....* in writing.

(iv) The term "Contractor's premises" means those premises designated as such in the Schedule or in writing by the .....* and any other place to which aircraft are moved for the purpose of safeguarding the Aircraft.

(v) The term "operation" means operations and tests, other than on any production line, of aircraft, when not in flight, whether or not the aircraft is in the open or in motion during the making of any such operations or tests, and includes operations and tests of equipment, accessories, and power plants, only when installed in aircraft.

(vi) The term "flight crew member" means the pilot, the co-pilot and unless otherwise specifically provided in the Schedule, the flight engineer, navigator, bombardier-navigator, and defensive systems operator, when required, or assigned to their respective crew positions, to conduct any flight on behalf of the Contractor.

(c)(1) The Government's assumption of risk under this clause, as to aircraft in the open, shall continue in effect unless terminated pursuant to subparagraph (3) below. Where the .....* finds that any of such aircraft is in the open under unreasonable conditions, he shall notify the Contractor in writing of the conditions he finds to be unreasonable and require the Contractor to correct such conditions within a reasonable time.

(2) Upon receipt of such notice, the contractor shall act promptly to correct such conditions, regardless of whether he agrees that such conditions are in fact unreasonable. To the extent that the Contracting Officer may later determine that such conditions were not in fact unreasonable, an equitable adjustment shall be made in the contract price to compensate the Contractor for any additional costs he incurred in correcting such conditions and the contract shall be modified in writing accordingly. Any dispute as to the unreasonableness of such conditions or the equitable adjustment shall be deemed to be a dispute concerning a question of the fact within the meaning of the clause of this contract entitled "Disputes".

(3) If the.....* finds that the Contractor failed to act promptly to correct such conditions or has failed to correct such conditions within a reasonable time, he may terminate the Government's assumption of risk under this clause, as to any of the aircraft which is in the open under such conditions, such terminations to be effective at 12:01 A.M. on the fifteenth day following the day of receipt by the Contractor of written notice thereof. If the Contracting Officer later determines that the Contractor acted promptly to correct such conditions or that the time taken by the Contractor was not in fact unreasonable, an equitable adjustment shall, notwithstanding paragraph (g) of this clause, be made in the contract price to compensate the Contractor for any additional costs he incurred as a result of termination of the Government's assumption of risk under this clause and the contract shall be modified in writing accordingly. Any dispute as to whether the Contractor failed to act promptly to correct such conditions, or as to the reasonableness of the time for correction of such conditions, or as to such equitable adjustment, shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(4) In the event the Government's assumption of risk under this clause is terminated in accordance with (3) above, the risk of loss with respect to Government-furnished property shall be determined in accordance with the clause of this contract, if any, entitled "Government Property" until the Government's assumption of risk is reinstated in accordance with (5) below.

(5) When unreasonable conditions have been corrected, the Contractor shall promptly notify the Government thereof. The Government may elect to again assume the risks and relieve the Contractor of liabilities as provided in this clause, or not, and the .....* shall notify the Contractor of the Government's election. If, after correction of the unreasonable conditions the Government elects to again assume such risks and relieve the Contractor of such liabilities, the Contractor shall be entitled to an equitable adjustment in the contract price for costs of insurance, if any, extending from the end of the third working day after the Contractor notifies the Government of such correction until the Government notifies the Contractor of such election. If the Government elects not to again assume such risks, and such conditions have in fact been corrected, the Contractor shall be entitled to an equitable adjustment for costs of insurance, if any, extending after such third working day.

(d) The Government's assumption of risk shall not extend to damage to, or loss or destruction of, such aircraft:

(i) resulting from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open, and during operation, in accordance with sound industrial practice (the term "Contractor's managerial personnel" means the Contractor's directors, officers, and any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant or separate location at which this contract is performed, or a separate and complete major industrial operation in connection with the performance of this contract);

(ii) sustained during flight if the flight crew members conducting such flight have not been approved in writing by the .....*;

(iii) while in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(iv) to the extent that such damage, loss or destruction is in fact covered by insurance;

(v) consisting of wear and tear, deterioration (including rust and corrosion), freezing, or mechanical, structural, or electrical breakdown or failure, unless such damage is the result of other loss, damage consists of reasonable wear and tear or deterioration, or results from inherent vice in such property, this exclusion shall not apply; or

(vi) sustained while the aircraft is being worked upon and directly resulting therefrom, including but not limited to any repairing, adjusting, servicing or maintenance operation, unless such damage, loss, or destruction, is of a type which would be covered by insurance which would customarily have been maintained by the Contractor at the time of such damage, loss, or destruction, but for the Government's assumption of risk under this clause.

(e) With the exception of damage to, or loss or destruction of aircraft in "flight", the Government's assumption of risk under this clause shall not extend to the first $1,000 of loss or damage resulting from each event separately occurring. The Contractor assumes the risk of and shall be responsible for the first $1,000 of loss of or damage to aircraft "in the open" or during "operation" resulting from each event separately occurring, except for reasonable wear and tear and except to the extent the loss or damage is caused by negligence of Government personnel. If the Government elects to require that the aircraft be replaced or restored by the contractor to the condition in which it was immediately prior to the damage, the equitable adjustment in the price authorized by paragraph (i) below shall not include the dollar amount of the risk assumed by the Contractor under this paragraph. In the event the Government does not elect repair or replacement, the Contractor agrees to credit the contract price or pay the Government $1,000 (or the amount of the loss is smaller) as directed by the Contracting Officer.

(f) A subcontractor shall not be relieved from liability for damage to, or loss or destruction of, aircraft while in his possession or control, except to the extent that the subcontract, with the prior written approval of the Contracting Officer, provides for relief of the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of such aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract. Where a subcontractor has not been relieved from liability for any damage, loss, or destruction of aircraft and any damage, loss, or destruction occurs, the Contractor shall enforce the liability of the subcontractor for such damage to, or loss or destruction of, the aircraft for the benefit of the Government.

(g) The Contractor warrants that the contract price does not and will not include, except as may be otherwise authorized in this clause, any charge or contingency reserve for insurance (including self-insurance funds or reserves) covering any damage to, or loss or destruction of, aircraft while in the open, during operation, or in flight, the risk of which has been assumed by the Government under the provision of this clause, whether or not such assumption may be terminated as to aircraft in the open.

(h) In the event of damage to, or loss or destruction of, aircraft in the open, during operation, or in flight, the Contractor shall take all reasonable steps to protect such aircraft from further damage, separate damaged and undamaged aircraft, put all aircraft in the best possible order and further, except in cases covered by (e) above, the Contractor should furnish to the.....* a statement of:

(i) the damaged, lost, or destroyed aircraft;

(ii) the time and origin of the damage, loss or destruction;

(iii) all known interests in commingled property of which aircraft are a part; and

(iv) the insurance, if any, covering any part of the interest in such commingled property. Except in cases covered by (e) above, an equitable adjustment shall be made in the amount due under this contract for expenditures made by the Contractor in performing his obligations under this paragraph (h) and this contract shall be modified in writing accordingly.

(i) If prior to delivery and acceptance by the Government any aircraft is damaged, lost, or destroyed and the Government has under this clause assumed the risk of such damage, loss or destruction, the Government shall either (1) require that such aircraft be replaced or restored by the Contractor to the condition in which it was immediately prior to such damage, or (2) shall terminate this contract with respect to such aircraft. In the event that the Government requires that the aircraft be replaced or restored, an equitable adjustment shall be made in the amount due under this contract and in the time required for its performance, and this contract shall be modified in writing accordingly. If, in the alternative, this contract is terminated under this paragraph with respect to such aircraft and under this clause the Government has assumed the risk of such damage, loss, or destruction, the Contractor shall be paid the contract price for said aircraft (or, if applicable, any work to be performed on said aircraft) less such amounts as the Contracting Officer determines (1) that it would have cost the Contractor to complete the aircraft (or any work to be performed on said aircraft) together with anticipated profit, if any, on any such uncompleted work, and (2) to be the value, if any, of the damaged aircraft or any remaining portion thereof retained by the Contractor. The Contracting Officer shall have the right to prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any remaining parts thereof; and, if any additional costs of such disposition are incurred by the Contractor, a further equitable adjustment will be

made in the amount due to the Contractor. Failure of the parties to agree upon an equitable adjustment or upon the amount to be paid in the event of termination of the contract with respect to any aircraft, shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(j) In the event the Contractor is at any time reimbursed or compensated by any third person for any damage, loss, or destruction of any aircraft, the risk of which has been assumed by the Government under the provisions of this clause and for which the Contractor has been compensated by the Government, he shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such damage, loss, or destruction and, upon the request of the.....*, shall at the Government's expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation in favor of the Government) in obtaining recovery.

(End of Clause)

*In the foregoing clause, insert in contracts of the Department of the Army, the Department of the Navy, the Department of the Air Force, and in contracts to be administered by the Defense Contract Administration Services the activity designated in combined regulation identified as Air Force Regulation 55-22, Army Regulation 95-20, NAVAIR Instruction 3710.1A, Defense Logistics Agency Regulation 8210.1, dated 5 October 1971, subject: Requirements for Contractor Operating Procedures and Flight Crews, enclosure 1.

52.228-7002 **Flight Risks.** As prescribed at 28.307-2(70)(1), insert the following clause:

FLIGHT RISKS (OCT 1975)

(a) Notwithstanding any other provision of this contract, and particularly subparagraph (g)(1) of the "Government Property" clause and paragraph (c) of the "Insurance--Liability to Third Persons" clause, the Contractor shall not (i) be relieved of liability for, damage to, or loss or destruction of, aircraft sustained during flight, or (ii) be reimbursed for liabilities to third persons for loss of or damage to property, or for death or bodily injury, which are caused by aircraft during flight, unless the flight crew members have previously been approved in writing by.....* (see footnote at end of clause.)

(b) For purposes of this clause:

(i) Unless otherwise specifically provided in the Schedule, the term "aircraft" means any aircraft, whether furnished by the Contractor under this contract (either before or after acceptance by the Government) or furnished by the Government to the Contractor under this contract, including all Government Property placed or installed therein or attached thereto; provided, however, that such aircraft and property are not covered by a separate bailment agreement.

(ii) The term "flight" means any flight demonstration, flight test, taxi test, or other flight, made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the .....* (see footnote at end of clause.) As to land based aircraft, "flight" shall commence with the taxi roll to a flight line; as to sea planes, "flight" shall commence with the launching from a ramp and continue until the aircraft has completed its landing run and is beached at a ramp; as to helicopters, "flight" shall commence upon engagement of the rotors for the purpose of take-off and continue until the aircraft has returned to the ground and rotors are disengaged; and for vertical take-off aircraft, "flight" shall commence upon engagement from any launching platform or device and continue until the aircraft has been re-engaged to any launching platform or device.

(iii) The term "flight crew members" means the pilot, the co-pilot and, unless otherwise specifically provided in the Schedule, the flight engineer, navigator, bombardier-navigator, and defense systems operator, when required, or assigned to their respective crew positions, to conduct any flight on behalf of the Contractor.

(c) If any aircraft is damaged, lost, or destroyed during flight, and if the amount of such damage, loss, or destruction exceeds one hundred thousand dollars ($100,000) or twenty percent (20%) of the estimated cost (exclusive of any fee) of this contract, whichever is less, and if the Contractor is not liable for the damage, loss or destruction pursuant to the "Government Property" clause of this contract together with paragraph (a) above, then an equitable adjustment for any resulting repair, restoration, or replacement that is required under this contract shall be made (i) in the estimated cost, delivery schedule, or both, and (ii) in the amount of any fee to be paid to the Contractor, and the contract shall be modified in writing accordingly; provided, in determining the amount of adjustment in the fee that is equitable, any fault of the Contractor, his employees, or any subcontractor, which materially contributed to the damage, loss, or destruction shall be taken into consideration. Failure to agree on any adjustment shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(End of Clause)

*In the foregoing clause, insert in contracts of the Department of the Army, the Department of the Navy, the Department of the Air Force, and in contracts to be administered by the Defense Contract Administration Services the activity designated in combined regulation identified as Air Force Regulation 55-22, Army Regulation 95-20, NAVAIR Instruction 3710.1A, Defense Logistics Agency Regulation 8210 1, dated 8 October 1971, subject: Requirements for Contractor Operating Procedures and Flight Crews, enclosure 1.

In the foregoing clause, the definition of "aircraft" may be appropriately modified in the Schedule if the contract covers helicopters, vertical take-off aircraft, lighter-than-air airships, or other nonconventional types of aircraft.

52.235-7000 **Indemnification Under 10 U.S.C. § 2354 -- Fixed Price.** As prescribed at 35.071(a), insert the following clause:

INDEMNIFICATION UNDER 10 U.S.C. § 2354 -- FIXED PRICE (APR 1974)

(a) Pursuant to the authority to 10 U.S.C. 2354, notwithstanding any other provisions of this contract, but subject to the following paragraphs of this clause, the Government shall hold harmless and indemnify the Contractor against:

(1) claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;

(2) loss of or damage to property of the Contractor, and loss of use of such property, but excluding loss of profit; and

(3) loss of, damage to, or loss of use of property of the Government; to the extent that such a claim, loss or damage (i) arises out of the direct performance of this contract; (ii) is not compensated by insurance or otherwise; and (iii) results from a risk defined in this contract to be unusually hazardous. Any such claim, loss, or damage within deductible amounts of Contractor's insurance shall not be covered under this clause.

(b) The Government shall not be liable for any such claim, loss or damage that results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the

part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the performance of this contract. The Contractor shall not be indemnified under this clause for liability assumed under any contract or agreement (except for subcontracts which are covered by paragraph (d) below) unless such assumption of liability has been specifically approved by the Contracting Officer; (or in contracts with the Department of the Navy, *The Department.)*

(c) No payment shall be made by the Government under this clause unless the amount thereof shall first have been certified to be just and reasonable by the Secretary or his representative designated for such purpose. Such payments shall be made from funds as stated in 10 U.S.C. § 2354. The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous. Such a subcontract shall provide the same papers and the like, between the Contractor and the subcontractor as are established by this clause. The Contracting Officer may also approve similar indemnification of lower tier subcontractors upon the same terms and conditions. Subcontractors providing for indemnification within the purview of this clause shall entitle the Contractor or the Government, or both, to direct, participate in, and supervise the settlement or defense of relevant actions and claims. The Government shall indemnify the Contractor with respect to his obligation to subcontractors under subcontract provisions thus approved by the Contracting Officer. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to persons to whom the subcontractors may be liable.

(e) If insurance coverage maintained by the Contractor on the date of the execution of this contract is reduced, the liability of the Government under this clause shall not, by reason of such reduction, be increased to cover risks theretofore insured, unless the Contracting Officer consents thereto in consideration of an equitable adjustment to the Government, if appropriate, of the price in a fixed-price contract, or the fee in a cost-reimbursement type contract, in such amount as the parties may agree.

(f) The Contractor shall (1) promptly notify the Contracting Officer of any occurrence, action or claim he learns of that reasonably may be expected to involve indemnification under this clause, (ii) furnish evidence or proof of any claim, loss or damage in the manner and form required by the Government, and (iii) immediately furnish to the Government copies of all pertinent papers received by the Contractor. The Government may direct, participate in, and supervise the settlement or defense of any such claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required, in regard to such settlement or defense.

(g) The Contractor shall procure and maintain, to the extent available, such insurance against unusually hazardous risks as the Contracting Officer (or in contracts with Department of the Navy, *The Department)* may from time to time require or approve. All such insurance shall be in such form, in the amounts, for the periods of time, at such rates, and with such insurers, as the Contracting Officer (or in contracts with Department of the Navy, *The Department)* may from time to time require or approve. The obligations of the Government under this clause shall not apply to claims, loss or damage to the extent that insurance is available and is either required or approved pursuant to this paragraph. The Contractor shall be reimbursed the cost of any such insurance in excess of that maintained by the Contractor as of the date of this contract, to the extent the cost thereof is properly allocable to this contract and is not included in the contract price.

(End of clause)

52.235-7001 **Indemnification Under 10 U.S.C. § 2354 - Cost Reimbursement.** As prescribed at 35.071(b), insert the following clause.

INDEMNIFICATION UNDER 10 U.S.C. § 2354 -- COST REIMBURSEMENT
(APR 1974)

(a) Pursuant to the authority of 10 U.S.C. § 2354, notwithstanding any other provision of this contract, but subject to the following paragraphs of this clause, the Government shall hold harmless and indemnify the Contractor against:

(1) claims (including reasonable expenses of litigation or settlement) by third persons (including employees of the Contractor) for death, bodily injury (including sickness or disease), or loss of, damage to, or loss of use of property;

(2) loss of or damage to property of the Contractor, and loss of use of such property, but excluding loss of profit; and

(3) loss of, damage to, or loss of use of property of the Government; to the extent that such a claim, loss or damage (i) arises out of the direct performance of this contract; (ii) is not compensated by insurance or otherwise; and (iii) results from a risk defined in this contract to be unusually hazardous. Any such claim, loss, or damage within deductible amounts of Contractor's insurance shall not be covered under this clause.

(b) The Government shall not be liable for any such claim, loss or damage that results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the performance of this contract. The Contractor shall not be indemnified under this clause for liability assumed under any contract or agreement (except for subcontracts which are covered by paragraph (d) below) unless such assumption of liability has been specifically approved by the Contracting Officer, (or in contracts with the Department of the Navy, *The Department).*

(c) No payment shall be made by the Government under this clause unless the amount thereof shall first have been certified to be just and reasonable by the Secretary or his representative designated for such purpose. Such payments shall be made from funds as stated in 10 U.S.C. § 2354. The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(d) With the prior written approval of the Contracting Officer, the Contractor may include in any subcontract under this contract the same provisions as those in this clause, whereby the Contractor shall indemnify the subcontractor against any risk defined in this contract to be unusually hazardous.

Such a subcontract shall provide the same rights and duties, and the same provisions for notice, furnishing of papers, and the like, between the Contractor and the subcontractor as are established by this clause. The Contracting Officer may also approve similar indemnification of lower tier subcontractors upon the same terms and conditions. Subcontractors providing for indemnification within the purview of this clause shall entitle the Contractor or the Government, or both, to direct, participate in, and supervise the settlement or defense of relevant actions and claims. The Government shall indemnify the Contractor with respect to his obligations to subcontractors under subcontract provisions thus approved by the Contracting Officer. The Government may discharge its obligations under this paragraph by making payments directly to subcontractors or to persons to whom the subcontractors may be liable.

(e) If insurance coverage maintained by the Contractor on the date of the execution of this contract is reduced, the liability of the Government under this clause shall not, by reasons of such reduction, be increased to cover risks theretofore insured, unless the Contracting Officer consents thereto in consideration of an equitable adjustment to the Government, if appropriate, of the price in a fixed-price contract, or the fee in a cost-reimbursement type contract, in such amount as the parties may agree.

(f) In addition to the Contractor's responsibilities under the "Insurance--Liability to Third Persons" clause of this contract, which are hereby made applicable to claims under this clause, the Contractor

shall (1) promptly notify the Contracting Officer of any occurrence he learns of that reasonably may be expected to involve indemnification under this clause, (2) furnish evidence or proof of any claim, loss or damage covered by this clause in the manner and form required by the Government, and (3) to the extent required by the Government, permit and authorize the Government to direct, participate in, and supervise the settlement or defense of any such claim or action. The cost of insurance (including self insurance), covering a risk defined in this contract as unusually hazardous, shall not be reimbursed either as a direct or indirect cost except to the extent that such insurance has been required or approved under the "Insurance--Liability to Third Persons" clause hereof.

(g) The "Limitation of Cost" clause of this contract does not apply to the Government's obligations under this clause. Such obligations shall be excepted from the release required under the "Allowable Cost, Fee, and Payment" clause of this contract.

(h) For purposes of this clause, a claim, loss or damage shall be considered to have arisen out of the direct performance of this contract if the cause for such claim, loss or damage occurred during the period of performance of this contract or as a result of the performance of this contract.

(End of Clause)

CHAPTER FIFTEEN

CLAUSES

52.203-1 **Officials Not to Benefit.**

As prescribed in 3.102-2, insert the following clause in solicitations and contracts, except those related to agriculture that are exempted by 41 U.S.C. § 22:

OFFICIALS NOT TO BENEFIT (APR 1984)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit arising from it. However, this clause does not apply to this contract to the extent that this contract is made with a corporation for the corporation's general benefit.

(End of Clause)
(R 7-103.19 1949 JUL)
(R 1-7.102-17)

52.203-3 **Gratuities.**

As prescribed in 3.202, insert the following clause in solicitations and contracts, except those for personal services and those between military departments or defense agencies and foreign governments that do not obligate any funds appropriated to the Department of Defense:

GRATUITIES (APR 1984)

(a) The right of the Contractor to proceed may be terminated by written notice if, after notice and hearing, the agency head or a designee determines that the Contractor, its agent, or another representative --

(1) Offered or gave a gratuity (e.g., an entertainment or gift) to an officer, official, or employee of the Government; and

(2) Intended, by the gratuity, to obtain a contract or favorable treatment under a contract.

(b) The facts supporting this determination may be reviewed by any court having lawful jurisdiction.

(c) If this contract is terminated under paragraph (a) above, the Government is entitled --

(1) To pursue the same remedies as in a breach of the contract; and

(2) In addition to any other damages provided by law, to exemplary damages of not less than 3 nor more than 10 times the cost incurred by the Contractor in giving gratuities to the person concerned, as determined by the agency head or a designee. (This subparagraph (c)(2) is applicable only if this contract uses money appropriate to the Department of Defense.)

(d) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)
(R 7-104.16 1952 MAR)

52.203-5 **Covenant Against Contingent Fees.**

As prescribed in 3.404(c), insert the following clause in all solicitations and contracts.

COVENANT AGAINST CONTINGENT FEES
(APR 1984)

(a) The Contractor warrants that no person or agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

(b) "Bona fide agency", as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employee", as used in this clause, means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain any Government contract or contracts through improper influence.

"Contingent fee", as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence", as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other than the merits of the matter.

(End of clause)
(R 7-103.20 1958 JAN)
(R 1-1.503)
(R 1-7.102-18)

52.215-1 **Examination of Records by Comptroller General.**

As prescribed in 15.106-1(b), when contracting by negotiation (including small business restricted advertising), insert the following clause in solicitations and contracts except when (a) making small purchases (see Part 13), (b) contracting for utility services at rates not exceeding those established to apply uniformly to the public, plus any applicable reasonable connection charge, or (c) making contracts with foreign contractors for which the agency head authorizes omission under Subpart 25.9:

EXAMINATION OF RECORDS BY COMPTROLLER GENERAL (APR 1984)

(a) This clause applies if this contract exceeds $10,000 and was entered into by negotiations.

(b) The Comptroller General of the United States or a duly authorized representative from the General Accounting Office shall, until 3 years after final payment under this contract or for any shorter period specified in Federal Acquisition Regulation (FAR) Subpart 4.7, Contractor Records Retention, have access to and the right to examine any of the Contractor's directly pertinent books, documents, papers, or other records involving transactions related to this contract.

(c) The Contractor agrees to include in first-tier subcontracts under this contract a clause to the effect that the Comptroller General or a duly authorized representative from the General Accounting Office shall, until 3 years after final payment under the subcontract or for any shorter period specified in FAR Subpart 4.7, have access to and the right to examine any of the subcontractor's directly pertinent books, documents, papers, or other records involving transactions related to the subcontract. "Subcontract," as used in this clause, excludes (1) purchase orders not exceeding $10,000 and (2) subcontracts or purchase orders for public utility services at rates established to apply uniformly to the public, plus any applicable reasonable connection charge.

(d) The periods of access and examination in paragraphs (b) and (c) above for records relating to (1) appeals under the Disputes clause, (2) litigation or settlement of claims arising from the performance of this contract, or (3) costs and expenses of this contract to which the Comptroller General or a duly authorized representative from the General Accounting Office has taken exception shall continue until

such appeals, litigation, claims, or exceptions are disposed of.

(End of clause)
(R 7-104.15 1975 JUN)
(R 1-7.103-3)

52.215-22 **Price Reduction for Defective Cost or Pricing Data.**

As prescribed in 15.804-8(a), when contracting by negotiation, insert the following clause in solicitations and contracts when it is contemplated that cost or pricing data will be required (see 15.804-2):

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA (APR 1984)

(a) If any price, including profit or fee, negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and the contract shall be modified to reflect the reduction.

(b) Any reduction in the contract price under paragraph (a) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(End of Clause)
(R 7-104.29(a) 1970 JAN)
(R 1-3.814-1(a))

52.215-23 **Price Reduction for Defective Cost or Pricing Data- Modifications.**

As prescribed in 15.804-8(b), insert the following clause:

PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS (APR 1985)

a. This clause shall become operative only for any modification to this contract involving a pricing adjustment expected to exceed $100,000, except that this clause does not apply to any modification for which the price is -

(1) Based on adequate price competition;

(2) Based on established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(3) Set by law or regulation.

(b) If any price, including profit or fee, negotiated in connection with any modification under this clause, or any cost reimbursable under this contract, was increased by any significant amount because (1) the Contractor or a subcontractor furnished cost or pricing data that were not complete, accurate, and current as certified in its Certificate of Current Cost or Pricing Data, (2) a subcontractor or prospective subcontractor furnished the Contractor cost or pricing data that were not complete, accurate, and current as certified in the Contractor's Certificate of Current Cost or Pricing Data, or (3) any of these parties furnished data of any description that were not accurate, the price or cost shall be reduced accordingly and

the contract shall be modified to reflect the reduction. This right to a price reduction is limited to that resulting from defects in data relating to modifications for which this clause becomes operative under paragraph (a) above.

c. Any reduction in the contract price under paragraph (b) above due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective cost or pricing data.

(End of clause)

52.236-5 **Material and Workmanship.**

As prescribed in 36.505, insert the following clause in solicitations and contracts when a fixed-price construction contract is contemplated:

MATERIAL AND WORKMANSHIP (APR 1984)

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract.

(b) The Contractor shall obtain the Contracting Officer's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the Contracting Officer the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the Contracting Officer, the Contractor shall also obtain the Contracting Officer's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.

(c) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)
(R 7-602.9 1965 JUN)

52.236-6 **Superintendence by the Contractor.**

As prescribed in 36.506, insert the following clause in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The contracting officer may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be within the small purchase limitation.

SUPERINTENDENCE BY THE CONTRACTOR
(APR 1984)

At all times during performance of this contract and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the work a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(End of Clause)
(R 7-602.12 1978 OCT)
(R 1-7.602-12)

5.236-7 **Permits and Responsibilities.**

As prescribed in 36.507, insert the following clause in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated.

PERMITS AND RESPONSIBILITIES (APR 1984)

(a) The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(End of Clause)
(R 7-602.13 1974 JUN)
(R 1-7.602-13)

52.244-1 **Subcontracts (Fixed-Price Contracts).**

As prescribed in 44.204(a)(1)(i), insert the following clause.

The threshhold in subparagraphs (b)(2) and (b)(3) of the clause may be lowered when closer surveillance of subcontracting is necessary because of the nature of the industry involved, criticality of the work expected to be subcontracted, absence of competition in placing the prime contract, uncertainties as

to the adequacy of the contractor's purchasing system, or novelty of the supplies or services being purchased.

SUBCONTRACTS (FIXED-PRICE CONTRACTS) (JAN 86)

(a) This clause does not apply to firm-fixed-price contracts and fixed-price contracts with economic price adjustment. However, it does apply to subcontracts resulting from unpriced modifications to such contracts.

(b) "Subcontract", as used in this clause, includes but is not limited to purchase orders, and changes and modifications to purchase orders. The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if the Contractor does not have an approved purchasing system and if the subcontract --

(1) Is to be a cost-reimbursement, time-and-materials, or labor-hour contract estimated to exceed $25,000 including any fee;

(2) Is proposed to exceed $100,000; or

(3) Is one of a number of subcontracts with a single subcontractor, under this contract, for the same or related supplies or services, that in the aggregate are expected to exceed $100,000.

(c) The advance notification required by paragraph (b) above shall include --

(1) A description of the supplies or services to be subcontracted;

(2) Identification of the type of subcontract to be used;

(3) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained;

(4) The proposed subcontract price and the Contractor's cost or price analysis;

(5) The subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions;

(6) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract; and

(7) A negotiation memorandum reflecting --

(i) The principal elements of the subcontract price negotiations;

(ii) The most significant considerations controlling establishment of initial or revised prices;

(iii) The reason cost or pricing data were or were not required;

(iv) The extent, if any, to which the Contractor did not rely on the subcontractor's cost or pricing data in determining the price objective and in negotiating the final price;

(v) The extent, if any, to which it was recognized in the negotiation that the subcontractor's cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and subcontractor; and the effect of any such defective data on the total price negotiated; and

(vi) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(vii) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation shall identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(d) The Contractor shall obtain the Contracting Officer's written consent before placing any subcontract for which advance notification is required under paragraph (b) above. However, the Contracting Officer may ratify in writing any such subcontract. Ratification shall constitute the consent of the Contracting Officer.

(e) Even if the Contractor's purchasing system has been approved, the Contractor shall obtain the Contracting Officer's written consent before placing subcontracts that have been selected for special surveillance and so identified in the Schedule of this contract.

(f) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination (1) of the acceptability of any subcontract terms or conditions, (2) of the acceptability of any subcontract price or any amount paid under any subcontract, or (3) to relieve the Contractor of any responsibility for performing this contract.

(g) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement subcontracts shall not exceed the fee limitations in sub-section 16.301-4 of the Federal Acquisition Regulation (FAR).

CHAPTER SIXTEEN

CLAUSES

52.233-1 Disputes.

As prescribed in 33.014, insert the following clause in solicitations and contracts unless the conditions in 33.003 apply:

DISPUTES (APR 1984)

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. §§ 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding $50,000, the Contractor shall submit with the claim a certification that --

(i) The claim is made in good faith.

(ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and

(iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(3) (i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contractor is not an individual, the certification shall be executed by --

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of the Contractor's affairs.

(e) For Contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month

period as fixed by the Treasury Secretary during the pendency of the claim.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of Clause)
(R 7-103.12 1980 JUN)
(R.FPR Temporary Regulation 55-II 1980 JUN)

Alternate I (APR 1984). If it is determined under agency procedures, that continued performance is necessary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (h) for the paragraph (h) of the basic clause:

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

(AV 7-103.12(h) 1980 JUN)

CHAPTER SEVENTEEN

No Clauses

CHAPTER EIGHTEEN

CLAUSES

52.249-8 Default (Fixed-Price Supply and Service).

As prescribed in 49.504(a)(1), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may also be used when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

DEFAULT (FIXED-PRICE SUPPLY AND SERVICE) (APR 1984)

(a)(1) The Government may, subject to paragraphs (c) and (d) below, by written notice of default to the Contractor, terminate this contract in whole or in part if the Contractor fails to --

(i) Deliver the supplies or to perform the services within the time specified in this contract or any extension;

(ii) Make progress, so as to endanger performance of this contract (but see subparagraph (a)(2) below); or

(iii) Perform any of the other provisions of this contract (but see subparagraph (a)(2) below).

(2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) above, may be exercised if the Contractor does not cure such failure within 10 days (or more if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

(b) If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services. However, the Contractor shall continue the work not terminated.

(c) Except for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.

(d) If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.

(e) If this contract is terminated for default, the Government may require the Contractor to transfer title and deliver to the Government, as directed by the Contracting Officer, any (1) completed supplies, and (2) partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as "manufacturing materials" in this clause) that the Contractor has specifically produced or acquired for the terminated portion of this contract. Upon direction of the Contracting Officer, the Contractor shall also protect and preserve property in its possession in which the Government has an interest.

(f) The Government shall pay contract price for completed supplies delivered and accepted. The Contractor and Contracting Officer shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be

a dispute under the Disputes clause. The Government may withhold from these amounts any sum the Contracting Officer determines to be necessary to protect the Government against loss because of outstanding liens or claims of former lien holders.

(g) If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

(h) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)
(R 1-8.707)
(R 7-103.11 1959 AUG)

52.249-10 **Default (Fixed-Price Construction).**

As prescribed in 49.504(c)(1), insert the following clause in solicitations and contracts for construction when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may also be used when the contract amount is not expected to exceed the small purchase limitation, if appropriate (e.g., if completion dates are essential).

DEFAULT (FIXED-PRICE CONSTRUCTION)
(APR 1984)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. The liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if --

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

(c) If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Government.

(d) The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.

(End of Clause)
(R 1-8.709-1)
(R 7-602.5 1969 AUG)

Alternate I (APR 1984). If the contract is for dismantling, demolition, or removal of improvements, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(R 7-2101.7 1976 OCT)

Alternate II (APR 1984). If the contract is to be awarded during a period of national emergency, subparagraph (b)(1) below may be substituted for subparagraph (b)(1) of the basic clause:

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers; and

(R 7-602.5 1969 AUG)
(R 1-16.404(e))

Alternate III (APR 1984). If the contract is for dismantling, demolition, or removal of improvements and is to be awarded during a period of national emergency, substitute the following paragraph (a) for paragraph (a) of the basic clause. The following subparagraph (b)(1) may be substituted for subparagraph (b)(1) of the basic clause:

(a)(1) If the Contractor refuses or fails to prosecute the work, or any separable part, with the diligence that will insure its completion within the time specified in this contract, including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work or the part of the work that has been delayed. In this event, the Government may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work.

(2) If title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor has disposed of by bona fide sale or removed from the site.

(3) The Contractor and its sureties shall be liable for any damage to the Government resulting from the Contractor's refusal or failure to complete the work within the specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Government in completing the work.

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if --

(1) The delay in completing the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (i) acts of God or of the public enemy, (ii) acts of the Government in either its sovereign or contractual capacity, (iii) acts of another Contractor in the performance of a contract with the Government, (iv) fires, (v) floods, (vi) epidemics, (vii) quarantine restrictions, (viii) strikes, (ix) freight embargoes, (x) unusually severe weather, or (xi) delays of subcontractors or suppliers at any tier arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and the subcontractor or suppliers; and

(R 7-2101.7 1976 OCT)

52.249-14 Excusable Delays.

As prescribed in 49.505(d), insert the following clause in solicitations and contracts for supplies, services, construction, and research and development on a fee basis whenever a cost- reimbursement contract is contemplated. Also insert the clause in time-and-material contracts, labor-hour contracts, consolidated facilities contracts, and facilities acquisition contracts. When used in construction contracts, substitute the words "completion time" for "delivery schedule" in the last sentence of the clause. When used in facilities contracts, substitute the words "termination of work" for "termination" in the last sentence of the clause.

EXCUSABLE DELAYS (APR 1984)

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless --

(1) The subcontracted supplies or services were obtainable from other sources;

(2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

(End of clause)
(R 7-203.11 1969 AUG)
(R 1-8.708)
(R 7-605.39)
(R 1-7.403-5)
(R 7-702.7)
(R 7-703.7)
(R 1-7.202-11)
(R 1-8.700-2(c))

52.249-1 **Termination for Convenience of the Government (Fixed- Price) (Short Form).**

As prescribed in 49.502(a)(1), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be $100,000 or less, except (a) if use of the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is appropriate (b), in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (c) in contracts for architect-engineer services, or (d) if one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)
(SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the rights, duties, and obligations of the parties, including compensation to the Contractor, shall be in accordance with Part 49 of the Federal Acquisition Regulation in effect on the date of this contract.

(End of clause)
(R 1-8.705-1)
(R 1-8.705-2)
(R 7-103.21(a) 1968 FEB)
(R 7-602.29(b) 1965 JAN)

Alternate I (APR 1984). If the contract is for dismantling, demolition, or removal of improvements, designate the basic clause as paragraph (a) and add the following paragraph (b):

(b) Upon receipt of the termination notice, if title to property is vested in the Contractor under this contract, it shall revest in the Government regardless of any other clause of this contract, except for property that the Contractor (a) disposed of by bona fide sale or (b) removed from the site.

(R 7-2101.8(b) 1976 OCT)

52.249-2 **Termination for Convenience of the Government (Fixed- Price).**

As prescribed in 49.502(b)(1)(i), insert the following clause in solicitations and contracts when a fixed-price contract is contemplated, and the contract amount is expected to be over $100,000, except in contracts for (a) dismantling and demolition, (b) research and development work with an educational or nonprofit institution on a no-profit basis, or (c) architect- engineer services. It shall not be used if the clause at 52.249- 4, Termination for Convenience of the Government (Services) (Short Form), is appropriate (see 49.502(c)), or one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE)
(APR 1984)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as sub contracts in this clause) for materials, services, or facilities, except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts; the approval or ratification will be final for purposes of this clause.

(6) As directed by the Contracting Officer, transfer title and deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (6) above; *provided,* however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(c) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(d) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(e) Subject to paragraph (d) above, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (e) or paragraph (f) below, exclusive of costs shown in subparagraph (f)(3) below, may not exceed the total contract price as reduced by (a) the amount of payments previously made and (2) the contract

price of work not terminated. The contract shall be amended, and the Contractor paid the agreed amount. Paragraph (f) below shall not limit, restrict, or affect the amount that may be agreed upon to be paid under this paragraph.

(f) If the Contractor and the Contracting Officer fail to agree on the whole amount to be paid because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined by the Contracting Officer as follows, but without duplication of any amounts agreed on under paragraph (e) above:

(1) The contract price for completed supplies or services accepted by the Government (or sold or acquired under subparagraph (b)(9) above) not previously paid for, adjusted for any saving of freight and other charges.

(2) The total of --

(i) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but excluding any costs attributable to supplies or services paid or to be paid under subparagraph (f)(1) above;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and

(iii) A sum, as profit on subdivision (i) above determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contacting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(3) The reasonable costs of settlement of the work terminated, including --

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(g) Except for normal spoilage, and except to the extent that the Government expressly assumed the risk of loss, the Contracting Officer shall exclude from the amounts payable to the Contractor under paragraph (f) above, the fair value, as determined by the Contracting Officer, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government or to a buyer.

(h) The cost principles and procedures of Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(i) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (d), (f), or (k), except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (d) or (k), and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (d), (f), or (k), the Government shall pay the Contractor if there is no right of appeal or if no timely appeal has been taken, or (2) the amount finally determined on an appeal.

(j) In arriving at the amount due the Contractor under this clause, there shall be deducted --

(1) All unliquidated advance or other payments to the Contractor under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by the Contractor or sold under the provisions of this clause and not recovered by or credited to the Government.

(k) If the termination is partial, the Contractor may file a proposal with the Contracting Officer for an equitable adjustment of the price(s) of the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination unless extended in writing by the Contracting Officer.

(l)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. § 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(m) Unless otherwise provided in this contract or by statute, the Contractor shall maintain all records and documents relating to the terminated portion of this contract for 3 years after final settlement. This includes all books and other evidence bearing on the Contractor's costs and expenses under this contract. The Contractor shall make these records and documents available to the Government, at the Contractor's office, at all reasonable times, without any direct charge. If approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

(End of clause)
(R 1-8.701)
(R 7-103.21(b) 1974 OCT)

Alternate I (APR 1984). If the contract is for construction, substitute the following paragraph (f) for paragraph (f) of the basic clause:

(f) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (e) above:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of --

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and

(iii) A sum, as profit on (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable costs of settlement of the work terminated, including --

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements), and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(R 1-8.703)
(R 7-602.29(a) 1974 APR)

Alternate II (APR 1984.) If the contract is with an agency of the U.S. Government or with State, local or foreign governments or their agencies, and if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (a)(2) of the basic clause.

(R 8-701(c))

Alternate III (APR 1984). If the contract is for construction and with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, substitute the following paragraph (f) for paragraph (f) of the basic clause. Subparagraph (l)(2) may be deleted from the basic clause if the Contracting Officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(f) If the Contractor and Contracting Officer fail to agree on the whole amount to be paid the Contractor because of the termination of work, the Contracting Officer shall pay the Contractor the amounts determined as follows, but without duplication of any amounts agreed upon under paragraph (e) above:

(1) For contract work performed before the effective date of termination, the total (without duplication of any items) of --

(i) The cost of this work;

(ii) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subdivision (i) above; and

(iii) A sum, as profit on (i) above, determined by the Contracting Officer under 49.202 of the Federal Acquisition Regulation, in effect on the date of this contract, to be fair and reasonable; however, if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, the Contracting Officer shall allow no profit under this subdivision (iii) and shall reduce the settlement to reflect the indicated rate of loss.

(2) The reasonable cost of settlement of the work terminated, including --

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlement); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.

(R 1-8.703)
(R 7-602.29(a) 1974 APR)
(R 8-701(c))

52.249-4 Termination for Convenience of the Government (Services) (Short Form).

As prescribed in 49.502(c), insert the following clause in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the Contracting Officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (SERVICES) (SHORT FORM) (APR 1984)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Government shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

(End of clause)
(R 7-1902.16 1968 FEB)
(R 1-8.705-1)

52.249-6 Termination (Cost-Reimbursement).

As prescribed in 49.503(a)(1), insert the following clause:

TERMINATION (COST-REIMBURSEMENT) (MAY 1986)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part, if --

(1) The Contracting Officer determines that a termination is in the Government's interest; or

(2) The Contractor defaults in performing this contract and fails to cure the default within 10 days (unless extended by the Contracting Officer) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.

(b) The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying whether termination is for default of the Contractor or for convenience of the Government, the extent of termination, and the effective date. If, after termination for default, it is determined that the Contractor was not in default or that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays clause, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Government.

(c) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the notice.

(2) Place no further subcontracts or orders (referred to as sub contracts in this clause), except as necessary to complete the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the Government, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case the Government shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

(5) With approval or ratification to the extent required by the Contracting Officer, settle all outstanding liabilities and termination settlement proposals arising from the termination of subcontracts, the cost of which would be reimbursable in whole or in part, under this contract, approval or ratification will

be final for purposes of this clause.

(6) Transfer title (if not already transferred) and, as directed by the Contracting Officer, deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to the Government, and (iii) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Contractor has been or will be reimbursed under this contract.

(7) Com[illegible] performance of the work not terminated.

(8) Take [illegible] action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which the Government has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (6) above; *provided, however,* that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Government under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

(d) After expiration of the plant clearance period as defined in Subpart 45.6 of the Federal Acquisition Regulation, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request the Government to remove those items or enter into an agreement for their storage. Within 15 days, the Government will accept the items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1-year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Contractor fails to submit the proposal within the time allowed, the Contracting Officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(f) Subject to paragraph (e) above, the Contractor and the Contracting Officer may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The contract shall be amended, and the Contractor paid the agreed amount.

(g) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor, and shall pay that amount, which shall include the following:

(1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination, and those costs that may continue for a reasonable time with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these costs as rapidly as practicable.

(2) The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract if not included in subparagraph (1) above.

(3) The reasonable costs of settlement of the work terminated, including --

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Contractor's termination settlement proposal may be included.

(4) A portion of the fee payable under the contract, determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Government is to the total number of articles (or amount of services) of a like kind required by the contract.

(5) If the settlement includes only fee, it will be determined under subparagraph (g)(4) above.

(h) The cost principles and procedures in Part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.

(i) The Contractor shall have the right of appeal, under the Disputes clause, from any determination made by the Contracting Officer under paragraph (e) or (g) above or paragraph (k) below, except that if the Contractor failed to submit the termination settlement proposal within the time provided in paragraph (e) and failed to request a time extension, there is no right of appeal. If the Contracting Officer has made a determination of the amount due under paragraph (e), (g) or (k), the Government shall pay the Contractor (1) the amount determined by the Contracting Officer if there is no right of appeal or if no timely appeal has been taken, or (2) the amount finally determined on an appeal.

(j) In arriving at the amount due the Contractor under this clause, there shall be deducted --

(1) All unliquidated advance or other payments to the Contractor, under the terminated portion of this contract;

(2) Any claim which the Government has against the Contractor under this contract; and

(3) The agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Contractor or sold under this clause and not recovered by or credited to the Government.

(k) The Contractor and Contracting Officer must agree to any equitable adjustment in fee for the continued portion of the contract when there is a partial termination. The Contracting Officer shall amend the contract to reflect the agreement.

(l)(1) The Government may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Contractor for the terminated portion of the contract, if the Contracting Officer believes the total of these payments will not exceed the amount to which the Contractor will be entitled.

(2) If the total payments exceed the amount finally determined to be due, the Contractor shall repay the excess to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. § 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Contractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Contractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contracting Officer because of the circumstances.

(m) The provisions of this clause relating to fee are inapplicable if this contract does not include a fee.

(End of clause) (R 1-8.702) (R 7-203.10 1973 APR)

Alternate I (APR 1984). If the contract is for construction, substitute the following subparagraph (g)(4) for subparagraph (g)(4) of the basic clause:

(4) A portion of the fee payable under the contract determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

(R 7-605.26 1974 APR)
(R 1-8.700-2(a)(3))

Alternate II (APR 1984). If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, delete subparagraph (1)(2) from the basic clause.

(R 8-702(d))

Alternate III (APR 1984). If the contract is for construction with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, the following subparagraph (g)(4) shall be substituted for subparagraph (g)(4) of the basic clause. Subparagraph (1)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(4) A portion of the fee payable under the contract determined as follows:

(i) If the contract is terminated for the convenience of the Government, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the contract, but excluding subcontract effort included in subcontractors' termination settlement proposals, less previous payments for fee.

(ii) If the contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the actual work in place is to the total work in place required by the contract.

(R 7-605.26 1974 APR)
(R 1-8.700-2(a)(3))
(R 8-702(d))

Alternate IV (APR 1984). If the contract is a time-and- material or labor- hour contract, substitute the following paragraphs (g) and (k) for paragraphs (g) and (k) of the basic clause:

(g) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include --

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination if they are reasonably incurred after the effective date, with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in (i), (ii), or (iii) above, the cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including --

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under (1) above but omit --

(i) Any amount for preparation of the Contractor's termination settlement proposal; and

(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.

(k) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of the price(s) for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

(R 7-901.4 1974 OCT)

Alternate V (APR 1984). If the contract is a time-and- material or labor-hour contract with an agency of the U.S. Government or with State, local or foreign governments or their agencies, substitute the following paragraphs (g) and (k) for paragraphs (g) and (k) of the basic clause. Subparagraph (1)(2) may be deleted from the basic clause if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate.

(g) If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount to be paid because of the termination of work, the Contracting Officer shall determine, on the basis of information available, the amount, if any, due the Contractor and shall pay the amount determined as follows:

(1) If the termination is for the convenience of the Government, include --

(i) An amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the Schedule, less any hourly rate payments already made to the Contractor;

(ii) An amount (computed under the provisions for payment of materials) for material expenses incurred before the effective date of termination, not previously paid to the Contractor;

(iii) An amount for labor and material expenses computed as if the expenses were incurred before the effective date of termination, if they are reasonably incurred after the effective date with the approval of or as directed by the Contracting Officer; however, the Contractor shall discontinue these expenses as rapidly as practicable;

(iv) If not included in (i), (ii), or (iii) above, the cost of settling and paying termination settlement proposals under terminated sub contracts that are properly chargeable to the terminated portion of the contract; and

(v) The reasonable costs of settlement of the work terminated, including --

(A) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(B) The termination and settlement of subcontracts (excluding the amounts of such settlements); and

(C) Storage, transportation, and other costs incurred, reasonably necessary for the protection or disposition of the termination inventory.

(2) If the termination is for default of the Contractor, include the amounts computed under (1) above but omit --

(i) Any amount for preparation of the Contractor's termination settlement proposal; and

(ii) The portion of the hourly rate allocable to profit for any direct labor hours expended in furnishing materials and services not delivered to and accepted by the Government.

(k) If the termination is partial, the Contractor may file with the Contracting Officer a proposal for an equitable adjustment of the prices for the continued portion of the contract. The Contracting Officer shall make any equitable adjustment agreed upon. Any proposal by the Contractor for an equitable adjustment under this clause shall be requested within 90 days from the effective date of termination, unless extended in writing by the Contracting Officer.

(R 7-901.4 1974 OCT)

52.249-12 **Termination (Personal Services).**

As prescribed in 49.505(b), insert the following clause in solicitations and contracts for personal services (see Part 37):

TERMINATION (PERSONAL SERVICES)(APR 1984)

The Government may terminate this contract at any time upon at least 15 days' written notice by the Contracting Officer to the Contractor. The Contractor, with the written consent of the Contracting Officer, may terminate this contract upon at least 15 days' written notice to the Contracting Officer.

(End of clause)
(R 7-503.7 1953 JAN)

52.212-4 **Liquidated Damages--Supplies, Services, or Research and Development.**

As prescribed in 12.204(a), the contracting officer may insert the following clause in solicitations and contracts when a fixed-price contract is contemplated for supplies, services, or research and development (see 12.202):

LIQUIDATED DAMAGES--SUPPLIES, SERVICES, OR RESEARCH AND DEVELOPMENT (APR 1984)

(a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension, the Contractor shall, in place of actual damages, pay to the Government as fixed, agreed, and liquidated damages, for each calendar day of delay the sum of ..... [Contracting Officer insert amount].

(b) Alternatively, if delivery or performance is so delayed, the Government may terminate this contract in whole or in part under the Termination for Default--Supplies and Services clause in this contract and in that event, the Contractor shall be liable for fixed, agreed, and liquidated damages accruing until the time the Government may reasonably obtain delivery or performance of similar supplies or services. The liquidated damages shall be in addition to excess costs under the Termination clause.

(c) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default--Supplies and Services clause in this contract.

(End of clause)
(R 7-105.5 1969 AUG)

52.212-5 **Liquidated Damages--Construction.**

As prescribed in 12.204(b), the contracting officer may insert the following clause in solicitations and contracts for construction, except contracts on a cost-plus-fixed-fee basis (see 12.202):

LIQUIDATED DAMAGES--CONSTRUCTION (APR 1984)

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of ..... [Contracting Officer insert amount] for each day of delay.

(b) If the Government terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If the Government does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

(End of clause)
(R 7-602.5 1969 AUG)
(R 1-18.110(a))
(R 7-603.39 1965 JAN)
(R 1-8.709-1)

Alternate I (APR 1984). If different completion dates are specified in the contract for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.

(R 7-603.39 1977 NOV)

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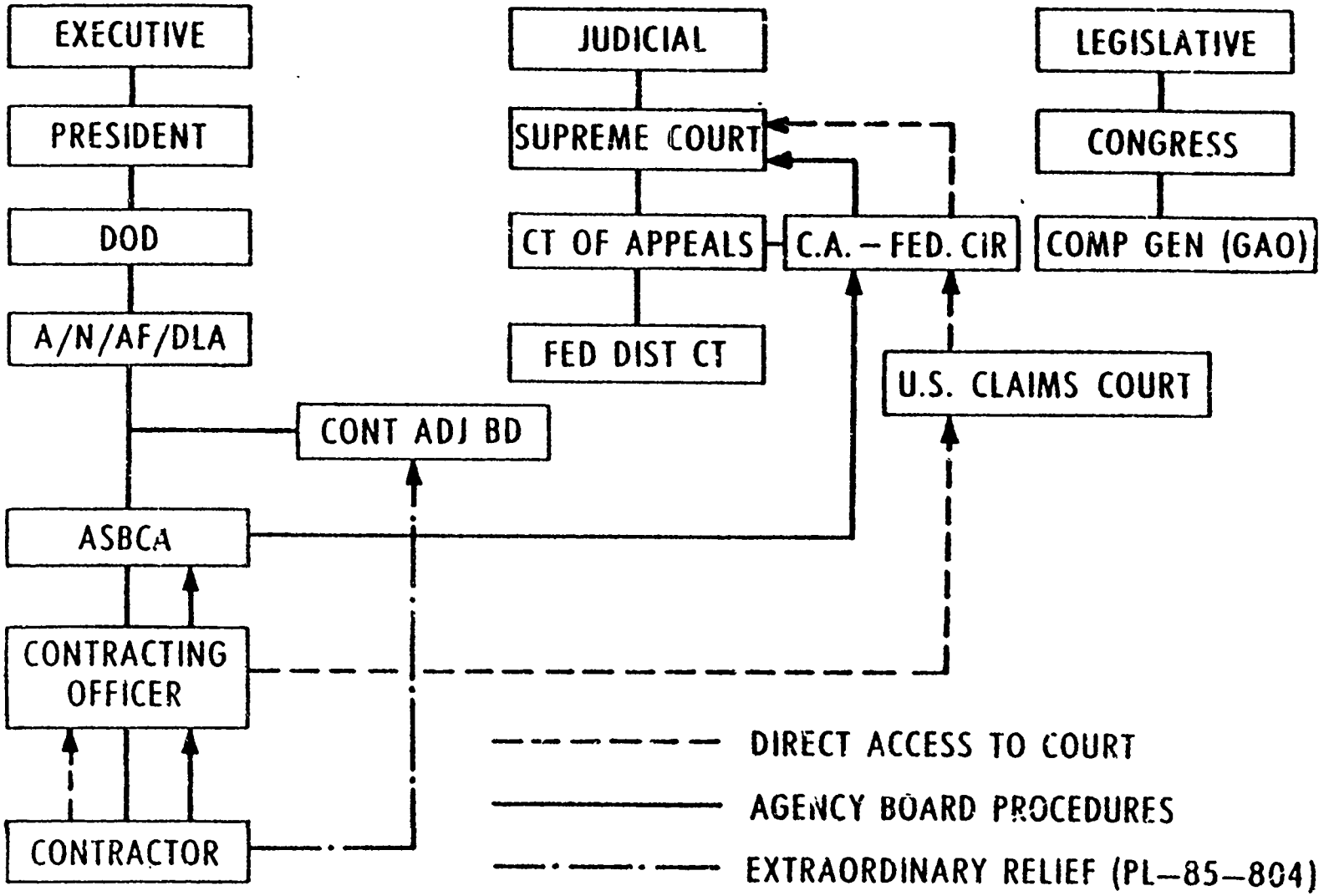
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Appendix E

ROADMAP OF CONTRACTOR REMEDIES

ROADMAP OF CONTRACTOR REMEDIES



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EFF: 1 OCT 82

CHAFTER ONE

STATUTES

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10. Armed Forces.
11. Bankruptcy.
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48. Territories and Insular Possessions
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50. War and National Defense.

TITLE 41
PUBLIC CONTRACTS
CHAPTER 7 - OFFICE OF FEDERAL PROCUREMENT POLICY

§ 401. Congressional declaration of policy

It is the policy of the Congress 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; and

(13) promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required.

(Pub.L. 96-83, § 2, Oct. 10, 1979, 93 Stat. 648, amended Pub.L. 98-191, § 3, Dec. 1, 1983, 97 Stat. 1325.)

§ 402. Congressional 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 procurement policies, regulations, procedures, and forms.

(b) The purpose of this chapter 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.

(Pub.L. 93-400, § 3, Aug. 30, 1974, 88 Stat. 796.)

§ 403. Definition

As used in this chapter --

(1) the term "executive agency" means --

(A) an executive department specified in § 101 of Title 5;

(B) a military department specified in § 102 of such Title;

(C) an independent establishment as defined in § 104(1) of such Title; and

(D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of Title 31;

(2) the term "procurement" includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout;

(3) the term "procurement system" means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function;

(4) the term "single system of Government-wide procurement regulations" means (A) a single Government-wide procurement regulation issued and maintained jointly by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities, title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 *et seq.*), chapter 137 of Title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2451 *et seq.*), and (B) agency acquisition regulations implementing and supplementing the Government-wide procurement regulation issued as provided in clause (A), which shall be limited to (i) regulations essential to implement Government-wide policies and procedures within the agency and (ii) additional policies and procedures required to satisfy the specific and unique needs of the agency; and

(5) the term "standards" means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system; and

(6) the term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition;

(7) the term "full and open competition", when used with respect to a procurement, means that all reasonable sources are permitted to submit sealed bids or competitive proposals on the procurement; and

(8) the term "responsible source" means a prospective contractor who -

(A) has adequate financial resources to perform the contract, or the ability to obtain such resources;

(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

(C) has a satisfactory performance record;

(D) has a satisfactory record of integrity and business ethics;

(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills,

(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

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

(10)(A) the term 'major system' means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

(B) a system shall be considered a major system if (i) the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than $75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than $300,000,000 (based on fiscal year 1980 constant dollars); (ii) a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed $750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a 'major system' established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled system is designated a 'major system' by the head of the agency responsible for the system; and

(11) The term 'item', 'item of supply', or 'supplies' means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an "item".

(Pub.L. 93-400, § 4, Aug 30, 1974, 88 Stat 797, amended Pub.L. 96-83, § 3 Oct 10, 1979, 93 Stat 649; Pub.L. 98-191,§ 4 Dec 1, 1983, 97 Stat 1326.) HR4170 (1984) Competition in Contracting Act of 1984. HR 4209, The Small Business and Federal Procurement Competition Enhancement Act of 1984.

§ 404. Establishment of Office of Federal Procurement Policy; appointment of Administrator

(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").

(b) There shall be at the head of the Office an Administrator for Federal Procurement Policy (hereinafter referred to as the "Administrator"), who shall be appointed by the President, by and with the advice and consent of the Senate.

(Pub.L. 93-400, § 5, Aug. 30, 1974, 88 Stat. 797.)

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agency, the Administrator may prescribe Government-wide procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be followed by executive agencies in the procurement of --

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government- wide regulations, procedures and forms in a timely manner, the Administrator may, with due regard for applicable laws and the program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of --

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to -

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefore or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include --

(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formation of the executive branch position on legislation relating to procurement;

(4) providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;

(5) providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall --

(A) foster and promote Government-wide career management programs for a professional procurement work force; and

(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 executive agencies;

(6) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms;

(7) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government; and

(8) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and interagency groups

In carrying out the functions set forth in subsection (d), the Administrator --

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establis ment, development, and maintenance of a single system of simplified Government-wide procurement : gulations and to assist in the performance of any of the other functions which the Administrator consi rs appropriate.

(f) Oversight of regulations promulgated by other agencies relating to procurement

The Director of the Office of Management and Budget may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to

procurement if the Administrator determines that such rule or regulation is inconsistent with the policies set forth in § 401 of this title or any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

(h) Automatic data processing and telecommunications equipment; real property procurement; Office of Management and Budget

Nothing in this chapter shall be construed to --

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 [41 U.S.C. § 251 *et seq.*] with respect to the procurement of automatic data processing and telecommunications equipment and service or of real property; or

(2) limit the current authorities and responsibilities of the Director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (l) shall be construed to --

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs, to provide Federal-grants or assistance to States and political subdivisions.

(Pub.L. 93-4006, § 6 Aug 30, 1974, 88 Stat 797, amended Pub.L 96-83, § 4 Oct 10, 1979, 93 Stat. § 49; Pub.L. 98-191, § 5, Dec 1, 1983, 97 Stat. 1326.)

§ 406. **Administrative powers**

Upon the request of the Administrator, each executive agency is directed to --

(1) make it services, personnel, and facilities available to the Office to the greatest practicable extent for the performance of functions under this chapter; and

(2) except when prohibited by law, furnish to the Administrator and give him access to all information and records in its possession which the Administrator may determine to be necessary for the performance of the functions of the Office.

(Pub.L. 93-400, § 7, Aug. 30, 1974, 88 Stat. 798.)

§ 407. **Responsiveness to Congress**

(A) Annual reports on activities

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) Submission of policy matter or regulation to Congressional committees

At least 30 days prior to the effective date of any policy or regulation prescribed under § 405(a) of this title, 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) Waiver of notice requirement by President

In the case of an emergency, the President may waive the notice requirement of subsection (b) of this section 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.

(Pub.L. 93-4009 § 8, Aug 30, 1974, 88 Stat 798, amended Pub.L. 96-83, § 5 Oct 10, 1979, 93 Stat 651; Pub. L. 98-191, § 8(a), Dec 1, 1983, 97 Stat 1331.)

§ 408. **Applicability of existing laws**

The authority of an executive agency under any other law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in § 405 of this title. (Pub.L. 93-400, 9, Aug. 30, 1974, 88 Stat. 799)

§ 409. **Effect on existing regulations**

Procurement policies, regulations, procedures, or forms in effect on December 1, 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.

(Pub.L. 93-400 § 10, Aug 30, 1974, 88 Stat 799, amended Pub.L. 96-83,§ 61, Oct 10, 1979, § 9 Stat 651; Pub.L 98-191, § 8(b), Dec 1, 1983, 97 Stat 1331.)

§ 410. **Authorization of appropriations**

There are authorized to be appropriated to carry out the provisions of this chapter, and for no other purpose, $4,500,000 for the fiscal year ending September 30, 1984, and for each of the three succeeding fiscal years.

(Pub.L. 93-400, § 11, Aug 30, 1974, 88 Stat 799, amended Pub.L. 96-83, § 7, Oct 10, 1979, 93 Stat 651; Pub.L. 98-191,§ 6, Dec 1, 1983, 97 Stat 1329.)

§ 411. **Delegation of authority by Administrator**

(a) The Administrator may delegate, and authorize successive redelegations of, any authority, function, or power of the Administrator under this chapter (other than the authority to provide overall direction of Federal procurement policy and to prescribe policies and regulations to carry out such policy), to any other executive agency with the consent of the head of such executive agency or at the direction of the President.

(b) The Administrator may make and authorize such delegations within the Office as he determines to be necessary to carry out the provisions of this chapter.

(Pub.L. 93-400, § 12, Aug 30, 1974, 88 Stat 799 amended Pub.L. 96-83, § 8, Oct 10, 1979, 93 Stat 652;

Pub.L. 98-191 § 8(c), Dec 1, 1983, 97 Stat 1331.)

§ 412. Comptroller General's access to information from Administrator; rule making procedure

(a) The Administrator and personnel in his Office shall furnish such information as the Comptroller General may require for the discharge of his responsibilities. For this purpose, the Comptroller General or his representatives shall have access to all books, documents, papers, and records of the Office.

(b) The Administrator shall, by regulation, require that formal meetings of the Office, as designated by him, for the purpose of developing procurement policies and regulations shall be open to the public, and that public notice of each such meeting shall be given not less than ten days prior thereto.

(Pub.L. 93-400, § 14, Aug. 30, 1974, 88 Stat. 800, amended Pub.L. 96-83, § 9, Oct. 10, 1979, 93 Stat. 652.)

§ 413. Tests of innovative procurement methods and procedures

(a) The Administrator may develop innovative procurement methods and procedures to be tested by selected executive agencies. The innovative procurement methods and procedures tested under this subsection shall be consistent with the policies set forth in § 401 of this title. In developing any program to test innovative procurement methods and procedures under this subsection, the Administrator shall consult with the heads of executive agencies to --

(1) ascertain the need for and specify the objectives of such program;

(2) develop the guidelines and procedures for carrying out such program and the criteria to be used in measuring the success of such program;

(3) evaluate the potential costs and benefits which may be derived from the innovative procurement methods and procedures tested under such program;

(4) select the appropriate executive agencies or components of executive agencies to carry out such program;

(5) specify the categories and types of products or services to be procured under such program; and

(6) develop the methods to be used to analyze the results of such program. A program to test innovative procurement methods and procedures may not be carried out unless approved by the heads of the executive agencies selected to carry out such program.

(b) If the Administrator determines that it is necessary to waive the application of any provision of law in order to carry out a proposed program to test innovative procurement methods and procedures under subsection (a) of this section, the Administrator shall transmit notice of the proposed program to the Committee on Government Operations of the House of Representatives and the Committee on Governmental Affairs of the Senate and request that such committees take such action as may be necessary to provide that such provision of law does not apply with respect to the proposed program. The notification to Congress shall include a description of the proposed program (including the scope and purpose of the proposed program), the procedures to be followed in carrying out the proposed program, the provisions of law affected and any provision of law the application of which must be waived in order to carry out the proposed program and the executive agencies involved in carrying out the proposed program.

(Pub.L. 93-400, § 15, as added Pub.L. 98-191, § 7, Dec. 1, 1983, 97 Stat. 1329.)

§ 414. Executive agency responsibilities

To further achieve 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 effective competition in procurement by the executive agency;

(2) establish clear lines of authority, accountability, and responsibility for procurement decision making within the executive agency, including placing the procurement function at a sufficiently high level in the executive agency to provide --

(A) direct access to the head of the major organizational element of the executive agency served; and

(B) comparative equality with organizational counterparts;

(3) designate a senior procurement executive who shall be responsible for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency; and

(4) develop and maintain a procurement career management program in the executive agency to assure an adequate professional work force.

(Pub.L. 93-400, § 16, as added Pub.L. 98-191,§ 7, Dec. 1, 1983, 97 Stat. 1330.)

§ 415. Studies and reports

(a) The Administrator shall conduct studies and issue a report on the extent of competition in the award of subcontracts by Federal prime contractors including an evaluation of the data available on subcontracts awarded in fiscal year 1982 with respect to (1) the source selection method used in awarding such subcontracts, (2) the type of subcontracts awarded, (3) the dollar value of such subcontracts, (4) the size of the subcontractors which were awarded the subcontract (by number of employees), and (5) the geographical location of such subcontractors. The report shall also include recommendations for improvements, if appropriate, in the extent of competition in the awarding of subcontracts and in the collection of data on such subcontract awards.

(b) The report required under subsection (a) of this section shall be submitted to the Committee on Government Affairs of the Senate and the Committee on Government Operations of the House of Representatives not later than April 15, 1984.

(Pub.L. 93-400, § 17, as added Pub.L. 98-191, § 7, Dec 1, 1983, 97 Stat. 1330.)

Procurement Notice

§ 416(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,

(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 described in subsection (b), or

(iii) solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000, if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors, and

(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation described in subsection (f) --

(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed $10,000, but not to exceed $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

(C) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order.

(2) The Secretary of Commerce shall publish promptly in the *Commerce Business Daily* each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not --

(A) issue the solicitation earlier than 15 days after the day on which the notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that --

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any case, is earlier than the date 30 days after the date the solicitation is issued.

(b) Each notice of solicitation required by subparagraph (A) or (B) of subsection (a)(1) shall include --

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit, or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that --

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which the qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency; and

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

(c)(1) A notice is not required under subsection (a)(1) if --

(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(B) the proposed procurement would result from acceptance of --

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal; or

(ii) a proposal submitted under § 9 of the Small Business Act;

(C) the procurement is made against an order placed under a requirements contract;

(D) the procurement is made for perishable subsistence supplies; or

(E) the procurement is for utility services, other than telecommunication services, and only one source is available.

(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of § 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 253(c)) or paragraph (2), (3), (4), (5), or (7) of § 2304(c) of Title 10, United States Code.

(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(d) An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice under subsection (e). An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

[Pub.L. 98-577, Oct 30, 1984, 98 Stat. 3066]

Record Requirements

§ 417 (a) Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements, other than small purchases, in such fiscal year.

(b) The record established under subsection (a) shall include

(1) with respect to each procurement carried out using competitive procedures --

(A) the date of contract award;

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

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

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures --

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under § 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 253(c) or section 2304(c) of title 10, United States Code, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) The information that is included in such record pursuant to subsection (b)(1) and relates to procurements resulting in the submission of a bid proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures.

(d) The information included in the record established and maintained under subsection (a) shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 6(d)(4).

[Pub.L. 98-369, July 18, 1984, 98 Stat. 1197]

Advocates for Competition

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

(2) The head of each executive agency shall --

(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of the Competition in Contracting Act of 1984 (other than the senior procurement executive designated pursuant to section 16(3) to serve as the advocate for competition;

(B) not assign such officer or employee any duty or responsibility that is inconsistent with the duties and responsibilities of the advocate for competition; and

(C) provide such officer or employee with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

(b) The advocate for competition of an executive agency shall --

(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

(2) review the procurement activities of the executive agency;

(3) identify and report to the senior procurement executive of the executive agency designated pursuant to § 16(3) --

(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

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

(4) prepare and transmit to such senior procurement executive an annual report describing --

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

(B) new initiatives required to increase competition; and

(C) barriers to full and open competition that remain;

(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

(6) recommend to the senior procurement executive of the executive agency a system of personnel and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

(c) The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.

[Pub.L. 98-369, July 18, 1984, 98 Stat. 1197]

Rights in Technical Data

§ 418a. (a) The legitimate proprietary interest of the United States and of a contractor in technical or other data shall be defined in regulations prescribed as part of the single system of Government-wide procurement regulations as defined in § 4(4) of this Act. Such regulations may not impair any right of the United States or of any contractor with respect to patents or copyrights or any other right in technical data otherwise established by law. Such regulations shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949, that the United States may not require persons who have developed products or processes offered or to be offered for sale to the public as a condition for the procurement of such products or processes by the United States, to provide to the United States technical data relating to the design, development, or manufacture of such products or processes (except for such data as may be necessary for the United States to operate and maintain the product or use the process if obtained by the United States as an element of performance under the contract).

(b)(1) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) shall provide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949, that the United States shall have unlimited rights in technical data developed exclusively with Federal funds if delivery of such data --

(A) was required as an element of performance under a contract; and

(B) is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future.

(2) Except as otherwise expressly provided by Federal statute, the regulations prescribed pursuant to subsection (a) shall , ovide, with respect to executive agencies that are subject to the provisions of title III of the Federal Property and Administrative Services Act of 1949, that the United States (and each agency thereof) shall have an unrestricted, royalty-free right to use, or to have its contractors use, for governmental purposes (excluding publication outside the Government) technical data developed exclusively with Federal funds.

(3) The requirements of paragraphs (1) and (2) shall be in addition to and not in lieu of any other rights that the United States may have pursuant to law.

(c) The following factors shall be considered in prescribing regulations pursuant to subsection (a):

(1) Whether the item or process to which the technical data pertains was developed --

(A) exclusively with Federal funds;

(B) exclusively at private expense; or

(C) in part with Federal funds and in part at private expense.

(2) The statement of congressional policy and objectives in § 200 of title 35, the statement of purposes in § 2(b) of the Small Business Innovation Development Act of 1982 (Public Law 97-219; 15 U.S.C. § 638 note), and the declaration of policy in § 2 of the Small Business Act (15 U.S.C. § 631).

(3) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(d) Regulations prescribed under subsection (a) shall require that a contract for property or services entered into by an executive agency contain appropriate provisions relating to technical data, including provisions --

(1) defining the respective rights of the United States and the contractor or subcontractor (at any tier) regarding any technical data to be delivered under the contract;

(2) specifying the technical data, if any, to be delivered under the contract and delivery schedules for such delivery;

(3) establishing or referencing procedures for determining the acceptability of technical data to be delivered under the contract;

(4) establishing separate contract line items for the technical data, if any, to be delivered under the contract;

(5) to the maximum practicable extent, identifying, in advance of delivery, technical data which is to be delivered with restrictions on the rights of the United States to use such data;

(6) requiring the contractor to revise any technical data delivered under the contract to reflect engineering design changes made during the performance of the contract and affecting the form, fit, and function of the items specified in the contract and to deliver such revised technical data to an agency within a time specified in the contract;

(7) requiring the contractor to furnish written assurance at the time the technical data is delivered or is made available that the technical data is complete and accurate and satisfies the requirements of the contract concerning technical data;

(8) establishing remedies to be available to the United States when technical data required to be delivered or made available under the contract is found to be incomplete or inadequate or to not satisfy the requirements of the contract concerning technical data; and

(9) authorizing the head of the agency to withhold payments under the contract (or exercise such other remedies as the head of the agency considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

Publication of Proposed Regulations

§ 418b. (a) Except as provided in subsection (d) of this section, no procurement policy, regulation, procedure, or form (including amendment or modifications thereto) relating to the expenditure of appropriated funds that has (1) a significant effect beyond the internal operating procedures of the agency issuing the procurement policy, regulations, procedures or form, or (2) a significant cost or administrative impact on contractors or offerors, may take effect until 30 days after the procurement policy, regulation, procedure, or form is published for public comment in the Federal Register pursuant to subsection (b).

(b) Subject to subsection (c) of this section, the head of the agency shall cause to be published in the Federal Register a notice of the proposed procurement policy, regulation, procedure, or form and provide for a public comment period for receiving and considering the views of all interested parties on such proposal. The length of such comment period may not be less than 30 days.

(c) Any notice of a proposed procurement policy, regulation, procedure, or form prepared for publication in the Federal Register shall include --

(1) the text of the proposal or, if it is impracticable to publish the full text of the proposal, a summary of the proposal and a statement specifying the name, address, and telephone number of the officer or employee of the executive agency from whom the full text may be obtained; and

(2) a request for interested parties to submit comments on the proposal and shall include the name and address of the officer or employee of the Government designated to receive such comments.

(d)(1) The requirements of subsections (a) and (b) may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with such requirements impracticable.

(2) A procurement policy, regulation, procedure, or form with respect to which the requirements of subsections (a) and (b) are waived under paragraph (1) shall be effective on a temporary basis if --

(A) a notice of such procurement policy, regulation, procedure, or form is published in the Federal Register and includes a statement that the procurement policy, regulation, procedure, or form is

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temporary; and

(B) provision is made for a public comment period of 30 days beginning on the date on which the notice is published.

After considering the comments received, the head of the agency waiving the requirements of subsections (a) and (b) under paragraph (1) may issue the final procurement policy, regulation, procedure, or form.

(b) The procedures required by the amendment made by subsection (a) shall apply with respect to procurement policies, regulations, procedures, or forms that an agency issues in final form on or after the date which is 30 days after the date of enactment of this Act.

Annual Report on Competition

§ 419. (a) Not later than January 31 of each of 1986, 1987, 1988, 1989, and 1990, the head of each executive agency shall transmit to each House of Congress a report including the information specified in subsection (b).

(b) Each report under subsection (a) shall include --

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

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

(B) reduce the number and dollar value of noncompetitive contracts entered into by the executive agency; and

(2) a summary of the activities and accomplishments of the advocate for competition of the executive agency during the preceding fiscal year.

(2) Section 16(1) of such Act (41 U.S.C. § 415(1)) is amended to read as follows:

(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or services procured;".

NOTE: §§ 416, 417, 418 and 419 were added by the Competition in Contracting Act of 1984 (HR 4170) Pub.L. 98-369 July 18, 1984. Sections 418a and 418b were added by the Small Business and Federal Procurement Enhancement Act of 1984, Pub. L. 98- 577, Oct 30, 1984.

TRAVEL EXPENSES OF GOVERNMENT CONTRACTORS

SEC. 24 Under any contract with any executive agency, costs incurred by contractor personnel for travel, including costs of lodging, other subsistence, and incidental expenses, shall be considered to be reasonable and allowable only to the extent that they do not exceed the rates and amounts set by subchapter I of chapter 57 of title 5, United States Code, or by the administrator of General Services or the President (or his designee) pursuant to any provision of such subchapter. This section shall be implemented in regulations prescribed as a part of the single system of Government-wide procurement regulations as defined in § 4 of this act. [NOTE: § 24 was added by the Federal Civilian Employee and Travel Expenses Act of 1985, P.L. 99-234.

CENTRAL INTELLIGENCE AGENCY
PROCUREMENT AUTHORITY

50 U.S.C. § 403

Procurement Authorities

§ 3.(a) In the performance of its functions the Central Intelligence Agency is authorized to exercise the authorities contained in §§ 151(c)(1-6), (10), (12), (15), (17)-155 and 159 of Title 41.

(b) In the exercise of the authorities granted in subsection (a) of this section, the term "Agency head" shall mean the Director, the Deputy Director, or the Executive of the Agency.

(c) The determinations and decisions provided in subsection (a) of this section to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (d) of this section, the Agency head is authorized to delegate his powers provided in this section, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the Agency.

(d) The power of the Agency head to make the determinations or decisions specified in §§ 151(c)(12), (15) and 154(a) of Title 41 shall not be delegable. Each determination or decision required by §§ 151(c)(12), (15), 153, or 154(a) of Title 41, shall be based upon written findings made by the official making such determinations, which findings shall be final and shall be available within the Agency for a period of at least six years following the date of the determination (50 U.S.C. § 403c).

(e) Notwithstanding subsection (e) of § 759 of Title 40, the provisions of § 759 of Title 40 relating to the procurement of automatic data processing equipment or services shall not apply with respect to such procurement by the Central Intelligence Agency.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

(42 U.S.C. § 2472
et seq.)

2472. (a) There is established the National Aeronautics and Space Administration (hereinafter called the "Administration"). The Administration shall be headed by an Administrator who shall be appointed from civilian life by the President by and with the advice and consent of the Senate. Under the supervision and direction of the President, the Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control of all personnel and activities thereof.

DEPUTY ADMINISTRATOR: APPOINTMENT AND DUTIES

(b) There shall be in the Administration a Deputy Administrator, who shall be appointed from civilian life by the President by and with the advice and consent of the Senate and shall perform such duties and exercise such powers as the Administrator may prescribe. The Deputy Administrator shall act for, and exercise the powers of, the Administrator during his absence or disability.

RESTRICTION ON ENGAGING IN ANY OTHER BUSINESS, VOCATION OR EMPLOYMENT

(c) The Administrator and the Deputy Administrator shall not engage in any other business, vocation, or employment while serving as such.

FUNCTIONS OF THE ADMINISTRATION

2473. (a) The Administration, in order to carry out the purpose of this chapter, shall --

(1) plan, direct, and conduct aeronautical and space activities,

(2) arrange for participation by the scientific community in planning scientific measurements and observations to be made through use of aeronautical and space vehicles, and conduct or arrange for the conduct of such measurements and observations, and

(3) provide for the widest practicable and appropriate dissemination of information concerning its activities and the results thereof.

(b)(1) The Administration shall, to the extent of appropriated funds, initiate, support, and carry out such research, development, demonstration, and other related activities in ground propulsion technologies as are provided for in §§ 2503 through 2509.

(2) The Administration shall initiate, support, and carry out such research, development, demonstrations, and other related activities in solar heating and cooling technologies (to the extent that funds are appropriated therefor) as are provided for in §§ 5503, 5504 and 5507 of this title.

(c) In the performance of its functions the Administration is authorized --

(1) to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law;

(2) to appoint and fix the compensation of such officers and employees as may be necessary to carry out such functions. Such officers and employees shall be appointed in accordance with the civil service laws and their compensation fixed in accordance with Chapter 15, and subchapter III of chapter 53 of Title 5, except that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering, and administrative personnel of the Administration without regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule,

and (B) to the extent the Administrator deems such action necessary to recruit specially qualified scientific and engineering talent, he may establish the entrance grade for scientific and engineering personnel without previous service in the Federal Government at a level up to two grades higher than the grade provided for such personnel under the General Schedule, and fix their compensation accordingly;

(3) to acquire (by purchase, lease, condemnation, or otherwise), construct, improve, repair, operate, and maintain laboratories, research and testing sites and facilities, aeronautical and space vehicles, quarters and related accommodations for employees and dependents of employees of the Administration, and such other real and personal property (including patents), or any interest therein, as the Administration deems necessary within and outside of the continental United States; to acquire by lease or otherwise, through the Administrator of General Services, buildings or parts of buildings in the District of Columbia for the use of the Administration for a period not to exceed ten years without regard to § 34 of Title 40; to lease to others such real and personal property; to sell and otherwise dispose of real and personal property (including patents and rights thereunder) in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended and to provide by contract or otherwise for cafeterias and other necessary facilities for the welfare of employees of the Administration at its installations and purchase and maintain equipment therefore;

(4) to accept unconditional gifts or donations of services, money, or property, real, personal, or mixed; tangible or intangible;

(5) without regard to § 3324 (a) and (b) of Title 31, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate, with any agency or instrumentality of the United States, or with any State, Territory, or possession, or with any political subdivision thereof, or with any person, firm, association, corporation, or educational institution. To the maximum extent practicable and consistent with the accomplishment of the purpose of this Chapter, such contracts, leases, agreements, and other transactions shall be allocated by the Administrator in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of the work of the Administration;

(6) to use, with their consent, the services, equipment, personnel, and facilities of Federal and other agencies with or without reimbursement, and on a similar basis to cooperate with other public and private agencies and instrumentalities in the use of services, equipment, and facilities. Each department and agency of the Federal Government shall cooperate fully with the Administration in making its services, equipment, personnel, and facilities available to the Administration, and any such department or agency is authorized, not withstanding any other provision of law, to transfer to or to receive from the Administration, without reimbursement, aeronautical and space vehicles, and supplies and equipment other than administrative supplies or equipment;

(7) to appoint such advisory committees as may be appropriate for purposes of consultation and advice to the Administration in the performance of its functions;

(8) to establish within the Administration such offices and procedures as may be appropriate to provide for the greatest possible coordination of its activities under this Chapter with related scientific and other activities being carried on by other public and private agencies and organizations;

(9) to obtain services as authorized by § 3109 of Title 5, but at rates for individuals not to exceed the per diem rate equivalent to the rate for GS-18;

(10) when determined by the Administrator to be necessary, and subject to such security investigations as he may determine to be appropriate, to employ aliens without regard to statutory provisions prohibiting payment of compensation to aliens;

(11) to provide by concession, without regard to § 303b of Title 40 on such terms as the Administrator may deem to be appropriate and to be necessary to protect the concessioner against loss of his investment in property (but not anticipated profits) resulting from the Administration's discretionary acts and decisions, for the construction, maintenance, and operation of all manner of facilities and equipment for visitors to the several installations of the Administration and in connection therewith, to provide services incident to the dissemination of information concerning its activities to such visitors, without charge or with a reasonable charge therefor (with this authority being in addition to any other authority which the Administration may have to provide facilities, equipment, and services for visitors to its installations).

A concession agreement under this paragraph may be negotiated with any qualified proposer following due consideration to all proposals received after reasonable public notice of the intention to contract. The concessioner shall be afforded a reasonable opportunity to make a profit commensurate with the capital invested and the obligations assumed, and the consideration paid by him for the concession shall be based on the probable value of such opportunity and not on maximizing revenue to the United States. Each concession agreement shall specify the manner in which the concessioner's records are to be maintained and shall provide for access to any such records by the Administration and the Comptroller General of the United States for a period of five years after the close of the business year to which such records relate. A concessioner may be accorded a possessory interest, consisting of all incidents of ownership except legal title (which shall vest in the United States), in any structure, fixture, or improvement he constructs or locates upon land owned by the United States; and, with the approval of the Administration, such possessory interest may be assigned, transferred, encumbered, or relinquished by him, and unless otherwise provided by contract, shall not be extinguished by the expiration or other termination of the concession and may not be taken for public use without just compensation;

(12) with the approval of the President, to enter into cooperative agreements under which members of the Army, Navy, Air Force, and Marine Corps may be detailed by the appropriate Secretary for services in the performance of functions under this Act to the same extent as that to which they might be lawfully assigned in the Department of Defense.

(13) (A) to consider, ascertain, adjust, determine, settle, and pay, on behalf of the United States, in full satisfaction thereof any claim of $25,000 or less against the United States for bodily injury, death, or damage to or loss of real or personal property resulting from the conduct of the Administration's functions as specified in subsection (a) of this section, where such claim is presented to the Administration in writing within two years after the accident or incident out of which the claim arises; and

(B) if the Administration considers that a claim in excess of $25,000 is meritorious and would otherwise be covered by this paragraph, to report the facts and circumstances thereof to the Congress for its consideration. (As amended Pub.L. 93-316, § 6, June 22, 1974, 88 Stat. 243;Pub L. 93-409, § 4, Sept 3, 1974, 88 Stat. 1070; Pub.L. 94-413, § 15 (c), Sept 17, 1976, 90 Stat. 1270; Pub.L. 95-401, § 6, Sept 30, 1978, 92 Stat. 860; Pub.L. 96-48, § 6 (a), Aug 8, 1979, 93 Stat. 349.)

CHAPTER TWO

No Statutes

CHAPTER THREE

STATUTES

TITLE 10

Chapter 131,

Planning and Coordinstion

§ 2202. **Obligation of Funds: Limitation**

Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions. Aug. 10, 1956, ch. 1041, 70A Stat. 120.

ARMED SERVICES PROCUREMENT ACT OF 1947

10 U.S.C. § 2301, *et seq.*
(as amended)

Sec.

Chapter 137

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2306a. Cost or pricing data: truth in negotiations.
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As amended by the Competition in Contracting Act of 1984 (Pub.L 98-369), the FY 1985 Defense Authorization Act (HR 5167), and the Small Business and Federal Procurement Competition Enhancement Act of 1984 (HR 4209). Also, by the 1986 Defense Authorization Act (§ 2638), and the Defense Acquisition Improvement Act of 1986.

§ 2301. **Congressional defense procurement policy**

(a) The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of Congress that --

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

(2) services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States;

(3) contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology;

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

(5) the head of an agency use advance procurement planning and market research and prepare contract specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired;

(6) the head of an agency encourage the development and maintenance of a procurement career management program to ensure a professional procurement work force; and

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

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

(1) promote full and open competition;

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

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

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

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

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

(7) require descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.

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

§ 2302. **Definitions**

In this chapter:

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

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

(A) procurement of architectural or engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 541 *et seq.*);

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

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

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

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

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

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

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

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

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

§ 2303. **Applicability of chapter**

(a) This chapter applies to the procurement by any of the following agencies for its use or otherwise, of all property (other than land) and all sources for which payment is to be made from appropriated funds:

(1) The Department of Defense.

(2) The Department of the Army.

(3) The Department of the Navy.

(4) The Department of the Air Force.

(5) The Coast Guard.

(6) The National Aeronautics and Space Administration.

(b) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration.

§ 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 modifications to regulations promulgated pursuant to § 2752 of the Competition in Contracting Act of 1984; and

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

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

(A) shall solicit sealed bids if --

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

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

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

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

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

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

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

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

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

(2) 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 §§ 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).

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

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

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

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

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

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

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

(7) the head of the agency-

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

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

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

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

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

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

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

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

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

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

(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 $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 § 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 § 18 of the Office of Federal Procurement Policy act and all bids and 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); 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) § 8(a) of the Small Business Act (15 U.S.C. § 637(a)). (Pub.L-99-145 11/8/85)

(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, or 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 shall be made available for inspection by the public consistent with the provisions of § 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.

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified in accordance with § 2752 of the Competition in Contracting Act of 1984 shall provide for special simplified procedures for small purchases of property and services.

(2) For the purposes of this chapter, a small purchase is a purchase or contract for an amount which does not exceed $25,000.

(3) A proposed purchase or contract for an amount above $25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

(4) In using small purchase 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-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 § 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 for which the price is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

§ 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 research; and

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

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

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

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

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

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

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

(iii) design requirements.

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

(A) a statement of-

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

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

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

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

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

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

(ii) in the case of competitive proposals-

(I) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded with our discussions with the offerors and

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

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

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

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract --

(i) after discussions with the offerors at any time after receipt of the proposals and before the award of the contract; or

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

(B) In the case of award of a contract under subparagraph (A)(i), the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only cost or price and the other factors included in the solicitation.

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

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

(5) 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.

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

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

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

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

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

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

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

(B) 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 reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

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

(ii) Proposals for the qualification of 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.

§ 2305a. **Major programs: competitive alternative sources**

(a)(1) The Secretary of Defense may not begin full-scale development under a major program until --

(A) the Secretary prepares an acquisition strategy for the program; and

(B) the Secretary submits to the Committees on Armed Services of the Senate and House of Representatives a report describing the acquisition strategy for that program.

(2) The report required by paragraph (1)(B) shall be submitted not later than the date of the submission of the President's budget to Congress for the fiscal year for which the initial request is made for appropriations for full-scale development of the program.

(3) If the Secretary proposes to revise an acquisition strategy prepared under paragraph (1) after the report on that strategy is submitted under that paragraph, the Secretary shall submit to the

committees a report describing the proposed revision. Such a revision may not be implemented until 60 days after the date on which the report on the revision is received by those committees.

(4) The Secretary shall ensure that contracts for each major program are awarded in accordance with the acquisition strategy for such program.

(b)(1) The acquisition strategy prepared under subsection (a) for a major program shall provide that there will be competitive alternative sources available for the system (and each major subsystem) under the program throughout the period from the beginning of full-scale development through the end of production.

(2) In carrying out this subsection, the Secretary may provide that the requirement for competitive alternative sources for a system or subsystem is satisfied even though the sources for that system or subsystem do not develop or produce identical systems if the systems developed or produced serve similar functions and compete effectively with each other. (Pub.L 99-145)

(c)(1) In preparing an acquisition strategy for a major program, the Secretary may waive subsection (b) with respect to full-scale development of that program if the Secretary determines that the application of that subsection to full-scale development of that program --

(A) would not materially reduce the technological risks associated with the program;

(B) would not likely result in an improvement in design commensurate with the additional cost;

(C) would result in unacceptable delays in fulfilling the needs of the Department of Defense; or

(D) would be adverse to the national security interests of the United States.

(2) In preparing an acquisition strategy for a major program, the Secretary may waive the requirement of subsection (b) with respect to production under the program if the Secretary determines that the application of that subsection to production under the program --

(A) would increase the total cost for the program;

(B) would result in unacceptable delays in fulfilling the needs of the Department of Defense; or

(C) would be adverse to the national security interests of the United States.

(3) If the Secretary grants a waiver under paragraph (1) or (2), the report submitted under subsection (a) with respect to that program --

(A) shall include notice that the waiver has been made; and

(B) shall set forth the reasons for the waiver, together with supporting documentation of comparative cost and schedule estimates and other background material.

(4) The Secretary shall separately exercise the authority under paragraphs (1) and (2) for each major defense acquisition program.

(d) In this section:

(1) "Major program" means a major defense acquisition program, as such term is defined in § 139a(a) of this title.

(2) "Major subsystem", with respect to a major program, means a subsystem of the system developed under the program that is purchased directly by the United States and for which --

(A) the amount for research, development, test and evaluation is 10 percent or more of the amount specified in § 139a(a)(1)(B) of this title as the research, development, test and evaluation funding criterion for identification of a major defense acquisition program; or

(B) the amount for production is 10 percent or more of the amount specified in § 139a(a)(1)(B) of this title as the production funding criterion for identification of a major defense acquisition program.

(Added Pub L 99-145, Title IX B & 912(a)(1), Nov 8 1985, 99 Stat 685.)

Effective Date: Section 912(b) of Pub L. 99-145 provided that: § 2305a of title 10 United States Code, as added by subsection (a) (enacting this section), shall apply with respect to major defense acquisition programs for which funds for full-scale development are first requested for a fiscal year after fiscal year 1986.

§ 2306. **Kinds of contracts.**

(a) The cost-plus-a-percentage-of-cost system of contracting may not be used. Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States.

(b) Each contract awarded under this chapter after using procedures other than sealed-bid procedures shall contain a warranty, determined to be suitable by the head of the agency, that the contractor has employed or retained no person or selling agency to solicit or obtain the contract under an understanding or agreement for a commission, percentage, brokerage, or contingent fee, except a bona fide employee or established commercial or selling agency maintained by him to obtain business. If a contractor breaks such a warranty the United States may annul the contract without liability or may deduct the commission, percentage, brokerage, or contingent fee from the contract price or consideration.

(c) No cost contract, cost-plus-a-fixed-fee contract, or incentive contract may be made under this chapter unless the head of the agency determines that such a contract is likely to be less costly to the United States than any other kind of contract or quality required except under such a contract.

(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 small purchase amount under § 2304(g) of this title 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 § 2306a of this title.

(g)(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 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 contract will promote the interests of the United States by encouraging effective competition and promoting economics 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 equipment amortized as a cost or 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 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 right, upon payment of the unamortized portion of the cost of the plant or equipment, to take title thereto under appropriate circumstances.

(3) In the event funds are not made available for the continuation of such a contract into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from --

(A) appropriations originally available for the performance of the contract concerned;

(B) appropriations currently available for procurement of the type of services concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(h)(1) To the extent that funds are otherwise available for obligation, the head of an agency may make multiyear contracts (other than contracts described in paragraph (6) for the purchase of property, including weapon systems and items and services associated with weapon systems (or the logistics support thereof), wherever he finds --

(A) that the use of such a contract will promote the national security of the United States and will result in reduced total costs under the contract;

(B) that the minimum need for the property to be purchased is expected to remain substantially unchanged during the contemplated contract period in terms of production rate, procurement rate, and total quantities;

(C) that there is a reasonable expectation that throughout the contemplated contract period the Department of Defense will request funding for the contract at the level required to avoid contract cancellation;

(D) that there is a stable design for the property to be acquired and that the technical risks associated with such property are not excessive; and

(E) that the estimates of both the cost of the contract and the anticipated cost avoidance through the use of a multiyear contract are realistic.

(2)(A) The Secretary of Defense shall prescribe defense acquisition regulations to promote the use of multiyear contracting as authorized by paragraph (1) in manner that will allow the most efficient use of multiyear contracting.

(B) Such regulations may provide for cancellation provisions in such multiyear contracts to the extent that such provisions are necessary and in the best interests of the United States. Such cancellation provisions may include consideration of both recurring and nonrecurring costs of the contractor associated with production of the items to be delivered under the contract,

(C) In order to broaden the defense industrial base, such regulations shall provide that, to the extent practicable --

(i) multiyear contracting under paragraph (1) shall be used in such a manner as to seek, retain, and promote the use under such contracts of companies that are subcontractors, vendors, or suppliers; and

(ii) upon accrual of any payment or other benefit under such a multiyear contract to any subcontractor, vendor, or supplier company participating in such contract, such payment or benefit shall be delivered to such company in the most expeditious manner practicable.

(D) Such regulations shall also provide that, to the extent practicable, the administration of this subsection, and of the regulations prescribed under this subsection, shall not be carried out in a manner to preclude or curtail the existing ability of agencies in the Department of Defense to --

(i) provide competition in the production of items to be delivered under such a contract; or

(ii) provide for termination of a prime contract the performance of which is deficient with respect to cost; quality, or schedule.

(3) Before any contract described in paragraph (1) that contains a clause setting forth a cancellation ceiling excess of $100,000,000 may be awarded, the head of the agency concerned shall give written notification of the proposed contract and on Appropriations of the Senate and House of Representatives, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

(4) Contracts made under this subsection may be used for the advance procurement of components, parts, and materials necessary to the manufacture of a weapon system, and contracts may be made under this subsection for such advance procurement, if feasible and practical, in order to achieve economic-lot purchases and more efficient production rates.

(5) In the event funds are not made available for the continuation of a contract made under this subsection into a subsequent fiscal year, the contract shall be canceled or terminated, and the costs of cancellation or termination may be paid from --

(A) appropriations currently available for procurement of the type of property concerned;

(B) appropriations currently available for procurement of the type of property concerned, and not otherwise obligated; or

(C) funds appropriated for those payments.

(6) This subsection does not apply to contracts for the construction, alteration, or major repair of improvements to real property or contracts for the purchase of property which § 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759) applies.

(7) This subsection does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(8) For the purpose of this subsection, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

§ 2306a. **Cost or pricing data: truth in negotiations**

(a) REQUIRED COST OR PRICING DATA AND CERTIFICATION. --

(1) the head of an agency shall require offerors, contractors and subcontractors to make cost or pricing data available as follows:

(A) An offeror for a prime contract under this chapter to be entered into using procedures other than sealed-bid procedures shall be required to submit cost or pricing data before the award of the contract if the price of the contract to the United States is expected to exceed $100,000.

(B) The contractor for a contract under this chapter shall be required to submit cost or pricing data before the pricing of a change or modification to the contract if the price adjustment is expected to exceed $100,000 (or such lesser amount as may be prescribed by the head of the agency).

(C) An offeror for a subcontract (at any tier) of a contract under this chapter shall be required to submit cost or pricing data before the award of the subcontract if --

(i) the price of the subcontract is expected to exceed $100,000; and

(ii) the prime contractor and each higher-tier subcontractor have been required to make available cost or pricing data under this section.

(D) The subcontractor for a subcontract covered by subparagraph (C) shall be required to submit cost or pricing data before the pricing of a change or modification to the subcontract if the price adjustment is expected to exceed $100,000 (or such lesser amount as may be prescribed by the head of the agency).

(2) A person required, as an offeror, contractor, or subcontractor, to submit cost or pricing data under paragraph (1) (or required by the head of an agency concerned to submit such data under subsection (c)) shall be required to certify that, to the best of the person's knowledge and belief, the cost of pricing data submitted are accurate complete, and current.

(3) Cost or pricing data required to be submitted under paragraph (1) or under subsection (c), and a certification required to be submitted under paragraph (2), shall be submitted --

(A) in the case of a submission by a prime contractor (or an offeror for a prime contract), to the contracting officer for the contract (or to a designated representative of the contracting officer); or

(B) In the case of a submission by a subcontractor (or an offeror for a subcontract), to the prime contractor.

(4) Except as provided under subsection (b), this section applies to contracts entered into by the head of an agency on behalf of a foreign government.

(5) The head of an agency may waive the requirement under this subsection for a contractor, subcontractor, or offeror to submit cost or pricing data. For purposes of paragraph (1)(c)(ii), a contractor or subcontractor granted such a waiver shall be considered as having been required to make available cost or pricing data under this section.

(b) EXCEPTIONS. -- This section need not be applied to a contract or subcontract --

1. for which the price agreed upon is based on --

(A) adequate price competition;

(B) established catalog or market prices of commercial items sold in substantial quantities to the general public; or

(C) prices set by law or regulation; or

2. in an exceptional case when the head of the agency determines that the requirements of this section may be waived and states in writing his reasons for such determination.

(c) AUTHORITY TO REQUIRE COST OR PRICING DATA. -- When cost or pricing data are not required to be submitted by subsection (a), such data may nevertheless be required to be submitted by the head of the agency if the head of the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract.

(d) PRICE REDUCTIONS FOR DEFECTIVE COST OR PRICING DATA. --

(1)(A) A prime contract (or change or modification to a prime contract) under which a certificate under subsection (a)(2) is required shall contain a provision that the price of the contract to the United States, including profit or fee, shall be adjusted to exclude any significant amount by which it may be determined by the head of the agency that such price was increased because the contractor (or any subcontractor required to make available such a certificate) submitted defective cost or pricing data.

(B) For the purposes of this section, defective cost or pricing data are cost or pricing data which, as of the date of agreement on the price of the contract (or another date agreed upon between the parties), were inaccurate, incomplete, or noncurrent. If for purposes of the preceding sentence the parties agree upon a date other than the date of agreement on the price of the contract, the date agreed upon by the parties shall be as close to the date of agreement on the price of the contract as is practicable.

(2) In determining for purposes of a contract price adjustment under a contract provision required by paragraph (1) whether, and to what extent, a contract price was increased because the

contractor (or a subcontractor) submitted defective cost or pricing data, it shall be a defense that the United States did not rely on the defective data submitted by the contractor or subcontractor.

(3) It is not a defense to an adjustment of the price of a contract under a contract provision required by paragraph (1) that --

(A) The price of the contract would not have been modified even if accurate, complete, and current cost or pricing data had been submitted by the contractor or subcontractor because the contractor or subcontractor --

(i) was the sole source of the property or services procured; or

(ii) otherwise was in a superior bargaining position with respect to the property or services procured;

(B) the contracting officer should have known that the cost and pricing data in issue were defective even though the contractor or subcontractor took no affirmative action to bring the character of the data to the attention of the contractor officer.

(C) the contract was based on an agreement between the contractor and the United States about the total cost of the contract and there was no agreement about the cost of each item procured under such contract; or

(D) the prime contractor or subcontractor did not submit a certification of cost and pricing data relating to the contract as required under subsection (a)(2)

(4)(A) a contractor shall be allowed to offset an amount against the amount of a contract price adjustment under a contract provision required by paragraph (1) if --

(i) the contractor certifies to the contracting officer (or to a designated representative of the contracting officer) that, to the best of the contractor's knowledge and belief, the contractor is entitled to the offset; and

(ii) the contractor proves that the cost or pricing data were available before the date of agreement on the price of the contract (or price of the modification) and that the data were not submitted as specified in subsection (a)(3) before such date.

(B) A contractor shall not be allowed to offset an amount otherwise authorized to be offset under subparagraph (A) if --

(i) the certification under subsection (a)(2) with respect to the cost or pricing data involved was known to be false when signed; or

(ii) The United States proves that, had the cost or pricing data referred to in subparagraph (A)(ii) been submitted to the United States before the date of agreement on the price of the contract (or price of the modification), the submission of such cost or pricing data would not have resulted in an increase in that price in the amount to be offset.

(e) INTEREST AND PENALITIES FOR CERTAIN OVERPAYMENTS. --

(1) If the United States makes an overpayment to a contractor under a contract with the Department of Defense subject to this section and the overpayment was due to the submission by the contractor or defective cost or pricing data, the contractor shall be liable to the United States --

(A) for interest on the amount of such overpayment, to be computed --

(i) for the period beginning on the date the overpayment was made to the contractor and ending on the date the contractor repays the amount of such overpayment to the United States; and

(ii) at the current rate prescribed by the Secretary of the Treasury under § 6621 of the Internal Revenue Code of 1954; and

(B) If the submission of such defective data was a knowing submission, for an additional amount equal to the amount of the overpayment.

(2) Except as provided under subsection (d), the liability of a contractor under this subsection shall not be affected by the contractor's refusal to submit a certification under subsection (a)(2) with respect to the cost or pricing data involved.

(f) RIGHT OF UNITED STATES TO EXAMINE CONTRACTOR RECORDS. -- (1) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this section with respect to a contract or subcontract, the head of the agency, acting through any authorized representative of the head of the agency who is an employee of the United States or a member of the armed forces, shall have the right to examine all records of the contractor or subcontractor related to --

(A) the proposal for the contract or subcontract;

(B) the discussions conducted on the proposal;

(C) pricing of the contract or subcontract; or

(D) performance of the contract or subcontract.

(3) In this subsection, the term "records" includes books, documents, and other data.

(g) COST OR PRICING DATA DEFINED. -- In this section, the term "cost or pricing data" means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification), 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".

§ 2307. **Advance payments**

(a) The head of any agency may --

(1) make advance, partial, progress, or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns, advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments made under subsection (a) may be made only if the contractor gives adequate security and after a determination by the head of the agency that to do so would be in the public interest. Such security may be in the form of a lien in favor of the United States on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien is paramount to any other liens.

(d) Payments under subsection (a) in the case of any contract, other than partial, progress, or other payments specifically provided for in such contract at the time such contract was initially entered into, may not exceed $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed payments and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such payments. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period.

§ 2308. **Assignment and delegation of procurement functions and responsibilities**

Subject to § 2311 of this title, to facilitate the procurement of property and services covered by this chapter by each agency named in section 2303 of this title for any other agency, and to facilitate joint procurement by those agencies --

(1) the head of an agency may, within his agency, delegate functions and assign responsibilities relating to procurement;

(2) the heads of two or more agencies may by agreement delegate procurement functions and assign procurement responsibilities from one agency to another of those agencies or to an officer or civilian employee of another of those agencies; and

(3) the heads of two or more agencies may create joint or combined offices to exercise procurement functions and responsibilities.

§ 2309. **Allocation of appropriations**

(a) Appropriations available for procurement by an agency named in section 2303 of this title may, through administrative allotment, be made available for obligation for procurement by any other agency in amounts authorized by the head of the allotting agency and without transfer of funds on the books of the Department of the Treasury.

(b) A disbursing official of the allotting agency may make any disbursement chargeable to an allotment under subsection (a) upon a voucher certified by an officer or civilian employee of the procuring agency.

§ 2310. **Determinations and decisions**

(a) Determinations and decisions required to be made under this chapter by the head of an agency may be made for an individual purchase or contract or, except for determinations and decisions under § 2304 or § 2305 of the title, for a class of purchases or contracts. Such a determination or decision, including a determination and decision under § 2304 or § 2305 of this title, is final.

(b) Each determination or decision under § 2306(c), § 2306(g)(1), § 2307(c), or § 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that --

(1) clearly indicate why the type of contract selected under § 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract;

(2) support the findings required by § 2306(g)(1),

(3) clearly indicate why advance payments under § 2307(c) would be in the public interest; or

(4) clearly indicate why the application of § 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.

§ 2311. **Delegation**

Except as provided in § 2304(d)(2) of this title, the head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter.

Repealed by Pub.L. 98-369; Re-enacted in HR 5167 (FY 85 Defense Authorization Act); Amended further by § 302 of Pub.L. 98-577, 98 Stat. 3077 (The Small Business and Federal Procurement Enhancement Act of 1984.)

§ 2312. **Remission of liquidated damages**

Upon the recommendation of the head of an agency, the Comptroller General may remit all or part, as he considers just and equitable, of any liquidated damages, assessed for delay in performing a contract, made by that agency, that provides for such damages.

§ 2313. **Examination of books and records of contractor**

(a) An agency named in § 2303 of this title is entitled, through an authorized representative, to inspect the plant and audit the books and records of --

(1) a contractor performing a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

(2) a subcontractor performing any subcontract under a cost or cost-plus-a-fixed-fee contract made by that agency under this chapter.

(b) Except as provided in subsection (c), each contract awarded after using procedures other than sealed bid procedures shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

(c) Subsection (b) does not apply to a contract or subcontract with a foreign contractor or foreign subcontractor if the head of the agency determines, with the concurrence of the Comptroller General or his designee, that the application of that subsection to the contract or subcontract would not be in the public interest. However, the concurrence of the Comptroller General or his designee is not required --

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the head of the agency determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by not applying subsection (b).

If subsection (b) is not applied to a contract or subcontract based on a determination under clause (2), a written report shall be furnished to the Congress.

(d)(1) The Director of the Defense Contract Audit Agency (or any successor agency) may require by subpoena the production of books, documents, papers, or records of a contractor, access to which is provided to the Secretary of Defense by subsection (a) or by § 2306(f) of this title.

(2) Any such subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of an appropriate United States district court.

(3) The authority provided by paragraph (1) may not be redelegated.

(4) The Director (or any successor official) shall submit an annual report to the Secretary of Defense on the exercise of such authority during the preceding year and the reasons why such authority was exercised in any instance. The Secretary shall forward a copy of each such report to the Committees on Armed Services of the Senate and House of Representatives. (Pub.L 99-145 11/8/85)

§ 2314. **Laws unapplicable to agencies named in § 2303 of this title**

Sections 3709 and 3735 of the Revised Statutes (41 U.S.C. §§ 5 and 13) do not apply to the procurement of property or services by the agencies named in § 2303 of this title.

§ 2315. **Law inapplicable to the procurement of automatic data processing equipment and services for certain defense purposes**

(a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759) is not applicable to the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of the equipment or services --

(1) involves intelligence activities;

(2) involves crytologic activities related to national security;

(3) involves the command and control of military forces;

(4) involves equipment that is an integral part of a weapon or weapons system; or

(5) subject to subsection (b), is critical to the direct fulfillment of military or intelligence missions

(b) Subsection (a)(5) does not include procurement of automatic data processing equipment or services to be used for routine administrative and business applications (including payroll, finance, logistics, and personnel management applications).

§ 2316. **Disclosure of identity of contractor**

The Secretary of Defense may disclose the identity or location of a person awarded a contract by the Department of Defense to any individual, including a Member of Congress, only after the Secretary makes a public announcement identifying the contractor. When the identity of a contractor is to be made public, the Secretary shall announce publicly that the contract has been awarded and the identity of the contractor.

§ 2317. Encouragement of competition and cost savings

The Secretary of Defense shall establish procedures to ensure that personnel appraisal systems of the Department of Defense give appropriate recognition to efforts to increase competition and achieve cost savings in areas relating to contracts covered by this chapter.

§ 2318. Advocates for competition

(a) In addition to the competition advocates established or designated pursuant to § 20(a) of the Office of Federal Procurement Policy Act, the Secretary of Defense shall designate an officer or employee of the Defense Logistics Agency to serve as the advocate for competition of the agency.

(b) The advocate for competition established pursuant to subsection (a) shall carry out the responsibilities and functions provided for in §§ 20(b) and 20(c) of the Office of Federal Procurement Policy Act.

(c) Each advocate for competition of an agency shall be a general or flag officer if a member of the armed forces or a grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule), if a civilian employee and shall be designated to serve for a minimum of two years.

(d) Each advocate for competition of an agency shall transmit to the Secretary of Defense a report describing his activities during the preceding year. The report of each advocate for competition shall be included in the annual report of the Secretary of Defense required by § 21 of the Office of Federal Procurement Policy Act, in the form in which it was submitted to the Secretary.

§ 2319. Encouragement of new competitors

(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 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 will not be 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) Except as otherwise provided in this subsection, the head of an agency may not establish a new qualification requirement, or enforce an existing qualified products list, qualified manufacturers list, or qualified bidders list, with respect to a potential offeror or its product unless the requirements of subsection (b) have been complied with.

(2) Except with respect to a qualified products list, qualified manufacturers list, or qualified bidders list, 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.

(3) A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror is not on a qualified bidders list, qualified manufacturers list, or qualified products list 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 if --

(A) such referral would not have been required in the absence of this subsection; or

(B) the offeror is challenging either the validity of the qualification requirement being used 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 § 3 of the Small Business Act.

(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).

§ 2320. **Rights in technical data**

(a)(1) The Secretary of Defense shall prescribe regulations to define the legitimate interest of the United States and of a contractor or subcontractor in technical data pertaining to an item or process. Such regulations shall be included in regulations of the Department of Defense prescribed as part of the Federal Acquisition Regulation. Such regulations may not impair any right of the United States or of any contractor or subcontractor with respect to patents or copyrights or any other right in technical data otherwise established by law.

(2) Such regulations shall include the following provisions:

(A) In the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds, the United States shall have the unlimited right to --

(i) use technical data pertaining to the item or process; or

(ii) release or disclose the technical data to persons outside the government or permit the use of the technical data by such persons.

(B) Except as provided in subparagraphs (C) and (D), in the case of an item or process that is developed by a contractor or subcontractor exclusively at private expense, the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the government or permit the use of the technical data by such persons.

(C) Subparagraph (B) does not apply to technical data that --

(i) constitutes a correction or change to data furnished by the United States;

(ii) relates to form, fit or function;

(iii) is necessary for operation, maintenance, installations, or training (other than detailed manufacturing or process data); or

(iv) is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restriction on further release or disclosure.

(D) Notwithstanding subparagraph (B), the United States may release or disclose technical data to persons outside the Government, or permit the use of technical data by such persons, if --

(i) such release, disclosure, or use --

(I) is necessary for emergency repair and overhaul; or

(II) is a release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the United States and is required for evaluational or informational purposes;

(ii) such release, disclosure, or use is made subject to a prohibition that the person to whom the data is released or disclosed may not further release, disclose, or use such data; and

(iii) the contractor or subcontractor asserting the restriction is notified of such release, disclosure, or use.

(E) In the case of an item or process that is developed in part with Federal funds and in part at private expense, the respective rights of the United States and of the contractor or subcontractor in technical data pertaining to such item or process shall be agreed upon as early in the acquisition process as practicable (preferably during contract negotiations), based upon consideration of all of the following factors:

(i) The statement of congressional policy and objectives in § 200 of title 35, the statement of purposes in section 2(b) of the Small Business Innovation Development Act of 1982 (15 U.S.C. § 638 note), and the declaration of policy in § 2 of the Small Business Act (15 U.S.C. § 631).

(ii) The interest of the United States in increasing competition and lowering costs by developing and locating alternative sources of supply and manufacture.

(iii) The interest of the United States in encouraging contractors to develop at private expense items for use by the Government.

(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data except --

(i) rights in technical data described in subparagraph (C); or

(ii) under the conditions described in subparagraph (D).

(G) The Secretary of Defense may --

(i) negotiate and enter into a contract with a contractor or subcontractor for the acquisition of rights in technical data pertaining to an item or process developed by such contractor or subcontractor exclusively at private expense if necessary to develop alternative sources of supply and manufacture; or

(ii) agree to restrict rights of the United States in technical data pertaining to an item or process developed entirely or in part with Federal funds if the United States receives a royalty-free license to use, release, or disclose the data for purposes of the United States (including purposes of competitive procurement).

(3) The Secretary of Defense shall define the terms "developed" and "private expense" in regulations prescribed under paragraph (1).

(4) For purposes of this subsection, the term "Federal Acquisition Regulation" means the single system of Government-wide procurement regulations as defined in § 4(4) of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(4)).

§ 2321. **Validation of proprietary data restrictions**

(a)(1) A contract for supplies or services entered into by the Department of Defense which provides for the delivery of technical data shall provide that a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data.

(b)(1) The Secretary of Defense shall ensure that there is a thorough review of the appropriateness of any restriction on the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons. Such review shall be conducted before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later.

(2)(A) If the Secretary determines, at any time before the end of the three-year period beginning on the date on which final payment is made on a contract under which technical data is required to be delivered, or the date on which technical data is delivered under such contract, whichever is later, that a challenge to a restriction is warranted, the Secretary shall provide written notice to the contractor or subcontractor asserting the restriction. Such a determination shall be based on a finding by the Secretary that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time. Such notice shall --

(i) state the specific grounds for challenging the asserted restriction;

(ii) require a response within 60 days justifying the current validity of the asserted restriction; and

(iii) state that evidence of a validation by the Department of Defense of a restriction identical to the asserted restriction within the three-year period preceding the challenge shall serve as justification for the asserted restriction if --

(I) the validation occurred after a review of the validated restriction under this subsection; and

(II) the validated restriction was asserted by the same contractor or subcontractor (or any licensee of such contractor or subcontractor) to which such notice is being provided.

(B) Notwithstanding subparagraph (A), the United States may challenge a restriction on the release, disclosure, or use of technical data delivered under a contract at any time if such technical data --

(i) is publicly available;

(ii) has been furnished to the United States without restriction; or

(iii) has been otherwise made available without restriction.

§ 2322. **Limitation on small business set-asides**

(a) The head of an agency may not authorize a procurement to be set-aside for participation only by small business concerns in the case of a procurement under the Foreign Military Sales program, if the foreign purchaser specifies the sources qualified to meet the requirement and only one of those sources is a small business concern.

(b) This section expires two years after the effective date of part B of the Defense Procurement Reform Act of 1984.

§ 2323. **Commercial pricing for spare or repair parts**

(a) LIMITATION ON PRICE OF COMMERCIALLY AVAILABLE PARTS. --

Except in the case of an offer submitted with a written statement under subsection (b)(2) and except as provided in subsection (c), if the head of an agency, using procedures other than competitive procedures, enters into a contract with a contractor for the purchase of spare or repair parts which the contractor also offers for sale to the general public, the price charged the United States for such parts under the contract may not exceed the lowest commercial price charged by the contractor in sales of such parts during a period described in subsection (b)(1).

(b) REQUIREMENTS FOR INCLUSION IN OFFER. -- The head of an agency, with respect to an offeror who submits an offer to the head of an agency to enter into a contract for the supply of spare or repair parts under a contract awarded using procedures other than competitive procedures, and who also offers such parts for sale to the general public, shall require that the offeror --

(1) Certify in such offer that, to the best of the knowledge and belief of the offeror, the price proposed in the offer does not exceed the lowest commercial price at which such offeror sold such parts during the most recent regular monthly, quarterly, or other period for which sales data are reasonably available; or

(2) submit with such offer a written statement --

(A) specifying the amount of the difference between the price proposed in the offer and the lowest commercial price at which such offeror sold such parts during a period described in paragraph (1); and

(B) providing a justification for that difference.

(c) EXCEPTION TO LIMITATION. -- Subsections (a) and (b) do not apply in the case of a contract with respect to which the contracting officer includes in the file on the contract a written determination by such officer that the use of the lowest commercial price with respect to such contract is not appropriate because of --

(1) national security considerations; or

(2) significant differences between the terms of the commercial sales of the parts to be acquired under such contract and the terms of such contract, including differences in --

(A) quantity;

(B) quality;

(C) delivery requirements; or

(D) other terms and conditions.

(d) AUDITING. --

(1) In order to verify any certification or statement made under subsection (b) with respect to a contract, the contracting officer who awards such contract (or any representative of the contracting

officer who is an employee of the United States or a member of the armed forces), during the time period specified in paragraph (2), may examine and audit all records of sales (including contract terms and conditions) maintained by or for the contractor that are directly pertinent to sales by the contractor of spare or repair parts identical to those covered by the contract during the period covered by such certification or statement.

(2) The head of an agency shall require an offeror who submits a certification or written statement under subsection (b) to make available the records, books, data, and documents described in paragraph (1) for examination, audit, or reproduction for the purposes of such paragraph during the three- year period beginning on the date that the offeror submits such certification or statement to such head of an agency.

(3) The authority provided by this subsection is in addition to the authority of the head of an agency under § 2306a of this title.

(e) REGULATIONS. -- The Secretary of Defense, after consultation with the Secretary of Transportation and the Administrator of the National Aeronautics and Space Administration, shall prescribe regulations to carry out this section. Such regulations may not require the disclosure or submission of any data related to any element underlying the price of a commercial product not otherwise required by law.

(f) DEFINITIONS. -- In this section.

(1) The term "spare or repair part" means any individual piece, part, subassembly or component which is furnished for the logistic support or repair of an end item and not as an end item itself.

(2) The term "lowest commercial price" means the lowest price at which a sale was made to the general public of a particular part. Such term does not include the price at which a sale was made --

(A) to any agency of the United States:

(B) to any person for resale by such person after such person performs a service or function in connection with such part that increases the cost of the part, unless the agency procuring the part can demonstrate that the agency is procuring the part before such service or function has been performed by any such person.

(C) to a subsidiary, affiliate or parent business organization of the contractor, or any other branch of the same business entity;

(D) to any person at a price that, for the purpose of making a donation, has been substantially discounted below the fair market value or regular price of such part; or

(E) to a customer located outside the United States.

(g) APPLICABILITY. -- This section does not apply to a contract entered into using simplified small purchase procedures established under § 2304(g) of this title.

§ 2324. **Allowable costs under defense contracts**

(a)(1) The Secretary of Defense shall require that a covered contract provide that if the contractor submits to the Department of Defense a proposal for settlement of indirect costs incurred by the contractor for any period after such costs have been accrued and if that proposal includes the submission of a cost which is unallowable because the cost violates a cost principle in the Federal Acquisition Regulation or the Department of Defense Supplement to the Federal Acquisition Regulation, the cost shall be disallowed.

(2) If the Secretary determines by clear and convincing evidence that a cost submitted by a contractor in its proposal for settlement is unallowable under paragraph (1), the Secretary shall assess a penalty against the contractor in an amount equal to --

(A) the amount of the disallowed costs; plus

(B) interest (to be computed based on regulations issued by the Secretary) to compensate the United States for the use of any funds which a contractor has been paid in excess of the amount to which the contractor was entitled.

(b) If the Secretary determines that a proposal for settlement of indirect costs submitted by a contractor includes a cost determined to be unallowable in the case of such contractor before the submission of such proposal, the Secretary shall assess a penalty against the contractor, in addition to the penalty assessed under subsection (a), in an amount equal to two times the amount of such cost.

(c) An action of the Secretary under subsection (a) or (b) --

(1) shall be considered a final decision for the purposes of § 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605); and

(2) is appealable in the manner provided in § 7 of such Act (41 U.S.C. § 606).

(d) If any penalty is assessed under subsection (a) or (b) with respect to a proposal for settlement of indirect costs, the Secretary may assess an additional penalty of not more than $10,000 per proposal.

(e)(1) The following costs are not allowable under a covered contract:

(A) Cost of entertainment, including amusement, diversion, and social activities and any costs directly associated with such costs (such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities).

(B) Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress or a State legislature.

(C) Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded *nolo contendere* to a charge of fraud or similar proceeding (including filing of a false certification).

(D) Payments of fines and penalties resulting from violations of or failure to comply with, Federal, State, local, or foreign laws and regulations, except when incurred as a result of compliance with specific terms and conditions of the contract or specific written instructions from the contracting officer authorizing in advance such payments in accordance with applicable regulations of the Secretary of Defense.

(E) Costs of membership in any social, dining, or country club or organization.

(F) Costs of alcoholic beverages.

(G) Contributions or donations, regardless of the recipient.

(H) Costs of advertising designed to promote the contractor or its products.

(I) Costs of promotional items and memorabilia, including models, gifts, and souvenirs.

(J) Costs for travel by commercial aircraft which exceed the amount of the standard commercial fare.

(2) The Secretary shall prescribe regulations to implement this section. Such regulations may establish appropriate definitions, exclusions, limitations, and qualifications.

(f)(1) The Secretary shall prescribe proposed regulations to amend those provisions of the Department of Defense Supplement to the Federal Acquisition Regulation dealing with the allowability of contractor costs. The amendments shall define in detail and in specific terms those costs which are unallowable, in whole or in part, under covered contracts. These regulations shall, at a minimum, clarify the cost principles applicable to contractor costs of the following:

(A) Air shows.

(B) Membership in civic, community, and professional organizations.

(C) Recruitment.

(D) Employee morale and welfare.

(E) Actions to influence (directly or indirectly) executive branch action on regulatory and contract matters (other than costs incurred in regard to contract proposals pursuant to solicited or unsolicited bids).

(F) Community relations.

(G) Dining facilities.

(H) Professional and consulting services, including legal services.

(I) Compensation.

(J) Selling and marketing.

(K) Travel.

(L) Public relations.

(M) Hotel and meal expenses.

(N) Expense of corporate aircraft.

(O) Company-furnished automobiles.

(P) Advertising.

(2) The regulations shall require that a contracting officer not resolve any questioned costs until he has obtained --

(A) adequate documentation with respect to such costs; and

(B) the opinion of the defense contract auditor on the allowability of such costs.

(3) The regulations shall provide that, to the maximum extent practicable, the defense contract auditor be present at any negotiation or meeting with the contractor regarding a determination of the allowability of indirect costs of the contractor.

(4) The regulations shall require that all categories of costs designated in the report of the defense contractor auditor as questioned with respect to a proposal for settlement be resolved in such a manner that the amount of the individual questioned costs that are paid will be reflected in the settlement.

(g) The regulations of the Secretary required to be prescribed under subsections (e) and (f)(1) shall require, to the maximum extent practicable, that such regulations apply to all subcontractors of a covered contract.

(h)(1) A proposal for settlement of indirect costs applicable to a covered contract shall include a certification by an official of the contractor that, to the best of the certifying official's knowledge and belief, all indirect costs included in the proposal are allowable. Any such certification shall be in a form prescribed by the Secretary.

(2) The Secretary of Defense or the Secretary of the military department concerned may waive the requirement for certification under paragraph (1) in the case of any contract if the Secretary --

(A) determines in such case that it would be in the interest of the United States to waive such certification; and

(B) states in writing the reasons for that determination and makes such determination available to the public.

(i) The submission to the Department of Defense of a proposal for settlement of costs for any period after such costs have been accrued that includes a cost that is expressly specified by statute or regulation as being unallowable, with the knowledge that such cost is unallowable, shall be subject to the provisions of § 287 of title 18 and § 3729 of title 31.

(j) In this section, 'covered contract' means a contract for an amount more than $100,000 entered into by the Department of Defense other than a fixed-price contract without cost incentives.

§ 2325. **Preference for nondevelopmental items**

(a) PREFERENCE. -- The Secretary of Defense shall ensure that, to the maximum extent practicable --

(1) requirements of the Department of Defense with respect to a procurement of supplies are stated in terms of --

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that nondevelopmental items may be procured to fulfill such requirements; and

(3) such requirements are fulfilled through the procurement of nondevelopmental items.

(b) IMPLEMENTATION. -- The Secretary of Defense shall carry out this section through the Under Secretary of Defense for Acquisition who shall have responsibility for its effective implementation.

(c) REGULATIONS. -- The Secretary of Defense shall prescribe regulations to carry out this section.

(d) DEFINITION. -- In this section, the term "nondevelopmental item" means --

(1) any item of supply that is available in the commercial marketplace.

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

(3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency; or

(4) any item of supply that is currently being produced that does not meet the requirements of paragraph (1), (2) or (3) solely because of the item --

(A) is not yet in use; or

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

§ 2326. Undefinitized contractual actions; restrictions

(a) IN GENERAL. -- The head of an agency may not enter into an undefinitized contractual action unless the request to the head of the agency for authorization of the contractual action includes a description of the anticipated effect on requirements of the military department concerned if a delay is incurred for purposes of determining contractual terms, specifications, and price before performance is begun under the contractual action.

(b) LIMITATIONS ON OBLIGATION AND EXPENDITURE OF FUNDS. --

(1) A contracting officer of the Department of Defense may not enter into an undefinitized contractual action unless the contractual action provides for agreement upon contractual terms, specifications, and price by the earlier of --

(A) the end of the 180-day period beginning on the date on which the contractor submits a qualifying proposal to definitize the contractual terms, specifications, and price; or

(B) the date on which the amount of funds obligated or expended under the contractual action is equal to more than 50 percent of the negotiated overall ceiling price for the contractual action.

(2) Except as provided in paragraph (3), the contracting officer for an undefinitized contractual action may not expend with respect to such contractual action an amount that is equal to more than 50 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(3) If a contractor submits a qualifying proposal (as defined in subsection (g) to definitize an undefinitized contractual action before an amount equal to more than 50 percent of the negotiated overall ceiling price is expended on such action, the contracting officer for such action may not expend with respect to such contractual action an amount that is equal to more than 75 percent of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized for such contractual action.

(4) This subsection does not apply to an undefinitized contractual action for the purchase of initial spares.

(c) INCLUSION OF NON-URGENT REQUIREMENTS. -- Requirements for spare parts and support equipment that are not needed on an urgent basis may not be included in an undefinitized contractual action for spare parts and support equipment that are needed on an urgent basis unless the head of the agency approves such inclusion as being --

(1) good business practice; and

(2) in the best interests of the United States

(d) MODIFICATION OF SCOPE. -- The scope of an undefinitized contractual action under which performance has begun may not be modified unless the head of the agency approves such modification as being --

(1) good business practice; and

(2) in the best interests of the United States.

(e) ALLOWABLE PROFIT. -- The head of an agency shall ensure that the profit allowed on an undefinitized contractual action for which the final price is negotiated after a substantial portion of the performance required is completed reflects --

(1) the possible reduced cost risk of the contractor with respect to cost incurred during performance of the contract before the final price is negotiated; and

(2) the reduced cost risk of the contractor with respect to costs incurred during performance of the remaining portion of the contract.

(f) APPLICABILITY. -- This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(g) DEFINITIONS. -- In this section:

(1) The term "undefinitized contractual action" means a new procurement action entered into by the head of an agency for which the contractual terms, specifications, or price are not agreed upon before performance is begun under the action. Such term does not include contractual actions with respect to the following:

(A) Foreign military sales.

(B) Purchases of less than $25,000.

(C) Special access programs.

(D) Congressionally-mandated long-lead procurement contracts.

(2) The term "qualifying proposal" means a proposal that contains sufficient information to enable the Department of Defense to conduct complete and meaningful audits of the information contained in the proposal and of any other information that the Department is entitled to review in connection with the contract as determined by the contracting officer.

§ 2327. **Contracts: Consideration of national security objectives**

(a) DISCLOSURE OF OWNERSHIP OR CONTROL BY A FOREIGN GOVERNMENT. -- The head of an agency shall require a firm or a subsidiary of a firm that submits a bid or proposal in response to a solicitation issued by the Department of Defense to disclose in that bid or proposal any significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary) that is owned or controlled (whether directly or indirectly) by a foreign government or an agent or instrumentality of a foreign government, if such foreign government is the government of a country that the Secretary of State determines under § 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. § 2405(j)(1)(A)) has repeatedly provided support for acts of international terrorism.

(b) PROHIBITION ON ENTERING INTO CONTRACTS AGAINST THE INTERESTS OF THE UNITED STATES. -- Except as provided in subsection (c), the head of an agency may not enter into a contract with a firm or a subsidiary of a firm if --

(1) a foreign government owns or controls (whether directly or indirectly) a significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary); and

(2) such foreign government is the government of a country that the Secretary of State determines under §.6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. § 2405(j)(1)(A)) has repeatedly provided support for acts of international terrorism.

(c) WAIVER. --

(1)(A) If the Secretary of Defense determines under paragraph (2) that entering into a contract with a firm or a subsidiary of a firm described in subsection (b) is not inconsistent with the national security objectives of the United States, the head of an agency may enter into a contract with such firm or subsidiary after the date on which such head of an agency submits to Congress a report on the contract.

(B) A report under subparagraph (A) shall include the following:

(i) the identity of the foreign government concerned.

(ii) the nature of the contract.

(iii) the extent of ownership or control of the firm or subsidiary concerned (or, if appropriate in the case of a subsidiary, of the firm that owns the subsidiary) by the foreign government concerned or the agency or instrumentality of such foreign government.

(iv) The reasons for entering into the contract.

(C) After the head of an agency submits a report to Congress under subparagraph (A) with respect to a firm or a subsidiary, such head of an agency is not required to submit a report before entering into any subsequent contract with such firm or subsidiary unless the information required to be included in such report under subparagraph (B) has materially changed since the submission of the previous report.

(2) Upon the request of the head of an agency, the Secretary of Defense shall determine whether entering into a contract with a firm or subsidiary described in subsection (b) is inconsistent with the national security objectives of the United States. In making such a determination, the Secretary of Defense shall consider the following:

(A) The relationship of the United States with the foreign government concerned.

(B) The obligations of the United States under international agreements.

(C) The extent of the ownership or control of the firm or subsidiary (or, if appropriate in the case of a subsidiary of the firm that owns the subsidiary) by the foreign government or an agent or instrumentality of the foreign government.

(D) Whether payments made, or information made available, to the firm or subsidiary under the contract could be used for purposes hostile to the interests of the United States.

(d) APPLICABILITY. --

[1] This section does not apply to a contract for an amount less than $100.000.

(2) This section does not apply to the Coast Guard or the National Aeronautics and Space Administration.

(e) REGULATIONS. -- The Secretary of Defense, after consultation with the Secretary of State, shall prescribe regulations to carry out this section. Such regulations shall include a definition of the term "significant interest."

§ 2328. Release of technical data

(a) IN GENERAL. --

(1) The Secretary of Defense shall, if required to release technical data under § 552 of title 5 (relating to the Freedom of Information Act), release technical data to a person requesting such a release if the person pays all reasonable costs attributable to search and duplication.

(2) The Secretary of Defense shall prescribe regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees under this section.

(b) DISPOSITION OF COSTS. -- An amount received under this section --

(1) shall be retained by the Department of Defense or the element of the Department of Defense receiving the amount; and

(2) shall be merged with and available for the same purpose and the same time period as the appropriation from which the costs incurred in complying with requests for technical data were paid.

(c) WAIVER. -- The Secretary of Defense shall waive the payment of costs required by subsection (a) which are in an amount greater than the costs that would be required for such a release of information under § 552 of title 5 if --

(1) the request is made by a citizen of the United States or a United States corporation, and such citizen or corporation certifies that the technical data requested is required to enable such citizen or corporation to submit an offer or determine whether it is capable of submitting an offer to provide the product to which the technical data relates to the United States or a contractor with the United States (except that the Secretary may require the citizen or corporation to pay a deposit in an amount equal to not more than the cost of complying with the request, to be refunded upon submission of an offer by the citizen or corporation);

(2) the release of technical data is requested in order to comply with the terms of an international agreement; or

(3) The Secretary determines, in accordance with § 552(a)(4)(A) of title 5, that such a waiver is in the interests of the United States.

MISCELLANEOUS PROVISIONS

DEFENSE AUTHORIZATION ACT
(FY 1985)
(HR 5617)
10 U.S.C. § 2384 *et seq.*.

§ 2384. **Supplies: identification of supplier and sources**

(a) The Secretary of Defense shall require that the contractor under a contract with the Department of Defense for the furnishing of supplies to the United States shall mark or otherwise identify supplies furnished under the contract with the identity of the contractor, the national stock number for the supplies furnished (if there is such a number), and the contractor's identification number for the supplies.

(b)(1) The Secretary of Defense shall prescribe regulations requiring that, whenever practicable, each contract requiring the delivery of supplies (other than a contract described in paragraph (2)) shall require that the contractor identify --

(A) the actual manufacturer or producer of the item or of all sources of supply of the contractor for that item;

(B) the national stock number of the item (if there is such a number) and the identification number of the actual manufacturer or producer of the item or of each source of supply of the contractor for the item; and

(C) the source of any technical data delivered under the contract.

(2) Paragraph (1) does not apply to a contract that requires the delivery of supplies that are commercial items sold in substantial quantities to the general public if the contract --

(A) provides for the acquisition of such supplies by the Department of Defense at established catalog or market prices; or

(B) is awarded through the use of competitive procedures.

(c) Identification of supplies and technical data under this section shall be made in the manner and with respect to the supplies prescribed by the Secretary of Defense.

(d) The amendment made by subsection (a) shall take effect at the end of the one-year period beginning on the date of the enactment of this Act.

(as amended by the Defense Improvement Act of 1986)

§ 2384a. **Supplies: economic order quantities**

(a)(1) An agency referred to in § 2303 of this title shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

(2) The Secretary of Defense shall take paragraph (1) into account in approving rates of obligation of appropriations under section 2204 of this title.

(b) Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

ADDITIONAL MISCELLANEOUS PROCUREMENT PROVISIONS

§ 2402. Prohibition of contractors limiting subcontractor sales directly to the United States.

(a) Each contract for the purchase of supplies or services made by the Department of Defense shall provide that the contractor will not --

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract for any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

(b) This section does not prohibit a contractor from asserting rights it otherwise has under law.

§ 2403. Major weapon systems: contractor guarantees

(a) In this section:

(1) 'Weapon system' means items that can be used directly by the armed forces to carry out combat missions and that cost more than $100,000 or for which the eventual total procurement cost is more than $10,000,000. Such term does not include commercial items sold in substantial quantities to the general public.

(2) 'Prime contractor' means a party that enters into an agreement directly with the United States to furnish part or all of a weapon system.

(3) 'Design and manufacturing requirements' means structural and engineering plans and manufacturing particulars, including precise measurements, tolerances, materials, and finished product tests for the weapon system being produced.

(4) 'Essential performance requirements', with respect to a weapon system, means the operating capabilities or maintenance and reliability characteristics of the system that are determined by the Secretary of Defense to be necessary for the system to fulfill the military requirement for which the system is designed.

(5) 'Component' means any constituent element of a weapon system.

(6) 'Mature full-scale production' means the manufacture of all units of a weapon system after the manufacture of the first one-tenth of the eventual total production or the initial production quantity of such system, whichever is less.

(7) 'Initial production quantity' means the number of units of a weapon system contracted for in the first year of full-scale production.

(8) 'Head of an agency' has the meaning given that term in § 2302 of this title.

(b) Except as otherwise provided in this section, the head of an agency may not after January 1, 1985, enter into a contract for the production of a weapon system unless each prime contractor for the system provides the United States with written guarantees that --

(1) the item provided under the contract will conform to the design and manufacturing requirements specifically delineated in the production contract (or in any amendment to that contract);

(2) the item provided under the contract, at the time it is delivered to the United States, will be free from all defects in materials and workmanship;

(3) the item provided under the contract will conform to the essential performance requirements of the item as specifically delineated in the production contract (or in any amendment to that contract); and

(4) if the item provided under the contract fails to meet the guarantee specified in clause (1), (2), or (3), the contractor will at the election of the Secretary of Defense or as otherwise provided in the contract --

(A) promptly take such corrective action as may be necessary to correct the failure at no additional cost to the United States; or

(B) pay costs reasonably incurred by the United States in taking such corrective action.

(c) The head of the agency concerned may not require guarantees under subsection (b) from a prime contractor for a weapon system, or for a component of a weapon system, that is furnished by the United States to the contractor.

(d) Subject to subsection (e)(1), the Secretary of Defense may waive part or all of subsection (b) in the case of a weapon system, or component of a weapon system, if the Secretary determines --

(1) that the waiver is necessary in the interest of national defense; or

(2) that a guarantee under that subsection would not be cost- effective.

The Secretary may not delegate authority under this subsection to any person who holds a position below the level of Assistant Secretary of Defense or Assistant Secretary of a military department.

(e)(1) Before making a waiver under subsection (d) with respect to a weapon system that is a major defense acquisition program for the purpose of § 139a of this title, the Secretary of Defense shall notify the Committees on Armed Services and on Appropriations of the Senate and House of Representatives in writing of his intention to waive any or all of the requirements of subsection (b) with respect to that system and shall include in the notice an explanation of the reasons for the waiver.

(2) Not later than February 1 of each year, the Secretary of Defense shall submit to the committees specified in paragraph (1) a report identifying each waiver made under subsection (d) during the preceding calendar year for a weapon system that is not a major defense acquisition program for the purpose of § 139a of this title and shall include in the report an explanation of the reasons for the waivers.

(f) The requirement for a guarantee under subsection (b)(3) applies only in the case of a contract for a weapon system that is in mature full-scale production. However, nothing in this section prohibits the head of the agency concerned from negotiating a guarantee similar to the guarantee described in that subsection for a weapon system not yet in mature full-scale production. When a contract for a weapon system not yet in mature full-scale production is not to include the full guarantee described in subsection (b)(3), the Secretary shall comply with the notice requirements of subsection (e).

(g) Nothing in this section prohibits the head of the agency concerned from --

(1) negotiating the specific details of a guarantee, including reasonable exclusions, limitations and time duration, so long as the negotiated guarantee is consistent with the general requirements of this section;

(2) requiring that components of a weapon system furnished by the United States to a contractor be properly installed so as not to invalidate any warranty or guarantee provided by the manufacturer of such component to the United States;

(3) reducing the price of any contract for a weapon system or other defense equipment to take account of any payment due from a contractor pursuant to subclause (B) of subsection (b)(4);

(4) in the case of a dual source procurement, exempting from the requirements of subsection (b)(3) an amount of production by the second source contractor equivalent to the first one-tenth of the eventual total production by the second source contractor; and

(5) using written guarantees to a greater extent than required by this section, including guarantees that exceed those in clauses (1), (2), and (3) of subsection (b) and guarantees that provide more comprehensive remedies than the remedies specified under clause (4) of that subsection.

(h)(1) The Secretary of Defense shall prescribe such regulations as may be necessary to carry out this section.

(2) This section does not apply to the Coast Guard or to the National Aeronautics and Space Administration.

§ 2404. **Acquisition of petroleum: authority to waive contract procedures**

(a) The Secretary of Defense may, for any purchase of petroleum, waive the application of any provision of law prescribing procedures to be followed in the formation of contracts, prescribing terms and conditions to be included in contracts, or regulating the performance of contracts if the Secretary determines --

(1) that petroleum market conditions have adversely affected (or will in the near future adversely affect) the acquisition of petroleum by the Department of Defense; and

(2) the waiver will expedite or facilitate the acquisition of petroleum for Government needs.

(b) A waiver under subsection (a) may be made with respect to a particular contract or with respect to classes of contracts. Such a waiver that is applicable to a contract for the purchase of petroleum may also be made applicable to a subcontract under that contract.

(c) The Secretary of Defense may acquire petroleum by exchange of petroleum or petroleum derivatives.

(d) The Secretary of Defense shall notify the Congress within 10 days of the date on which any waiver is made under this section and of the reasons for the necessity of exercising such waiver.

(e) In this section, 'petroleum' means natural or synthetic crude, blends of natural or synthetic crude, and products refined or derived from natural or synthetic crude or from such blends.

§ 2405. **Limitation on adjustment of shipbuilding contracts**

(a) The Secretary of a military department may not adjust any price under a shipbuilding contract entered into after December 7, 1983, for an amount set forth in a claim, request for equitable adjustment, or demand for payment under the contract (or incurred due to the preparation, submission, or adjudication of any such claim, request, or demand) arising out of events occurring more than 18 months before the submission of the claim, request, or demand.

(b) For the purposes of subsection (a), a claim, request, or demand shall be considered to have been submitted only when the contractor has provided the certification required by § 6(c)(1) of the Contract Disputes Act of 1978 (41 U.S.C. § 605(c)(1)) and the supporting data for the claim, request, or demand.

§ 2406. **Availability of cost and pricing records**

(a) REQUIREMENT. -- (1) The head of an agency shall require a contractor under a covered contract with that agency to make available in a timely manner to any authorized representative of the head of the agency records of the contractor's cost and pricing data described in subsection (b) with respect to work under the covered contract.

(2) The head of the agency (or the representative of the head of the agency) shall be entitled to have access to records in the form and manner maintained by the contractor.

(b) COVERED RECORDS. -- Records covered by section (a) include (for a covered contract and end items under such a contract) the following:

(1) Work measurement system data (and any revision to such data), including records of labor content expressed in standard hours of work content for --

(A) the contractor's proposal for the contract; and

(B) the contract as negotiated.

(2) The costs described in subsection (c) --

(A) as proposed by the contractor;

(B) as negotiated by the contractor with the head of the agency; and

(C) as incurred by the contractor.

(3) Bills of material.

(c) COVERED COSTS. -- Costs referred to in subsection (b)(2) are --

(1) labor costs;

(2) material costs;

(3) subcontract costs;

(4) overhead costs;

(5) general and administrative costs; and

(6) fee or profit.

(d) NATURE OF RECORDS TO BE MAINTAINED. -- Nothing in this section shall require a contractor under a covered contract to --

(1) collect or maintain additional data not otherwise collected or maintained by the contractor, or

(2) maintain data in a form or manner different from that in which the contractor maintains such data.

(e) REGULATIONS. -- The Secretary of Defense shall prescribe regulations to carry out this section. Such regulations shall specify the period for which records shall be covered by this section, which shall not be less than three years after final payment under the contract to which the records pertain.

(f) DEFINITIONS. -- In this section:

(1) The term "head of an agency" means the Secretary of Defense or the Secretary of a military department.

(2) The term "covered contract" means a manufacturing contract --

(A) that is awarded under a major defense acquisition program (as such term is defined in § 2432(a) of this title); and

(B) that is subject to the provisions of § 2306a of this title.

(3) The term "work measurement system data" means --

(A) data generated from time standard setting, time monitoring, and variance analysis; and

(B) such data described in subparagraph (A)as included in planning, cost estimating, and productivity improvement.

(4) The term "authorized representative" means a representative of the head of an agency who is an employee of the United States or a member of the armed forces.

§ 2407 Acquisition of defense equipment; NATO projects

(text omitted)

§ 2408. Prohibition on persons convicted of defense-contract related felonies and related criminal penalty on defense contractors

(a) PROHIBITION. -- A person who is convicted of fraud or any other felony arising out of a contract with the Department of Defense shall be prohibited from working in a management or supervisory capacity on any defense contract, or serving on the board of directors of any defense contractor, for a period, as determined by the Secretary of Defense, of not less than one year from the date of the conviction.

(b) CRIMINAL PENALTY. -- A defense contractor shall be subject to a criminal penalty of not more than $500,000 if such contractor is convicted of knowingly --

(1) employing a person under a prohibition under subsection(a); or

(2) allowing such a person to serve on the board of directors of such contractor.

§ 2409. Contractor employees: protection from reprisal for disclosure of certain information

(a) PROHIBITION OF REPRISALS. -- an employee of a defense contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of the Department of Defense or the Department of Justice information relating to a substantial violation of law related to a defense contract (including the competition for or negotiation of a defense contract).

(b) INVESTIGATION OF COMPLAINTS. -- A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the Department of Defense. Unless the Inspector General determines that the complaint is frivolous, the Inspector General shall investigate the complaint and, upon completion of such investigation, submit a report of the findings of the investigation to the person, the contractor concerned, and the Secretary of Defense.

(c) CONSTRUCTION. -- Nothing in this section may be construed to authorize the discharge of, demotion of, or discrimination against an employee for a disclosure other than a disclosure protected by subsection (a) or to modify or derogate from a right or remedy otherwise available to the employee.

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949

40 U.S.C. § 471,
et seq.
(abridged)

Act of June 30, 1949, 63 Stat. 378, P.L. 152, effective July 1, 1949, as amended. An Act to simplify the procurement, utilization, and disposal of Government property, to reorganize certain agencies of the Government, and for other purposes.

Short Title (§ 1). This Act may be cited as the "Federal Property and Administrative Services Act of 1949."

DECLARATION OF POLICY

§ 2. It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for --

(a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, establishment of pools or systems for transportation of Government personnel and property by motor vehicle within specific areas, management of public utility services, repairing and converting, establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies;

(b) the utilization of available property;

(c) the disposal of surplus property; and

(d) records management (P.L. 766, Sept. 1, 1954, 68 Stat. 1126; 40 U.S.C. § 471.)

DEFINITIONS

§ 3 As used in titles I through VI of this Act --

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).

(c) The term "Administrator" means the Administrator of General Services provided for in Title I hereof.

(d) The term "property" means any interest in property except (1) the public domain; lands reserved or dedicated for national park purposes; minerals in lands and portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government.

(e) The term "excess property" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(f) The term "foreign excess property" means any excess property located outside the States of the Union, the District of Columbia, Puerto Rico, American Samoa, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

(g) The term "surplus property" means any excess property not required for the needs and discharge of the responsibilities of all Federal agencies, as determined by the Administrator.

(h) the term "care and handling" includes completing, repairing, converting, rehabilitation, operating, preserving, protecting, insuring, packing, storing, handling, conserving, and transporting excess and surplus property, and in the case of property which is dangerous to public health or safety, destroying or rendering innocuous such property.

(i) The term "person" includes any corporation, partnership, firm, association, trust, estate, or other entity.

(j) the term "nonpersonal services" means such contractual services, other than personal and professional services, as the Administrator shall designate.

(k) The term "contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated or has the option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

(l) The term "motor-vehicle" means any vehicle, self-propelled or drawn by mechanical power, designed and operated principally for highway transportation of property or passengers, exclusive of any vehicle designed or used for military field training, combat, or tactical purposes, or used principally within the confines of a regularly established military post, camp, or depot, and any vehicle regularly used by an agency in the performance of investigative, law enforcement, or intelligence duties if the head of such agency determines the exclusive control of such vehicle is essential to the effective performance of such duties. (P.L. 754, September 5, 1950, 64 Stat. 590; P.L. 522, July 12, 1952, 66 Stat. 593, P.L. 766, September 1, 1954, 68 Stat. 1129; P.L. 388, August 12, 1955, 69 Stat. 722; P.L. 85-337, February 28, 1958, 72 Stat. 29; P.L. 86-70, June 25, 1959, 73 Stat. 148; P.L. 86-624, July 12, 1960, 74 Stat. 418; P.L. 93-594, January 2, 1975, 88 Stat. 1926; 40 U.S.C. § 472.)

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

(40 U.S.C. § 751, *et seq.*)

TITLE 1 - ORGANIZATION

General Services Administration

§ 101.(a) There is hereby established an agency in the executive branch of the Government which shall be known as the General Services Administration.

(b) There shall be at the head of the General Services Administration an Administrator of General Services who shall be appointed by the President by and with the advice and consent of the Senate, and perform his functions subject to the direction and control of the President.

(c) There shall be in the General Services Administration a Deputy Administrator of General Services who shall be appointed by the Administrator of General Services. The Deputy Administrator shall perform such functions as the Administrator shall designate and shall be Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President shall designate another officer of the Government, in the event of a vacancy in the office of Administrator. (40 U.S.C. § 751).

General Supply Fund

§ 109.(a) There is authorized to be set aside in the Treasury a special fund which shall be known as the General Supply Fund. Such fund shall be composed of the assets of the general supply fund (including any surplus therein) created by § 3 of the Act of February 27, 1929 (45 Stat. 1342; 41 U.S.C. § 7c), and transferred to the Administrator by § 102 of this Act such sums as may be appropriated thereto, and the value, as determined by the Administrator, of inventories of personal property from time to time transferred to the Administrator by other executive agencies under authority of § 201(a)(2) to the extent that payment is not made or credit allowed therefor, and the fund shall assume all of the liabilities, obligations, and commitments of the general supply fund created by such Act of February 27, 1929. The General Supply Fund shall be available for use by or under the direction and control of the Administrator (1) for procuring personal property (including the purchase from or through the Public Printer, for warehouse issue, of standard forms, blank-book work, standard specifications, and other printed material in common use by Federal agencies not available through the Superintendent of Documents) and nonpersonal services for the use of Federal agencies in the proper discharge of their responsibilities, and (2) for paying the purchase price, transportation of supplies and services, and the cost of personal services employed directly in the repair, rehabilitation, and conversion of personal property.

(b) Payment by requisition agencies shall be at prices fixed by the Administrator. Such prices shall be fixed at levels so as to recover so far as practicable the applicable purchase price, the transportation cost, inventory losses, the cost of personal services employed directly in the repair, rehabilitation, and conversion of personal property, and the cost of amortization, and repair of equipment utilized for lease or rent to executive agencies. Requisitioning agencies shall pay by advance of funds in all cases where it is determined by the Administrator that there is insufficient capital otherwise available in the General Supply Fund. Advances of funds may also be made by agreement between the requisitioning agencies and the Administrator. Where an advance of funds is not made, the General Services Administration shall be reimbursed promptly out of funds of the requisitioning agency in accordance with accounting procedures approved by the Comptroller General: Provided, That in any case where payment shall not have been made by the requisitioning agency within forty-five days after the date of billing by the Administrator or the date on which an actual liability for supplies or services is incurred by the Administrator, whichever is the later, reimbursement may be obtained by the Administrator by the issuance of transfer and counter-warrants, or other lawful transfer documents supported by itemized invoices.

Credits to Fund

(c) The General Supply Fund shall be credited with all reimbursements, advances of funds, and refunds or recovering relating to personal property or services procured through the fund, including the net proceeds of disposal of surplus supplies procured through the fund and receipts from carriers and others for loss of, or damage to, supplies procured through the fund; and the same are reappropriated for the purposes of the fund.

(d) (Repealed August 24, 1962, P.L. 87-600, 76 Stat. 401.)

Annual Audit; Surplus; Report to Congress

(e)(1) As of June 30 of each year, there shall be covered into the United States Treasury as miscellaneous receipts any surplus in the General Supply Fund, all assets, liabilities, and prior losses considered, above the amounts transferred or appropriated to establish and maintain said fund.

(2) The Comptroller General shall make audits of the General Supply Fund in accordance with the provisions of the Accounting and Auditing Act of 1950 and make reports on the results thereof.

Additional Uses of Fund

(f) Subject to the requirements of subsections (a) to (e), inclusive, of this section, the General Supply Fund also may be used for the procurement of personal property and nonpersonal services authorized to be acquired by mixed- ownership Government corporations, or by the municipal government of the District of Columbia, or by a requisitioning non-Federal agency when the function of a Federal agency authorized to procure for it is transferred to the General Services Administration.

Material Tests; Fees; Disposition of Fees

(g) Whenever any producer or vendor shall tender any article or commodity for sale or lease to the General Services Administration or to any procurement authority acting under the direction and control of the Administrator pursuant to this Act, the Administrator is authorized in his discretion, with the consent of such producer or vendor, to cause to be conducted, in such manner as the Administrator shall specify, such tests as he shall prescribe either to determine whether such article or commodity conforms to prescribed specifications and standards; or to aid in the development of contemplated specifications and standards. When the Administrator determines that the making of such tests will serve predominantly the interest of such producer or vendor, he shall charge such producer or vendor a fee which shall be fixed by the Administrator in such amount as will recover the cost of conducting such tests, including all components of such cost, determined in accordance with accepted accounting principles. When the Administrator determines that the making of such tests will not serve predominantly the interest of such producer or vendor, he shall charge such producer or vendor such fee as he shall determine to be reasonable for the furnishing of such testing service. All such fees collected by the Administrator may be deposited in the General Supply Fund to be used for any purpose authorized by subsection 109(a) of this Act. (P.L. 754, September 5, 1950, 64 Stat. 578; P.L. 522, July 12, 1952, 66 Stat. 593, P.L. 86-591, July 5, 1960, 74 Stat. 330; P.L. 87-372, October 4, 1961, 75 Stat. 802; P.L. 87-600, August 24, 1962, 76 Stat. 401; P.L. 93-604, January 2, 1975, 88 Stat. 1963; 40 U.S.C. § 756.)

INFORMATION TECHNOLOGY FUND

§ 110. (a)(1) There is established on the books of the Treasury an Information Technology Fund (hereinafter referred to as the "Fund"), which shall be available without fiscal year limitation. There are authorized to be appropriated to the Fund such sums as may be required. For purposes of subsection (b), the Fund shall consist of --

(A) the capital and assets of the Federal telecommunications fund established under this section (as in effect on December 31, 1986), which are in such fund on January 1, 1987;

(B) the capital and assets which are in the automatic data processing fund established under § 111 of this Act (as in effect on December 31, 1986) which are in such fund on January 1, 1987; and

(C) the supplies and equipment transferred to the Administrator under §§ 111 and 205(f) of this Act, subject to any liabilities assumed with respect to such supplies and equipment.

(2) The Administrator shall determine the cost and capital requirements of the Fund for each year and shall submit plans concerning such requirements and such other information as may be requested for

the review and approval of the Director of the Office of Management and Budget. Any change to the cost and capital requirements of the Fund for a fiscal year shall be made in the same manner as provided by this section for the initial fiscal year determination. If approved by the Director, the Administrator shall establish rates to be charged agencies provided, or to be provided, information technology resources through the Fund consistent with such approvals. Such cost and capital requirements may include funds --

(A) needed for the purchase (if the Administrator has determined that purchase is the least costly alternative) of information processing and transmission equipment, software systems, and operating facilities necessary for the provision of such services;

(B) resulting from operations of the Fund, including the net proceeds of disposal of excess or surplus personal property and receipts from carriers and others for loss or damage to property; and

(C) which are appropriated, authorized to be transferred, or otherwise made available to the Fund.

(b) The Fund shall --

(1) assume all of the liabilities, obligations, and committments of the funds described in subparagraphs (A) and (B) of subsection (a)(1); and

(2) be available for expenses, including personal services and other costs, and for procurement (by lease, purchase, transfer, or otherwise) for efficiently providing information technology resources to Federal agencies and for the efficient management, coordination, operation, and utilization of such resources.

(c)(1) In the operation of the Fund, the Administrator is authorized to enter into multiyear contracts for the provision of information technology hardware, software, or services for periods not in excess of five years, if --

(A) funds are available and adequate for payment of the costs of such contract for the fiscal year and any costs of cancellation or termination;

(B) such contract is awarded on a fully competitive basis; and

(C) the Administrator determines that --

(i) the need for the information technology hardware, software, or services being provided will continue over the period of the contract;

(ii) the use of the multiyear contract will yield substantial cost savings when compared with other methods of providing the necessary resources; and

(iii) such a method of contracting will not exclude small business participation.

(2) Any cancellation costs incurred with respect to a contract entered into under this subsection shall be paid from currently available funds in the Fund.

(3) This subsection shall not be construed to limit the authority of the Administrator to procure equipment and services under § 201 of this Act.

(d) Following the close of each fiscal year, the uncommitted balance of any funds remaining in the Fund, after making provision for anticipated operating needs as determined by the Office of Management and Budget, shall be transferred to the general fund of the Treasury as miscellaneous receipts.

(e) A report on the operation of the Fund shall be made annually by the Administrator to the Director of the Office of Management and Budget. Such report shall identify any proposed increases to the capital of the Fund and shall include a report on information processing equipment inventory, utilization, and acquisition.

(f) For purposes of this section, the term "information technology resources" includes any service or equipment which had been acquired or provided under this section or § 111 of this Act, including other information processing and transmission equipment, software, systems, operating facilities, supplies, and services related thereto, and maintenance and repair thereof.

Brooks Act Amendments, Pub.L 99-591, Oct 18, 1986

Automatic Data Processing Equipment

§ 111.(a)(1) The Administrator is authorized and directed to coordinate and provide for the economic and efficient purchase, lease, and maintenance of automatic data processing equipment by Federal agencies.

(2)(A) For purposes of this section, the term "automatic data processing equipment" means any equipment or interconnected system or subsystems of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching interchange, transmission, or reception, of data or information --

(i) by a Federal agency, or

(ii) under a contract with a Federal agency which --

(I) requires the use of such equipment, or

(II) requires the performance of a service or the furnishing of a product which is performed or produced making significant use of such equipment.

(B) Such term includes --

(i) computers;

(ii) ancillary equipment;

(iii) software, firmware, and similar procedures;

(iv) services, including support services; and

(v) related resources as defined by regulations issued by the Administrator for General Services.

(3) This section does not apply to --

(A) automatic data processing equipment acquired by a Federal contractor which is incidental to the performance of a Federal contract;

(B) radar, sonar, radio, or television equipment;

(C) the procurement by the Department of Defense of automatic data processing equipment or services if the function, operation, or use of which --

(i) involves intelligence activities;

(ii) involves cryptologic activities related to national security;

(iii) involves the command and control of military forces;

(iv) involves equipment which is an integral part of a weapon or weapons system; or

(v) is critical to the direct fulfillment of military or intelligence missions, provided that this exclusion shall not include automatic data processing equipment used for routine administrative and business applications such as payroll, finance, logistics, and personnel management; or

(D) the procurement of automatic data processing equipment or services by the Central Intelligence Agency.

(b) Section 111(b) of such Act is amended by adding at the end thereof the following new paragraph:

(3) If the Administrator finds that a senior official of an agency designated pursuant to § 3605(b) of title 44, United States Code, is sufficiently independent of program responsibility and has sufficient experience, resources, and ability to carry out fairly and effectively procurements under this section, the Administrator may delegate to such official the authority to lease, purchase, or maintain automatic data processing equipment pursuant to paragraph (2) of this subsection, except that any such delegation shall not relieve the Administrator under this section. A delegation by the Administrator under this subsection shall not preclude the Administrator from reviewing individual procurement requests if the Administrator determines that circumstances warrant such a review. The Administrator shall retain authority to revoke

such delegations, both in general and with regard to any specific matter. In acting for the Administrator, any official to whom approval authority has been delegated under this subsection shall comply fully with the rules and regulations promulgated by the Administrator.

Procurement Authority

(b)(1) Automatic data processing equipment suitable for efficient and effective use by Federal agencies shall be provided by the Administrator through purchase, lease, transfer of equipment from other Federal agencies, or otherwise, and the Administrator is authorized and directed to provide by contract or otherwise for the maintenance and repair of such equipment. In carrying out his responsibilities under this section the Administrator is authorized to transfer automatic data processing equipment between Federal agencies, to provide for joint utilization of such equipment by two or more Federal agencies, and to establish and operate equipment pools and data processing centers for the use of two or more such agencies when necessary for its most efficient and effective utilization.

(2) The Administrator may delegate to one or more Federal agencies authority to operate data processing equipment pools and automatic data processing centers, and to lease, purchase, or maintain individual automatic data processing systems or specific units of equipment, including such equipment used in automatic data processing pools and automatic data processing centers, when such action is determined by the Administrator to be necessary for the economy and efficiency of operation, or when such action is essential to national defense or national security. The Administrator may delegate to one or more Federal agencies authority to lease, purchase, or maintain automatic data processing equipment to the extent to which he determines such action to be necessary and desirable to allow for the orderly implementation of a program for the utilization of such equipment.

Establishment of Revolving Fund

Nonapplicability of Other Sections

(c) The proviso following paragraph (4) in § 201(a) of this Act and the provisions of § 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

Scientific and Technological Advisory Service

(d) The Secretary of Commerce is authorized (1) to provide agencies, and the Administrator of General Services in the exercise of the authority delegated in this section, with scientific and technological advisory services relating to automatic data processing and related systems, and (2) to make appropriate recommendations to the President relating to the establishment of uniform Federal automatic data processing standards. The Secretary of Commerce is authorized to undertake the necessary research in the sciences and technologies of automatic data processing computer and related systems, as may be required under provisions of this subsection.

Limitations on Authority

(e) The authority conferred upon the Administrator and the Secretary of Commerce by this section shall be exercised subject to direction by the President and to fiscal and policy control exercised by the Office of Management and Budget. Authority so conferred upon the Administrator shall not be so construed as to impair or interfere with the determination by agencies of their individual automatic data processing equipment requirements, including the development of specifications for and the selection of the types and configurations of equipment needed. The Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any

agency. The Administrator shall provide adequate notice to all agencies and other users concerned with respect to each proposed determination whether or not the automatic data processing equipment will be provided by the Administrator or whether or not the authority to lease, purchase, or maintain the equipment will be delegated. If the Administrator denies an agency procurement request such denial shall be subject to review and decision by the Director of the Office of Management and Budget, unless the President otherwise directs. Such review and decision shall be made only on the basis of a written appeal, and such written appeal, together with any written communications to the Administrator or any officer or employee of the Office of Management and Budget concerning such denial shall be made available to the public.

(f)(1) Upon request of any interested party in connection with any procurement which is subject to this section, including procurements subject to delegation of procurement authority, the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the "board"), shall review any decision by a contracting officer alleged to violate statute or regulation, or both, 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 action under § 3551 of title 31, United States Code, with respect to any procurement may not file a protest action with respect to such procurement under this subsection.

(2) When a protest action under this subsection is filed before award of the challenged procurement, the board, at the request of any interested party and within 10 days of the filing of the protest action, shall hold a hearing to determine whether it should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest action. The delegation of procurement authority shall be suspended unless the agency establishes that --

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

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

(3) At the request of any interested party, when a protest action is filed within 30 days after the date of publication of award by the Secretary of Commerce or the date of receipt of written notice of award by the party challenging the award, whichever comes first, the board shall, within 10 days after the date of the filing of the protest action, hold a hearing to determine whether it should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis. The board shall suspend the agency's authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the agency establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit awaiting the decision of the board.

(4) The board shall conduct such proceedings and allow such discovery as may be required for the expeditious, fair and reasonable resolution of the protest action. The board shall give priority to protest actions filed under this subsection and shall issue its final decision within 45 working days after the date of protest unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period. However, nothing contained in this subsection shall conflict with any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. § 608(a)). In making a decision on the merits of protest actions brought under this section, the board shall accord due weight to the policies of this section, and the goals of economic and efficient procurement set forth in this section. When the board determines that challenged agency action violates a procurement statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the delegation of procurement authority applicable to the challenged procurement. Whenever the board makes such a determination, it may, in accordance with § 1304 of title 31, United States Code, further declare the entitlement of an appropriate party to the costs of (A) filing and pursuing the protest, including reasonable attorney's fees, and (B) bid and proposal preparation, the final

decision of the board may be appealed by the head of the agency involved and by any interested party, including interested parties who intervene in any protest action filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. § 501 *et seq.*). If the board revokes or suspends the procurement authority of the Administrator or the Administrator's delegation of procurement authority after contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted thereunder prior to the suspension, revocation, or revision of the delegation of procurement authority. Nothing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation. However, the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section. In addition, nothing contained in this subsection shall affect the right of any person to file protests with the contracting agency or to file actions in the district court or the United States Claims Court.

(5) The board is authorized to dismiss any protest action determined to be frivolous or which, on its face, does not state a valid basis for protest. 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.

(6) The board shall, within 180 days after the date of enactment of this subsection, adopt and issue such rules and procedures, not inconsistent with this section, as may be necessary to the expeditious disposition of protest actions filed under authority of this subsection.

(7) For purposes of this subsection --

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

(B) the term 'interested party' means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or nonaward of the contract.".

(b) The amendment made by this section shall cease to be effective three years after such amendment first takes effect in accordance with § 2751.

(g) The justifications and approvals required by § 303(f)(1) of this Act shall apply in the case of any procurement under this section for which the minimum needs are so restrictive that only one manufacturer is capable of satisfying such needs. Such procurement includes either a sole source procurement or a procurement by specific make and model. Such justification and approval shall be required notwithstanding that more than one bid or offer is made or that the procurement obtains price competition and such procurement shall be treated as a procurement using procedures other than competitive procedures for purposes of § 19(b) of the Office of Federal Procurement Policy Act (41 U.S.C. § 417(b)).

TITLE II -- PROPERTY MANAGEMENT

Procurement, Warehousing, and Related Activities

§ 201.(a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned --

(1) subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Federal Procurement Policy Act, prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by an executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply as those mentioned above in subparagraph (1): *Provided,* That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies; *Provided,* That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administration under clauses (1), (2), (3), and (4) above whenever he determines such exemption to be in the best interests of national security.

(b) The Administrator shall as far as practicable provide any of the services specified in subsection (a) of this section to any other Federal agency, mixed ownership corporation (as defined in the Government Corporation Act), or the District of Columbia, upon its request.

(c) In acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator, subject to regulations prescribed by the Administrator for Federal Procurement Policy pursuant to the Office of Federal Procurement Policy Act, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired: *Provided,* That any transaction carried out under the authority of this subsection shall be evidenced in writing.

(d) In conformity with policies prescribed by the Administrator undersubsection (a), any executive agency may utilize the services, work, materials, and equipment of any other executive agency, with the consent of such other executive agency, for the inspection of personal property incident of the procurement thereof, and notwithstanding § 3678 of the Revised Statutes (31 U.S.C. § 628) or any other provision of law such other executive agency may furnish such services, work, materials, and equipment for that purpose without reimbursement or transfer of funds.

(e) Whenever the head of any executive agency determines that the remaining storage or shelf life of any medical materials or medical supplies held by such agency for national emergency purposes is of too short duration to justify their continued retention for such purposes and that their transfer or disposal would be in the interest of the United States, such material or supplies shall be considered for the purposes of § 483 of this title to be excess property. In accordance with the regulations of the Administrator, such excess materials or supplies may thereupon be transferred to or exchanged with any other Federal agency for other medical materials or supplies. Any proceeds derived from such transfers may be credited to the current applicable appropriation or fund of the transferor agency and shall be available only for the purchase of medical materials or supplies to be held for national emergency purposes. If such materials or supplies are not transferred to or exchanged with any other Federal agency, they shall be disposed of as surplus property. To the greatest extent practicable, the head of the executive agency holding such medical materials or supplies shall make the determination provided for in the first sentence of this subsection at such times as to insure that such medical materials or medical supplies can be transferred or otherwise disposed of in sufficient time to permit their use before their shelf life expires and they are rendered unfit for human use. (P.L. 216, August 10, 1949, 63 Stat. 591; P.L. 754, September 5, 1950, 64 Stat. 591; P.L. 85-781, August 27, 1958, 72 Stat. 936; P.L. 91-426, September 26, 1970, 84 Stat. 883; P.L. 93-400, August 30, 1974, 88 Stat. 796; 40 U.S.C. § 481. et. seq.)

TITLE III -- PROCUREMENT PROCEDURE

Declaration of Purpose

§ 301. The purpose of this title is to facilitate the procurement of property and services. (P.L. 522, July 12, 1952, 66 Stat. 594; 41 U.S.C. § 251.)

§ 302. **Purchases and contracts for property**

(a) Applicability of chapter; delegation of authority

Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations of the Administrator; but this chapter does not apply --

(1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or

(2) when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other law, but when this chapter is made inapplicable by any such provision of law, §§ 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.

Small business concerns; share of business; advance publicity on negotiated purchases and contracts for property

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns.

(c)(1) This title does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using other than sealed bid procedures under § 303(a)(2)(A), if the conditions set forth in § 303(a)(2)(A) apply or the contract is to be performed outside the United States.

(2) Section 303(a)(2)(A) does not require the use of sealed bid procedures in cases in which § 204(e) of title 23, United States Code, applies.

Carriage of cargo; specification of container size

(d) No contract for the carriage of Government property in other than Government-owned cargo containers shall require carriage of such property in cargo containers of any stated length, height, or width.

(As amended Nov. 8, 1965, Pub.L. 89-343, 1, 2, 79 Stat. 1303; Nov. 8, 1965, Pub.L. 89-348, 1(2), 79 Stat. 1310; Mar. 16, 1968, Pub.L. 90-268, 4, 82 Stat. 50; July 25, 1974, Pub.L. 93-356, 3, 88 Stat. 390; Dec. 1, 1983, Pub.L. 98-191, 9(a)(1), 97 Stat. 1331.)

Competition Requirements

§ 303 (a)(1) Except as provided in subsections (b) and (c) and except in the case of procurement procedures otherwise expressly authorized by statute, executive agency --

(A) shall comply with the full and open competition requirements set out in this title and in the modifications to regulations promulgated pursuant to § 2572 of the Competition in Contracting Act of 1984, and

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

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

(A) shall solicit sealed bids if --

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

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

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

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

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

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

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

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

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

(2) 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 §§ 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).

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

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

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

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

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

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

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

(7) the head of the executive agency --

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

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

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

(1) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique innovative concept, the substance of which is not otherwise available to the United States, and does not resemble the substance of a pending competitive procurement; and

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

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

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

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

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

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

(iii) in the case of a contract for an amount exceeding $10,000,000, such justification is approved by the senior procurement executive of the agency designated pursuant to § 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. § 414(3)); and

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

(2) In the case of procurements permitted by subsection (c)(2), the justification and approvals required by paragraph (1) may be made after the procurement has occurred. The justification and 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. [*] *et seq.*), popularly referred to as the Wagner-O'Day Act, or (ii) § 8(a) of the Small Business Act (15 U.S.C. § 637(a)).

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

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

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

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

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

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

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

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

(5) In no case may an executive agency --

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

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

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

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

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

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

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

Planning and Solicitation Requirements

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

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

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

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

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

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

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

(3) For the purposes of paragraph (l), 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 started in terms of --

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

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

(C) design requirements.

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

(1) a statement of --

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

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

(2)(A) in the case of sealed bids --

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

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

(B) in the case of competitive proposals --

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

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

Evaluation and Award

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

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

(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and shall, except as provided in subsection (b), award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only the price and the other price-related factors included in the solicitation under § 303A(b)(l). The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

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

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

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

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

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

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

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

(f)(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 reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

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

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

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as objectives in negotiating the contract to be awarded.

(b) The amendment made by subsection (a) shall apply with respect to any solicitation issued more than 180 days after the date of the enactment of this Act.

SEC. 303C [Not Found]

Encouragement of New Competition

§ 303C. (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 procuring activity may wave the requirements of paragraphs (2) through (3) of sub-section (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 § 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).

(b) The amendment made by subsection (a) shall apply with respect to solicitations issued more than 180 days after the date of enactment of this Act.

Validation of Proprietary Data Restrictions

§ 303D. (a) A contract for property or services entered into by an executive agency which provides for the delivery of technical data, shall provide that --

(1) a contractor or subcontractor at any tier shall be prepared to furnish to the contracting officer a written justification for any restriction asserted by the contractor or subcontractor on the right of the United States to use such technical data; and

(2) the contracting officer may review the validity of any restriction asserted by the contractor or by a subcontractor under the contract on the right of the United States to use technical data furnished to the United States under the contract if the contracting officer determines that reasonable grounds exist to question the current validity of the asserted restriction and that the continued adherence to the asserted restriction by the United States would make it impracticable to procure the item competitively at a later time.

(b) If after such review the contracting officer determines that a challenge to the asserted restriction is warranted, the contracting officer shall provide written notice to the contractor or subcontractor asserting the restriction. Such notice shall state --

(1) the grounds for challenging the asserted restriction; and

(2) the requirement for a response within 60 days justifying the current validity of the asserted restriction.

(c) If a contractor or subcontractor asserting a restriction subject to this section submits to the contracting officer a written request, showing the need for additional time to comply with the requirement to justify the current validity of the asserted restriction, additional time to adequately permit the submission of such justification shall be provided by the contracting officer as appropriate. If a party asserting a restriction receives notices of challenges to restrictions on technical data from more than one contracting officer, and notifies each contracting officer of the existence of more than one challenge, the contracting officer initiating the first in time challenge, after consultation with the party asserting the restriction and the other contracting officers, shall formulate a schedule of responses to each of the challenges that will afford the party asserting the restriction with an equitable opportunity to respond to each such challenge.

(d)(1) Upon a failure by the contractor or subcontractor to submit any response under subsection (b), the contracting officer shall issue a decision pertaining to the validity of the asserted restriction.

(2) If a justification is submitted in response to the notice provided pursuant to subsection (b), a contracting officer shall within 60 days of receipt of any justification submitted, issue a decision or notify the party asserting the restriction of the time within which a decision will be issued.

(e) If a claim pertaining to the validity of the asserted restriction is submitted in writing to a contracting officer by a contractor or subcontractor at any tier, such claim shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. § 601 *et seq.*)

(f)(1) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is sustained --

(A) the restriction on the right of the United States to use the technical data shall be cancelled; and

(B) if the asserted restriction is found not to be substantially justified, the contractor or subcontractor, as appropriate, shall be liable to the United States for payment of the cost to the United States of reviewing the asserted restriction and the fees and other expenses (as defined in § 2412(d)(2)(A) of title 28) incurred by the United States in challenging the asserted restriction, unless special circumstances would make such payment unjust.

(2) If, upon final disposition, the contracting officer's challenge to the restriction on the right of the United States to use such technical data is not sustained --

(A) the United States shall continue to be bound by the restriction; and

(B) the United States shall be liable for payment to the party asserting the restriction for fees and other expenses (as defined in § 2412(d)(2)(A) of title 28) incurred by the party asserting the restriction in defending the asserted restriction if the challenge by the United States is found not to be made in good faith.

(b) The amendment made by subsection (a) shall apply with respect to solicitations issued more than 60 days after the date of the enactment of this Act.

Commercial Pricing for Supplies

§ 303E. (a) Except in the case of an offer submitted with a written statement under subsection (b)(2) and except as provided in subsection (c), a contract entered into using other than competitive procedures by an executive agency for the purchase of items that are offered for sale to the public may not result in a price to the United States that exceeds the lowest price at which such items are sold by the contractor to the public.

(b) A person who submits an offer to an executive agency for the supply of items that it offers for sale to the public (1) shall certify in the offer that the price offered is not more than its lowest commercial price for the items, or (2) shall submit with the offer a written statement specifying the amount of the difference between its lowest commercial price for the items and the price offered, and providing a justification for that difference.

(c) Subsections (a) and (b) do not apply to a contract if the contracting officer determines that the use of the price otherwise required by subsection (a) for such contract is not appropriate because of --

(1) national security considerations; or

(2) differences in quantities, quality, delivery, or other terms and conditions of the contract from commercial contract terms.

(b) The amendment made by subsection (a) shall take effect at the end of the 180-day period beginning on the date of the enactment of this Act.

Economic Order Quantities

§ 303F. (a) Each executive agency shall procure supplies in such quantity as (A) will result in the total cost and unit cost most advantageous to the United States, where practicable, and (B) does not exceed the quantity reasonably expected to be required by the agency.

(b) Each solicitation for a contract for supplies shall, if practicable, include a provision inviting each offeror responding to the solicitation to state an opinion on whether the quantity of the supplies proposed to be procured is economically advantageous to the United States and, if applicable, to recommend a quantity or quantities which would be more economically advantageous to the United States. Each such recommendation shall include a quotation of the total price and the unit price for supplies procured in each recommended quantity.

(The amendment made by subsection (a) shall take effect at the end of the 180- day period beginning on the date of the enactment of this Act.)

Directly to the United States

§. 303G. (a) Each contract for the purchase of property or services made by an executive agency shall provide that the contractor will not --

(1) enter into any agreement with a subcontractor under the contract that has the effect of unreasonably restricting sales by the subcontractor directly to the United States of any item or process (including computer software) made or furnished by the subcontractor under the contract (or any follow-on production contract); or

(2) otherwise act to restrict unreasonably the ability of a subcontractor to make sales to the United States described in clause (1).

(b) This section does not prohibit a contractor from asserting rights it otherwise has under law.

(c) The amendment made by subsection (a) shall apply with respect to solicitations made more than 180 days after the date of the enactment of this Act.

Requirements of Negotiated Contracts

§ 304. (41 U.S.C. § 254) (a) Except as provided in subsection (b) of this section, contracts awarded after using 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. Every contract awarded after using 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.

(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 per centum 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 per centum 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 per centum 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). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure property or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive- type contract. 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 $25,000 or 5 per centum 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.

(c) Examination of books, records, etc., of contractors; time limitation; exemptions: exceptio: ! conditions; reports to Congress

All contracts awarded after using other than sealed bid procedures shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause --

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2), a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.

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

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

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

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

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

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

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

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

(5) When cost or pricing data are not required to be submitted to this subsection, such data may nevertheless be required by the agency if the agency determines that such data are necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract.

§ 304(a) (41 U S C § 254a.) Cost-type research and development contracts with educational institutions

On and after September 5, 1962, provision may be made in cost-type research and development contracts (including grants) with universities, colleges, or other educational institutions for payment of reimbursable indirect costs on the basis of predetermined fixed-percentage rates applied to the total, or an element thereof, of the reimbursable direct costs incurred.

(Pub.L. 87-638, Sept. 5, 1962, 76 Stat. 437.)

Advance Payments

§ 305. (a) Any executive agency may --

(1) make advance, partial, progress or other payments under contracts for property or services made by the agency; and

(2) insert in bid solicitations for procurement of property or services a provision limiting to small business concerns advance or progress payments.

(b) Payments made under subsection (a) may not exceed the unpaid contract price.

(c) Advance payments under subsection (a) may be made only upon adequate security and a determination by the agency head that to do so would be in the public interest. Such security may be in the form of a lien in favor of the Government on the property contracted for, on the balance in an account in which such payments are deposited, and on such of the property acquired for performance of the contract as the parties may agree. This lien shall be paramount to all other liens. (P.L. 522, July 12, 1952, 66 Stat. 594; P.L. 85-800, August 28, 1958, 72 Stat. 966; 41 U.S.C. § 255.

Waiver of Liquidated Damages

§ 306. (§ 306 was repealed by § 10(b) of P.L. 754, September 5, 1950, 64 Stat. 591, and § 10(a) of that law substituted.)

§ 10(a). Whenever any contract made on behalf of the Government by the head of any Federal Agency, or by officers authorized by him so to do, includes a provision for liquidated damages for delay, the Comptroller General upon recommendation of such head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable. (41 U.S.C. § 256a)

Administrative Determinations and Delegations

§ 307(a). The determinations and decisions provided in this title to be made by the Administrator or other agency head may be made with respect to individual purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, and except as provided in § 205(d) with respect to the Administrator, the agency head is authorized to delegate his powers provided by the title, including the making of such determinations and decisions in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) Each determination or decision required by § 304 or by section 305(c) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract. (P.L. 85-800, August 28, 1958, 72 Stat 967; P.L. 89-343, November 8, 1965, 79 Stat. 1303; 41 U.S.C. § 527.)

Statutes Continued in Effect

§ 308. No purchase or contract shall be exempt from the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. §§ 35 to 45) or from the Act of March 3, 1931 (46 Stat. 1494, as amended, 40 U.S.C. §§ 276a to 276a-6), solely by reason of having been made or awarded after using other than sealed bid procedures and the provisions of said acts and of the Act of June 19, 1912 (37 Stat. 137, as amended 40 U.S.C §§ 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts. (41 U.S.C. § 258).

Definitions

§ 309. As used in this title --

(a) The term "agency head" shall mean the head or any assistant head of any executive agency and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration. (P.L. 522 July 12, 1952, 66 Stat. 593; 41 U.S.C. § 259.)

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

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

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

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

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

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

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

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

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

41 U.S.C. § 260. **Laws not applicable to contracts**

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this chapter by § 252(a) of this title), to procure any property or services without advertising or without regard to said § 5 of this title shall be construed to authorize the procurement of such property or services pursuant to the provisions of this title relating [to] other than sealed bid procedures.

TITLE IX -- SELECTION OF ARCHITECTS AND ENGINEERS

Definitions

§ 901. As used in this title --

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

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

(3) The n "architectural and engineering services" includes those professional services of an architectural or engineering nature as well as incidental services that members of these professions and those in their employ may logicaliy or justifiably perform. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1278; 40 U.S.C. § 541).

Policy

§ 902 The Congress hereby declares it to be the policy of the Federal Government to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1279; 40 U.S.C. § 542.)

Requests for Data on Architectural and Engineering Services

§ 903. In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required. (P.L. 92-582, Oct. 27, 1972, 86 Stat. 1279; 40 U.S.C. § 543.)

Negotiation of Contracts for Architectural and Engineering Services

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

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

(c) Should the agency be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached. (P.L. 92-582, Oct 27, 1972, 86 Stat. 1279; 40 U.S.C. § 544.)

CHAPTER FOUR

STATUTES

(See Also Chapter Three Statutes)

CONTRACTING WITH SMALL BUSINESS ADMINISTRATION

15 U.S.C..§ 631. **Declaration of policy**

(a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation.

(b) It is the declared policy of the Congress that the Government, through the Small Business Administration, should aid and assist small business concerns which are engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries; and the financial assistance programs authorized by this chapter are also to be used to assist such concerns.

(c)(1) The assistance programs authorized by §§ 636(i) and 636(j) of this title are to be utilized to assist in the establishment, preservation, and strengthening of small business concerns and improve the managerial skills employed in such enterprises, with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals; or (2) owned by low-income individuals; and to mobilize for these objectives private as well as public managerial skills and resources.

(2)(A) With respect to the programs authorized by § 636(j) of this title, the Congress finds --

(i) that ownership and control of productive capital is concentrated in the economy of the United States and certain groups, therefore, own and control little productive capital;

(ii) that certain groups in the United States own and control little productive capital because they have limited opportunities for small business ownership;

(iii) that the broadening of small business ownership among groups that presently own and control little productive capital is essential to provide for the well-being of this Nation by promoting their increased participation in the free enterprise system of the United States;

(iv) that such development of business ownership among groups that presently own and control little productive capital will be greatly facilitated through the creation of a small business ownership development program, which shall provide services, including, but not limited to, financial, management, and technical assistance.

(v) that the power to let sole source Federal contracts pursuant to § 637(a) of this title can be an effective procurement assistance tool for development of business ownership among groups that own and control little productive capital; and

(vi) that the procurement authority under § 637(a) of this title shall be used only as a tool for developing business ownership among groups that own and control little productive capital.

(B) It is, therefore, the purpose of the programs authorized by § 636(j) of this title to --

(i) foster business ownership by individuals in groups that own and control little productive capital; and

(ii) promote the competitive viability of such firms by creating a small business and capital ownership development program to provide such available financial, technical, and management assistance as may be necessary.

(d) Further, it is the declared policy of the Congress that the Government should aid and assist victims of floods and other catastrophes, and small- business concerns which are displaced as a result of federally aided construction programs.

(e)(1) with respect to the Administration's business development programs the Congress finds --

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is, therefore, the purpose of § 637(a) of this title to --

(A) foster business ownership by individuals who are both socially and economically disadvantaged;

(B) promote the competitive viability of such firms by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) clarify and expand the program for the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

(As amended Pub.L. 94-305, Title I, § 112(a), June 4, 1976, 90 Stat. 667; Pub.L. 95-507, Title II, § § 201, 203, Oct. 24, 1978, 92 Stat. 1760, 1763; Pub.L. 96-302, Title I, § 118(a), July 2, 1980, 94 Stat. 840.)

§ 632. **Small-business concern**

(a) Criteria

For the purposes of this chapter, a small-business concern, including but not limited to enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries, shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. In addition to the foregoing criteria the Administrator, in making a detailed definition, may use these criteria, among others:

Number of employees and dollar volume of business: *Provided,* That the Administration shall not promulgate, amend rescind any rule or regulation with respect to size standards prior to March 31, 1981. Where the number of employees is used as one of the criteria in making such definition for any of the purposes of this chapter, the maximum number of employees which a small-business concern may have under the definition shall vary from industry to industry to the extent necessary to reflect differing characteristics of such industries and to take proper account of other relevant factors.

(b) "Agency" defined

For purposes of this chapter, any reference to an agency or department of the United States, and the term "Federal agency", shall have the meaning given the term "agency" by § 551(1) of Title 5, but does not include the United States Postal Service or the General Accounting Office.

(c) Qualified employee trust; eligibility for loan guarantee; definition; regulations for treatment of trust as qualified employee trust

(1) For purposes of this chapter, a qualified employee trust shall be eligible for any loan guarantee under § 636(a) of this title with respect to a small business concern on the same basis as if such trust were the same legal entity as such concern.

(2) For purposes of this chapter, the term "qualified employee trust" means, with respect to a small business concern, a trust --

(A) which forms part of an employee stock ownership plan (as defined in § 4975(e)(7) of Title 26) --

(i) which is maintained by such concern, and

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities (as defined in section 4975(e)(8) of Title 26) which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be decided by a majority vote of outstanding common shares voted; and

(B) in the case of any loan guarantee under § 636(a) of this title, the trustee of which enters into an agreement with the Administrator which is binding on the trust and on such small business concern and which provides that --

(i) the loan guaranteed under § 636(a) of this title shall be used solely for the purchase of qualifying employer securities of such concern,

(ii) all funds acquired by the concern in such purchase shall be used by such concern solely for the purposes for which such loan was guaranteed,

(iii) such concern will provide such funds as may be necessary for the timely repayment of such loan, and the property of such concern shall be available as security for repayment of such loan, and

(iv) all qualifying employer securities acquired by such trust in such purchase shall be allocated to the accounts of participants in such plan who are entitled to share in such allocation, and each participant has a nonforfeitable right, not later than the date such loan is repaid, to all such qualifying employer securities which are so allocated to the participant's account.

(3) Under regulations which may be prescribed by the Administrator, a trust may be treated as a qualified employee trust with respect to a small business concern if --

(A) the trust is maintained by an employee organization which represents at least 51 percent of the employees of such concern, and

(B) such concern maintains a plan --

(i) which is an employee benefit plan which is designed to invest primarily in qualifying employer securities (as defined in § 4975(e)(8) of Title 26),

(ii) which provides that each participant in the plan is entitled to direct the plan as to the manner in which voting rights under qualifying employer securities which are allocated to the account of such participant are to be exercised with respect to a corporate matter which (by law or charter) must be decided by a majority vote of the outstanding common shares voted,

(iii) which provides that each participant who is entitled to distribution from the plan has a right, in the case of qualifying employer securities which are not readily tradable on an established market, to require that the concern repurchase such securities under a fair valuation formula, and

(iv) which meets such other requirements (similar to requirements applicable to employee stock ownership plans as defined in § 4975(e)(7) of Title 26) as the Administrator may prescribe, and

(C) in the case of a loan guarantee under § 636(a) of this title, such organization enters into an agreement with the Administration which is described in paragraph (2)(B).

(d) "Qualified Indian tribe" defined

For purposes of § 636 of this title, the term "qualified Indian tribe" means an Indian tribe as defined in § 450b(a) of Title 25, which owns and controls 100 per centum of a small business concern.

(e) "Public or private organization for the handicapped" defined

For purposes of § 636 of this title, the term "public or private organization for the handicapped" means one --

(1) which is organized under the laws of the United States or of any State, operated in the interest of handicapped individuals, the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(2) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(3) which, in the production of commodities and in the provision of services during any fiscal year in which it received financial assistance under this subsection, employs handicapped individuals for not less than 75 per centum of the man-hours required for the production or provision of the commodities or services.

(f) "Handicapped individual" defined

For purposes of § 636 of this title, the term "handicapped individual" means a person who has a physical, mental, or emotional impairment, defect, ailment, disease, or disability of a permanent nature which in any way limits the selection of any type of employment for which the person would otherwise be qualified or qualifiable.

(g) "Energy measures" defined

For purposes of § 636 of this title, the term "energy measures" includes --

(1) solar thermal energy equipment which is either of the active type based upon mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer or some combination of these types;

(2) photovoltaic cells and related equipment;

(3) a product or service the primary purpose of which is conservation of energy through devices or techniques which increase the energy efficiency of existing equipment, methods of operation, or systems which use fossil fuels, and which is on the Energy Conservation Measures list of the Secretary of Energy or which the Administrator determines to be consistent with the intent of this subsection;

(4) equipment the primary purpose of which is production of energy from wood, biological waste, grain, or other biomass source of energy;

(5) equipment the primary purpose of which is industrial cogeneration of energy, district heating, or production of energy from industrial waste;

(6) hydroelectric power equipment;

(7) wind energy conversion equipment; and

(8) engineering, architectural, consulting, or other professional services which are necessary or appropriate to aid citizens in using any of the measures described in paragraph (1) through (7).

(h) "Credit elsewhere" defined

For purposes of this chapter, the term "credit elsewhere" means the availability of credit from non-Federal sources on reasonable terms and conditions taking into consideration the prevailing rates and

terms in the community in or near where the concern transacts business, or the homeowner resides, for similar purposes and periods of time.

(i) "Homeowners" defined

For purposes of § 636 of this title, the term "homeowners" includes owners and lessees of residential property and also includes personal property.

(As amended Pub.L. 94-305, Title I, § 112(b), June 4, 1976, 90 Stat. 667; Pub.L. 95-507, Title II, § 224(b), Oct. 24, 1978, 92 Stat. 1772; Pub.L. 96-302, Title V,§ 504, July 2, 1980, 94 Stat. 851; Pub.L. 96-481, Title I, § 108, Oct. 21, 1980, 94 Stat. 2323; Pub.L. 97-35, Title XIX, § 1903, Aug. 13, 1981, 95 Stat. 771.)

(j)(1) "Computer crime" defined

For purposes of this chapter --

(1) the term "computer crime" means --

(A) any crime committed against a small business concern by means of the use of a computer; and

(B) any crime involving the illegal use of, or tampering with, a computer owned or utilized by a small business concern.

(As amended Pub.L. 98-362, 6, July 16, 1984, 98 Stat. 434.)

(1) So in original. Another subsec. (j) was added by Pub.L. 98-270.

1984 Amendment. Subsec. (j). Pub.L. 98-362 added subsec. (j).

(j) "Small agricultural cooperative" defined

For the purposes of § 636(b)(2) of this title, the term "small agricultural cooperative" means an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act [12 U.S.C.A. § 1141 *et seq.],* whose size does not exceed the size standard established by the Administration for other similar agricultural small business concerns. In determining such size, the Administration shall regard the association as an entity and shall not include the income or employees of any member shareholder of such cooperative: Provided, That such an association shall not be deemed to be a small agricultural cooperative unless each member of the board of directors of the association, or each member of the governing body of the association if it is not incorporated, also individually qualifies as a small business concern.

(As amended Pub.L. 98-270, Title III, § 310, Apr. 18, 1984, 98 Stat. 161.)

§ 637. **Additional powers**

(a) Procurement contracts, subcontracts to disadvantaged small business concerns; performance bonds, contract negotiations; definitions; eligibility; determinations; publication, recruitment, construction subcontracts. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate --

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. Whenever the Administration and such

procurement officer fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price.

(B) to enter into contracts with such agency (other than the Department of Defense or any component thereof) as shall be designated by the President, to furnish articles, equipment, supplies, services, or materials, or to perform construction work for such agency. In any case in which the Administration certifies to any officer of such agency having procurement powers that the Administration is competent and responsible to perform any specific procurement contract to be let by any such officer, such officer shall let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. If the Administration and such procurement officer fail to agree on such terms and conditions, either the Administration or such officer shall promptly notify, in writing, the head of such agency. The head of such agency shall have five days (exclusive of Saturdays, Sundays, and legal holidays) to establish the terms and conditions upon which such procurement contract may be let to the Administration, and shall communicate in writing to the Administration the terms and conditions so established. Within five days (exclusive of Saturdays, Sundays, and legal holidays) after the receipt of such written communication, the Administration shall decide whether to perform such procurement contract or withdraw its prior certification that the Administration is competent and responsible to perform such contract; and

(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

No contract may be entered into under subparagraph (B) prior to October 1, 1983 nor after September 30, 1985.

(2) Notwithstanding subsections (a) and (c) of § 270a of Title 40, no small business concern shall be required to provide any amount of any bond as a condition of receiving any subcontract under this subsection if the Administrator determines that such amount is inappropriate for such concern in performing such contract: *Provided,* That the Administrator shall exercise the authority granted by the paragraph only if --

(A) the Administration takes such measures as it deems appropriate for the protection of persons furnishing materials and labor to a small business receiving any benefit pursuant to this paragraph;

(B) the Administration assists, insofar as practicable, a small business receiving the benefits of this paragraph to develop, within a reasonable period of time, such financial and other capability as may be needed to obtain such bonds as the Administration may subsequently require for the successful completion of any program conducted under the authority of this subsection;

(C) the Administration finds that such small business is unable to obtain the requisite bond or bonds from a surety and that no surety is willing to issue such bond or bonds subject to the guarantee provisions of Title IV of the Small Business Investment Act of 1958 [15 U.S.C.A. § 692 *et seq.*]; and

(D) the small business is determined to be a start-up concern and such concern has not been participating in any program conducted under the authority of this subsection for a period exceeding one year.

The authority to waive bonds provided in this paragraph (2) may not be exercised prior to October 1, 1983 nor after September 30, 1985.

(3) Any small business concern selected by the Administration to perform any Federal Government procurement contract to be let pursuant to this subsection shall, when practicable, participate in any negotiation of the terms and conditions of such contract.

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) and

(i) which is at least 51 per centum owned by --

(I) one or more socially and economically disadvantaged individuals, or

(II) an economically disadvantaged Indian tribe, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by --

(I) one or more socially and economically disadvantaged individuals, or

(II) an economically disadvantaged Indian tribe.

(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more --

(i) socially and economically disadvantaged individuals described in subparagraph (A)(ii)(I), or

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II).

(5) Socially disadvantaged individuals are those who have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(6) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determining the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.

(7) No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines that with contract, financial, technical, and management support the small business concern will be able to perform contracts which may be awarded to such concern under paragraph (1)(C) and has reasonable prospects for success in competing in the private sector.

(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6) and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

(9) Within ninety days after the effective date of this paragraph, the Administration shall publish in the Federal Register rules setting forth those conditions or circumstances pursuant to which a firm previously deemed eligible by the Administration may be denied assistance under the provisions of this subsection: *Provided,* That no such firm shall be denied total participation in any program conducted under the authority of this subsection without first being afforded a hearing on the record in accordance with chapter 5 of Title 5.

(10) The Administration shall develop and implement an outreach program to inform and recruit small business concerns to apply for eligibility for assistance under this subsection.

(11) To the maximum extent practicable, construction subcontracts awarded by the Administration pursuant to this subsection shall be awarded within the county or state where the work is to be performed.

(12) To the maximum extent practicable the Associate Administrator for Minority Small Business and Capital Ownership Development shall submit, no less frequently than annually, a yearly estimate of the dollar amounts and types of contracts required for the efficient use of any program conducted under

the authority of this subsection, to each agency which may participate in such program.

(13) For purposes of this subsection, the term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 *et seq.*]) which --

(A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or

(B) is recognized as such by the State in which such tribe, band nation, group or community resides.

(14)(A) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that --

(i) in the case of a contract for services (except construction), at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern; and

(ii) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

(B) The Administrator may change the percentage under clause (i) or (ii) of subparagraph (A) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for business in that industry category. A percentage established under the preceding sentence may not differ from a percentage established under § 15(n).

(C) The Administration shall establish, through public rulemaking, requirements similar to those specified in subparagraph (A) to be applicable to contracts for general and speciality construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. The percentage applicable to any such requirement shall be determined in accordance with subparagraph (B), except that such a percentage may not differ from a percentage established under § 15(n) for the same industry category.

(b) Procurement and property disposal powers; determination of small-business concerns

It shall also be the duty of the Administration and it is empowered, whenever it determines such action is necessary --

(1)(A) to provide technical and managerial aids to small-business concerns, by advising and counseling on matters in connection with Government procurement and property disposal and on policies, principals, and practices of good management, including but not limited to cost accounting, methods of financing, business insurance, accident control, wage incentives, computer security, and methods engineering, by cooperating and advising with voluntary business, professional, educational, and other nonprofit organizations, associations, and institutions and with other Federal and State agencies, by maintaining a clearinghouse for information concerning the managing, financing, and operation of small-business enterprises, by disseminating such information, and by such other activities as are deemed appropriate by the Administration. Such assistance also may be provided to small business concerns by the Administration through cooperation with a profit-making concern (hereafter in this paragraph referred to as a "co-sponsor") to provide training: *Provided,* That the Administration shall take such actions as it deems appropriate to ensure that the cooperation does not constitute or imply an endorsement by the Administration of the products or services of the co-sponsor, to avoid unnecessary promotion of the products or services of the co-sponsor, and to minimize utilization of any one co-sponsor in a marketing area. Such actions shall include, but not be limited to: (i) developing an agreement which specifies the standard terms and conditions of the cooperation, the use of which shall be mandatory; (ii) prohibiting any fee or charge from being imposed upon any small business concern for receiving assistance in excess of a minimal amount to cover the direct costs of providing such assistance; (iii) prohibiting the release to the co-sponsor of any of the Administration's lists of names and addresses of small business concerns, and (iv) requiring that all printed materials which contain the names of both the Administration and the co sponsor include a prominent disclaimer that the cooperation does not constitute or

imply an endorsement by the Administration of the products or services of the co-sponsor. (As amended Pub.L. 98-362, § 5(a), July 16, 1984, 98 Stat. 433.)

(B) To establish, conduct, and publicize, and to recruit, select, and train volunteers for (and to enter into contracts, grants, or cooperative agreements therefor), volunteer programs, including a Service Corps of Retired Executives (SCORE) and an Active Corps of Executive (ACE) for the purposes of subparagraph (A); and to facilitate the implementation of such volunteer programs the Administration may maintain at its headquarters and pay the expenses of a team of volunteers subject to such conditions and limitations as the Administration deems appropriate: *Provided,* That any such payments made pursuant to this subparagraph shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts.

(C) To allow any individual or group of persons participating with it in furtherance of the purposes of subparagraphs (A) and (B) to use the Administration's office facilities and related material and services as the Administration deems appropriate, including clerical and stenographic services:

(i) such volunteers, while carrying out activities under this paragraph shall be deemed Federal employees for the purposes of the Federal tort claims provisions in Title 28; and for the purposes of subchapter I of chapter 81 of Title 5 (relative to compensation to Federal employees for work injuries) shall be deemed civil employees of the United States within the meaning of the term "employee" as defined in § 8101 of Title 5, and the provisions of that subchapter shall apply except that in computing compensation benefits for disability or death, the monthly pay of a volunteer shall be deemed that received under the entrance salary for a grade GS-11 employee;

(ii) the Administrator is authorized to reimburse such volunteers for all necessary out-of-pocket expenses incident to their provision of services under this chapter, or in connection with attendance at meetings sponsored by the Administration, or for the cost of malpractice insurance, as the Administrator shall determine, in accordance with regulations which he or she shall prescribe, and, while they are carrying out such activities away from their homes or regular places of business, for travel expenses (including per diem in lieu of subsistence) as authorized by § 5703 of Title 5 for individuals serving without pay; and

(iii) such volunteers shall in no way provide services to a client of such Administration with a delinquent loan outstanding, except upon a specific request signed by such client for assistance in connection with such matter.

(D) Notwithstanding any other provision of law, no payment for supportive services or reimbursement of out-of-pocket expenses made to persons serving pursuant to this paragraph shall be subject to any tax or charge or be treated as wages or compensation for the purposes of unemployment, disability, retirement, public assistance, or similar benefit payments, or minimum wage laws.

(E) Notwithstanding any other provision of law and pursuant to regulations which the Administrator shall prescribe, counsel may be employed and counsel fees, court costs, bail, and other expenses incidental to the defense of volunteers may be paid in judicial or administrative proceedings arising directly out of the performance of activities pursuant to this paragraph, to which volunteers have been made parties.

(F) In carrying out its functions under this paragraph, the Administration is authorized to accept, in the name of the Administration, and employ or dispose of in furtherance of the purposes of this chapter, any money or property, real, personal, or mixed, tangible, or intangible, received by gift, devise, bequest, or otherwise; and, further, to accept gratuitous services and facilities.

(2) to make a complete inventory of all productive facilities of small-business concerns or to arrange for such inventory to be made by any other governmental agency which has the facilities. In making any such inventory, the appropriate agencies in the several States may be requested to furnish an inventory of the productive facilities of small-business concerns in each respective State if such an inventory is available or in prospect;

(3) To coordinate and to ascertain the means by which the productive capacity of small-business concerns can be most effectively utilized;

(4) to consult and cooperate with officers of the Government having procurement or property disposal powers, in order to utilize the potential productive capacity of plants operated by small-business concerns;

(5) to obtain information as to methods and practices which Government prime contractors utilize in letting subcontracts and to take action to encourage the letting of subcontracts by prime contractors to small-business concerns at prices and on conditions and terms which are fair and equitable;

(6) to determine within any industry the concerns, firms, persons, corporations, partnerships, cooperatives, or other business enterprises which are to be designated "small-business concerns" for the purpose of effectuating the provisions of this chapter. To carry out this purpose the Administrator, when requested to do so, shall issue in response to each such request an appropriate certificate certifying an individual concern as a "small-business concern" in accordance with the criteria expressed in this chapter. Any such certificate shall be subject to revocation when the concern covered thereby ceases to be a "small-business concern". Offices of the Government having procurement or lending powers, or engaging in the disposal of Federal property or allocating materials or supplies, or promulgating regulations affecting the distribution of materials or supplies, shall accept as conclusive the Administration's determination as to which enterprises are to be designated "small-business concerns", as authorized and directed under this paragraph;

(7)(A) To certify to Government procurement officers, and officers engaged in the sale and disposal of Federal property, with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern or group of such concerns to receive and perform a specific Government contract. A Government procurement officer or an officer engaged in the sale and disposal of Federal property may not, for any reason specified in the preceding sentence, preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration.

(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of § 35(a) of Title 41, he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation.

(C) In any case in which a small business concern or group of such concerns has been certified by the Administration pursuant to (A) or (B) to be a responsible or eligible Government contractor as to a specific Government contract, the officers of the Government having procurement or property disposal powers are directed to accept such certification as conclusive, and shall let such Government contract to such concern or group of concerns without requiring it to meet any other requirement of responsibility or eligibility. Notwithstanding the first sentence of this subparagraph, the Administration may not establish an exemption from referral or notification or refuse to accept a referral or notification from a Government procurement officer made pursuant to subparagraph (A) or (B) of this paragraph, but nothing in this paragraph shall require the processing of an application for certification if the small business concern to which the referral pertains declines to have the application processed.

(8) to obtain from any Federal department, establishment, or agency engaged in procurement or in the financing of procurement or production such reports concerning the letting of contracts and subcontracts and the making of loans to business concerns as it may deem pertinent in carrying out its functions under this chapter;

(9) to obtain from any Federal department, establishment, or agency engaged in the disposal of Federal property, such reports concerning the solicitation of bids, time of sale, or otherwise as it may deem pertinent in carrying out its functions under this chapter;

(10) to obtain from suppliers of materials information pertaining to the method of filling orders and the bases for allocating their supply, whenever it appears that any small business is unable to obtain materials from its normal sources;

(11) to make studies and recommendations to the appropriate Federal agencies to insure that a fair proportion of the total purchases and contracts for property and services for the Government be placed with small-business enterprises, to insure that a fair proportion of Government contracts for research and development be placed with small-business concerns, to insure that a fair proportion of the total sales of Government property be made to small-business concerns, and to insure a fair and equitable share of materials, supplies, and equipment to small-business concerns;

(12) to consult and cooperate with all Government agencies for the purposes of insuring that small-business concerns shall receive fair and reasonable treatment from such agencies;

(13) to establish such advisory boards and committees as may be necessary to achieve the purposes of this chapter and of the Small Business Investment Act of 1958; to call meetings of such boards and committees from time to time; to pay the transportation expenses and a per diem allowance in accordance with § 5703 of Title 5 to the members of such boards and committees for travel and subsistence expenses incurred at the request of the Administration in connection with travel to points more than fifty miles distant from the homes of such members in attending the meetings of such boards and committees; and to rent temporarily, within the District of Columbia or elsewhere, such hotel or other accommodations as are needed to facilitate the conduct of such meetings;

(14) to provide at the earliest practicable time such information and assistance as may be appropriate, including information concerning eligibility for loans under § 636(b)(3) of this title to local public agencies (as defined in § 1460 of Title 42) and to small-business concerns to be displaced by federally aided urban renewal projects in order to assist such small-business concerns in reestablishing their operations; and

(15) to disseminate, without regard to the provisions of section 3204 of Title 39 data and information, in such form as it shall deem appropriate, to public agencies, private organizations, and the general public.

Studies and Recommendations

(c) The Administration shall from time to time make studies of matters materially affecting the competitive strength of small business, and of the effect on small business of Federal laws, programs, and regulations, and shall make recommendations to the appropriate Federal agency or agencies for the adjustment of such programs and regulations to the needs of small business.

(d) Performance of contracts by small business concerns; inclusion of required contract clause; subcontracting plans; contract eligibility; incentives; breach of contract; review; report to Congress

(1) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontract with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which --

(A) does not exceed $25,000;

(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(C) is for services which are personal in nature.

(3) The clause required by paragraph (2) shall be as follows:

(A) it is the policy of the United States that small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

(C) As used in this contract, the term 'small business concern' shall mean a small business as defined pursuant to § 3 of the Small Business Act [15 U.S.C.A. § 632] and relevant regulations promulgated pursuant thereto. The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' shall mean a small business concern --

(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

(ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to § 8(a) of the Small Business Act [15 U.S.C.A. § 637(a)].

(D) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern or a small business concern owned and controlled by socially and economically disadvantaged individuals.

(4)(A) Each solicitation of an offer for a contract to be let by a Federal agency which is to be awarded pursuant to the negotiated method of procurement and which may exceed $1,000,000, in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, shall contain a clause notifying potential offering companies of the provisions of this subsection relating to contracts awarded pursuant to the negotiated method of procurement.

(B) Before the award of any contract to be let, or any amendment or modification to any contract let, by any Federal agency which --

(i) is to be awarded, or was let, pursuant to the negotiated method of procurement,

(ii) is required to include the clause stated in paragraph (3),

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000 in the case of all other contracts, and

(iv) which offers subcontracting possibilities, the apparent successful offeror shall negotiate with the procurement authority a subcontracting plan which incorporates the information prescribed in paragraph (6). The subcontracting plan shall be included in and made a material part of the contract.

(C) If, within the time limit prescribed in regulations of the Federal agency concerned, the apparent successful offeror fails to negotiate the subcontracting plan required by this paragraph, such offeror shall become ineligible to be awarded the contract. Prior compliance of the offeror with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of that offeror for the award of the contract.

(D) No contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror pursuant to this paragraph provides the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially

and economically disadvantaged individuals to participate in the performance of the contract.

(E) Notwithstanding any other provision of law, every Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals as defined in paragraph (3) of this subsection, is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract: *Provided,* That, this subparagraph shall apply only to contracts let pursuant to the negotiated method of procurement.

(5)(A) Each solicitation of a bid for any contract to be let, or any amendment or modification to any contract let, by any Federal agency which --

(i) is to be awarded pursuant to the formal advertising method of procurement,

(ii) is required to contain the clause stated in paragraph (3) of this subsection,

(iii) may exceed $1,000,000 in the case of a contract for the construction of any public facility, or $500,000, in the case of all other contracts, and

(iv) offers subcontracting possibilities, shall contain a clause requiring any bidder who is selected to be awarded a contract to submit to the Federal agency concerned a subcontracting plan which incorporates the information prescribed in paragraph (6).

(B) If, within the time limit prescribed in regulations of the Federal agency concerned, the bidder selected to be awarded the contract fails to submit the subcontracting plan required by this paragraph, such bidder shall become ineligible to be awarded the contract. Prior compliance of the bidder with other such subcontracting plans shall be considered by the Federal agency in determining the responsibility of such bidder for the award of the contract. The subcontracting plan of the bidder awarded the contract shall be included in and made a material part of the contract.

(6) Each subcontracting plan required under paragraph (4) or (5) shall include --

(A) percentage goals for the utilization as subcontractors of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals;

(B) the name of an individual within the employ of the offeror or bidder who will administer the subcontracting program of the offeror or bidder and a description of the duties of such individual;

(C) a description of the efforts the offeror or bidder will take to assure that small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals will have an equitable opportunity to compete for subcontracts;

(D) assurances that the offeror or bidder will include the clause required by paragraph (2) of this subsection in all sub- contracts which offer further subcontracting opportunities, and that the offeror or bidder will require all subcontractors (except small business concerns) who receive subcontracts in excess of $1,000,000 in the case of a contract for the construction of any public facility, or in excess of $500,000 in the case of all other contracts, to adopt a plan similar to the plan required under paragraph (4) or (5);

(E) assurances that the offeror or bidder will submit such periodic reports and cooperate in any studies or surveys as may be required by the Federal agency or the Administration in order to determine the extent of compliance by the offeror or bidder with the subcontracting plan; and

(F) a recitation of the types of records the successful offeror or bidder will maintain to demonstrate procedures which have been adopted to comply with the requirements and goals set forth in this plan, including the establishment of source lists of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals, and efforts to identify and award subcontracts to such small business concerns.

(7) The provisions of paragraphs (4), (5), and (6) shall not apply to offerors or bidders who are small business concerns

(8) The failure of any contractor or subcontractor to comply in good faith with -

(A) the clause contained in paragraph (3) of this subsection, or

(B) any plan required of such contractor pursuant to the authority of this subsection to be included in its contract or sub- contract, shall be a material breach of such contract or subcontract.

(9) Nothing contained in this subsection shall be construed to supersede the requirements of Defense Manpower Policy Number 4A (32A CFR Chap. I) or any successor policy.

(10) In the case of contracts within the provisions of paragraphs (4), (5), and (6), the Administration is authorized to --

(A) assist Federal agencies and businesses in complying with their responsibilities under the provisions of this subsection, including the formulation of subcontracting plans pursuant to paragraph (4);

(B) review any solicitation for any contract to be let pursuant to paragraphs (4) and (5) to determine the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate as subcontractors in the performance of any contract resulting from any solicitation, and to submit its findings, which shall be advisory in nature, to the appropriate Federal agency; and

(C) evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or in the case of contractors having multiple contracts, on an aggregate basis.

(11) At the conclusion of each fiscal year, the Administration shall submit to the Senate Select Committee on Small Business and the Committee on Small Busir[illegible]f the House of Representatives a report on subcontracting plans found acceptable by any Federal age[illegible]y which the Administration determines do not contain maximum practicable opportunities for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts described in this subsection.

Procurement Notices

(e)(1) Except as provided in subsection (g) --

(A) An executive agency intending to --

(i) solicit bids or proposals for a contract for property or services for a price expected to exceed $25,000;

(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 described in subsection (D); or

(iii) solicit bids or proposals for a contract for property or services for a price expected to exceed $10,000, if there is not a reasonable expectation that at least two offers will be received from responsive and responsible offerors.

(B) an executive agency intending to solicit bids or proposals for a contract for property or services shall post, for a period of not less than ten days, in a public place at the contracting office issuing the solicitation a notice of solicitation described in subsection (f) --

(i) in the case of an executive agency other than the Department of Defense, if the contract is for a price expected to exceed $10,000, but not to exceed $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

(C) an executive agency awarding a contract for property or services for a price exceeding $25,000, or placing an order referred to in clause (A)(ii) exceeding $25,000, shall furnish for publication by the Secretary of Commerce a notice announcing the award or order if there is likely to be any subcontract under such contract or order

(2) The Secretary of Commerce shall publish promptly in the *Commerce Business Daily* each notice required by paragraph (1).

(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice to the Secretary of Commerce, such executive agency may not --

(A) issue the solicitation earlier than 15 days after the date on which the notice is published by the Secretary of Commerce; or

(B) establish a deadline for the submission of all bids or proposals in response to the notice required by paragraph (1)(A) that --

(i) in the case of an order under a basic agreement, basic ordering agreement, or similar arrangement, is earlier than the date 30 days after the date the notice required by paragraph (1)(A)(ii) is published;

(ii) in the case of a solicitation for research and development, is earlier than the date 45 days after the date the notice required by paragraph (1)(A)(i) is published; or

(iii) in any other case, is earlier than the date 30 days after the date the solicitation is issued.

(f) Each notice of solicitation required by subsection (e)(1)(A) shall include --

(1) an accurate description of the property or services to be contracted for, which description (A) shall not be unnecessarily restrictive of competition, and (B) shall include, as appropriate, the agency nomenclature, National Stock Number or other part number, and a brief description of the item's form, fit or function, physical dimensions, predominant material of manufacture, or similar information that will assist a prospective contractor to make an informed business judgment as to whether a copy of the solicitation should be requested;

(2) provisions that --

(A) state whether the technical data required to respond to the solicitation will not be furnished as part of such solicitation, and identify the source in the Government, if any, from which the technical data may be obtained; and

(B) state whether an offeror, its product, or service must meet a qualification requirement in order to be eligible for award, and, if so, identify the office from which a qualification requirement may be obtained;

(3) the name, business address, and telephone number of the contracting officer;

(4) a statement that all responsible sources may submit a bid, proposal, or quotation (as appropriate) which shall be considered by the agency; and

(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

(g)(1) A notice is not required under subsection (a)(1) if --

(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

(B) the proposed procurement would result from acceptance of --

(i) any unsolicited proposal that demonstrates a unique and innovative research concept and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposals; or

(ii) a proposal submitted under § 9 of this Act;

(C) the procurement is made against an order placed under a requirements contract;

(D) the procurement is made for perishable subsistence supplies;

(E) the procurement is for utility services, other than telecommunication services, and only one source is available.

(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in paragraph (2), (3), (4), (5), or (7) of § 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C § 253(c)) or paragraph (2), (3), (4), (5), or (7) of § 2304(c) of title 10, United States Code.

(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, after consultation with the Administrator for Federal Procurement Policy and the Administrator of the Small Business Administration, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

(h)(1) An Executive agency may not award a contract using procedures other than competitive procedures unless --

(A) except as provided in paragraph (2), a written justification for the use of such procedures has been 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 advocate for competition for the procuring activity (without further delegation);

(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 § 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. § 414(3)) (without further delegation); and

(B) all other requirements applicable to the use of such procedures under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. § 251 *et seq.*) or chapter 137 of title 10, United States Code, as appropriate, have been satisfied.

(2) The same exceptions as are provided in § 303(f)(2) of the Federal Property and Administration Services Act of 1949 (41 U.S.C. § 253(f)(2)) or § 2304(f)(2) of title 10, United States Code, shall apply with respect to the requirements of paragraph (1)(A) of this subsection in the same manner as such exceptions apply to the requirements of § 303(f)(1) of such Act or § 2304(f)(1) of such title, as appropriate.

(i) An executive agency shall make available to any business concern, or the authorized representative of such concern, the complete solicitation package for any on-going procurement announced pursuant to a notice under subsection (e). An executive agency may require the payment of a fee, not exceeding the actual cost of duplication, for a copy of such package.

(j) For purposes of this section, the term 'executive agency' has the meaning provided such term in § 4(1) of the Office of Federal Procurement Policy Act (41 U.S.C. § 403(1)).

§ 644. Awards or contracts

(a) Determination

To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and to be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator. For purposes of clause (3) of the first sentence of this subsection, an industry category is a discrete group of similar goods and services. Such

groups shall be determined by the Administration in accordance with the four-digit standard industrial classification codes contained in the Standard Industrial Classification Manual published by the Office of Management and Budget, except that the Administration shall limit such an industry category to a greater extent than provided under such classification codes if the Administration receives evidence indicating that further segmentation for purposes of this paragraph is warranted due to special capital equipment needs or special labor or geographic requirements or to recognize a new industry. A market for goods or services may not be segmented under the preceding sentence due to geographic requirements unless the Government typically designates the area where the work for contracts for such goods or services is to be performed and Government purchases comprise the major portion of the entire domestic market for such goods or services and, due to the fixed location of facilities, high mobilization costs, or similar economic factors, it is unreasonable to expect competition from business concerns located outside the general areas where such concerns are located. A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price.

(b) Placement of contracts by contracting procurement agency

With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under § 694b of this title, the contracting procurement agency shall, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work.

(c) Eligibility: participating organizations; monitoring and evaluation; report to congressional committees

(1) During fiscal years 1981, 1982, and 1983, public and private not-for-profit organizations eligible for assistance under section 636(h) of this title shall be eligible to participate in programs authorized under this section in an aggregate amount not to exceed $100,000,000 for each such year: *Provided,* That the Administrator shall monitor and evaluate such participation and in any case where the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped find that the participation of such organizations has or may cause severe economic injury to for-profit small businesses, the Administrator shall and is hereby authorized to direct and require every agency and department having procurement powers to take such actions as the Administrator and the Executive Director of the Committee for the Purchase from the Blind and Severely Handicapped may deem appropriate to alleviate the economic injury sustained or likely to be sustained by such for-profit small businesses.

(2) The Administration shall, not later than January 1, 1982, prepare and transmit to the Senate Select Committee on Small Business and the Committee on Small Business of the House of Representatives, a report on the impact of contracts awarded to such organizations on for-profit small businesses.

(d) Priority

For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to small business concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area set-asides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

(e) Placement of contracts by departments, agencies, and instrumentalities of the executive branch, priorities

In carrying out small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated

(1) concerns which are small buiness concerns and which are located in labor surplus areas, on the basis of a total set-aside;

(2) concerns which are small business concerns, on the basis of a total set-aside;

(3) concerns which are small business concerns and which are located in a labor surplus area, on the basis of a partial set- aside;

(4) concerns which are small business concerns, on the basis of a partial set-aside.

(f) Contract awards; other priorities

After priority is given to the small business concerns specified in subsection (e) of this section, priority shall also be given to the awarding of contracts and the placement of subcontracts, on the basis of a total set-aside, to concerns which --

(1) are not eligible under subsection (e) of this section;

(2) are not small business concerns: and

(3) will perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas.

(g) Goals for participation of small business concerns in procurement contracts

The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency having values of $10,000 or more. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination. For the purpose of establishing goals under this subsection, the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by socially and economically disadvantaged individuals. The head of each Federal agency, in attempting to attain such participation, shall consider --

(1) contracts awarded as a result of unrestricted competition; and

(2) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under § 8(a).

(h) Reports to Administration; submittal of information to Congress

At the conclusion of each fiscal year, the head of each Federal agency shall report to the Administration on the extent of participation by small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals in procurement contracts of such agency. Such reports shall contain appropriate justifications for failure to meet the goals established under subsection (g) of this section. The Administration shall submit to the Select Committee on Small Business of the Senate and the Committee on Small Business of the House of Representatives information obtained from such reports, together with appropriate comments.

(i) Small business set-asides

Nothing in this chapter or any other provision of law precludes exclusive small business set-asides for procurements of architectural and engineering services, research, development, test and evaluation, and each Federal agency is authorized to develop such set-asides to further the interests of small business in those areas.

(j) Small purchase procedures

Each contract for the procurement of goods and services which has anticipated value of less than $25,000 and which is subject to small purchase procedures shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business

concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased. In utilizing small purchase procedures, contracting officers shall, wherever circumstances permit, choose a method of payment which minimizes paperwork and facilitates prompt payment to contractors.

(k) Office of Small and Disadvantaged Business Utilization; Director

There is hereby established in each Federal agency having procurement powers an office to be known as the "Office of Small and Disadvantaged Business Utilization". The management of each such office shall be vested in an officer or employee of such agency who shall --

(1) be known as the "Director of Small and Disadvantaged Business Utilization" for such agency,

(2) be appointed by the head of such agency,

(3) be responsible only to, and report directly to, the head of such agency or to his deputy,

(4) be responsible for the implementation and execution of the functions and duties under this section and § 637 of this title which relate to such agency,

(5) have supervisory authority over personnel of such agency to the extent that the functions and duties of such personnel relate to functions and duties under this section and § 637 of this title,

(6) assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative--

(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at the activity, and

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to this section and § 637 of this title, and

(7) cooperate, and consult on a regular basis, with the Administration with respect to carrying out the functions and duties described in paragraph (4) of this subsection.

This subsection shall not apply to the Administration.

(l)(1) The Administration shall assign to each major procurement center a breakout procurement center representative with such assistance as may be appropriate. The breakout procurement center representative shall carry out the activities described in paragraph (2), and shall be an advocate for the breakout of items for procurement through full and open competition, whenever appropriate, while maintaining the integrity of the system in which such items are used, and an advocate for the use of full and open competition, whenever appropriate, for the procurement of supplies and services by such center. Any breakout procurement center representative assigned under this subsection shall be in addition to the representative referred to in subsection (k)(6).

(2) In addition to carrying out the responsibilities assigned by the Administration, a breakout procurement center representative is authorized to --

(A) attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be procured through other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(B) review, at any time, restrictions on competition previously imposed on items through acquisition method coding or similar procedures, and recommend to personnel of the appropriate activity the prompt reevaluation of such limitations;

(C) review restrictions on competition arising out of restrictions on the rights of the United States in technical data, and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(D) obtain from any governmental source, and make available to personnel of the appropriate activity, unrestricted technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously procured noncompetitively due to the unavailability of such

unrestricted technical data;

(E) have access to the unclassified procurement records and other data of the procurement center;

(F) receive unsolicited engineering proposals and, when appropriate (i) conduct a value analysis of such proposal to determine whether such proposal, if adopted, will result in lower costs to the United States without substantially impeding legitimate acquisition objectives and forward to personnel of the appropriate activity recommendations with respect to such proposal, or (ii) forward such proposals without analysis to personnel of the activity responsible for reviewing such proposals and who shall furnish the breakout procurement center representative with information regarding the disposition of any such proposals; and

(G) review the systems that accounts for the acquisition and management of technical data within the procurement center to assure that such systems provide the maximum availability and access to data needed for the preparation of offers to sell to the United States those supplies to which such data pertain which potential offerors are entitled to receive.

(3) A breakout procurement center representative is authorized to appeal a failure to act favorably on any recommendation made pursuant to paragraph (2). Such appeal shall be in writing, specifically reciting both the circumstances of the appeal and the basis of the recommendation. The appeal shall be decided by a person within the employ of the appropriate activity who is at least one supervisory level above the person who initially failed to act favorably on the recommendation. Such appeal shall be decided within 30 calendar days of its receipt.

(4) The Administration shall assign and co-locate at least two small business technical advisers to each major procurement center in addition to such other advisers as may be authorized from time to time. The sole duties of such advisers shall be to assist the breakout procurement center representative for the center to which such advisers are assigned in carrying out the functions described in paragraph (2) and the representatives referred to in subsection (k)(6).

(5)(A) The breakout procurement center representatives and technical advisers assigned pursuant to this subsection shall be --

(i) full time employees of the Administration; and

(ii) fully qualified, technically trained, and familiar with the supplies and services procured by the major procurement center to which they are assigned.

(B) In addition to the requirements of subparagraph (A), each breakout procurement center representative, and at least one technical adviser assigned to such representative, shall be an accredited engineer.

(C) The Administration shall establish personnel positions for breakout procurement representatives and advisers assigned pursuant to this subsection, which are classified at a grade level of the General Schedule sufficient to attract and retain highly qualified personnel.

(6) For purposes of this subsection, the term 'major procurement center' means a procurement center of the Department of Defense that awarded contracts for items other than commercial items totaling at least $150,000,000 in the preceding fiscal year, and such other procurement centers as designated by the Administrator.

(b)(1) The Administrator of the Small Business Administration and the Comptroller General of the United States shall jointly establish standards for measuring cost savings achieved through the efforts of breakout procurement center representatives and for measuring the extent to which competition has been increased as a result of such efforts. Thereafter, the Administrator shall annually prepare and submit to the Congress a report setting forth --

(A) the cost savings achieved during the year covered by such report through the efforts of breakout procurement center representatives;

(B) an evaluation of the extent to which competition has been increased as a result of such efforts; and

(C) such other information as the Administrator may deem appropriate.

(2) Within 180 days following the submission of the second annual report to Congress by the Administrator, the Comptroller General shall report to the Congress an evaluation of the Administration's adherence to the standards jointly established and the accuracy of the information the Administration has submitted to the Congress.

(m) Labor surplus area procurement and manpower programs; report to Congress

(1) The President shall, not later than October 1, 1979, transmit to the Select Committee on Small Business and the Committee on Armed Services of the Senate and to the Committee on Small Business and the Committee on Armed Services of the House of Representatives a report on the labor surplus area procurement program under this section and the manpower policy described in subparagraph (D). Such report, together with recommendations, shall include, but not be limited to --

(A) an analysis of the effectiveness of such labor surplus area procurement program, including its effectiveness in creating jobs in the areas of high unemployment and the method by which labor markets are classified and designated as labor surplus areas;

(B) its potential benefits to Federal, State and local governments, including tax benefits, reductions in Federal payments to labor surplus areas, and reductions in State unemployment costs where such information is available;

(C) its potential costs, including its impact on the efficient utilization of Federal resources, its effect on the local economy of nonlabor surplus areas, its impact on small business concerns not in labor surplus areas to the extent such information is available, and its impact on contract costs to the Federal Government; and

(D) with respect to the implementation by the Department of Defense of Defense Manpower Policy Number 4A (32A CFR Chapter 1) or any successor policy, in addition to the matters required by subparagraphs (A), (B), and (C), information concerning the impact on such matters of the expenditure of any funds which were available for procurement and which were not obligated for expenditures on September 30, 1977.

(n) Determination of labor surplus areas

For purposes of this section, the determination of labor surplus areas shall be made on the basis of criteria in effect at the time of the determination, except that any minimum population criteria shall not exceed twenty-five thousand. Such determination, as modified by the preceding sentence, shall be made by the Secretary of Labor.

(o)(1) A concern may not be awarded a contract under this subsection as a small business concern unless the concern agrees that --

(A) in the case of a contract for services (except in construction), the concern will perform at least 50 percent of the cost of the contract with its own employees; and

(B) in the case of a contract for procurement of supplies (other than procurement from a regular dealer in such supplies), the concern will perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

(2) The Administrator may change the percentage under subparagraph (A) or (B) of paragraph (1) if the Administrator determines that such change is necessary to reflect conventional industry practices among business concerns that are below the numerical size standard for businesses in that industry category.

(3) The Administration shall establish, through public rulemaking, requirements similar to those specified in paragraph (1) to be applicable to contracts for general and specialty construction and to contracts for any other industry category not otherwise subject to the requirements of such subparagraph. otherwise subject to the requirements of such subparagraph.

(p)(1) Except as provided in paragraphs (2) and (3), the head of any Federal agency shall, within five days of the agency's decision to set aside a procurement for small business concerns under this section, provide the names and addresses of the small business concerns expected to respond to the procurement to any person who requests such information.

(2) The Secretary of Defense may decline to provide information under paragraph (1) in order to protect national security interests.

(3) The head of a Federal agency is not required to release any information under paragraph (1) that is not required to be released under § 552 of title 5, United States Code.

(As amended Pub.L. 95-89, Title V, § 502, Aug. 4, 1977, 91 Stat. 562; Pub.L. 95-507, Title II, § 221, 232, 233, Oct. 24, 1978, 92 Stat. 1770, 1772; Pub.L. 96-302, Title I, § § 116, 117, July 2, 1980, 94 Stat. 839.; Pub.L. 99-272, Apr. 7, 1986, 100 Stat. 370, 371; Defense Acquisition Improvement Act of 1986.)

EXECUTIVE ORDER NO. 12432

July 14, 1983, 48 F.R. 32551

MINORITY BUSINESS ENTERPRISE DEVELOPMENT

By virtue of the authority vested in me as President by the Constitution and laws of the United States of America, including § 205(a) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 486(a)) [§ 486(a) of Title 40, Public Buildings, Property, and Works], in order to provide guidance and oversight for programs for the development of minority business enterprise pursuant to my statement of December 17, 1982 concerning Minority Business Development; and to implement the commitment of the Federal government to the goal of encouraging greater economic opportunity for minority entrepreneurs, it is hereby ordered as follows:

§ 1. **Minority Business Development Plans.**

(a) Minority business enterprise development plans shall be developed by each Federal agency having substantial procurement or grant-making authority. Such agencies shall submit these plans to the Cabinet Counsel on Commerce and Trade on an annual basis.

(b) These annual plans shall establish minority enterprise development objectives for the participating agencies and methods for encouraging both prime contractors and grantees to utilize minority business enterprises. The plans shall, to the extent possible, build upon the programs administered by the Minority Business Development Agency and the Small Business Administration, including the goals established pursuant to Public Law 95-507.

(c) The Secretary of Commerce and the Administrator of the Small Business Administration, in consultation with the Cabinet Council on Commerce and Trade, shall establish uniform guidelines for all Federal agencies to be utilized in establishing the minority business programs set forth in § 2 of this Order.

(d) The participating agencies shall furnish an annual report regarding the implementation of their programs in such form as the Cabinet Council on Commerce and Trade may request, and at such time as the Secretary of Commerce shall designate.

(e) The Secretary of Commerce shall provide an annual report to the President, through the Cabinet Council on Commerce and Trade, on activities under this Order and agency implementation of minority business development programs.

Sec. 2. **Minority Business Development Responsibilities of Federal Agencies.**

(a) To the extent permitted by law and consistent with its primary mission, each Federal agency which is required to develop a minority business development plan under § 1 of this Order shall, to accomplish the objectives set forth in its plan, establish programs concerning provision of direct assistance, procurement assistance, and management and technical assistance to minority business enterprises.

(b) Each Federal agency shall, to the extent permitted by law and consistent with its primary mission, establish minority business development programs, consistent with § 211 of Public Law 95-507 [amending subsec. (d) of this section] to develop and implement incentive techniques to encourage greater minority business subcontracting by Federal prime contractors.

(c) Each Federal agency shall encourage recipients of Federal grants and cooperative agreements to achieve a reasonable minority business participation in contracts let as a result of its grants and agreements. In cases where State and local governments are the recipients, such encouragement shall be consistent with principles of federalism.

(d) Each Federal agency shall provide the Cabinet Council on Commerce and Trade such information as it shall request from time to time concerning the agency's progress in implementing these programs.

RONALD REAGAN

PROHIBITION AGAINST DOING BUSINESS WITH CERTAIN OFFERORS OR CONTRACTORS

10 U.S.C. § 2393

(a)(1) Except as provided in paragraph (2), the Secretary of a military department may not solicit an offer from, award a contract to, extend an existing contract with, or when approval by the Secretary of the award of a subcontract is required, approve the award of a sub- contract to, an offeror or contractor which to the Secretary's knowledge has been debarred or suspended by another Federal agency unless--

(A) in the case of a debarment, the debarment of the offeror or contractor by all other agencies has been terminated or the period of time specified for such debarment has expired; and

(B) in the case of a suspension, the period of time specified by all other agencies for the suspension of the offeror or contractor has expired.

(2) Paragraph (1) does not apply in any case in which the Secretary concerned determines that there is a compelling reason to solicit an offer from, award a contract to, extend a contract with, or approve a subcontract with such offeror or contractor.

(b) Whenever the Secretary concerned makes a determination described in subsection (a)(2), he shall at the time of the determination, transmit a notice to the Administrator of General Services describing the determination. The Administrator of General Services shall maintain each such notice in a file available for public inspection.

(c) In this section:

(1) "Debar" means to exclude, pursuant to established administrative procedures, from Government contracting and subcontracting for a specified period of time commensurate with the seriousness of the failure or offense or the inadequacy of performance.

(2) "Suspend" means to disqualify, pursuant to established administrative procedures, from Government contracting and sub- contracting for a temporary period of time because a concern or individual is suspected of engaging in criminal, fraudulent or seriously improper conduct. (P.L. 97-86, Dec. 1, 1981, 95 Stat. 1124.)

THE MAYBANK AMENDMENT

PROHIBITION ON USE OF FUNDS TO RELIEVE ECONOMIC DISLOCATIONS

10 U.S.C. § 2392

(a) In order to help avoid the uneconomic use of Department of Defense funds in the procurement of goods and services, the Congress finds that it is necessary to prohibit the use of such funds for certain purposes.

(b) No funds appropriated to or for the use of the Department of Defense may be used to pay, in connection with any contract awarded by the Department of Defense, a price differential for the purpose of relieving economic dislocations. (P.L. 97-86, Dec. 1, 1981, 95 Stat. 1123.)

TRADE AGREEMENTS ACT OF 1979

ACT OF JULY 26, 1979, P.L. 96-39,93 STAT. 236-242.

TITLE III--GOVERNMENT PROCUREMENT

19 U.S.C. § 2511. GENERAL AUTHORITY TO MODIFY DISCRIMINATORY PURCHASING REQUIREMENTS.

(a) Presidential Waiver of Discriminatory Purchasing Requirements. The President may waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality designated under subsection (b), and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded--

(1) the United States products and suppliers of such products; or

(2) to eligible products of another foreign country or instrumentality which is a party to the Agreement and suppliers of such products.

(b) Designation of Eligible Countries and Instrumentalities. The President may designate a foreign country or instrumentality for purposes of subsection (a) only if he determines that such country or instrumentality --

(1) is a country or instrumentality which (A) has become a party to the Agreement, and (B) will provide appropriate reciprocal competitive governmen. procurement opportunities to United States products and suppliers of such products;

(2) is a country or instrumentality, other than a major industrial country, which (A) will otherwise assume the obligations of the Agreement, and (B) will provide such opportunities to such products and suppliers;

(3) is a country or instrumentality, other than a major industrial country, which will provide such opportunities to such products and suppliers; or

(4) is a least developed country.

(c) Modification or Withdrawal of Waivers and Designations. The President may modify or withdraw any waiver granted pursuant to subsection (a) or designation made pursuant to subsection (b). (19 U.S.C. § 2511.)

19 U.S.C. § 2512. AUTHORITY TO ENCOURAGE RECIPROCAL COMPETITIVE PROCUREMENT PRACTICES.

(a) Authority to Bar Procurement From Non-Designated Countries. With respect to procurement covered by the Agreement, the President, in order to encourage additional countries to become parties to the Agreement and to provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products--

(1) shall prohibit the procurement, after the date on which any waiver under § 301(a) first takes effect, of products (A) which are products of a foreign country or instrumentality which is not designated pursuant to § 301(b), and (B) which would otherwise be eligible products; and

(2) may take such other actions within his authority as he deems necessary.

(b) Deferrals and Waivers. Notwithstanding subsection (a), but in furtherance of the objective of encouraging countries to become parties to the Agreement and provide appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products, the President may--

(1) delay, for a period not to exceed two years, the prohibition of procurement, required pursuant to subsection (a)(1), of products of a foreign country or instrumentality which is not designated pursuant

to § 301(b), except that no such delay shall be granted with respect to the procurement of products of any major industrial country;

(2) authorize agency heads to waive, subject to interagency review and general policy guidance by the organization established under § 242(a) of the Trade Expansion Act of 1962 (19 U.S.C. § 1872(a)), such prohibition on a case-by-case basis when in the national interest; and

(3) authorize the Secretary of Defense to waive, subject to interagency review and policy guidance by the organization established under § 242(a) of the Trade Expansion Act of 1962 (19 U.S.C. § 1872(a)), such prohibition for products of any country or instrumentality which enters into a reciprocal procurement agreement with the Department of Defense.

(c) Report on Impact of Restrictions.--

(1) **Impact on the Economy.** On or before July 1, 1981, the President shall report to the Committee on Ways and Means and the Committee on Government Operations of the House of Representatives and to the Committee on Finance and the Committee of Governmental Affairs of the Senate on the effects on the United States economy (including effects on employment, production, competition, costs and prices, technological development, export trade, balance of payments, inflation, and the Federal budget) of the refusal of developed countries to allow the Agreement to cover the entities of the governments of such countries which are the principal purchasers of goods and equipment in appropriate product sectors.

(2) **Recommendations for Attaining Reciprocity.** The report required by paragraph (1) shall include an evaluation of alternative means to obtain equity and reciprocity in such product sectors, including (A) prohibiting the procurement of products of such countries by United States entities not covered by the Agreement, and (B) modifying the application of title III of the Act of March 3, 1933 (41 U.S.C. § 10a *et seq.*), commonly referred to as the Buy American Act. The report shall include an analysis of the effect of such alternative means on the United States economy (including effects on employment, production, competition, costs and prices, technological development, export trade, balance of payments, inflation, and the Federal budget), and on successful negotiations on the expansion of the coverage of the Agreement pursuant to § 304(a) and (b), other trade negotiating objectives, the relationship of the Federal Government to State and local governments, and such other factors as the President deems appropriate.

(3) **Consultation.** In the preparation of the report required by paragraph (1) and the evaluation and analysis required by paragraph (2), the President shall consult with representatives of the public, industry, and labor, and make available pertinent, nonconfidential information obtained in the course of such preparation to the advisory committees established pursuant to § 135 of the Trade Act of 1974.

(d) Proposed action. --

(1) **Presidential Report.** On or before October 1, 1981, the President shall prepare and transmit to the congressional committees referred to in subsection (c)(1) a report which describes the actions he deems appropriate to establish reciprocity with major industrialized countries in the area of Government procurement.

(2) **Procedures.** --

(A) **Presidential Determination.** If the President determines that any changes in existing law or new statutory authority are required to authorize or to implement any action proposed in the report submitted under paragraph (1), he shall, on or after January 1, 1982, submit to the Congress a bill to accomplish such changes or provide such new statutory authority. Prior to submitting such a bill, the President shall consult with the appropriate committees of the Congress having jurisdiction over legislation involving subject matters which would be affected by such action, and shall submit to such committees a proposed draft of such bill.

(B) **Congressional Consideration.** The appropriate committee of each House of the Congress shall give a bill submitted pursuant to subparagraph (A) prompt consideration and shall make its best efforts to take final committee action on such bill in an expeditious manner. (19 U.S.C. § 2512.)

19 U.S.C. § 2513. **WAIVER OF DISCRIMINATORY PURCHASING REQUIREMENTS WITH RESPECT TO PURCHASES OF CIVIL AIRCRAFT.**

The President may waive the application of the provisions of title III of the Act of March 3, 1933 (41 U.S.C. § 10a *et seq.*), popularly referred to as the Buy American Act, in the case of any procurement of civil aircraft and related articles of a country or instrumentality which is a party to the Agreement on Trade in Civil Aircraft. The President may modify or withdraw any waiver granted pursuant to this section. (19 U.S.C. § 2513.)

19 U.S.C. § 2514. **EXPANSION OF THE COVERAGE OF THE AGREEMENT.**

(a) **Overall Negotiating Objective.** The President shall seek in the renegotiations provided for in part IX, paragraph 6, of the Agreement more open and equitable market access abroad, and the harmonization, reduction, or elimination of devices which distort trade or commerce related to Government procurement, with the overall goal of maximizing the economic benefit to the United States through maintaining and enlarging foreign markets for products of United States agriculture, industry, mining, and commerce, the development of fair and equitable market opportunities, and open and nondiscriminatory world trade. In carrying out the provisions of this subsection, the President shall consider the assessment made in the report required under section 306(a).

(b) **Sector Negotiating Objectives.** The President shall seek consistent with the overall objective set forth in subsection (a) and to the maximum extent feasible, with respect to appropriate product sectors, competitive opportunities for the export of United States products to the developed countries of the world equivalent to the competitive opportunities afforded by the United States, taking into account all barriers to, and other distortions of, international trade affecting that sector.

(c) **Independent Verification Objective.** The President shall seek to establish in the renegotiation provided for in part IX, paragraph 6, of the Agreement a system for independent verification of information provided by parties to the Agreement to the Committee on Government Procurement pursuant to part VI, paragraph 9, of the Agreement.

(d) **Reports on Negotiations.**

(Text Omitted)

(e) **Extension of Nondis..imination and National Treatment.** Before exercising the waiver authority in § 301 for procurement not covered by the Agreement on the date of enactment of this Act, the President shall follow the consultation provisions of § 135 and chapter 6 of title I of the Trade Act of 1974 for private sector and congressional consultations. (19 U.S.C. § 2514.)

§ 2515. omitted

§ 2516. omitted

§ 2517. omitted

19 U.S.C. § 2518. **DEFINITIONS.**

As used in this subchapter --

(1) **Agreement.** The term "Agreement" means the Agreement on Government Procurement referred to in § 2(c) of this Act, as submitted to the Congress, but including rectifications, modifications, and amendments which are accepted by the United States

(2) **Civil Aircraft.** The term "civil aircraft and related articles" means --

(A) all aircraft other than aircraft to be purchased for use by the Department of Defense or the United States Coast Guard;

(B) the engines (and parts and components for incorporation therein) of such aircraft;

(C) any other parts, components, and subassemblies for incorporation in such aircraft, and

(D) any ground flight simulators, and parts and components thereof, for use with respect to such aircraft, whether to be purchased for use as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of such aircraft, and without regard to whether such aircraft or articles receive duty-fee [sic] treatment pursuant to § 601(A)(2).

(3) **Developed Countries.** The term "developed countries" means countries so designated by the President.

(4) **Eligible Products.** --

(A) **In General.** The term "eligible product" means, with respect to any foreign country or instrumentality, a product or service of that country or instrumentality which is covered under the Agreement for procurement by the United States.

(B) **Rule of Origin.** An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

(5) **Instrumentality.** The term "instrumentality" shall not be construed to include an agency or division of the government of a country, but may be construed to include such arrangements as the European Economic Community.

(6) **Least Developed Country.** The term "least developed country" means any country on the United Nations General Assembly list of least developed countries.

(7) **Major Industrial Country.** The term "major industrial country" means any such country as defined in § 126 of the Trade Act of 1974 and any instrumentality of such a country. (19 U.S.C. § 2518.)

CHAPTER FIVE
STATUTES

PROCUREMENT PROTEST SYSTEM

35 U.S.C. § 3551, *et seq.*

§ 3551. **Definitions** In this subchapter --

(1) "protest" means a written objection by an interested party to a solicitation by an 1Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract;

(2) "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; and

(3) "Federal agency" has the meaning given such term by § 3 of the Federal property and Administrative Services Act of 1949 (40 U.S.C. § 472).

(Added Pub.L. 98-369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1199, and amended Pub.L. 99-145, Title XIII, § 1304(d), Nov 8, 1985, 99 Stat. 742)

1So in original. Probably should be "a".

§ 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 § 111(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759(h) with respect to a procurement or proposed procurement may not file a protest with respect to that procurement under this subchapter.

(Added Pub.L. 98-369, Title VII, § 274(a), July 18, 1984, 98 Stat. 1199.)

§ 3553. **Review of protests; effect on contracts pending decision**

(a) Under procedures prescribed under § 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.

(b)(1) Within one working day of the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.

(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement --

(A) within 25 working days from 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 § 3554(a)(2) of this title, within 10 working days from the date of the Federal agency's receipt of that determination.

(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under § 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 thereafter.

(d)(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but within 10 days of the date of the contract award, the Federal agency (except as provided under paragraph (2) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

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

(A) upon a written finding --

(i) that performance of the contract is in the best interests of the United States; or

(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

(B) after the Comptroller General is notified of that finding.

(e) The authority of the head of the procuring 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) 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.

(Added Pub.L. 98-369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1200.)

§ 3554. Decisions on protests

(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period.

(2) The Comptroller General shall, by regulation prescribed pursuant to § 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted.

(3) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation,

proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency --

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

(B) recompete the contract immediately;

(C) issue a new solicitation;

(D) 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 § 3553(d)(A)(i) of this title, the comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of --

(A) filing and pursuing the protest, including reasonable attorneys' fees; and

(B) bid and proposal preparation.

(2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.

(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

(e)(1) The head of the procuring activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented those recommendations within 60 days of receipt of the Comptroller General's recommendations under subsection (b) of this section.

(2) Not later than January 31 of each year, the Comptroller General shall transmit to Congress a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year.

(Added Pub.L. 98-369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1201.)

§ 3555. **Regulations; authority of Comptroller General to verify assertions**

(a) Not later than January 15, 1985, the Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by § 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 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.

(Added Pub.L. 98-369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1202.)

§ 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 §§ 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.

(Added Pub.L. 98-369, Title VII, § 2741(a), July 18, 1984, 98 Stat. 1202.)

CHAPTER SIX

STATUTES

THE BUDGET AND ACCOUNTING ACT OF 1921

(as recodified Sept 13, 1982, Pub.L-97-258)
31 U.S.C. § 501
et seq.

SUBCHAPTER I -- ORGANIZATION

§ 501. **Office of Management and Budget**

The Office of Management and Budget is an office in the Executive Office of the President.

§ 502. **Officers**

(a) The head of the Office of Management and Budget is the Director of the Office of Management and Budget. The Director is appointed by the President, by and with the advice and consent of the Senate. Under the direction of the President, the Director shall administer the Office.

(b) The Office has a Deputy Director of the Office of Management and Budget, appointed by the President, by and with the advice and consent of the Senate. The Deputy Director --

(1) shall carry out the duties and powers prescribed by the Director; and

(2) acts as the Director when the Director is absent or unable to serve or when the office of Director is vacant.

(c) The Office has 3 Assistant Directors who shall carry out the duties and powers prescribed by the Director.

(d) The Office may have not more than 6 additional officers, each of whom is appointed in the competitive service by the Director, with the approval of the President. Each additional officer shall carry out the duties and powers prescribed by the Director. The Director shall specify the title of each additional officer.

(e) When the Director and Deputy Director are absent or unable to serve or when the offices of Director and Deputy Director are vacant, the President may designate an officer of the Office to act as Director.

GENERAL ACCOUNTING OFFICE

SUBCHAPTER I -- DEFINITIONS AND GENERAL ORGANIZATION

§ 701. **Definitions**

In this chapter --

(1) "agency" includes the District of Columbia government but does not include the legislative branch or the Supreme Court.

(2) "appropriations" means appropriated amounts and includes, in appropriate context --

(A) funds;

(B) authority to make obligations by contract before appropriations; and

(C) other authority making amounts available for obligation or expenditure.

§ 702. **General Accounting Office**

(a) The General Accounting Office is an instrumentality of the United States Government independent of the executive departments.

(b) The head of the Office is the Comptroller General of the United States. The Office has a Deputy Comptroller General of the United States.

(c) The Administrator of General Services shall provide the Comptroller General with space in the General Accounting Office Building that the Comptroller General considers necessary for use by the Comptroller General.

(d) The Comptroller General may adopt a seal for the Office.

§ 703. **Comptroller General and Deputy Comptroller General**

(a)(1) The Comptroller General and Deputy Comptroller General are appointed by the President by and with the advice and consent of the Senate.

(2) When a vacancy occurs in the office of Comptroller General or Deputy Comptroller General, a commission is established to recommend individuals to the President for appointment to the vacant office. The commission shall be composed of --

(A) the Speaker of the House of Representatives;

(B) the President pro tempore of the Senate;

(C) the majority and minority leaders of the House of Representatives and the Senate;

(D) the chairmen and ranking minority members of the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House; and

(E) when the office of Deputy Comptroller General is vacant, the Comptroller General.

(3) A commission established because of a vacancy in the office of the Comptroller General shall recommend at least 3 individuals. The President may ask the commission to recommend additional individuals.

(b) Except as provided in subsection (e) of this section, the term of the Comptroller General is 15 years. The Comptroller General may not be reappointed. The term of the Deputy Comptroller General expires on the date an individual is appointed Comptroller General. The Deputy Comptroller General may continue to serve until a successor is appointed.

(c) The Deputy Comptroller General --

(1) carries out duties and powers prescribed by the Comptroller General; and

(2) acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant.

(d) The Comptroller General shall designate an officer or employee of the General Accounting Office to act as Comptroller General when the Comptroller General and Deputy Comptroller General are absent or unable to serve or when the office of Comptroller General and Deputy Comptroller General are vacant.

(e)(1) A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by --

(A) impeachment; or

(B) joint resolution of Congress, after notice and an opportunity for a hearing, only for --

(i) permanent disability;

(ii) inefficiency;

(iii) neglect of duty;

(iv) malfeasance, or

(v) a felony or conduct involving moral turpitude.

(2) A Comptroller General or Deputy Comptroller General removed from office under paragraph (1) of this subsection may not be reappointed to the office.

(f) The annual rate of basic pay of the --

(1) Comptroller General is equal to the rate for level II of the Executive Schedule; and

(2) Deputy Comptroller General is equal to the rate for level III of the Executive Schedule.

§ 704. **Relationship to other laws**

(a) To the extent applicable, all laws generally related to administering an agency apply to the Comptroller General:

(b) A copy of a record and a transcript from a record or proceeding of the Comptroller General, that the Comptroller General or Deputy Comptroller General certifies under seal, shall be admitted as evidence with the same effect as a copy or transcript referred to in § 1733 of title 28.

SUBCHAPTER II -- GENERAL DUTIES AND POWERS

§ 711. **General authority**

The Comptroller General may --

(1) prescribe regulations to carry out the duties and powers of the Comptroller General;

(2) delegate the duties and powers of the Comptroller General to officers and employees of the General Accounting Office as the Comptroller General decides is necessary to carry out those duties and powers;

(3) regulate the practice of representatives of persons before the Office; and

(4) administer oaths to witnesses when auditing and settling accounts.

§ 712. **Investigating the use of public money**

The Comptroller General shall --

(1) investigate all matters related to the receipt, disbursement, and use of public money;

(2) estimate the cost to the United States Government of complying with each restriction on expenditures of a specific appropriation in a general appropriation law and report each estimate to Congress with recommendations the Comptroller General considers desirable;

(3) analyze expenditures of each executive agency the Comptroller General believes will help Congress decide whether public money has been used and extended economically and efficiently;

(4) make an investigation and report ordered by either House of Congress or a committee of Congress having jurisdiction over revenue, appropriations, or expenditures; and

(5) give a committee of Congress having jurisdiction over revenue, appropriations, or expenditures the help and information the committee requests.

§ 716. **Availability of information and inspection of records**

(a) Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information. This subsection does not apply to expenditures made under § 3524 or § 3526(e) of this title.

(b)(1) When an agency record is not made available to the Comptroller General within a reasonable time, the Comptroller General may make a written request to the head of the agency. The request shall state the authority for inspecting the records and the reason for the inspection. The head of the agency has 20 days after receiving the request to respond. The response shall describe the record withheld and the reason the record is being withheld. If the Comptroller General is not given an opportunity to inspect the record within the 20-day period, the Comptroller General may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress.

(2) Through an attorney the Comptroller General designates in writing, the Comptroller General may bring a civil action in the district court of the United States for the District of Columbia to require the head of the agency to produce a record --

(A) after 20 days after a report is filed under paragraph (1) of this subsection; and

(B) subject to subsection (d) of this section.

(3) The Attorney General may represent the head of the agency. The court may punish a failure to obey an order of the court under this subsection as a contempt of court.

(c)(1) Subject to subsection (d) of this section, the Comptroller General may subpoena a record of a person not in the United States Government when the record is not made available to the Comptroller General to which the Comptroller General has access by law or by agreement of that person from whom access is sought. A subpoena shall identify the record and the authority for the inspection and may be issued by the Comptroller General. The Comptroller General may have an individual serve a subpoena under this subsection by delivering a copy to the person named in the subpoena or by mailing a copy of the subpoena by certified or registered mail, return receipt requested, to the residence or principal place of business of the person. Proof of service is shown by a verified return by the individual serving the subpoena that states how the subpoena was served or by the return receipt signed by the person served.

(2) If a person residing, found, or doing business in a judicial district refuses to comply with a subpoena issued under paragraph (1) of this subsection, the Comptroller General, through an attorney the Comptroller General designates in writing, may bring a civil action in that district court to require the person to produce the record. The court has jurisdiction of the action and may punish a failure to obey an order of the court under this subsection as a contempt of court.

(d)(1) The Comptroller General may not bring a civil action for a record withheld under subsection (b) of this section or issue a subpoena under subsection (c) of this section if --

(A) the record related to activities the President designates as foreign intelligence or counterintelligence activities;

(B) the record is specifically exempted from disclosure to the Comptroller General by a statute that --

(i) without discretion requires that the record be withheld from the Comptroller General;

(ii) establishes particular criteria for withholding the record from the Comptroller General; or

(iii) refers to particular types of records to be withheld from the Comptroller General; or

(A) develop a statement of legislative goals and ways to assess and report program performance related to the goals, including recommended ways to assess performance, information to be reported, responsibility for reporting, frequency of reports, and feasibility of pilot testing; and

(B) assess program evaluations prepared by and for an agency.

(2) On request of a member of Congress, the Comptroller General shall give the member a copy of the material the Comptroller General compiles in carrying out this subsection that has been released

by the committee for which the material was compiled.

§ 718. Availability of draft reports

(a) A draft report of an audit under § 714 of this title shall be submitted to the Financial Institution Examination Council, the Federal Reserve Board, the Federal Deposit Insurance Corporation, or the Office of the Comptroller of the Currency for comment for 30 days.

(b)(1) The Comptroller General may submit a part of a draft report to an agency for comment for more than 30 days only if the Comptroller General decides, after a showing by the agency, that a longer period is necessary and likely to result in a more accurate report. The report may not be delayed because the agency does not comment within the comment period.

(2) when a draft report is submitted to an agency for comment, the Comptroller General shall make the draft report available on request to --

(A) either House of Congress, a committee of Congress, or a member of Congress if the report was begun because of a request of the House, committee, or member; or

(B) the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives if the report was not begun because of a request of either House of Congress, a committee of Congress, or a Member of Congress.

(3) This subsection is subject to statutory and executive order guidelines for handling and storing classified information and material.

(c) A final report of the Comptroller General shall include --

(1) a statement of significant changes of a finding, conclusion or recommendation in an earlier draft report because of comments on the draft by an agency;

(2) a statement of the reasons the changes were made; and

(3) for a draft report submitted under subsection (a) of this section, written comments of the agency submitted during the comment period.

§ 719. Comptroller General reports

(a) At the beginning of each regular session of Congress, the Comptroller General shall report to Congress (and to the President when requested by the President) on the work of the Comptroller General. A report shall include recommendations on --

(1) legislation the Comptroller General considers necessary to make easier the prompt and accurate making and settlement of accounts; and

(2) other matters related to the receipt, disbursement, and use of public money the Comptroller General considers advisable.

(b)(1) The Comptroller General shall include in the report to Congress under subsection (a) of this section --

(A) a review of activities under §§ 717(b)-(d) and 731(e)(2) of this title, including recommendations under § 717(c) of this title;

(B) information on carrying out duties and powers of the Comptroller General under clauses (A) and (C) of this paragraph, subsections (g) and (h) of this section, and §§ 717, 731(e)(2), 734, 1112, and 1113 of this title; and

(C) the name of each officer and employee of the General Accounting Office assigned or detailed to a committee of Congress, the committee to which the officer or employee is assigned or detailed, the length of the period of assignment or detail, a statement on whether the assignment or detail is finished or continuing, and compensation paid out of appropriations available to the Comptroller General for the period of the assignment or detail that has been completed.

(2) In a report under subsection (a) of this section or in a special report to Congress when Congress is in session, the Comptroller General shall include recommendations on greater economy and efficiency in public expenditures.

(c) The Comptroller General shall report to Congress --

(1) specially on expenditures and contracts an agency makes in violation of law;

(2) on the adequacy and effectiveness of --

(A) administrative audits of accounts and claims in an agency; and

(B) inspections by an agency of offices and accounts of fiscal officials; and

(3) as frequently as practicable on audits carried out under §§ 713 and 714 of this title.

(d) The Comptroller General shall report each year to the Committees on Finance and Governmental Affairs of the Senate, the Committees on Ways and Means and Government Operations of the House of Representatives, and the Joint Committee on Taxation. Each report shall include --

(1) procedures and requirements the Comptroller General, the Commissioner of Internal Revenue, and the Director of the Bureau of Alcohol, Tobacco, and Firearms, prescribe to protect the confidentiality of returns and return information made available to the Comptroller General under § 713(b)(1) of this title;

(2) the scope and subject matter of audits under § 713 of this title; and

(3) findings, conclusions, or recommendations the Comptroller General develops as a result of an audit under § 713 of this title, including significant evidence of inefficiency or mismanagement.

(e) The Comptroller General shall report on analyses carried out under § 712(3) of this title to the Committees on Governmental Affairs and Appropriations of the Senate, the Committees on Government Operations and Appropriations of the House, and the committees with jurisdiction over legislation related operation of each executive agency.

(f) the Comptroller General shall give the President information on expenditures and accounting the President requests.

(g) When the Comptroller General submits a report to Congress, the Comptroller General shall deliver copies of the report to --

(1) the Committees on Governmental Affairs and Appropriations of the Senate;

(2) the Committees on Government Operations and Appropriations of the House;

(3) a committee of Congress that requested information on any part of a program or activity of a department, agency, or instrumentality of the United States Government (except a mixed-ownership Government corporation) or the District of Columbia government that is the subject of any part of a report; and

(4) any other committee of Congress requesting a copy.

(h)(1) The Comptroller General shall prepare --

(A) each month a list of reports issued during the prior month; and

(B) at least once each year a list of reports issued during the prior 12 months.

(2) A copy of each list shall be sent to each committee of Congress and each member of Congress. On request, the Comptroller General promptly shall provide a copy of a report to a committee or member.

(i) On request of a committee of Congress, the Comptroller General shall explain to and discuss with the committee or committee staff a report the Comptroller General makes that would help the committee --

(1) evaluate a program or activity of an agency within the jurisdiction of the committee; or

(2) in its consideration of proposed legislation.

§ 720. **Agency reports**

(a) In this section, "agency" means a department, agency, or instrumentality of the United States Government (except a mixed-ownership Government corporation) or the District of Columbia government.

(b) When the Comptroller General makes a report that includes a recommendation to the head of an agency, the head of the agency shall submit a written statement on action taken on the recommendation by the head of the agency. The statement shall be submitted to --

(1) the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives before the 61st day after the date of the report; and

(2) the Committees on Appropriations of both Houses of Congress in the first request for appropriations submitted more than 60 days after the date of the report.

SUBTITLE II THE BUDGET PROCESS

§ 1101. **Definitions**

In this chapter --

(1) "agency" includes the District of Columbia government but does not include the legislative branch or the Supreme Court.

(2) "appropriations" means appropriated amounts and includes, in appropriate context --

(A) funds;

(B) authority to make obligations by contract before appropriations; and

(C) other authority making amounts available for obligation or expenditure.

§ 1102. **Fiscal year**

The fiscal year of the Treasury begins on October 1 of each year and ends on September 30 of the following year. Accounts of receipts and expenditures required under law to be published each year shall be published for the fiscal year.

§ 1103. **Budget ceiling**

Congress reaffirms its commitment that budget outlays of the United States Government for a fiscal year may be not more than the receipts of the Government for that year.

§ 1104. **Budget and appropriations authority of the President**

(a) The President shall prepare budgets of the United States Government under § 1105 of this title and proposed deficiency and supplemental appropriations under § 1107 of this title. To the extent practicable, the President shall use uniform terms in stating the purposes and conditions of appropriations.

(b) Except as provided in this chapter, the President shall prescribe the contents and order of statements in the budget on expenditures and estimated expenditures and statements on proposed appropriations and information submitted with the budget and proposed appropriations. The President shall include with the budget and proposed appropriations information on personnel and other objects of expenditure in the way that information was included in the budget for fiscal year 1950. However, the requirement that information be included in the budget in that way may be waived or changed by joint action of the Committees on Appropriations of both Houses of Congress. This subsection does not limit the authority of a committee of Congress to request information in a form it prescribes.

(c) When the President makes a basic change in the form of the budget, the President shall submit with the budget information showing where items in the budget for the prior fiscal year are contained in the present budget. However, the President may change the functional categories in the budget only in consultation with the Committees on Appropriations and on the budget of both Houses of Congress.

(d) The President shall develop programs and prescribe regulations to improve the compilation, analysis, publication, and dissemination of statistical information by executive agencies. The President shall carry out this subsection through the Administrator for the Office of Information and Regulatory Affairs in the Office of Management and Budget.

(e) Under regulations prescribed by the President, each agency shall provide information required by the President in carrying out this chapter. The President has access to, and may inspect, records of an agency to obtain information.

§ 1105. **Budget contents and submission to Congress**

(a) On or before the first Monday after January 3 of each year, the President shall submit a budget of the United States Government for the following fiscal year. Each budget shall include a budget message and summary and supporting information. The President shall include in each budget the following:

(1) information on activities and functions of the Government.

(2) when practicable, information on costs and achievements of Government programs.

(3) other desirable classifications of information.

(4) a recompilation of the summary information on expenditures with proposed appropriations.

(5) except as provided in subsection (b) of this section, estimated expenditures and proposed appropriations the President decides are necessary to support the Government in the fiscal year for which the budget is submitted and the 4 fiscal years after that year.

(6) estimated receipts of the Government in the fiscal year for which the budget is submitted and the 4 fiscal years after that year under --

(A) laws in effect when the budget is submitted; and

(B) proposals in the budget to increase revenues.

(7) appropriations, expenditures, and receipts of the Government in the prior fiscal year.

(8) estimated expenditures and receipts, and appropriations and proposed appropriations, of the Government for the current fiscal year.

(9) balanced statements of the --

(A) condition of the Treasury at the end of the prior fiscal year;

(B) estimated condition of the Treasury at the end of the current fiscal year; and

(C) estimated condition of the Treasury at the end of the fiscal year for which the budget is submitted if financial proposals in the budget are adopted.

(10) essential information about the debt of the Government.

(11) other financial information the President decides is desirable to explain in practicable detail the financial condition of the Government.

(12) for each proposal in the budget for legislation that would establish or expand a Government activity or function, a table showing --

(A) the amount proposed in the budget for appropriation and for expenditure because of the proposal in the fiscal year for which the budget is submitted; and

(B) the estimated appropriation required because of the proposal for each of the 4 fiscal years after that year that the proposal will be in effect.

(13) an allowance for additional estimated expenditures and proposed appropriations for the fiscal year for which the budget is submitted.

(14) an allowance for unanticipated uncontrollable expenditures for that year.

(15) a separate statement on each of the items referred to in § 301(a)(1)-(5) of the Congressional Budget Act of 1974 (2 U.S.C. §§ 632(a)(1)-(5)).

(16) the level of tax expenditures under existing law in the tax expenditures budget (as defined in § 3(a)(3) of the Congressional Budget Act of (2 U.S.C. § 622(a)(3)) for the fiscal year for which the budget is submitted, considering projected economic factors and changes in the existing levels based on proposals in the budget.

(17) information on estimates of appropriations for the fiscal year following the fiscal year for which the budget is submitted for grants, contracts, and other payments under each program for which there is an authorization of appropriations for that following fiscal year when the appropriations are authorized to be included in an appropriation law for the fiscal year before the fiscal year in which the appropriation is to be available for obligation.

(18) a comparison of the total amount of budget outlays for the prior fiscal year, estimated in the budget submitted for that year, for each major program having relatively uncontrollable outlays with the total amount of outlays for that program in that year.

(19) a comparison of the total amount of receipts for the prior fiscal year, estimated in the budget submitted for that year, with receipts received in that year, and for each major source of receipts, a comparison of the amount of receipts estimated in that budget with the amount of receipts from that source in that year.

(20) an analysis and explanation of the differences between each amount compared under clauses (18) and (19) of this subsection.

(21) a horizontal budget showing --

(A) the programs for meteorology and of the National Climate Program established under § 5 of the National Climate Program Act (15 U.S.C. § 2904);

(B) specific aspects of the program of, and appropriations for each agency; and

(C) estimated goals and financial requirements.

(22) a statement of budget authority, proposed budget authority, budget outlays, and descriptive information in terms of --

(A) a detailed structure of national needs that refers to the missions and programs of agencies (as defined in § 101 of this title); and

(B) the missions and basic programs.

(23) separate appropriation accounts for appropriations under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*) and the Federal Mine Safety and Health Act of 1977 (30 U.S.C § 801 *et seq.*).

(24) recommendations on the return of Government capital to the Treasury by a mixed-ownership corporation (as defined in § 9101(2) of this title) that the President decides are desirable.

(b) Estimated expenditures and proposed appropriations for the legislative branch and the judicial branch to be included in each budget under subsection (a)(5) of this section shall be submitted to the President before October 16 of each year and included in the budget by the President without change.

(c) The President shall recommend in the budget appropriate action to meet an estimated deficiency when the estimated receipts for the fiscal year for which the budget is submitted (under laws in effect when the budget is submitted) and the estimated amounts in the Treasury at the end of the current fiscal year are available for expenditures for that year. The President shall make recommendations required by the public interest when the estimated receipts and estimated amounts in the Treasury are more than the estimated expenditures.

(d) When the President submits a budget or supporting information about a budget, the President shall include a statement on all changes about the current fiscal year that were made before the budget or information was submitted

§ 1106. Supplemental budget estimates and changes

(a) Before July 16 of each year, the President shall submit to Congress a supplemental summary of the budget for the fiscal year for which the budget is submitted under § 105(a) of this title. The summary shall include --

(1) for that fiscal year --

(A) substantial changes in or reappraisals of estimates of expenditures and receipts;

(B) substantial obligation imposed on the budget after its submission;

(C) current information on matters referred to in § 1105(a)(8) and (9)(B) and (C) of this title; and

(D) additional information the President decides is advisable to provide Congress with complete and current information about the budget and current estimates of the functions, obligations, requirements, and financial condition of the United States Government

(2) for the 4 fiscal years following the fiscal year for which the budget is submitted, information on estimated expenditures for programs authorized to continue in future years, or that are considered mandatory, under law; and

(3) for future fiscal years, information on estimated expenditures of balances carried over from the fiscal year for which the budget is submitted.

(b) Before April 11 and July 16 of each year, the President shall submit to Congress a statement of changes in budget authority requested, estimated budget outlays, and estimated receipts for the fiscal year for which the budget is submitted (including prior changes proposed for the executive branch of the Government) that the President decides are necessary and appropriate based on current information. The statement shall include the effect of this change in the information submitted under § 1105(a)(1)-(14) and (b) of this title and shall include supporting information as practicable. The statement submitted before July 16 may be included in the information submitted under subsection (a)(1) of this section.

§ 1107. Deficiency and supplemental appropriations

The President may submit to Congress proposed deficiency and supplemental appropriations the President decides are necessary because of laws enacted after the submission of the budget or that are in the public interest. The President shall include the reasons for the submission of the proposed appropriations and the reasons the proposed appropriations were not included in the budget. When the total proposed appropriations would have required the President to make a recommendation under § 1105(c) of this title, if they had been included in the budget, the President shall make a recommendation under that section.

§ 1108. Preparation and submission of appropriations requests to the President

(a) In this section (except subsections (b)(l) and (e)), "agency" means a department, agency, or instrumentality of the United States Government.

(b)(1) The head of each agency shall prepare and submit to the President each appropriation request for the agency. The request shall be prepared and submitted in the form prescribed by the President under this chapter and by the date established by the President. When the head of an agency does not submit a request by that date, the President shall prepare the request for the agency to be included in the budget or changes in the budget or as deficiency and supplemental appropriations. The President may change agency appropriation requests. Agency appropriation requests shall be developed from cost-based budgets in the way and at times prescribed by the President. The head of the agency shall use the cost-based budget to administer the agency and to divide appropriations or amounts.

(2) An officer or employee of an agency in the executive branch may submit to the President or Congress a request or legislation authorizing deficiency or supplemental appropriations for the agency only with the approval of the head of the agency.

(c) The head of an agency shall include with an appropriation request submitted to the President a report that the statement of obligations submitted with the request contains obligations consistent with § 1501 of this title. The head of the agency shall support the report with a certification of the consistency and shall support the certification with records showing that the amounts have been obligated. The head of the agency shall designate officials to make the certifications, and those officials may not delegate the duty to make the certifications. The certifications and records shall be kept in the agency --

(1) in a form that makes audits and reconciliations easy; and

(2) for a period necessary to carry out audits and reconciliations.

(d) To the extent practicable, the head of an agency shall --

(1) provide information supporting the agency's budget request for its missions by function and subfunction (including the mission of each organizational unit of the agency); and

(2) relate the agency's programs to its missions.

(e) Except as provided in subsection (f) of this section, an officer or employee of an agency (as defined in § 1101 of this title) may submit to Congress or a committee of Congress an appropriations estimate or request, a request for an increase in that estimate or request, or a recommendation on meeting the financial needs of the Government only when requested by either House of Congress.

(f) The Interstate Commerce Commission shall submit to Congress copies of budget estimates, requests, and information (including personnel needs), legislative recommendations, prepared testimony for congressional hearings, and comments on legislation at the same time they are sent to the President or the Office of Management and Budget. An officer of an agency may not impose conditions on or impair communication by the Commission with Congress, or a committee or member of Congress, about the information.

(g) Amounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress.

§ 1109. **Current programs and activities estimates**

(a) Before November 11 of each year, the President shall submit to both Houses of Congress the estimated budget outlays and proposed budget authority that would be included in the budget for the following fiscal year if programs and activities of the United States Government were carried on during that year at the same level as the current fiscal year without a change in policy. The President shall state the estimated budget outlays and proposed budget authority by function and subfunction under the classifications in the budget summary table under the heading "Budget Authority and Outlays by Function and Agency", by major programs in each function, and by agency. The President also shall include a statement of the economic and program assumptions on which those budget outlays and budget authority are based, including inflation, real economic growth, and unemployment rates, program caseloads, and pay increases.

(b) The Joint Economic Committee shall review the estimated budget outlays and proposed budget authority and submit an economic evaluation of the budget outlays and budget authority to the Committees on the Budget of both Houses before January 1 of each year.

§ 1110. **Year ahead requests for authorizing legislation**

A request to enact legislation authorizing new budget authority to continue a program or activity for a fiscal year shall be submitted to Congress before May 16 of the year before the year in which the fiscal year begins. If a new program or activity will continue for more than one year, the request must be submitted for at least the first and second fiscal years.

§ 1111. **Improving economy and efficiency**

To improve economy and efficiency in the United States Government, the President shall --

(1) make a study of each agency to decide, and may send Congress recommendations, on changes that should be made in --

(A) the organization, activities, and business methods of agencies;

(B) agency appropriations;

(C) the assignment of particular activities to particular services; and

(D) regrouping of services; and

(2) evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government.

§ 1112. **Fiscal, budget, and program information**

(a) In this section, "agency" means a department, agency, or instrumentality of the United States Government except a mixed-ownership Government corporation.

(b) In cooperation with the Comptroller General, the Secretary of the Treasury and the Director of the Office of Management and Budget shall establish and maintain standard data processing and information systems for fiscal, budget, and program information for use by agencies to meet the needs of the Government, and to the extent practicable, of State and local governments.

(c) The Comptroller General --

(1) in cooperation with the Secretary, the Director of the Office of Management and Budget, and the Director of the Congressional Budget Office, shall establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government including information on fiscal policy, receipts, expenditures, programs, projects, activities, and functions;

(2) when advisable, shall report to Congress on those terms and classifications, and recommend legislation necessary to promote the establishment, maintenance, and use of standard terms and classifications by the executive branch of the Government; and

(3) in carrying out this subsection, shall give particular consideration to the needs of the Committees on Appropriations and on the Budget of both Houses of Congress, the Committee on Ways and Means of the House, the Committee on Finance of the Senate and the Congressional Budget Office.

(d) Agencies shall use the standard terms and classifications published under subsection (c)(1) of this section in providing fiscal, budget, and program information to Congress.

(e) In consultation with the President, the head of each executive agency shall take actions necessary to achieve to the extent possible --

(1) consistency in budget and accounting classifications;

(2) synchronization between those classifications and organizational structure; and

(3) information by organizational unit on performance and program costs to support budget justifications.

(f) In cooperation with the Director of the Congressional Budget Office, the Comptroller General, and appropriate representatives of State and local governments, the Director of the Office of Management and Budget (to the extent practicable) shall provide State and local governments with fiscal, budget, and program information necessary for accurate and timely determination by those governments of the impact on their budgets of assistance of the United States Government.

§ 1113. **Congressional information**

(a) When requested by a committee of Congress having jurisdiction over receipts or appropriations, the President shall provide the committee with assistance and information.

(b) When requested by a committee of Congress, by the Comptroller General, or by the Director of the Congressional Budget Office, the Secretary of the Treasury, the Director of the Office of Management and Budget, and the head of each executive agency shall --

(1) provide information on the location and kind of available fiscal, budget, and program information;

(2) to the extent practicable, prepare summary tables of that fiscal, budget, and program information and related information the committee, the Comptroller General, or the Director of the Congressional Budget Office considers necessary; and

(3) Before March 2 of each year, the Director of the Office of Management and Budget and the Secretary shall report to Congress on plans for meeting the needs identified under paragraph (1)(A) of this subsection, including --

(A) plans for carrying out changes to classifications to meet information needs of Congress;

(B) the status of information systems in the prior year; and

(C) the use of standard classifications.

§ 1114. **Budget information on consulting services**

(a) The head of each agency shall include in the budget justification for the agency submitted each year to the Committees on Appropriations of both Houses of Congress --

(1) amounts requested for consulting services;

(2) the appropriation accounts from which the amounts are to be paid; and

(3) a description of the need for the consulting services, including a list of the major programs requiring those services.

(b) The Inspector General or comparable official of each agency shall submit to Congress each year, with the budget justification for the agency, an evaluation of the progress of the agency in establishing effective management controls and improving the accuracy and completeness of the information provided to the Federal Procurement Data System on contracts for consulting services. If the agency does not have an Inspector General or comparable official, the head of the agency or officer or employee designated by the head of the agency shall submit the evaluation.

§ 3523. **General audit authority of the Comptroller General**

(a) Except as specifically provided by law, the Comptroller General shall audit the financial transactions of each agency. In deciding on auditing procedures and the extent to which records are to be inspected, the Comptroller General shall consider generally accepted auditing principles, including the effectiveness of accounting organizations and systems, internal audit and control and related administrative practices of each agency.

(b) The Comptroller General shall audit the Architect of the Capitol at times the Comptroller General considers appropriate. Section 716 of this title applies to the Architect in conducting the audit. The Comptroller General shall report the results of the audit to Congress. Each report shall be printed as a Senate document.

(c)(1) When the Comptroller General decides an audit shall be conducted at a place at which the records of an executive agency or the Architect of the Capitol are usually kept, the Comptroller General may require the head of the agency or the Architect to keep any part of an account of an accountable official or of a record required to be submitted to the Comptroller General. The Comptroller General may require records be kept under conditions and for a period of not more than 10 years specified by the Comptroller General. However, the Comptroller General and the head of the agency or the Architect may agree on a longer period.

(2) The Comptroller General and the head of an agency in the legislative or judicial branch of the United States Government (except the Architect) may agree to apply this subsection to the agency.

§ 3524. **Auditing Expenditures Approved Without Vouchers**

(Text omitted)

§ 3525. **Auditing Nonappropriated Fund Activities**

(a) The Comptroller General may audit --

(1) the operations and accounts of each nonappropriated fund and related activities authorized or operated by the head of an executive agency to sell goods or services to United States Government personnel and their dependents;

(2) accounting systems and internal controls of the fund and related activities; and

(3) internal or independent audits or reviews of the fund and related activities.

(b) The head of each executive agency promptly shall provide the Comptroller General with --

(1) a copy of the annual report of a nonappropriated fund and related activities subject to this section when the Comptroller General --

(A) requires a report for a designated class of each fund and related activities having gross sales receipts of more than $100,000 a year; or

(B) specifically requests a report for another fund and related activities; and

(2) a statement on the yearly financial operations, financial conditions and cash flow and other yearly information about the fund and related activities that the head of the agency and the Comptroller General agree on if the information is not included in the annual report.

(c) Records and property of a fund and related activities subject to this section shall be made available to the Comptroller General to the extent the Comptroller General considers necessary.

§ 3526. **Settlement of accounts**

(a) The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government.

(b) A decision of the Comptroller General under § 3529 of this title is conclusive on the Comptroller General when settling the account containing the payment.

(c)(1) The Comptroller General shall settle an account of an accountable official within 3 years after the date the Comptroller General receives the account. A copy of the certificate of settlement shall be provided the official.

(2) The settlement of an account is conclusive on the Comptroller General after 3 years after the account is received by the Comptroller General. However, an amount may be charged against the account after the 3-year period when the Government has or may have lost money because the official acted fraudulently or criminally.

(3) A 3-year period under this subsection is suspended during a war.

(4) This subsection does not prohibit --

(A) recovery of public money illegally or erroneously paid;

(B) recovery from an official of a balance due the Government under a settlement within the 3-year period; or

(C) an official from clearing an account of questioned items as prescribed by law.

(d) On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government. On the initiative of the Comptroller General or on request of an individual whose accounts are settled or the head of the agency to which the account relates, the Comptroller General may change the account within a year after settlement. The decision of the Comptroller General to change the account is conclusive on the executive branch.

(e) When an amount of money is expended under law for a treaty of relations with a foreign country, the President may --

(1) authorize the amount to be accounted for each year specifically by settlement of the Comptroller General when the President decides the amount expended may be made public; or

(2) make, or have the Secretary of State make, a certificate of the amount expended if the President decides the amount is not to be accounted for specifically. The certificate is a sufficient voucher for the amount stated in the certificate.

(f) The Comptroller General shall keep all settled accounts, vouchers, certificates, and related papers until they are disposed of as prescribed by law.

(g) This subchapter does not prohibit the Comptroller General from suspending an item in an account to get additional evidence or explanations needed to settle an account.

§ 3527. **General authority to relieve accountable officials and agents from liability**

(a) Except as provided in subsection (b) of this section, the Comptroller General may relieve a present or former accountable official or agent of an agency responsible for the physical loss or deficiency of public money, vouchers, checks, securities, or records, or may authorize reimbursement from an appropriation or fund available for the activity in which the loss or deficiency occurred for the amount of the loss or deficiency paid by the official or agent as restitution, when --

(1) the head of the agency decides that --

(A) the official or agent was carrying out official duties when the loss or deficiency occurred, or the loss or deficiency occurred because of an act or failure to act by a subordinate of the official or agent; and

(B) the loss or deficiency was not the result of fault or negligence by the official or agent;

(2) the loss or deficiency was not the result of an illegal or incorrect payment; and

(3) the Comptroller General agrees with the decision of the head of the agency

(b)(1) The Comptroller General shall relieve a disbursing official of the armed forces responsible for the physical loss or deficiency of public money, vouchers, or records, or shall authorize reimbursement, from an appropriation or fund available for reimbursement, of the amount of the loss or deficiency paid by or for the official as restitution, when --

(A) the Secretary of Defense or the appropriate Secretary of the military department of the Department of Defense decides that the official was carrying out official duties when the loss or deficiency occurred;

(B) the loss or deficiency was not the result of an illegal or incorrect payment; and

(C) the loss or deficiency was not the result of fault or negligence by the official.

(2) The finding of the Secretary involved is conclusive on the Comptroller General.

(c) On the initiative of the Comptroller General or written recommendation of the head of an agency, the Comptroller General may relieve a present or former disbursing official of the agency responsible for a deficiency in an account because of an illegal, improper, or incorrect payment, and credit the account for the deficiency, when the Comptroller General decides that the payment was not the improper transportation rates or classifications or the failure to deduct the proper amount under a land-grant law or agreement.

(d) This section does not apply to disbursements of a military department of the Department of Defense, except disbursements for departmental pay and expenses in the District of Columbia.

§ 3529. **Requests for decisions of the Comptroller General**

(a) A disbursing or certifying official or the head of an agency may request a decision from the Comptroller General on a question involving --

(1) a payment the disbursing official or head of the agency will make; or

(2) a voucher presented to a certifying official for certification.

(b) The Comptroller General shall issue a decision requested under this section.

§ 3530. **Adjusting accounts**

(a) An appropriation or fund currently available for the expense of an accountable function shall be charged with an amount necessary to adjust an account of an accountable official or agent when --

(1) necessary to adjust the account for a loss to the United States Government resulting from the fault or negligence of the official or agent; and

(2) the head of the agency decides the loss is uncollectible.

(b) An adjustment does not affect the personal financial liability of an official or agent for the loss.

(c) The Comptroller General shall prescribe regulations to carry out subsection (a) of this section.

(d) Under procedures prescribed by the Comptroller General, the head of an agency may charge the net amount of unpaid and overpaid baiances in individual pay accounts against the appropriation for the fiscal year in which the balances occurred and from which the accounts were payable. The net amount shall be credited to and paid from the corresponding appropriation for the next fiscal year.

§ 3531. **Property returns**

(a) The head of an executive department --

(1) shall certify to the Comptroller General a charge against an official or agent entrusted with public property for the department resulting from a loss to the United States Government from the property because of fault of the official or agent; and

(2) may not forward the property to the Comptroller General.

(b)(1) A certificate under subsection (a) of this section shall state --

(A) the condition of the property;

(B) that the official or agent has had a reasonable opportunity to be heard but has not been relieved of liability; and

(C) that the certificate includes all charges not certified previously.

(2) The effect of information in the certificate is the same as if the Comptroller General had discovered the information when auditing the account. The Comptroller General shall charge the appropriate account for the amount of the loss.

(c) Except as provided in subsection (a) of this section, this section does not affect the way a property return is made or liability for property is decided.

CLAIMS

§ 3701. **Definitions**

In this chapter --

(1) "executive or legislative agency" means a department, agency, or instrumentality in executive or legislative branch of the United States Government.

(2) "military department" means the Departments of the Army, Navy, and Air Force.

(3) "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, the Commissioned Corps of the National Oceanic and Atmospheric Administration, and the Commissioned Corps of the Public Health Service.

§ 3702. **Authority of the Comptroller General to settle claims**

(a) Except as provided in this chapter or another law, the Comptroller General shall settle all claims of or against the United States Government. A claim that was not administratively examined before submission to the Comptroller General shall be examined by 2 officers or employees of the General Accounting Office independently of each other.

(b)(1) A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the Comptroller General within 6 years after the claim accrues except --

(A) as provided in this chapter or another law; or

(B) a claim of a State, the District of Columbia, or a territory or possession of the United States.

(2) When the claim of a member of the armed forces accrues during war or within 5 years before war begins, the claim must be presented to the Comptroller General within 5 years after peace is established or within the period provided in clause (1) of subsection, whichever is later.

(3) The Comptroller General shall return a claim not received in the time required under this subsection with a copy of this subsection and no further communication is required.

(c) A claim on a check or warrant that the records of the Comptroller General or the Secretary of the Treasury show as being paid must be presented to the Comptroller General or the Secretary within 6 years after the check or warrant was issued.

(d) The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General.

31 U.S.C. § 1501. **Documentary evidence requirement for Government obligations**

(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of --

(1) a binding agreement between an agency and another person (including an agency) that is --

(A) in writing, in a way and form, and for a purpose authorized by law; and

(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;

(2) a loan agreement showing the amount and terms of repayment;

(3) an order required by law to be placed with an agency;

(4) an order issued under a law authorizing purchases without advertising --

(A) when necessary because of a public exigency;

(B) for perishable subsistence supplies; or

(C) within specific monetary limits;

(5) a grant or subsidy payable --

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

(B) under an agreement authorized by law; or

(C) under plans approved consistent with and authorized by law;

(6) a liability that may result from pending litigation;

(7) employment or services of persons or expenses of travel under law;

(8) services provided by public utilities; or

(9) other legal liability of the Government against an available appropriation or fund.

(b) a statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

ANTI-DEFICIENCY ACT

31 U.S.C. § 1341,
et seq.

§ 1341. Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not --

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or

(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation; made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

§ 1342. Limitation on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts without legal liability of the United States.

SUBCHAPTER II -- APPORTIONMENT

§ 1511. Definition and application

(a) In this subchapter, "appropriations" means --

(1) appropriated amounts;

(2) funds; and

(3) authority to make obligations by contract before appropriations.

(b) This subchapter does not apply to --

(1) amounts (except amounts for administrative expenses) available --

(A) for price support and surplus removal of agricultural commodities; and

(B) under § 32 of the Act of August 24, 1935 (7 U.S.C. § 612c);

(2) a corporation getting amounts to make loans (except paid in capital amounts) without legal liability on the part of the United States Government; and

(3) the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office.

§ 1512. **Apportionment and Reserves**

(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section.

(b)(1) An appropriation subject to apportionment is apportioned by --

(A) months, calendar quarters, operating seasons, or other time periods;

(B) activities, functions, projects, or objects; or

(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.

(2) The official designated in § 1513 of this title to make apportionments shall apportion an appropriation under paragraph (1) of this subsection as the official considers appropriate. Except as specified by the official, an amount apportioned is available for obligation under the terms of the appropriation on a cumulative basis unless reapportioned.

(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only --

(A) to provide for contingencies;

(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or

(C) as specifically provided by law.

(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in § 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress (as provided in the Impoundment Control Act of 1974 (2) U.S.C. § 681, *et seq.).*

(d) An apportionment or a reapportionment shall be reviewed at least 4 times a year by the official designated in § 1513 of this title to make apportionments.

§ 1513. **Officials Controlling Apportionments**

(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government that is required to be apportioned under § sc 1512 of this title shall apportion the appropriation in writing. An appropriation shall be apportioned not later than the later of the following:

(1) 30 days before the beginning of the fiscal year for which the appropriation is available; or

(2) 30 days after the date of enactment of the law by which the appropriation is made available.

(b)(1) The President shall apportion in writing an appropriation available to an executive agency (except the Commission) that is required to be apportioned under § 1512 of this title. The head of each executive agency to which the appropriation is available shall submit to the President information required for the apportionment in the form and the way and at the time specified by the President. The information shall be submitted no later than the later of the following:

(A) 40 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 15 days after the date of enactment of the law by which the appropriation is made available.

(2) The President shall notify the head of the executive agency of the action taken in apportioning the appropriation under paragraph (1) of this subsection not later than the later of the following:

(A) 20 days before the beginning of the fiscal year for which the appropriation is available; or

(B) 30 days after the date of enactment of the law by which the appropriation is made available.

(c) By the first day of each fiscal year, the head of each executive department of the United States Government shall apportion among the major organizational units of the department the maximum amount to be expended by each unit during the fiscal year out of each contingent fund appropriated for the entire year for the department. Each amount may be changed during the fiscal year only by written direction of the head of the department. The direction shall state the reasons for the change.

(d) An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment.

(e) This section does not affect the initiation and operation of agricultural price support programs.

§ 1517. Prohibited obligations and expenditures

(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding --

(1) an apportionment; or

(2) the amount permitted by regulations prescribed under section 1514(a) of this title.

(b) If an officer or employee of an executive agency or of the District of Columbia government violates subsection (a) of this section, the head of the executive agency or the Mayor of the District of Columbia, as the case may be, shall report immediately to the President and Congress all relevant facts and a statement of actions taken.

LIMITATIONS ON CONTRACTING

41 U.S.C. § 11
et seq.

§ 11. No Contracts or Purchases Unless Authorized or Under Adequate Appropriation; Report to Congress

(a) No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies which, however, shall not exceed the necessities of the current year.

(b) The Secretary of Defense shall immediately advise the Congress of the exercise of the authority granted in subsection (a) of this section, and shall report quarterly on the estimated obligations incurred pursuant to the authority granted in subsection (a) of this section. As amended October 15, 1966, Pub. L. 89-687, Title VI,§ 612(e), 80 Stat. 993.

§ 11a. Contracts for fuel by Secretary of Army without regard to current fiscal year

When, in the opinion of the Secretary of the Army, it is in the interest of the United States so to do, he is authorized to enter into contracts and to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year, and payments for supplies delivered under such contracts may be made from funds appropriated for the fiscal year in which the contract is made, or from funds appropriated or which may be appropriated for such supplies for the ensuing fiscal year.

(June 30, 1921, c. 33, § 1, 42 Stat. 78.)

§ 12. **No Contract to Exceed Appropriation**

No contract shall be entered into for the erection, repair, or furnishing of any public building, for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose. R.S. 3733.

§ 13. **Contracts Limited to One Year**

Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made. R.S. 3735.

31 U.S.C. § 1301

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

31 U.S.C. § 1502

§ 1502. **Balances available**

(a) The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with § 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

(b) A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance.

IMPOUNDMENT CONTROL ACT OF 1974
(2 U.S.C. §§ 681-688)

§ 681. **Disclaimer**

Nothing contained in this Act, or in any amendments made by this Act, shall be construed as --

(1) asserting or conceding the constitutional powers or limitations of either the Congress or the President;

(2) ratifying or approving any impoundment heretofore or hereafter executed or approved by the President or any other Federal officer or employee, except insofar as pursuant to statutory authorization then in effect;

(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment; or

(4) superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder.

(Pub L. 93-344, Title X, § 1001, July 12, 1974, 88 Stat 332.)

§ 682. **Definitions**

For purposes of §§ 682 to 688 of this title --

(1) "deferral of budget authority" includes --

(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or

(B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law;

(2) "Comptroller General" means the Comptroller General of the United States;

(3) "rescission bill" means a bill or joint resolution which only rescinds, in whole or in part, budget authority proposed to be rescinded in a special message transmitted by the President under § 683 of this title, and upon which the Congress completes action before the end of the first period of 45 calendar days of continuous session of the Congress after the date on which the President's message is received by the Congress;

(4) "impoundment resolution" means a resolution of the House of Representatives or the Senate which only expresses its disapproval of a proposed deferral of budget authority set forth in a special message transmitted by the President under § 684 of this title; and

(5) continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded in the computation of the 45-day period referred to in paragraph (3) of this section and in § 683 of this title, and the 25-day periods referred to in §§ 687 and 688(b)(1) of this title. If a special message is transmitted under § 683 of this title during any Congress and the last session of such Congress adjourns sine die before the expiration of 45 calendar days of continuous session (or a special message is so transmitted after the last session of the Congress adjourns sine die), the message shall be deemed to have been retransmitted on the first day of the succeeding Congress and the 45-day period referred to in paragraph (3) of this section and in § 683 of this title (with respect to such message) shall commence on the day after such first day.

(Pub L. 93-344, Title X, § 1011, July 12, 1974, 88 Stat 333.§

§ 683. **Rescission of budget authority**

(a) Transmittal of special message

Whenever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons (including the termination of authorized projects or activities for which budget authority has been provided), or whenever all or part of budget authority provided for only one fiscal year is to be reserved from obligation for such fiscal year, the President shall transmit to both Houses of Congress a special message specifying --

(1) the amount of budget authority which he proposes to be rescinded or which is to be so reserved;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons why the budget authority should be rescinded or is to be so reserved;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or of the reservation; and

(5) all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or the reservation and the decision to effect the proposed rescission or the reservation, and to the maximum extent practicable, the estimated effect of the proposed rescission or the reservation upon the objects, purposes, and programs for which the budget authority is provided.

(b) Requirement to make available for obligation

Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period,

the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved.

(Pub L. 93-344, Title X, § 1012, July 12, 1974, 88 Stat 333.)

§ 684. **Disapproval of proposed deferrals of budget authority.**

(a) Transmittal of special message

Whenever the President, the director of the Office of Management and Budget, the head of any department or agency of the United States, or any officer or employee of the United States proposed to defer any budget authority provided for a specific purpose or project, the President shall transmit to the House of Representatives and the Senate a special message specifying --

(1) the amount of budget authority which he proposed to be deferred;

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific projects or governmental functions involved;

(3) the period of time during which the budget authority is proposed to be deferred;

(4) the reason for the proposed deferral, including any legal authority invoked by him to justify the proposed deferral;

(5) to the maximum extent practicable, the estimated fiscal economic and budgetary effect of the proposed deferral; and

(6) all facts, circumstances, and considerations relating to or bearing upon the proposed deferral and the decision to effect the proposed deferral, including an analysis of such facts, circumstances, any consideration in terms of their application to any legal authority and specific elements of legal authority involved by him to justify such proposed deferral, ar d [to] the maximum extent practicable, the estimated effect of the proposed deferral upon the objects, purposes, and programs for which the budget authority is provided.

A special message may include one or more proposed deferrals of budget authority. A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate.

(b) Requirement to make available for obligation

Any amount of budget authority proposed to be deferred, as set forth in a special message transmitted under subsection (a) of this section, shall be made available for obligation [if] either House of Congress passed an impoundment resolution disapproving such proposed deferral.

(c) Exception

The provisions of this section do not apply to any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message to be transmitted under § 683 of this title.

(Pub.L. 93-344, Title X, § 1013, July 12, 1974, 88 Stat. 334.)

Ed. Note: Unconstitutionality of Legislative Veto Provisions

The provisions of § 1254(c) of Title 8, Aliens and Nationality, which authorize a House of Congress by resolution, to invalidate an action of the Executive Branch, were declared unconstitutional in *Immigration and Naturalization v. Chadha,* 1983, 103 S. Ct. 2764. See similar provisions in subsec. (b) of this section.

§ 685. **Transmission of messages: publication**

(a) Delivery to House and Senate.

Each special message transmitted under § 683 or § 684 of this title shall be transmitted to the House of Representatives and the Senate on the same day, and shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in

session. Each special message so transmitted shall be referred to the appropriate committee of the House of Representatives and the Senate. Each such message shall be printed as a document of each House.

(b) Delivery to Comptroller General

A copy of each special message transmitted under § 683 or § 684 of this title shall be transmitted to the Comptroller General on the same day it is transmitted to the House of Representatives and the Senate. In order to assist the Congress in the exercise of its functions under §§ 683 and 684 of this title, the Comptroller General shall review each such message and inform the House of Representatives and the Senate as promptly as practicable with respect to --

(1) in the case of a special message transmitted under § 683 of this title, the facts surrounding the proposed rescission or the reservation of budget authority (including the probable effects thereof); and

(2) in the case of a special message transmitted under § 684 of this title, (A) the facts surrounding each proposed deferral of budget authority (including the probable effects thereof) and (B) whether or not (or to what extent), in his judgment, such proposed deferral is in accordance with existing statutory authority.

(c) Transmission of supplementary messages

If any information contained in a special message transmitted under § 683 or § 684 of this title is subsequently revised, the President shall transmit to both Houses of Congress and the Comptroller General a supplementary message stating and explaining such revision. Any such supplementary message shall be delivered, referred, and printed as provided in subsection (a) of this section. The Comptroller General shall promptly notify the House of Representatives and the Senate of any changes in the information submitted by him under subsection (b) of this section which may be necessitated by such revision.

(d) Printing in *Federal Register*

Any special message transmitted under § 683 or § 684 of this title, and any supplementary message transmitted under subsection (c) of this section, shall be printed in the first issue of the *Federal Register* published after such transmittal.

(e) Cumulative reports of proposed rescissions, reservations, and deferrals of budget authority

(1) The President shall submit a report to the House of Representatives and the Senate, not later than the 10th day of each month during a fiscal year, listing all budget authority for that fiscal year with respect to which, as of the first day of each month --

(A) he has transmitted a special message under § 683 of this title with respect to a proposed rescission or a reservation; and

(B) he has transmitted a special message under § 684 of this title proposing a deferral.

Such report shall also contain, with respect to each such proposed rescission or deferral, or each such reservation, the information required to be submitted in the special message with respect thereto under § 683 or § 684 of this title.

(2) Each report submitted under paragraph (1) shall be printed in the first issue of the *Federal Register* published after its submission.

(Pub L. 93-344, Title X, § 1014, July 12, 1974, 88 Stat 335.)

§ 686. **Reports by Comptroller General**

(a) Failure to transmit special message

If the Comptroller General finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States, or any other officer or employee of the United States --

(1) is to establish a reserve or proposes to defer budget authority with respect to which the President is required to transmit a special message under § 683 or § 684 of this title; or

(2) has ordered, permitted, or approved the establishment of such a reserve or a deferral of budget authority; and that the President has failed to transmit a special message with respect to such reserve or deferral, the Comptroller General shall make a report on such reserve or deferral and any available information concerning it to both Houses of Congress. The provisions of §§ 682 to 688 of this title shall apply with respect to such reserve or deferral in the same manner and with the same effect as if such report of the Comptroller General were a special message transmitted by the President under § 683 or § 684 of this title, and for purposes of §§ 682 to 688 of this title such report shall be considered a special message transmitted under § 688 or § 684 of this title.

(b) Incorrect classification of special message

If the President has transmitted a special message to both Houses of Congress in accordance with § 683 or § 684 of this title, and the Comptroller General believes that the President so transmitted the special message in accordance with one of those sections when the special message should have been transmitted in accordance with the other of those sections, the Comptroller General shall make a report to both Houses of the Congress setting forth his reasons.

(Pub L. 93-344, Title X, § 1015, July 12, 1974, 88 Stat 336.)

§ 687. **Suits by Comptroller General**

If, under § 683(b) or § 684(b) of this title, budget authority is required to be made available for obligation and such budget authority is not made available for obligation, the Comptroller General is hereby expressly empowered, through attorneys of his own selection, to bring a civil action in the United States District Court for the District of Columbia to require such budget authority to be made available for obligation, and such court is hereby expressly empowered to enter in such civil action, against any department, agency, officer, or employee of the United States, any decree, judgment, or order which may be necessary or appropriate to make such budget authority available for obligation. The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs. No civil action shall be brought by the Comptroller General under this section until the expiration of 25 calendar days of continuous session of the Congress following the date on which an explanatory statement by the Comptroller General of the circumstances giving rise to the action contemplated has been filed with the Speaker of the House of Representatives and the President of the Senate.

(Pub L. 93-344, Title X, § 1016, July 12, 1974, 88 Stat 336.)

§ 688. **Procedure in House of Representatives and Senate**

(text omitted)

EXECUTIVE ORDER NO. 11845

Mar. 24, 1975, 40 F.R. 13299

Delegation of Certain Reporting Functions to Director of Office of Management and Budget By virtue of the authority vested in me by the Impoundment Control Act of 1974 (Public Law 93-344) 88 Stat. 332, hereinafter referred to as the Act (this chapter), and § 301 of title 3 of the United States Code (§ 301 of Title 3, The President), the Director of the Office of Management and Budget is hereby designated and empowered to exercise, as of October 1, 1974 without ratification or other action of the President (1) the functions required by §§ 1014(b) and 1014(d) of the Act (subsecs. (b) and (d) of this section) of transmitting to the Comptroller General of the United States and to the Office of the *Federal Register* copies of special messages transmitted pursuant to § 1012 or § 1013 of the Act (§§ 1402 and 1403 of this title); and

(2) the function conferred upon the President by § 1014(e) of the Act (subsec. (e) of this section) of submitting to the Congress cumulative reports of proposed rescissions, reservations, and deferrals of budget authority.

GERALD R. FORD

§ 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 function, participated personally and substantially, and in a manner involving decision-making responsibilities, with respect to a contract for that system through contact with the contractor, or

(C) during such two-year period the person acted as a primary representative 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 0-7.

(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).

(d) 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; or

(ii) a State or local government.

(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) "armed forces" does not include the Coast Guard.

(5) The term "major defense system" has the meaning given the term "major system" in § 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 Defense 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 or $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 § 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 any agency hearing on the record pursuant to regulations prescribed by the Secretary of Defense. 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 completeness of the report, and (B) identifying possible violations of § 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 § 2397b of this title, and the definitions prescribed in subsection (f) of such section, apply to this section.

PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

31 U.S.C § 3801 *et seq.*

(HR 5300 -- 99th Congress -- 1986)

CHAPTER 38 -- ADMINISTRATIVE REMEDIES FOR FALSE CLAIMS AND STATEMENTS

Sec.

3801. Definitions.
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§ 3801. Definitions

(a) For purposes of this chapter --

(1) 'authority' means --

(A) an executive department;

(B) a military department;

(C) an establishment (as such term is defined in section 11(2) of the Inspector General Act of 1978) which is not an executive department; and

(D) the United States Postal Service;

(2) 'authority head' means --

(A) the head of an authority; or

(B) an official or employee of the authority designated, in regulations promulgated by the head of the authority, to act on behalf of the head of the authority;

(3) 'claim' means any request, demand, or submission --

(A) made to an authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(B) made to a recipient of property, services, or money from an authority or to a party to a contract with an authority --

(i) for property or services if the United States --

(I) provided such property or services;

(II) provided any portion of the funds for the purchase of such property or services; or

(III) will reimburse such recipient or party for the purchase of such property or services; or

(ii) for the payment of money (including money representing grants, loans, insurance, or benefits) if the United States --

(I) provided any portion of the money requested or demanded; or

(II) will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(C) made to an authority which has the effect of decreasing an obligation to pay or account for property, services, or money, except that such term does not include any claim made in any return of tax imposed by the Internal Revenue Code of 1954;

(4) 'investigating official' means an individual who –

(A)(i) in the case of an authority in which an *Office of Inspector General* is established by the Inspector General Act of 1978 or by any other Federal law, is the Inspector General of that authority or an officer or employee of such *Office* designated by the Inspector General;

(ii) in the case of an authority in which an Office of Inspector General is not established by the Inspector General Act of 1978 or by any other Federal law, is an officer or employee of the authority designated by the authority head to conduct investigations under § 3803(a)(1) of this title; or

(iii) in the case of a military department, is the inspector General of the Department of Defense or an officer or employee of the Office of Inspector General of the Department of Defense who is designated by the Inspector General; and

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade of O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule;

(5) 'knows or has reason to know', for purposes of establishing liability under § 3802, means that a person, with respect to a claim or statement –

(A) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(B) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(C) acts in a reckless disregard of the truth or falsity of the claim or statement, and no proof of specific intent to defraud is required;

(6) 'person' means any individual, partnership, corporation, association, or private organization;

(7) 'presiding officer' means –

(A) in the case of an authority to which the provisions of subchapter II of chapter 5 of title 5 apply, an administrative law judge appointed in the authority pursuant to § 3105 of such title or detailed to the authority pursuant to § 3344 of such title; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, an officer or employee of the authority who –

(i) is selected under chapter 33 of title 5 pursuant to the competitive examination process applicable to administrative law judges;

(ii) is appointed by the authority head to conduct hearings under § 3803 of such title;

(iii) is assigned to cases in rotation so far as practicable;

(iv) may not perform duties inconsistent with the duties and responsibilities of a presiding officer;

(v) is entitled to pay prescribed by the Office of Personnel Management independently of ratings and recommendations made by the authority and in accordance with chapter 51 of such title and subchapter III of chapter 53 of such title;

(vi) may be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit System Protection Board on the record after opportunity for hearing by such Board;

(8) 'reviewing official' means any officer or employee of an authority –

(A) who is designated by the authority head to make the determination required under § 3803(a)(2) of this title;

(B) who, if a member of the Armed Forces of the United States on active duty, is serving in grade of O-7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule; and

(C) who is --

(i) not subject to supervision by, or required to report to, the investigating official; and

(ii) not employed in the organizational unit of the authority in which the investigating official is employed; and

(9) 'statement' means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made --

(A) with respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(B) with respect to (including relating to eligibility for) --

(i) a contract with, or a bid proposal for a contract with; or

(ii) a grant, loan, or benefit from, an authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit, except that such term does not include any statement made in any return of tax imposed by the Internal Revenue Code of 1954.

(b) For purposes of paragraph (3) of subsection (a) --

(1) each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim;

(2) each claim for property, services, or money is subject to this chapter regardless of whether such property, services, or money is actually delivered or paid; and

(3) a claim shall be considered made, presented, or submitted to an authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

(c) For purposes of paragraph (9) of subsection (a) --

(1) each written representation, certification, or affirmation constitutes a separate statement; and

(2) a statement shall be considered made, presented, or submitted to an authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

§ 3802. **False claims and statements; liability**

(a)(1) Any person who makes, presents, or submits, or causes to be made, presented, or submitted, a claim that the person knows or has reason to know --

(A) is false, fictitious, or fraudulent;

(B) includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(C) includes or is supported by any written statement that --

(i) omits a material fact;

(ii) is false, fictitious, or fraudulent as a result of such omission; and

(iii) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact; or

(D) is for payment for the provision of property or services which the person has not provided as claimed, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such claim. Except as provided in paragraph (3) of this subsection, such person shall also be subject to an assessment, in lieu of damages sustained by the United States because of such claim, of not more than twice the amount of such claim or portion of such claim, which is determined under this chapter to be in violation of the preceding sentence.

(2) Any person who makes, presents, or submits, or causes to be made, presented, or submitted a statement that.--

(A) the person knows or has reason to know --

(i) asserts a material fact which is false, fictitious, or fraudulent; or

(ii)(I) omits a material fact; and

(II) is false, fictitious, or fraudulent as a result of such omission;

(B) in the case of a statement described in clause (ii) of subparagraph (A), is a statement which the person is making, presenting, or submitting such statement has a duty to include such material fact; and

(C) contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject to, in addition to any other remedy that may be prescribed by law, a civil penalty of not more than $5,000 for each such statement,

(3) An assessment shall not be made under the second sentence of paragraph (1) with respect to a claim if payment by the Government has not been made on such claim.

(b)(1) Except as provided in paragraph (2) and (3) of this subsection --

(A) a determination under § 3803(a)(2) of this title that there is adequate evidence to believe that a person is liable under subsection (a) of this section; or

(B) a determination under § 3803 of this title that a person is liable under subsection (a) of this section -- may provide the authority with grounds for commencing any administrative or contractual action against such person which is authorized by law and which is in addition to any action against such person under this chapter.

(2) A determination referred to in paragraph (1) of this subsection may be used by the authority, but shall not require such authority to commence any administrative or contractual action which is authorized by law.

(3) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, a determination referred to in paragraph (1) of this subsection shall not be considered as a conclusive determination of such person's responsibility pursuant to Federal procurement laws and regulations.

§ 3803. **Hearing and determinations**

(a)(1) The investigating official of an authority may investigate allegations that a person is liable under § 3802 of this title and shall report the findings and conclusions of such investigation to the reviewing official of the authority. The preceding sentence does not modify any responsibility of an investigating official to report violations of criminal law to the Attorney General.

(2) If the reviewing official of an authority determines, based upon the report of the investigating official under paragraph (1) of this subsection, that there is adequate evidence to believe that a person is liable under § 3802 of this title, the reviewing official shall transmit to the Attorney General a written notice of the intention of such official to refer the allegations of such liability to a presiding officer of such authority. Such notice shall include --

(A) a statement of the reasons of the reviewing official for the referral of such allegations;

(B) a statement specifying the evidence which supports such allegations;

(C) a description of the claims or statements for which liability under § 3802 of this title is alleged;

(D) an estimate of the amount of money or the value of property or services requested or demanded in violation of § 3802 of this title; and

(E) a statement of any exculpatory or mitigating circumstances which may relate to such claims or statements.

(b)(1) Within 90 days after receipt of a notice from a reviewing official under paragraph (2) of subsection (a), the Attorney General or an Assistant Attorney General designated by the Attorney General shall transmit a written statement to the reviewing official which specifies --

(A) that the Attorney General or such Assistant Attorney General approves or disapproves the referral to a presiding officer of the allegations of liability stated in such notice;

(B) in any case in which the referral of allegations is approved, that the initiation of a proceeding under this section with respect to such allegations is appropriate; and

(C) in any case in which the referral of allegations is disapproved, the reasons for such disapproval.

(2) A reviewing official may refer allegations of liability to a presiding officer only if the Attorney General or an Assistant Attorney General designated by the Attorney General approves the referral of such allegations in a written statement described in paragraph (1) of this subsection.

(3) If the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to an authority head a written finding that the continuation of any hearing under this section with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, such hearing shall be immediately stayed and may be resumed only upon written authorization of the Attorney General.

(c)(1) No allegations of liability under § 3802 of this title with respect to any claim made, presented, or submitted by any person shall be referred to a presiding officer under paragraph (2) of subsection (b) if the reviewing official determines that --

(A) an amount of money in excess of $150,000; or

(B) property or services with a value in excess of $150,000, is requested or demanded in violation of § 3802 of this title in such claim or in a group of related claims which are submitted at the time such claim is submitted.

(2)(A) Except as provided in subparagraph (B) of this paragraph, no allegations of liability against an individual under § 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted by such individual shall be referred to a presiding officer under paragraph (2) of subsection (b).

(B) Allegations of liability against an individual under § 3802 of this title with respect to any claim or statement made, presented, or submitted, or caused to be made, presented, or submitted, by such individual relating to any benefits received by such individual may be referred to a presiding officer under paragraph (2) of subsection (b) if --

(i) such claim or statement is made by such individual in making application for such benefits;

(ii) such allegations relate to the eligibility of such individual to receive such benefits; and

(iii) with respect to such claim or statement, the individual --

(I) has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(II) acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(III) acts in reckless disregard of the truth or falsity of the claim or statement.

(C) For purposes of this section the term "benefits" means --

(i) benefits under the supplemental security income program under title XVI of the Social Security Act;

(ii) old age, survivors, and disability insurance benefits under title II of the Social Security Act;

(iii) benefits under title XVIII of the Social Security Act;

(iv) Aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

(v) medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(vi) benefits under title XX of the Social Security Act;

(vii) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977);

(viii) benefits under chapters 11, 13, 15, 17, and 21 of title 38;

(ix) benefits under the Black Lung Benefits Act;

(x) benefits under the special supplemental food program for women, infants, and children established under section 17 of the Child Nutrition Act of 1966;

(xi) benefits under section 336 of the Older Americans Act;

(xii) any annuity or other benefit under the Railroad Retirement Act of 1974;

(xiii) benefits under the National School Lunch Act;

(xiv) benefits under any housing assistance program for lower income families or elderly or handicapped persons which is administered by the Secretary of Housing and Urban Development or the Secretary of Agriculture;

(xv) benefits under the Low-Income Home Energy Assistance Act of 1981; and

(xvi) benefits under part A of the Energy Conservation in Existing Buildings Act of 1976, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d)(1) On or after the date on which a reviewing official is permitted to refer allegations of liability to a presiding officer under subsection (b) of this section, the reviewing official shall mail by registered or certified mail, or shall deliver, a notice to the person alleged to be liable under § 3802 of this title. Such notice shall specify the allegations of liability against such person and shall state the right of such person to request a hearing with respect to such allegations.

(2) If, within 30 days after receiving a notice under paragraph (1) of this subsection, the person receiving such notice requests a hearing with respect to the allegations contained in such notice --

(A) the reviewing official shall refer such allegations to a presiding officer for the commencement of such hearings; and

(B) the presiding officer shall commence such hearing by mailing by registered or certified mail, or by delivery of, a notice which complies with paragraphs (2)(A) and (3)(B)(i) of subsection (g) to such person.

(e)(1)(A) Except as provided in subparagraph (B) of this paragraph, at any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to review, and upon payment of a reasonable fee for duplication, shall be entitled to obtain a copy of, all relevant and material documents, transcripts, records, and other materials, which relate to such allegations and upon which the findings and conclusions of the investigating official under paragraph (1) of subsection (a) are based.

(B) A person is not entitled under subparagraph (A) to review and obtain a copy of any document, transcript, record, or material which is privileged under Federal law.

(2) At any time after receiving a notice under paragraph (2)(B) of subsection (d), the person receiving such notice shall be entitled to obtain all exculpatory information in the possession of the investigating official or the reviewing official relating to the allegations contained in such notice. The provisions of subparagraph (B) of paragraph (1) do not apply to any document, transcript, record, or other material, or any portion thereof, in which such exculpatory information is contained.

(f) Any hearing commenced under paragraph (2) of subsection (d) shall be conducted by the presiding officer on the record in order to determine --

(1) the liability of a person under § 3802 of this title; and

(2) if a person is determined to be liable under such section, the amount of any civil penalty or assessment to be imposed on such person. Any such determination shall be based on the preponderance of the evidence.

(g)(1) Each hearing under subsection (f) of this section shall be conducted --

(A) in the case of an authority to which the provisions of subchapter I' f chapter 5 of title 5 apply, in accordance with --

(i) the provisions of such subchapter to the extent that such provisions are not inconsistent with the provisions of this chapter; and

(ii) procedures promulgated by the authority head under paragraph (3) of this subsection; or

(B) in the case of an authority to which the provisions of such subchapter do not apply, in accordance with procedures promulgated by the authority head under paragraphs (2) and (3) of this subsection.

(2) An authority head of an authority described in subparagraph (B) of paragraph (1) shall by regulation promulgate procedures for the conduct of hearings under this chapter. Such procedures shall include:

(A) The provision of written notice of the hearing to any person alleged to be liable under § 3802 of this title, including written notice of --

(i) the time, place, and nature of the hearing;

(ii) the legal authority and jurisdiction under which the hearing is to be held; and

(iii) the matters of facts and law to be asserted.

(B) The provision to any person alleged to be liable under § 3802 of this title of opportunities for the submission of facts, arguments, offers of settlement, or proposals of adjustment.

(C) Procedures to ensure that the presiding officer shall not, except to the extent required for the disposition of *ex parte* matters as authorized by law --

(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate; or

(ii) be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(D) Procedures to ensure that the investigating official and the reviewing official do not participate or advise in the decision required under subsection (h) of this section or the review of the decision by the authority head under subsection (i) of this section, except as provided in subsection (j) of this section.

(E) The provision to any person alleged to be liable under § 3802 of this title of opportunities to present such person's case through oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(F) Procedures to permit any person alleged to be liable under § 3802 of this title to be accompanied, represented, and advised by counsel or such other qualified representative as the authority head may specify in such regulations.

(G) Procedures to ensure that the hearing is conducted in an impartial manner, including procedures to --

(i) permit the presiding officer to at any time disqualify himself; and

(ii) permit the filing, in good faith, of a timely and sufficient affidavit alleging personal bias or another reason for disqualification of a presiding officer or a reviewing official.

(3)(A) Each authority head shall promulgate by regulation procedures described in subparagraph (B) of this paragraph for the conduct of hearings under this chapter. Such procedures shall be in addition to the procedures described in paragraph (1) or paragraph (2) of this subsection, as the case may be.

(B) The procedures referred to in subparagraph (A) of this paragraph are:

(i) Procedures for the inclusion, in any written notice of a hearing under this section to any person alleged to be liable under § 3802 of this title, of a description of the procedures for the conduct of the hearing.

(ii) Procedures to permit discovery by any person alleged to be liable under § 3802 of this title only to the extent that the presiding officer determines that such discovery is necessary for the expeditious, fair, and reasonable consideration of the issues, except that such procedures shall not apply to documents,

transcripts, records, or other material which a person is entitled to review under paragraph (1) of subsection (e) or to information to which a person is entitled under paragraph (2) of such subsection. Procedures promulgated under this clause shall prohibit the discovery of the notice required under subsection (a)(2) of this section.

(4) Each hearing under subsection (f) of this section shall be held --

(A) in the judicial district of the United States in which the person alleged to be liable under § 3802 of this title resides or transacts business;

(B) in the judicial district of the United States in which the claim or statement upon which the allegation of liability under such section was made, presented, or submitted; or

(C) in such other place as may be agreed upon by such person and the presiding officer who will conduct such hearing.

(h) The presiding officer shall issue a written decision, including findings and determinations, after the conclusion of the hearing. Such decision shall include the findings of fact and conclusions of law which the presiding officer relied upon in determining whether a person is liable under this chapter. The presiding officer shall promptly send to each party to the hearing a copy of such decision and a statement describing the right of any person determined to be liable under § 3802 of this title to appeal the decision of the presiding officer to the authority head under paragraph (2) of subsection (i).

(i)(1) Except as provided in paragraph (2) of this subsection and § 3805 of this title, the decision, including the findings and determinations, of the presiding officer issued under subsection (h) of this section are final.

(2)(A)(i) Except as provided in clause (ii) of this subparagraph, within 30 days after the presiding officer issues a decision under subsection (h) of this section, any person determined in such decision to be liable under § 3802 of this title may appeal such decision to the authority head. (ii) If, within the 30-day period described in clause (i) of this subparagraph, a person determined to be liable under this chapter requests the authority head for an extension of such 30-day period to file an appeal of a decision issued by the presiding officer under subsection (h) of this section, the authority head may extend such period if such person demonstrates good cause for such extension.

(B) Any authority head reviewing under this section the decision, findings, and determinations of a presiding officer shall not consider any objection that was not raised in the hearing conducted pursuant to subsection (f) of this section unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

(C) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer pursuant to this section. The authority head shall promptly send to each party to the appeal a copy of the decision by the authority head and a statement describing the right of any person determined to be liable under § 3802 of this title to judicial review under § 3805 of this title.

(j) The reviewing official has the exclusive authority to compromise or settle any allegations of liability under § 3802 of this title against a person without the consent of the presiding officer at any time after the date on which the reviewing official is permitted to refer allegations of liability to a presiding officer under subsection (b) of this section and prior to the date on which the presiding officer issues a decision under subsection (h) of this section. Any such compromise or settlement shall be in writing.

§ 3804. Subpoena authority

(a) For the purposes of an investigation under § 3803(a)(1) of this title, an investigating official is authorized to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and data not otherwise reasonably available to the authority.

(b) For the purposes of conducting a hearing under § 3803(f) of this title, a presiding officer is authorized --

(1) to administer oaths or affirmations; and

(2) to require by subpoena the attendance and testimony of witnesses and the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence which the presiding officer considers relevant and material to the hearing.

(c) In the case of contumacy or refusal to obey a subpoena issued pursuant to subsection (a) or (b) of this section, the district courts of the United States shall have jurisdiction to issue an appropriate order for the enforcement of any such subpoena. Any failure to obey such order of the court is punishable by such court as contempt. In any case in which an authority seeks the enforcement of a subpoena issued pursuant to subsection (a) or (b) of the section, the authority shall request the Attorney General to petition any district court in which a hearing under this chapter is being conducted, or in which the person receiving the subpoena resides or conducts business, to issue such an order.

§ 3805. **Judicial review**

(a)(1) A determination by a reviewing official under § 3803 of this title shall be final and shall not be subject to judicial review.

(2) Unless a petition is filed under this section, a determination under § 3803 of this title that a person is liable under § 3802 of this title shall be final and shall not be subject to judicial review.

(b)(1)(A) Any person who has been determined to be liable under § 3802 of this title pursuant to § 3803 of this title may obtain review of such determination in --

(i) the United States district court for the district in which such person resides or transacts business;

(ii) the United States district court for the district in which the claim or statement upon which the determination of liability is based was made, presented, or submitted; or

(iii) the United States District Court for the District of Columbia.

(B) Such review may be obtained by filing in any such court a written petition that such determination be modified or set aside. Such petition shall be filed --

(i) only after such person has exhausted all administrative remedies under this chapter; and

(ii) within 60 days after the date on which the authority head sends such person a copy of the decision of such authority head under § 3803(i)(2) of this title.

(2) The clerk of the court shall transmit a copy of a petition filed under paragraph (1) of this subsection to the authority and to the Attorney General. Upon receipt of the copy of such petition, the authority shall transmit to the Attorney General the record in the proceeding resulting in the determination of liability under § 3802 of this title. Except as otherwise provided in this section, the district courts of the United States shall have jurisdiction to review the decision, findings, and determinations in issue and to affirm, modify, remand for further consideration, or set aside, in whole or in part, the decision, findings, and determinations of the authority, and to enforce such decision, findings, and determinations to the extent that such decision, findings, and determinations are affirmed or modified.

(c) The decisions, findings, and determinations of the authority with respect to questions of fact shall be final and conclusive, and shall not be set aside unless such decisions, findings, and determinations are found by the court to be unsupported by substantial evidence. In concluding whether the decisions, findings, and determinations of an authority are unsupported by substantial evidence, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(d) Any district court reviewing under this section the decision, findings, and determinations of an authority shall not consider any objection that was not raised in the hearing conducted pursuant to § 3803(f) of this title unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection. If any party demonstrates to the satisfaction of the court that additional evidence not

presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the court shall remand the matter to the authority for consideration of such additional evidence.

(e) Upon a final determination by the district court that a person is liable under § 3802 of this title, the court shall enter a final judgment for the appropriate amount in favor of the United States.

§ 3806. Collection of civil penalties and assessments

(a) The Attorney General shall be responsible for judicial enforcement of any civil penalty or assessment imposed pursuant to the provisions of this chapter.

(b) Any penalty or assessment imposed in a determination which has become final pursuant to this chapter may be recovered in a civil action brought by the Attorney General. In any such action, no matter that was raised or that could have been raised in a hearing conducted under § 3803(f) of this title or pursuant to judicial review under § 3805 of this title may be raised as a defense, and the determination of amounts of penalties and assessments shall not be subject to review.

(c) The district courts of the United States have the jurisdiction of any action commenced by the United States under subsection (b) of this section.

(d) Any action under subsection (b) of this section may, without regard to venue requirements, be joined and consolidated with or asserted as a counterclaim, cross-claim, or setoff by the United States in any other civil action which includes as parties the United States and the person against whom such action may be brought.

(e) The United States Claims Court shall have jurisdiction of any action under subsection (b) of this section to recover any penalty or assessment if the cause of action is asserted by the United States as a counterclaim in a matter pending in such court.

(f) The Attorney General shall have exclusive authority to compromise or settle any penalty or assessment the determination of which is the subject of a pending petition pursuant to § 3805 of this title or a pending action to recover such penalty or assessment pursuant to this section.

(g)(1) Except as provided in paragraph (2) of this subsection, any amount of penalty or assessment collected under this chapter shall be deposited as miscellaneous receipts in the Treasury of the United States.

(2)(A) Any amount of a penalty or assessment imposed by the United States Postal Service under this chapter shall be deposited in the Postal Service Fund established by section 2003 of title 39.

(B) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with old age and survivors benefits under title II of the Social Security Act shall be deposited in the Federal Old-Age and Survivors Insurance Trust Fund.

(C) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with disability benefits under title II of the Social Security Act shall be deposited in the Federal Disability Insurance Trust Fund.

(D) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part A of title XVIII of the Social Security Act shall be deposited in the Federal Hospital Insurance Trust Fund.

(E) Any amount of a penalty or assessment imposed by the Secretary of Health and Human Services under this chapter with respect to a claim or statement made in connection with benefits under part B of title XVIII of the Social Security Act shall be deposited in the Federal Supplementary Medical Insurance Trust Fund.

§ 3807. Right to Administrative offset

(a) The amount of any penalty or assessment which has become final under § 3803 of this title, or for which a judgment has been entered under § 3805(e) or § 3806 of this title, or any amount agreed upon in a settlement or compromise under § 3803(j) or § 3806(f) of this title, may be collected by administrative offset under § 3716 of this title, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the person liable for such penalty or assessment.

(b) All amounts collected pursuant to this section shall be remitted to the Secretary of the Treasury for deposit in accordance with § 3806(g) of this title.

§ 3808. **Limitations**

(a) A hearing under § 3803(d)(2) of this title with respect to a claim or statement shall be commenced within 6 years after the date on which such claim or statement is made, presented, or submitted.

(b) A civil action to recover a penalty or assessment under § 3806 of this title shall be commenced within 3 years after the date on which the determination of liability for such penalty or assessment becomes final.

(c) If at any time during the course of proceedings brought pursuant to this chapter the authority head receives or discovers any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General, and in the case of an authority in which an Office of Inspector General is established by the Inspector General Act of 1978 or by any other Federal law, to the Inspector General of that authority.

§ 3809. **Regulations**

Within 180 days after the date of enactment of this chapter, each authority head shall promulgate rules and regulations necessary to implement the provisions of this chapter. Such rules and regulations shall --

(1) ensure that investigating officials and reviewing officials are not responsible for conducting the hearing required in § 3803(f) of this title, making the determinations required by subsections (f) and (h) of § 3803 of this title, or making collections under § 3806 of this title; and

(2) require a reviewing official to include in any notice required by § 3803(a)(2) of this title a statement which specifies that the reviewing official has determined that there is a reasonable prospect of collecting, from a person with respect to whom the reviewing official is referring allegations of liability in such notice, the amount for which such person may be liable.

§ 3810. **Reports**

Not later than October 31 of each year, each authority head shall prepare and transmit to the appropriate committees and subcommittees of the Congress an annual report summarizing actions taken under this chapter during the most recent 12-month period ending September 30. Such report shall include --

(1) a summary of matters referred by the investigating official of the authority to the reviewing official of the authority under § 3803(a)(1) of this title during such period;

(2) a summary of matters transmitted to the Attorney General under § 3803(a)(2) of this title during such period;

(3) a summary of all hearings conducted by presiding officers under § 3803(f) of this title, and the results of such hearings, during such period; and

(4) a summary of the actions taken during such period to collect any civil penalty or assessment imposed under this chapter.

§ 3811. **Effect on other law**

(a) This chapter does not diminish the responsibility of any agency to comply with the provisions of chapter 35 of title 44.

(b) This chapter does not supersede the provisions of § 3512 of title 44.

(c) For purposes of this section, the term "agency" has the same meaning as in § 3502(1) of title 44.

§ 3812. **Prohibition against delegation**

Any function, duty, or responsibility which this chapter specifies be carried out by the Attorney General or an Assistant Attorney General designated by the Attorney General, shall not be delegated to, or carried out by, any other officer or employee of the Department of Justice.

CHAPTER SEVEN

STATUTES

THE ASSIGNMENT OF CLAIMS ACT OF 1940.

31 U.S.C. § 3727

§ 3727. **Assignments of Claims**

(a) In this section, "assignment" means --

(1) a transfer or assignment of any part of a claim against the United States Government or of an interest in the claim; or

(2) the authorization to receive payment for any part of the claim.

(b) An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. The assignment shall specify the warrant must be made freely and must be attested to by two witnesses. The person making the assignment shall acknowledge it before an official who may acknowledge a deed, and the official shall certify the assignment. The certificate shall state that the official completely explained the assignment when it was acknowledged. An assignment under this subsection is valid for any purpose.

(c) Subsection (b) of this section does not apply to an assignment to a financing institution of money due or to become due under a contract providing for payments totaling at least $1,000 when --

(1) the contract does not forbid an assignment;

(2) unless the contract expressly provides otherwise, the assignment --

(A) is for the entire amount not already paid;

(B) is made to only one party, except that it may be made to a party as agent or trustee for more than one party participating in the financing and

(C) may not be reassigned; and

(3) the assignee files a written notice of the assignment and a copy of the assignment with the contracting official or the head of the agency, the surety on a bond on the contract, and any disbursing official for the contract.

(d) During a war or national emergency proclaimed by the President or declared by law and ended by proclamation or law, a contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission, or other agency the President designates) may provide, or may be changed without consideration to provide, that a future payment under the contract an assignee is not subject to reduction or setoff. A payment subsequently under the contract (even after the war or emergency is ended) shall be assigned without a reduction or setoff for liability of the assignor --

(1) to the Government independent of the contract; or

(2) because of renegotiation, fine, penalty (except an amount that may be collected or withheld under, or because the assignor does not comply with the contract), taxes, social security contributions, or withholding or failing to withhold taxes or social security contributions, arising from, or dependent of, the contract.

(e)(1) An assignee under this section does not have to make restitution of refund, or repay the amount received because of the liability of the assignor to the Government, that arises from or is independent of the contract.

(2) The Government may not collect or reclaim money paid to a person receiving an amount under an assignment or allotment of pay or allowances authorized by law when liability may exist

because of the death of the person making the assignment or allotment.

Title 41

§ 15. TRANSFERS OF CONTRACTS; ASSIGNMENTS OF CLAIMS; SET-OFF AGAINST ASSIGNEE

No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States is concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States.

The provisions of the preceding paragraph shall not apply in any case in which the moneys due or to become due from the United States or from any agency or department thereof, under a contract providing for payments aggregating $1,000 or more, are assigned to a bank, trust company, or other financing institution, including any Federal lending agency: *Provided* (1) That in the case of any contract entered into prior to October 9, 1940, no claim shall be assigned without the consent of the head of the department or agency concerned; (2) That in the case of any contract entered into after October 9, 1940, no claim shall be assigned if it arises under a contract which forbids such assignment; (3) That unless otherwise expressly permitted by such contract any such assignment shall cover all amounts payable under such contract and not already paid, and shall not be subject to further assignment, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; (4) That in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment.

Notwithstanding any law to the contrary governing the validity of assignments, any assignment pursuant to this section shall constitute a valid assignment for all purposes. In any case in which monies due or to become due under any contract are or have been assigned pursuant to this section, no liability of any nature of the assignor to the United States or any department or agency thereof, whether arising from or independently of such contract, shall create or impose any liability on the part of the assignee to make restitution, refund, or repayment to the United States of any amount heretofore since July 1, 1950, or thereafter received under the assignment.

Any contract of the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President, except any such contract under which full payment has been made, may, in time of war or national emergency proclaimed by the President (including the national emergency proclaimed December 16, 1950) or by Act or joint resolution of the Congress and until such war or national emergency has been terminated in such manner, provide or be amended without consideration to provide that payments to be made to the assignee of any moneys due or to become due under such contract shall not be subject to reduction or set-off, and if such provision or one to the same general effect has been at any time heretofore or is hereafter included or inserted in any such contract, payments to be made thereafter to an assignee of any moneys due or to become due under such contract, whether during or after such war or emergency, shall not be subject to reduction or set-off for any liability of any nature of the assignor to the United States or any department or agency thereof which arises independently of such contract, or hereafter for any liabuity of the assignor on account of (1) renegotiation under any renegotiation statute or under any statutory renegotiation article in the contract, (2) fines, (3) penalties (which term does not include amounts which may be collected or withheld from the assignor in accordance with or for failure to comply with the terms of the contract), or (4) taxes, social security contributions, whether arising from or independently of such contract.

Except as herein otherwise provided, nothing in this section shall be deemed to affect or impair rights or obligations heretofore accrued. R.S. 3737; Oct. 9, 1940, c. 779, 1, 54 Stat. 1029; May 15, 1951, c. 75, 65 Stat. 41. (41 U.S.C. § 15)

§ 2166. Termination of Act

(a) Title I [§ 2071 to § 2076 of this Appendix], (except § 104 [§ 2074 of this Appendix]) title III [§ 2091 to § 2099 of this Appendix], and title VII [§ 2151 to 2§ 169 of this Appendix], (except § 708, § 714, and § 719 [§t 2158, § 2163a, and § 2168 of this Appendix]) of this Act, and all authority conferred thereunder, shall terminate at the close of September 30, 1986, *Provided,* That all authority hereby or hereafter extended under title III of this Act [§§ 2091 to 2099 of this Appendix] shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance in Appropriation Acts. Section 714 of this Act [§ 2163a of this Appendix], and all authority conferred thereunder, shall terminate at the close of July 31, 1953. Section 104 [§ 2074 of this Appendix], and titlc II [§ 2081 of this Appendix], and title VI [§§ 2131 to 2137 of this Appendix] of this Act, and all authority conferred thereunder, shall terminate at the close of June 30, 1953. Titles IV [§§ 2101 of this Appendix] and V [§§ 2121 to 2123 of this Appendix] of this Act, and all authority conferred thereunder, shall terminate at the close of April 30, 1953.

[text of (b) to (d) omitted]

(As amended Apr. 17, 1984, Pub.L. 98-265, § 2, 98 Stat. 149.)

§ 2167. Feasibility study of application of uniform cost accounting standards to defense procurement contracts; consultations; reports

The Comptroller General, in cooperation with the Secretary of Defense and the Director of the Bureau of the Budget, shall undertake a study to determine the feasibility of applying uniform cost accounting standards to be used in all negotiated prime contract and subcontract defense procurements of $100,000 or more. In carrying out such study the Comptroller General shall consult with representatives of the accounting profession and with representatives of that segment of American industry which is actively engaged in defense contracting. The results of such study shall be reported to the Committees on Banking and Currency and the Committees on Armed Services of the Senate and House of Representatives at the earliest practicable date, but in no event later than eighteen months after the date of enactment of this section [July 1, 1968].

(Sept. 8, 1950, c. 932, Title VII, § 718, as added July 1, 1968, Pub.L. 90-370, § 3, 82 Stat. 279.)

§ 2168. Cost-Accounting Standards Board

(a) Formation; Comptroller General as chairman; experience of Board members; terms of office; vacancies; compensation of Board members appointed from private life

There is established, as an agent of the Congress, a Cost-Accounting Standards Board which shall be independent of the executive departments and shall consist of the Comptroller General of the United States who shall serve as Chairman of the Board and four members to be appointed by the Comptroller General. Of the members appointed to the Board, two, of whom one shall be particularly knowledgeable about the cost accounting problems of small business, shall be from the accounting profession, one shall be representative of industry, and one shall be from a department or agency of the Federal Government who shall be appointed with the consent of the head of the department or agency concerned. The term of office of each of the appointed members of the Board shall be four years, except that any member appointed to fill a vacancy in the Board shall serve for the remainder of the term for which his predecessor was appointed. Each member of the Board appointed from private life shall receive compensation at the rate of two-hundred-sixtieth of the rate prescribed for level IV of the Federal Executive Salary Schedule [5 U.S.C A § 5315] for each day (including travel time) in which he is engaged in the actual

performance of duties vested in the Board.

(b) Appointment and compensation of staff members

The Board shall have the power to appoint, fix the compensation of, and remove an executive secretary and two additional staff members without regard to chapter 51, subchapters III and VI of chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service. The executive secretary and the two additional staff members may be paid compensation at rates not to exceed the rates prescribed for levels IV and V of the Federal Executive Salary Schedule, respectively [5 U.S.C.A. §§ 5315, 5316].

(c) Appointment and compensation of other necessary personnel

The Board is authorized to appoint and fix the compensation of such other personnel as the Board deems necessary to carry out its functions.

(d) Utilization of personnel from Federal agencies or private life

The Board may utilize personnel from the Federal Government (with the consent of the head of the agency concerned) or appoint personnel from private life without regard to chapter 51, subchapters III and VI of chapter 53, and chapter 75 of title 5, United States Code, and those provisions of such title relating to appointment in the competitive service, to serve on advisory committees and task forces to assist the Board in carrying out its functions and responsibilities under this section.

(e) Compensation of Board members and other personnel from Federal agencies; compensation of appointees from private life; travel expenses for personnel serving on an intermittent basis

Except as otherwise provided in subsection (a), members of the Board and officers or employees of other agencies of the Federal Government utilized under this section shall receive no compensation for their services as such but shall continue to receive the compensation of their regular positions. Appointees under subsection (d) from private life shall receive compensation at rates fixed by the Board, not to exceed one two-hundred-sixtieth of the rate prescribed for level V in the Federal Executive Salary Schedule [5 U.S.C.A. § 5316] for each day (including travel time) in which they are engaged in the actual performance of their duties as prescribed by the Board. While serving away from their homes or regular place of business, Board members and other appointees serving on an intermittent basis under this section shall be allowed travel expenses in accordance with § 5703 of title 5, United States Code.

(f) Cooperation between Board and other Federal departments and agencies

All departments and agencies of the Government are authorized to cooperate with the Board and to furnish information, appropriate personnel with or without reimbursement, and such financial and other assistance as may be agreed to between the Board and the department or agency concerned.

(g) Promulgation of cost accounting standards; use of standards by defense contractors and relevant Federal agencies; conditions for use of standards; inflationary effect of standards and implementing major rules and regulations; report to Congress; contents

The Board shall from time to time promulgate cost-accounting standards designed to achieve uniformity and consistency in the cost-accounting principles followed by defense contractors and subcontractors under Federal contracts. Such promulgated standards shall be used by all relevant Federal agencies and by defense contractors and subcontractors in estimating, accumulating, and reporting costs in connection with the pricing, administrating and settlement of all negotiated prime contract and subcontract national defense procurements with the United States in excess of $100,000, other than contracts or subcontracts where the price negotiated is based on (1) established catalog or market prices of commercial items sold in substantial quantities to the general public, or (2) prices set by law or regulation. In promulgating such standards and major rules and regulations for the implementation of such standards, the Board shall take into account, and shall report to the Congress in the transmittal required by § 719(h)(3) of this Act [subsec. (h)(3) of this section] the probable costs of implementation, including inflationary effects, if any, compared to the probable benefits, including advantages and improvements in the pricing, administration, and settlement of contracts.

(h) Implementation of cost accounting standards; cost-accounting disclosure by defense contractors as a condition of contract, mandatory price adjustment clause in contract, with interest, for any increased costs due to contractor's failure to follow cost accounting standards; maximum rate and duration of

interest; contract dispute; exemptions; effective date of proposed standards and regulations

(1) The Board is authorized to make, promulgate, amend, and rescind rules and regulations for the implementation of cost-accounting standards promulgated under subsection (g). Such regulations shall require defense contractors and subcontractors as a condition of contracting to disclose in writing their cost-accounting principles, including methods of distinguishing direct costs from indirect costs and the basis used for allocating indirect costs, and to agree to a contract price adjustment, with interest, for any increased costs paid to the defense contractor by the United States because of the defense contractor's failure to comply with duly promulgated cost-accounting standards or to follow consistently his disclosed cost-accounting practices in pricing contract proposals and in accumulating and reporting contract performance cost data. Such interest shall not exceed 7 per centum per annum measured from the time such payments were made to the contractor or subcontractor to the time such price adjustment is effected. If the parties fail to agree as to whether the defense contractor or subcontractor has complied with cost-accounting standards, the rules and regulations relating thereto, and cost adjustments demanded by the United States, such disagreement will constitute a dispute under the contract dispute clause.

(2) The Board is authorized, as soon as practicable after the date of enactment of this section [Aug. 15, 1970], to prescribe rules and regulations exempting from the requirements of this section such classes or categories of defense contractors or subcontractors under contracts negotiated in connection with national defense procurements as it determines, on the basis of the size of the contracts involved or otherwise, are appropriate and consistent with the purposes sought to be achieved by this section.

(3) Cost-accounting standards promulgated under subsection (g) and rules and regulations prescribed under this subsection shall take effect not earlier than the expiration of the first period of sixty calendar days of continuous session of the Congress following the date on which a copy of the proposed standards, rules, or regulations is transmitted to the Congress; if, between the date of transmittal and the expiration of such sixty-day period, there is not passed by the two Houses a concurrent resolution stating in substance that the Congress does not favor the proposed standards, rules, or regulations. For the purposes of this subparagraph, in the computation of the sixty-day period there shall be excluded the days on which either House is not in session because of adjournment of more than three days to a day certain or an adjournment of the Congress sine die. The provisions of this paragraph do not apply to modifications of cost-accounting standards, rules, or regulations which have become effective in conformity with those provisions.

(i) Publication in *Federal Register* of cost-accounting standards and regulations; submission and consideration of views and comments by interested parties; standards, regulations and modifications thereof as having full force and effect of law; effective date; exclusion of functions exercised from operation of specified laws; exemptions

(A) Prior to the promulgation under this section of rules, regulations, cost-accounting standards, and modifications thereof, notice of the action proposed to be taken, including a description of the terms and substance thereof, shall be published in the *Federal Register*. All parties affected thereby shall be afforded a period of not less than thirty days after such publication in which to submit their views and comments with respect to the action proposed to be taken. After full consideration of the views and comments so submitted the Board may promulgate rules, regulations, cost-accounting standards, and modifications thereof which shall have the full force and effect of law and shall become effective not later than the start of the second fiscal quarter beginning after the expiration of not less than thirty days after publication in the *Federal Register*.

(B) The functions exercised under this section are excluded from the operation of §§ 551, 553-559, and 701-706 of title 5, United States Code.

(C) The provisions of paragraph (A) of this subsection shall not be applicable to rules and regulations prescribed by the Board pursuant to subsection (h)(2).

(j) Determination of compliance with cost-accounting standards, right of authorized person to examine and copy relevant records of contractor

For the purpose of determining whether a defense contractor or subcontractor has complied with duly promulgated cost-accounting standards and has followed consistently his disclosed cost-accounting practices, any authorized representative of the head of the agency concerned, of the Board, or of the

Comptroller General of the United States shall have the right to examine and make copies of any documents, papers, or records of such contractor or subcontractor relating to compliance with such cost-accounting standards and principles.

(k) Reports to Congress by Board

The Board shall report to the Congress, not later than twenty-four months after the date of enactment of this section [Aug. 15, 1970], concerning its progress in promulgating cost-accounting standards under subsection (g) and rules and regulations under subsection (h). Thereafter, the Board shall make an annual report to the Congress with respect to its activities and operations, together with such recommendations as it deems appropriate.

(l) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(Sept. 8, 1950, c. 932, Title VII, § 719, as added Aug. 15, 1970, Pub.L. 91- 379, Title I, § 103, 84 Stat. 796; Dec. 16, 1975, Pub.L. 94-152, § 7, 89 Stat. 820.)

PROMPT PAYMENT ACT

31 U.S.C. § 3901 *et seq.*.
(Pub.L 97-258) 1982.

DEFINITIONS AND APPLICATION

§ 3901. (a) In this chapter --

(1) "agency" has the same meaning given that term in § 551(1) of title 5 and includes an entity being operated, and the head of the agency identifies the entity as being operated only as an instrumentality of the agency to carry out a program of the agency.

(2) "business concern" means --

(A) a person carrying on a trade or business; and

(B) a nonprofit entity operating as a contractor.

(3) "proper invoice" is an invoice containing or accompanied by substantiating documentation the Director of the Office of Management and Budget may require by regulation and the head of the appropriate agency may require by regulation or contract.

(4) the head of an agency is deemed to receive an invoice on the later of the dates that --

(A) the designated payment office or finance center of the agency actually receives a proper invoice; or

(B) the head of the agency accepts the applicable property or service.

(5) a payment is deemed to be made on the date a check for the payment is dated.

(6) a contract to rent property is deemed to be a contract to acquire the property.

(b) This chapter applies to the Tennessee Valley Authority. However, regulations prescribed under this chapter do not apply to the Authority, and the Authority alone is responsible for carrying out this chapter as it applies to contracts of the Authority. [P.L. 97-452, Jan. 12, 1983, 96 Stat. 2474]

INTEREST PENALTIES

§ 3902. (a) Under regulations prescribed under § 3903 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay interest penalty to the concern on the amount of the payment due. The interest shall be computed at the rate the Secretary of the Treasury

establishes for interest payments under § 12 of the Contract Disputes Act of 1978 (41 U.S.C. § 611). The Secretary shall publish each rate in the *Federal Register.*

(b) Except as provided in § 3906 of this title, the interest penalty shall be paid for the period beginning on the day after the required payment date and ending on the date on which payment is made. However, a penalty may not be paid if payment for the item is made --

(1) when the item is a meat or meat food product described in § 3903(2) of this title, before the 4th day after the required payment date;

(2) when the item is an agricultural commodity described in § 3903(2) of this title, before the 6th day after the required payment date; or

(3) when the item is not an item referred to in clauses (1) and (2) of this subsection, before the 16th day after the required payment date.

(c) An amount of an interest penalty unpaid after any 30-day period shall be added to the principal amount of the debt, and a penalty accrues thereafter on the added amount.

(d) This section does not authorize the appropriation of additional amounts to pay an interest penalty. The head of an agency shall pay a penalty under this section out of amounts made available to carry out the program for which the penalty is incurred.

(e) A recipient of a grant from the head of an agency may provide in a contract for the acquisition of property or service from a business concern that, consistent with the usual business practices of the recipient[ ] State and local law, the recipient will pay an interest penalty on amounts overdue under the contract under conditions agreed to by the recipient and the concern. The recipient may not pay the penalty from amounts received from an agency. Amounts expended for the penalty may not be counted toward a matching requirement applicable to the grant. An obligation to pay the penalty is not an obligation of the United States Government. [P.L. 97-452, Jan. 12, 1983, 96 Stat. 2475; P.L. 98-216, Feb. 14, 1984, 98 Stat. 4.]

REGULATIONS

§ 3903. The Director of the Office of Management and Budget shall prescribe regulations to carry out § 3902 of this title. The regulations shall --

(1) provide that the required payment date is --

(A) the date payment is due under the contract for the item of property or service provided; or

(B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;

(2) for the acquisition of meat or a meat food product (as defined in § 2(a)(3) of the Packers and Stockyards Act, 1921 [7 U.S.C. § 192(3)]), provide a required payment date of not later than 7 days after the meat or meat food product is delivered; and

(3) for the acquisition of a perishable agricultural commodity (as defined in § 1(4) of the Perishable Agricultural Commodities Act, 1930 [7 U.S.C. § 499a(4)]), provide a required payment date consistent with that Act;

(4) provide separate required payment dates for a contract under which property or service is provided in a series of partial executions or deliveries to the extent the contract provides for separate payments for partial execution or delivery; and

(5) require that, within 15 days after an invoice is received, the head of an agency notify the business concern of a defect of impropriety in the invoice that would prevent the running of the time period specified in clause (1)(B) of this section. [P.L. 97-452, Jan 12, 1983, 96 Stat. 2476.]

LIMITATIONS ON DISCOUNT PAYMENTS

§ 3904. The head of an agency offered a discount by a business concern from an amount due under a contract for property or service in exchange for payment within a specified time may pay the discounted amount only if payment is made within the specified time. The head of the agency shall pay an interest penalty on an amount remaining unpaid in violation of this section. The penalty accrues as provided under §§ 3902 and 3903 of this title, except that the required payment date for the unpaid amount is the last day specified in the contract that the discounted amount may be paid. [P.L. 97-452, Jan. 12, 1983, 96 Stat. 2476]

REPORTS

§ 3905. (a) By the 60th day after the end of each fiscal year, the head of each agency shall submit to the Director of the Office of Management and Budget a report on interest penalty payments made under this chapter during that fiscal year. The report shall include the number, amounts, and frequency of the payments and the reasons the payments were not avoided by prompt payment.

(b) By the 120th day after the end of each fiscal year, the Director shall submit to the Committees on Governmental Affairs, Appropriations, and Small Business of the Senate and the Committees on Government Operations, Appropriations and Small Business of the House of Representatives a report on agency compliance with this chapter. The report shall include a summary of the report of each agency submitted under subsection (a) of this section and an analysis of progress made in reducing interest penalty payments by that agency from prior years. [P.L. 97-452, Jan 12, 1983, 96 Stat. 2476.]

RELATIONSHIP TO OTHER LAWS

§ 3906. (a) A claim for an interest penalty not paid under this chapter may be filed under § 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605).

(b)(1) An interest penalty under this chapter does not continue to accrue --

(A) after a claim for a penalty is filed under the Contract Disputes Act of 1978 (41 U.S.C. § 601 *et seq.*); or

(B) for more than one year.

(2) Paragraph (1) of this subsection does not prevent an interest penalty from accruing under § 12 of the Contract Disputes Act of 1978 (41 U.S.C. § 611) after a penalty stops accruing under this chapter. A penalty accruing under § 12 may accrue on an unpaid contract payment and on the unpaid penalty under this chapter.

(c) Except as provided in § 3904 of this title, this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978 (41 U.S.C. § 601 *et seq.*). [P.L. 97-452, Jan. 12, 1983, 96 Stat. 2477.]

10 U.S.C. § 2325 **Preference for Nondevelopmental Items**

(a) Preference. -- The Secretary of Defense shall ensure that, to the maximum extent practicable --

(1) requirements of the Department of Defense with respect to a procurement of supplies are stated in terms of --

(A) functions to be performed;

(B) performance required; or

(C) essential physical characteristics;

(2) such requirements are defined so that nondevelopmental items may be procured to fulfill such requirements; and

(3) such requirements are fulfilled through the procurement of nondevelopmental items.

(b) Implementation. -- The Secretary of Defense shall carry out this section through the Under Secretary of Defense for Acquisition, who shall have responsibility for its effective implementation.

(c) Regulations. -- The Secretary of Defense shall prescribe regulations to carry out this section.

(d) Definition. -- In this section, the term 'nondevelopmental item' means --

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

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

(3) any item of supply described in paragraph (1) or (2) that requires only minor modification in order to meet the requirements of the procuring agency; or

(4) any item of supply that is currently being produced that does not meet the requirements of paragraph (1), (2), or (3) solely because the item --

(A) is not yet in use; or

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

(Defense Acquisition Improvement Act of 1985)

CHAPTER NINE

CHAPTER TEN

CHAPTER ELEVEN

No Statutes

CHAPTER TWELVE

STATUTES

PATENTS

35 U.S.C. §§ 100,101

§ 100. **Definitions**

When used in this title unless the context otherwise indicates --

(a) The term "invention" means invention or discovery.

(b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

(c) The terms "United States" and "this country" mean the United States of America, its territories and possessions.

(d) The word "patentee" includes not only the patentee to whom the patent was issued but also the successors in title to the patentee. July 19, 1952, c. 950, 1, 66 Stat. 797.

§ 101. **Inventions Patentable**

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title. July 19, 1952, c. 950, § 1, 66 Stat. 797.

NOTE: see *Armed Service Procurement Act* (10 U.S.C. § 2301, *et seq.*) for Data statutes

TITLE 10

Chapter 141. **Miscellaneous Procurement**

§ 2386. **Copyrights, patents, designs, etc.; acquisition**

Funds appropriated for a military department available for making or procuring supplies may be used to acquire any of the following if the acquisition relates to supplies or processes produced or used by or for, or useful to, that department:

(1) Copyrights, patents, and applications for patents.

(2) Licenses under copyrights, patents, and applications for patents.

(3) Designs, processes, and manufacturing data.

(4) Releases, before suit is brought, for past infringement of patents or copyrights. As amended Sept. 8, 1960, Pub.L. 86-726, § 3, 74 Stat. 855.

PATENT INFRINGEMENT

28 U.S.C. § 1498

§ 1498. Patent and copyright cases

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Claims Court for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Claims Court for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in § 504(c), of title 17, United States Code: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provision of this section shall not apply to any claim arising in a foreign country. As amended Oct. 31, 1951, C. 655, § 50(c), 65 Stat. 727; July 17, 1952, C. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, § § 1, 4, 74 Stat. 855, 856.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Claims Court for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations.

(As amended Oct. 19, 1976, Pub.L. 94-553, § 105(c), 90 Stat. 2599; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(d), 96 Stat. 40.)

Technical Data -- see -- Chapter 1 statutes, Office of Federal Procurement Policy Act, § 21.

CHAPTER THIRTEEN

STATUTES

THE MILLER ACT

(40 U.S.C. § 270)

§ 270a. Bonds of Contractors for Public Buildings or Works; Waiver of Bonds Covering Contract Performed in Foreign Country

(a) Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor" (P.L. 95-585, Nov 2, 1978):

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000, the said payment bond shall be in a sum of one-half the total amount payable by the terms of contract. Whenever the total amount payable by terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000, the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug 24, 1935, c. 642, 1, 49 Stat. 793.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given. (P.L. 89-719, Title I. § 105(b), Nov. 2, 1966, 80 Stat. 1139; P.L. 95-585, Nov. 2, 1978, 92 Stat. 2484)

§ 270b. Same; Rights of Persons Furnishing Labor or Material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under § 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided,* however, That any person having direct

contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.

§ 270c. **Same; Right of Person Furnishing Labor or Material to Copy of Bond.**

The department secretary or agency head of the contracting agency is authorized and directed to furnish to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution and delivery of the original. Applicants shall pay for such certified copies such fees as the department secretary or agency head of the contracting agency fixes to cover the cost of preparation thereof.

(As amended Apr. 18, 1984, Pub.L. 98-269, 98 Stat. 156.)

§ 270d. **Same; definition of "Person" in §§ 270a, 270b, and 270c.**

The term "person" and the masculine pronoun as used in §§ 270a-270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations. Aug. 24, 1935, c. 642, 4, 49 Stat. 794.

§ 270e. **Same; Waiver of §§ 270a-270d with respect to Army, Navy, Air Force, or Coast Guard Contracts.**

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive §§ 270a-270d of this title with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, material, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of such contracts as to payment or title. As amended June 3, 1955, c 129, 69 Stat. 83.

§ 270f. **Same; waiver of provisions for contracts respecting vessels**

The Secretary of Transportation may waive § 270a to 270d of this title, with respect to contracts for the construction, alteration, or repair, of vessels of any kind or nature, entered into pursuant to the Act of June 30, 1932 (47 Stat. 382, 417-418), as amended [31 U.S.C.A. §§ 686, 686b], the Merchant Marine Act, 1936 [46 U.S.C.A. § 1101 *et seq.*], or the Merchant Ship Sales Act of 1946 [50 App. U.S.C.A. § 1735 *et seq.*], regardless of the terms of such contracts as to payment or title.

(Apr. 29. 1941, c. 81, § 2, as added Oct. 21, 1970, Pub.L. 91-469, §§ 39, 84 Stat. 1036, and amended Aug. 6, 1981, Pub.L. 97-31, § 12(12), 95 Stat. 154.)

DAVIS-BACON ACT

40 U.S.C. § 276a

§ 276a. RATE OF WAGES FOR LABORERS AND MECHANICS.

(a) The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alterations, and/or repair, including painting and decorating of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rate of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractor, or their agents.

(b) As used in § 276a to § 276a-5 of this title the terms "wages" and "prevailing wages" shall include --

(1) the basic hourly rate of pay; and

(2) the amount of --

(A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected, for medical or hospital care, pensions or retirements or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for employment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits; *Provided,* that the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, insofar as § 276a-5 of this title and other Acts incorporating §§ 276a to 276a-5 of this title by reference are concerned, may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the

aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

In determining the overtime pay to which the laborer or mechanic is entitled under any Federal law, his regular or basic hourly rate of pay (or other alternative rate upon which premium rate of overtime compensation is computed) shall be deemed to be the rate computed under paragraph (1), except that where the amounts of payments, contributions, or costs incurred with respect to him exceeds the prevailing wage applicable to him under § 276a to § 276a-5 of this title, such regular or basic hourly rate pay (or other alternative rate) shall be arrived at by deducting from the amount of payments, contributions, or costs actually incurred with respect to him, the amount of contributions or costs of the types described in paragraph (2) actually incurred with respect to him, or the amount determined under paragraph (2) but not actually paid, whichever amount is the greater. As amended July 12, 1960, Pub. L. 86-624, § 26, 74 Stat. 418; July 2, 1964, Pub. L. 88-349, § 1, 78 Stat 238.

§ 276a-1 TERMINATION OF WORK ON FAILURE TO PAY AGREED WAGES: COMPLETION OF WORK BY GOVERNMENT.

Every contract within the scope of § 276a to § 276a-5 of this title shall contain the further provisions that in the event it is found by the contracting officer that any laborer or mechanic on the site of the work covered by the contract has been, or is being, paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby. Mar. 3, 1931, c. 411 § 2, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§ 276a-2 PAYMENT OF WAGES BY COMPTROLLER GENERAL FROM WITHHELD PAYMENTS; LISTING CONTRACTORS VIOLATING CONTRACTS.

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to §§ 276a and 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to contribute a list of all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligation to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to § 276a-5 of this title, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds. Mar. 3, 1931, c. 411, § 3, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§ 276a-3. EFFECT ON OTHER FEDERAL LAWS.

Sections 276a to 276a-5 of this title shall not be construed to supercede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates. Mar. 3, 1931, c 411, § 4, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§ 276a-4. EFFECTIVE DATE OF § 276a to § 276a-5.

Sections 276a to 276a-5 of this title shall take effect thirty days after August 20, 1935, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding on August 30, 1935. Mar. 3, 1931, c. 411, § 5, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§ 276a-5. SUSPENSION OF § 276a to § 276a-5 DURING EMERGENCY.

In the event of a national emergency the President is authorized to suspend the provisions of § 276a to 276a-5 of this title. Mar. 3, 1931, c. 411, § 6, as added Aug. 30, 1935, c. 825, 49 Stat. 1011.

§ 276a-6. APPROPRIATION.

* * *

§ 276a-7. APPLICATION OF § 276a THROUGH 276a-5 TO CONTRACTS ENTERED INTO WITHOUT REGARD TO § 5 OF TITLE 41.

The fact that any contract authorized by any Act is entered into without regard to § 5 of Title 41, or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of § 276a to § 276a-5 of this title, if such Act would otherwise be applicable to such contract.

Mar. 23, 1941, 12 Noon, c. 26, 55 Stat. 53; Aug. 21, 1941, c. 395, 55 Stat. 658.

§ 276b. **Repealed.** June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 276c. **Regulations governing contractors and subcontractors**

The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

June 13, 1934, c. 482, § 2, 48 Stat. 948; May 24, 1949, c. 139, § 134, 63 Stat. 108; Aug 28, 1958, Pub.L. 85-800, § 12, 72 Stat. 967.

ANTI-KICKBACK ACTS

(18 U S.C. § 874)
(41 U.S.C. §§ 51-54)

18 U.S.C. § 874. KICKBACKS FROM PUBLIC WORKS EMPLOYEES.

Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion, or repair of any public building, public work, or building or work financed in whole or part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 740.

ANTI KICKBACK ACT OF 1986.
41 U.S.C. §§ 51-54 § 2250.

§ 1. This Act may be cited as the 'Anti-Kickback Act of 1986'.

DEFINITIONS

§ 2 As used in this Act:

(1) The term 'contracting agency' when used with respect to a prime contractor, means any department, agency, or establishment of the United States which enters into a prime contract with a prime contractor.

(2) The term 'kickback' means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

(3) The term 'person' means a corporation, partnership, business association of any kind, trust, joint-stock company, or individual.

(4) The term 'prime contract' means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

(5) The term 'prime contractor' means a person who has entered into a prime contract with the United States.

(6) The term 'prime contractor employee' means any officer, partner, employee or agent of a prime contractor.

(7) The term 'subcontract' means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

(8) The term 'subcontractor' --

(A) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and

(B) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

(9) The term 'subcontractor employee' means any officer, partner, employee, or agent of a subcontractor.

PROHIBITED CONDUCT

§ 3. It is prohibited for any person --

(1) to provide, attempt to provide, or offer to provide any kickback,

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.

CRIMINAL PENALTIES

§ 4. Any person who knowingly and willfully engages in conduct prohibited by § 3 shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, United States Code, or both.

CIVIL ACTION

§ 5.(a)(1) The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by § 3. The amount of such civil penalty shall be --

(A) twice the amount of each kickback involved in the violation; and

(B) not more than $10,000 for each occurrence of prohibited conduct.

(2) The United States may, in a civil action, recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates § 3 by providing, accepting, or charging a kickback. The amount of such civil penalty shall be the amount of that kickback.

(b) A civil action under this section shall be barred unless the action is commenced within 6 years after the later of (1) the date on which the prohibited conduct establishing the cause of action occurred, and (2) the date on which the United States first knew or should reasonably have known that the prohibited conduct had occurred.

ADMINISTRATIVE OFFSETS

§ 6.(a) A contracting officer of a contracting agency may offset the amount of a kickback provided, accepted, or charged in violation of § 3 against any moneys owed by the United States to the prime contractor under the prime contract to which such kickback relates.

(b)(1) Upon direction of a contacting officer of a contracting agency with respect to a prime contract, the prime contractor shall withhold from any sums owed to a subcontractor under a subcontract of the prime contract the amount of any kickback which was or may be offset against that prime contractor under subsection (a).

(2) Such contracting officer may order that sums withheld under paragraph (1) --

(A) be paid over to the contracting agency; or

(B) if the United States has already offset the amount of such sums against that prime contractor, be retained by the prime contractor.

(3) the prime contractor shall notify the contracting officer when an amount is withheld and retained under paragraph (2)(B).

(c) An offset under subsection (a) or a direction or order of a contracting officer under subsection (b) is a claim by the Government for the purposes of the Contract Disputes Act of 1978.

(d) As used in this section, the term 'contracting officer' has the meaning given that term for the purposes of the Contract Disputes Act of 1978.

CONTRACTOR RESPONSIBILITIES

§ 7.(a) Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall have in place and follow reasonable procedures designed to prevent and detect violations of § 3 in its own operations and direct business relationships.

(b) Each contracting agency shall include in each prime contract awarded by such agency a requirement that the prime contractor shall cooperate fully with any Federal Government agency investigating a violation of § 3.

(c)(1)(A) Whenever a prime contractor or subcontractor has reasonable grounds to believe that a violation of § 3 may have occurred, the prime contractor or subcontractor shall promptly report the possible violation in writing.

(B) A contractor shall make the reports required by subparagraph (A) to the inspector general of the contracting agency, the head of the contracting agency if the agency does not have an inspector general, or the Department of Justice.

(2) In the case of an administrative or contractual action to suspend or debar any person who is eligible to enter into contracts with the Federal Government, evidence that such person has supplied information to the United States pursuant to paragraph (1) shall be favorable evidence of such person's responsibility for the purposes of Federal procurement laws and regulations.

INSPECTION AUTHORITY

§ 8. For the purpose of ascertaining whether there has been a violation of § 3 with respect to any prime contract, the General Accounting Office and the inspector general of the contracting agency, or a representative of such contracting agency designated by the head of such agency if the agency does not have an inspector general, shall have access to and may inspect the facilities and audit the books and records, including any electronic data or records, of any prime contractor or subcontractor under a prime contract awarded by such agency.

(Enacted Oct. 7, 1986. P.L. 99-634.)

THE WALSH-HEALEY PUBLIC CONTRACTS ACT

41 U.S.C. § 35, *et seq.*

§ 35. CONTRACTS FOR MATERIALS, ETC., EXCEEDING $10,000; REPRESENTATIONS AND STIPULATIONS.

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the material, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of forty hours in any one week: *Provided,* that the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of § 207 of Title 29;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract, except that this section, or any other law or Executive order containing similar prohibitions against purchase of goods by the Federal Government, shall not apply to convict labor which satisfies the conditions of § 1761(c) of Title 18, (as amended Pub. L. 90-351, Title I, § 827(b), as added Dec. 27, 1979, Pub. L. 96-157, § 2, 93 Stat. 1215.); and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings or surroundings or under work conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract Compliance with the safety, sanitary, and factory inspection laws of the state in which the work or part thereof is to be performed shall be *prima facie* evidence of compliance with this subsection. June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 12, 1942, c. 306, 56 Stat. 277.

§ 36. SAME: LIABILITY FOR BREACH; CANCELLATION, COMPLETION BY GOVERNMENT AGENCY; EMPLOYEE'S WAGES.

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in § 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages. In addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in § 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered; *Provided*, that no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America. June 30, 1936, c. 881, § 2, 49 Stat. 2037.

§ 37. SAME; DISTRIBUTION OF LIST OF PERSONS BREACHING CONTRACT; FUTURE CONTRACTS PROHIBITED.

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by §§ 35-45 of this title. Unless the Secretary of Labor otherwise recommends, no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred. June 30, 1936, c. 881, § 3, 49 Stat. 2037.

§ 38. SAME; ADMINISTRATION; OFFICERS AND EMPLOYEES; APPOINTMENT; INVESTIGATIONS; RULES AND REGULATIONS.

The Secretary of Labor is authorized and directed to administer the provisions of §§ 35-45 of this title and to utilize such Federal officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1949, an administrative officer and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of §§ 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in §§ 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of §§ 35-45 of this title. June 30, 1936, c. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, § 1106, (a), 63 Stat. 972.

§ 39. SAME; HEARINGS BY SECRETARY OF LABOR; WITNESS FEES; FAILURE TO OBEY ORDERS; PUNISHMENT.

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of §§ 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the United States District Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or a representative designated by him to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be furnished by said court as a contempt thereof and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions based upon findings of fact, as are deemed to be necessary to enforce the provisions of §§ 35-45 of this title, June 30, 1936, c. 881 § 5, 49 Stat 2038; June 25,

1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 40. SAME; EXCEPTIONS; MODIFICATION OF CONTRACTS VARIATIONS; OVERTIME; SUSPENSION OF REPRESENTATIONS AND STIPULATIONS.

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in § 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendations of the contracting agency and the contract, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations to and from any or all provisions of §§ 35-45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors; as herein before described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rates shall be not less than one and one-half times the basic hourly rate received by an employee affected: Provided, that whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in § 35 of this title. June 30, 1936, c. 881, § 6, 49 Stat. 2038; June 28, 1940, c. 440, Title I, § 13, 54 Stat. 681.

§ 41. SAME; "PERSON" DEFINED.

Whenever used in §§ 35-45 of this title, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers. As amended Nov. 6, 1978 Pub. L. 95-598, Title III, § 326, 92 Stat. 2679.

§ 42. SAME; EFFECT OF §§ 35-45 ON OTHER LAWS.

The provisions of §§ 35-45 of this title shall not be construed to modify or amend title III of the act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of §§ 35-45 of this title be construed to modify or amend §§ 276a to 276a-5 of Title 40, nor the labor provisions of Title II of the National Industry Recovery Act, approved April 8, 1935 as extended, or of § 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of §§ 35-45 of this title be construed to modify or amend §§ 744a-744n of Title 18, June 30, 1936, c. 881, § 8, 49 Stat. 2039.

§ 43. SAME, § . -45 NOT APPLICABLE TO CERTAIN CONTRACTS.

Sections 35-45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934. June 30, 1936, c. 881 § 9, 49 Stat. 2039.

§ 43a. SAME; APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT; WAGE DETERMINATION; ADMINISTRATIVE REVIEW; JUDICIAL REVIEW.

(a) Notwithstanding any provision of § 1003 of Title 5, §§ 1001-1010 of Title 5, shall be applicable in the administration of §§ 35-39 and 41-43 of this title.

(b) All wage determinations under § 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in § 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Notwithstanding the inclusion of any stipulations required by any provision of §§ 35-45 of this title in any contract subject to said sections any interested person shall have the right to judicial review of any legal question which might otherwise be raised, including, but not limited to wage determinations and the interpretations of the terms "locality," "regular dealer," "manufacturer," and the "open market." June 30, 1936, 881, 10, as added June 30, 1952, 9:36 a.m., E.D.T., c. 530, Title III, § 301, 66 Stat. 308.

§ 44. SAME; SEPARABILITY OF PROVISIONS.

If any provision of §§ 35-45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the application of such provisions to other persons or circumstances, shall not be affected thereby. June 30, 1936, c. 881, § 11, 49 Stat. 2039, renumbered June 30, 1952, 9.36 a.m. E.D.T., c. 530, Title III, § 301, 66 Stat 308.

§ 45. SAME; EFFECTIVE DATE; EXCEPTION AS TO REPRESENTATIONS WITH RESPECT TO MINIMUM WAGES.

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936; Provided, however, that the provisions, requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, § 12, 49 Stat., 2039, renumbered June 30, 1952, 9:36 a.m. E.D.T. c. 530, Title III, §

301, 66 Stat. 308.

THE BUY AMERICAN ACT

41 U.S.C. § 10a-10d

§ 10a. AMERICAN MATERIALS REQUIRED FOR PUBLIC USE.

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. Mar. 3, 1933, c. 212, Title III, § 2, 47 Stat. 1520.

§ 10b. CONTRACTS FOR PUBLIC WORKS; SPECIFICATION FOR USE OF AMERICAN MATERIALS; BLACKLISTING CONTRACTORS VIOLATING REQUIREMENTS.

(a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States substantially all from articles, materials, or supplies, mined, produced, or manufactured, as the case may be, in the United States except as provided in § 10a of this title: Provided, however, that if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirements or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to the particular article, material, or supply, and a public record made on the findings which justified the exception.

(b) If the head of a department, bureau, agency, or independent establishment which has made any contract containing the provision required by subsection (a) of this section finds that in the performance of such contract there has been a failure to comply with such provisions, he shall make public findings, including herein the name of the contractor obligated under such contract, and no other contract for the construction, alteration, or repair of any public building or public work in the United States or elsewhere shall be awarded to such contractor, subcontractors, material men, or supplies with which such contractor is associated or affiliated, within a period of three years after such finding is made public. Mar. 3, 1933, c. 212, Title III, § 3, 47 Stat. 1520.

§ 10c. DEFINITION OF TERMS USED IN SECTIONS 10a AND 10b. WHEN USED IN SECTIONS 10a AND 10b OF THIS TITLE --

(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) the terms "public use", and "public building", and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands. As amended June 25, 1959, Pub. L. 86-70, § 43, 73 Stat. 151; July 12, 1960, Pub. L. 86-624, § 28, 74 Stat. 419.

§ 10d. CLARIFICATION OF CONGRESSIONAL INTENT REGARDING SECTIONS 10a AND 10b(a).

In order to clarify the original intent of Congress, hereafter, § 10a of this title and that part of § 10b(a) of this title preceding the words "Provided, However", shall be regarded as requiring the purchase, for public use within the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable. Oct. 29, 1949, c. 787, Title VI, § 633, 63 Stat. 1024.

WORK HOURS AND SAFETY ACT OF 1962

40 U.S.C. § 327, *et seq.*

§ 327. MEANING OF SECRETARY.

As used herein the term "Secretary" means the Secretary of Labor, United States Department of Labor. Pub. L. 87-581, Title I, § 101, Aug. 13, 1962, 76 Stat. 357.

§ 328. FORTY-HOUR WEEK; OVERTIME COMPENSATION; CONTRACTUAL CONDITIONS; LIABILITY OF EMPLOYERS FOR VIOLATION; WITHHOLDING FUNDS TO SATISFY LIABILITIES OF EMPLOYERS.

(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in § 329 of this title shall be computed on the basis of a standard workweek of forty hours, and work in excess of such standard workday or workweek shall be permitted subject to the provisions of this section. For each workweek in which any such laborer or mechanic is so employed, such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of forty hours in the workweek.

(b) The following provision shall be a condition of every contract of the character specified in § 329 of this title and of any obligation of the United States, any territory, or the District of Columbia in connection therewith:

(1) No contractor or subcontractor controlling for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any work week in which he is employed on such work, to work in excess of forty hours in such workweek except in accordance with the provisions of this Act; and,

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be computed with respect to each individual employed as a laborer or mechanic in violation of any provisions of this Act, in the sum of $10 per day for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by this Act. The Governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be with held, subject to the provisions of § 330 of this title, from any moneys payable on account of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as herein provided. Pub. L 87-581, Title I, § 102, Aug. 13, 1962, 76 Stat. 357. Pub.L 99-145, eff. 1/1/86.

§ 329. CONTRACTS SUBJECT TO THIS SUBCHAPTER; WORKERS COVERED; EXCEPTIONS.

The provisions of §§ 327-332 of this title shall apply, except as otherwise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work; Provided, That the provisions of § 328 of this title, shall not apply to work where the assistance from the United States or any agency or instrumentality as set forth above is only in the nature of a loan guarantee, or insurance. Except as otherwise expressly provided, the provisions of the Act shall apply to all laborers and mechanics, including watchmen and guards, employed by any contractor or subcontractor in the performance of any part of the work contemplated and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or any territory of the District of Columbia, but shall not include any employee as a seaman.

(b) Sections 327-332 of this title shall not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market. Sections 327-332 of this title shall not apply with respect to any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act. Pub. L. 87-581, Title I, § 103, Aug. 13, 1962, 76 Stat. 358.

§ 330. REPORT OF VIOLATIONS AND WITHHOLDING OF FUNDS FOR UNPAID WAGES AND LIQUIDATED DAMAGES.

(a) Any officer or person designated as inspector of the work to be performed under any contract of the character specified in § 329 of this title or to aid in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States of any territory or possession, or of the District of Columbia, all violations of the provisions of this Act occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted, to work in violation of such provisions and the day or days of such violation. The amount of unpaid wages and liquidated damages owing under the provisions of this act shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidated damages to be withheld for the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this act. The Comptroller General of the United States is authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayments of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and if not, an equitable proportion of such amounts.

(b) If the accrued payments withheld under the terms of the contracts, as foresaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this act, such laborers and mechanics shall, in the case of a department or agency of the Federal Government, have the rights of action and/or intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

(c) Right of contractors to appeal; limitations; administrative determination; review by Secretary and issuance of final decision; filing claim in United States Claims Court.

Any contractor or subcontractor aggrieved by the withholding of a sum as liquidated damages as provided in §§ 327-332 of this title shall have the right, within sixty days thereafter, to appeal to the head of the agency of the United States or of the territory for which the contract work is done or by which

financial assistance for the work is provided, or to the Commissioner of the District of Columbia in the case of liquidated damages withheld for the use and benefit of said District. Such agency head or Commissioner, as the case may be, shall have authority to review the administrative determination of liquidated damages and to issue a final order affirming such determination; or, if it is found that the sum determined is incorrect or that the contractor or subcontractor violated the provisions of §§ 327-332 of this title inadvertently notwithstanding the exercise of due care on his part and that of his agents, recommendations may be made to the Secretary that an appropriate adjustment in liquidated damages be made, or that the contractor or subcontractor be relieved of liability for such liquidated damages. The Secretary shall review all pertinent facts in the matter and may conduct such investigations as he deems necessary, so as to affirm or reject the recommendation. The decision of the Secretary shall be final. In all such cases in which a contractor or subcontractor may be aggrieved by a final order for the withholding of liquidated damages as hereinbefore provided, such contractor or subcontractor may, within sixty days after such final order, file a claim in the United States Claims Court: Provided, however, That final orders of the agency head, the Commissioner of the District of Columbia or the Secretary, as the case may be, shall be conclusive with respect to findings of fact if such findings are supported by substantial evidence.

§ 331. LIMITATIONS, VARIATIONS, TOLERANCES, AND EXEMPTIONS.

The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act as he may find necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business. Pub. L. 87-581, Title I, § 105, Aug. 13, 1962, 76 Stat. 359.

§ 332. VIOLATIONS; PENALTIES.

Any contractor or subcontractor whose duty it shall be to employ, direct or control any laborer or mechanic employed in the performance of any work contemplated by any contract to which this act applies, who shall intentionally violate any provision of such section, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine of not to exceed $1,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof. Pub. L. 87-581, Title I, § 106, Aug. 13, 1962, 76 Stat. 359.

HEALTH AND SAFETY STANDARDS IN BUILDING AND CONSTRUCTION INDUSTRY

(40 U.S.C. § 333)

(a) It shall be a condition of each contract which is entered into under legislation subject to Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267), and is for construction, alteration, and/or repair, including painting and decorating, that no contractor or subcontractor contracting for any part of the contract work shall require any laborer or mechanic employed in the performance of the contract to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health or safety, as determined under construction safety and health standards promulgated by the Secretary by regulation based on proceedings pursuant to § 553 of title 5, United States Code, provided that such proceedings include a hearing of the nature authorized by said section. In formulating such standards, the Secretary shall consult with the Advisory Committee created by subsection (e).

(b) The Secretary is authorized to make such inspections, hold such hearings, issue such orders, and make such decisions based on findings of fact, as are deemed necessary to gain compliance with this section and any health and safety standard promulgated by the Secretary under subsection (a) of this section,

and for such purposes the Secretary and the United States district courts shall have the authority and jurisdiction provided by §§ 4 and 5 of the Act of June 30, 1936 (41 U.S.C. §§ 38, 39). In the event that the Secretary of Labor determines noncompliance under the provisions of this section after an opportunity for the adjudicatory hearing by the Secretary of any condition of a contract of a type described in clause (1) or (2) of § 103(a) of this act (40 U.S.C. § 329(a)), the Governmental agency for which the contract work is done shall have the right to cancel the contract, and to enter into other contracts for the completion of the contract work, charging any additional cost to the original contractor. In the event of noncompliance as determined by the Secretary after an opportunity for an adjudicatory hearing by the Secretary, of any condition of a contract of a type described in clause (3) of § 103(a) (40 U.S.C. § 329(a)), the governmental agency by which financial guarantee, assistance, or insurance for the contract work is provided shall have the right to withhold any such assistance attributable to the performance of the contract. Section 104 of this Act shall not apply to the enforcement of this section.

(c) The United States district courts shall have jurisdiction for cause shown, in any actions brought by the Secretary, to enforce compliance with the construction safety and health standard promulgated by the Secretary under subsection (a).

(d)(1) If the Secretary determines on the record after an opportunity for an agency hearing that, by repeated willful or grossly negligent violations of this Act (40 U.S.C. §§ 327-333), a contractor or subcontractor has demonstrated that the provisions of subsections (b) and (c) are not effective to protect the safety and health of his employees, the Secretary shall make a finding to all interested persons and transmit the name of such contractor or subcontractor to the Comptroller General.

(2) The Comptroller General shall distribute each name so transmitted to him to all agencies of the Government. Unless the Secretary otherwise recommends, no contract subject to this section shall be awarded to such contractor or subcontractor or to any person in which such contractor or subcontractor has a substantial interest until three years have elapsed from the date the name is transmitted to the Comptroller General. If, before the end of such three-year period, the Secretary, after affording interested persons due notice and opportunity for hearing, is satisfied that a contractor or subcontractor whose name he has transmitted to the Comptroller General will thereafter comply responsibly with the requirements of this section, he shall terminate the application of the preceding sentence to such contractor or sub- contractor (and to any person in which the contractor or subcontractor has a substantial interest); and when the Comptroller General is informed of the Secretary's action he shall inform all agencies of the Government thereof.

(3) Any person aggrieved by the Secretary's action under subsection (b) or (d) may, within sixty days after receiving notice thereof, file with the appropriate United States court of appeals a petition for review of such action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, who shall thereupon file in the court the record upon which he based his action, as provided in § 2112 of title 28, United States Code. The findings of fact by the Secretary, if supported by substantial evidence, shall be final. The court shall have power to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Secretary of the appropriate Government agency. The judgement of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in § 1254 of title 28, United States Code.

(e)(1) The Secretary shall establish in the Department of Labor an Advisory Committee on Construction Safety and Health (hereinafter referred to as the "Advisory Committee") consisting of twelve members appointed, without regard to the civil service laws, by the Secretary. The Secretary shall appoint one such member as Chairman. Three members of the Advisory Committee shall be persons representative of contractors to whom this section applies, three members shall be persons representative of employees to whom this section applies, three members shall be persons representative of employees primarily in the building trades and construction industry engaged in carrying out contracts to which this section applies, and three members shall be public representatives who shall be selected on the basis of their professional and technical competence and experience in the construction health and safety field.

(2) The Advisory Committee shall advise the Secretary in the formulation of construction safety and health standards and other regulations, and with respect to policy matters arising in the administration of this section. The Secretary may appoint such special advisory and technical experts or

consultants as may be necessary to carry out the functions of the Advisory Committee.

(3) Members of the Advisory Committee shall, while serving on the business of the Advisory Committee, be entitled to receive compensation at rates fixed by the Secretary, but not exceeding $100 per day, including travel time; and while so serving away from their homes or regular places of business, they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by § 5703 of title 5 of the United States Code of persons in the Government service employed intermittently.

(f) The Secretary shall provide for the establishment and supervision of programs for the education and training of employees in the recognition, avoidance, and prevention of unsafe working conditions in employments covered by the Act, and to collect such reports and data and to consult with and advise employers as to the best means of preventing injuries. P.L. 91-54, August 9, 1969, 83 Stat. 96.

SERVICE CONTRACT ACT OF 1965

41 U.S. Code § 351, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Service Contract Act of 1965."

§ 351. REQUIRED CONTRACT PROVISIONS; MINIMUM WAGES

(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of $2,500, except as provided in § 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's length negotiations. Such fringe benefits shall include medical or hospital care, pensions, on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay; costs of apprenticeship or other similar programs and other bona-fide fringe benefits not otherwise required by Federal, State, or local law are to be provided by the contractor or subcontractor. The obligation under this paragraph may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary.

(3) A provision that no part of the services covered by this Act will be performed in buildings or surroundings or under working conditions, provided by or under the control of supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

(4) A provision that on the date a service employee commences work on a contract to which this Act applies, the contractor or subcontractor will deliver to the employee a notice of the compensation

required under paragraphs (1) and (2) of this subsection, on a form prepared by the Federal agency, or will post a notice of the required compensation in a prominent place at the worksite.

(5) A statement of the rates that would be paid by the Federal agency to the various classes of service employees if § 5341 or § 5332 of title 5, United States Code, were applicable to them. The Secretary shall give due consideration to such rates in making the wage and fringe benefit determinations specified in this section.

(b)(1) No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under § 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. § 206(a)(1)), as amended (52 Stat. 1060; 29 U.S.C. § 201, *et seq.*)

(2) The provisions of §§ 3, 4, and 5 of this Act (41 U.S.C. §§ 352-354) shall be applicable to violations of this subsection. (P.L. 92-473, § 1, 2, Oct. 9, 1972, 86 Stat. 789; P.L. 94-489, Oct. 13, 1976, 90 Stat. 2358§).

§ 352. VIOLATIONS

(a) Any violation of any of the contract stipulations required by § 351 (a)(1) or (2) or § 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this Act shall be paid directly to the underpaid employees from any accrued payments withheld under this Act.

(b) In accordance with regulations prescribed pursuant to § 4 of this Act (41 U.S.C. § 353), the Federal agency head or the Secretary is hereby authorized to carry out the provisions of this section.

(c) In addition, when a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency. Whereupon, the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor. Pub. L. 89-286, § 3, Oct. 22, 1965, 79 Stat. 1035.

§ 353. LAW GOVERNING AUTHORITY OF SECRETARY

(a) Sections 38 and 39 of this title shall govern the Secretary's authority to enforce this chapter, make rules, regulations, issue orders, hold hearings, and make decisions based upon findings of fact, and take other appropriate action hereunder.

(b) The Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exceptions to and from any or all provisions of this chapter, (other than § 358 of this title), but only in special circumstances where he determines that such limitation, variation, tolerance, or exception is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this chapter to protect prevailing labor standards.

(c) No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract; *Provided*, that in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

(d) Subject to limitations in annual appropriation Acts but not withstanding any other provision of law, contracts to which this chapter applies may, if authorized by the Secretary, be for any term of years not exceeding five, if each such contract provides for the periodic adjustment of wages and fringe benefits pursuant to future determinations, issued in the manner prescribed in § 351 of this title no less often than once every two years during the term of the contract, covering the various classes of service employees. P.L. 92-473, § 3, Oct. 9, 1972, 86 Stat. 789.

§ 354. LIST OF VIOLATORS; PROHIBITION OF CONTRACT AWARD TO FIRMS APPEARING ON LIST; ACTIONS TO RECOVER UNDERPAYMENTS; PAYMENT OF SUMS RECOVERED

(a) The Comptroller General is directed to distribute a list of all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms. Where the Secretary does not otherwise recommend because of unusual circumstances, he shall, not later then ninety days after a hearing examiner has made a finding of a violation of this Act, forward to the Comptroller General the name of the individual or firm found to have violated the provisions of this act.

(b) If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of the competent jurisdiction to recover the remaining amount of underpayments. Any sums recovered by the United States shall be held in the deposit fund and shall be paid, on order of the Secretary, directly to the underpaid employee or employees, any sum not paid to an employee because of inability to do so within three years shall be covered into the Treasury of the United States as miscellaneous receipts. P.L. 92- 473, § 4, Oct. 9, 1972, 86 Stat. 790.

§ 355. EXCLUSION OF FRINGE BENEFIT PAYMENTS IN DETERMINING OVERTIME PAY

In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of pay of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of § 7(d) thereof. (29 U.S.C. § 207(d)).

§ 356. EXEMPTIONS

This Act shall not apply to --

(1) any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works;

(2) any work required to be done in accordance with the provisions of the Walsh-Healey Public Contracts Act;

(3) any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipe line where published tariff rates are in effect;

(4) any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) any contract for public utility service, including electric light and power, water, steam, and gas;

(6) any employment contract providing for direct services to a Federal agency by an individual or individuals; and

(7) any contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. Pub. L. 89-286, § 7, Oct. 22, 1965, 79 Stat. 1035.

§ 357. DEFINITIONS

For the purpose of this chapter --

(a) "Secretary" means Secretary of Labor.

(b) the term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under § 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(c) The term "compensation" means any of the payments or fringe benefits described in § 2 of this Act (41 U.S.C. § 351).

(d) The term "United States" when used in a geographical sense shall include any State of the United States, the District of Columbia, Puerto Rico, the Virgin Island, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island and Canton Island, but shall not include any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country. P.L. 93-57, § 1, July 6, 1973, 87 Stat. 140; P.L. 94-489, § 3, Oct. 13, 1976, 90 Stat. 2358.

§ 358. WAGE AND FRINGE BENEFIT DETERMINATIONS OF SECRETARY

It is the intent of the Congress that determinations of minimum monetary wages and fringe benefits for the various classes of service employees under the provision of paragraph (1) and (2) of § 351 of this title should be made with respect to all contracts subject to this Act, as soon as it is administratively feasible to do so. In any event, the Secretary shall make such determinations with respect to at least the following contracts subject to this Act which are entered into during the applicable fiscal year:

(1) For the fiscal year ending June 30, 1973, all contracts under which more than twenty-five service employees are to be employed.

(2) For the fiscal year ending June 30, 1974, all contracts under which more than twenty service employees are to be employed.

(3) For the fiscal year ending June 30, 1975, all contracts under which more than fifteen service employees are to be employed.

(4) For the fiscal year ending June 30, 1976, all contracts under which more than ten service employees are to be employed.

(5) On or after July 1, 1976, and for each fiscal year thereafter, all contracts under which more than five service employees are to be employed." P.L. 92-473, § 5, Oct. 9, 1972, 86 Stat. 790; P.L. 94-273, § 29, Apr. 21, 1976, 90 Stat. 380.

SOCIAL AND ECONOMIC PROGRAMS

Program	Authority	Purpose
Restrictions on Foreign vs. Domestic Sources		
1. Buy American Act (1933)	41 U.S.C. § 10a-10d	To provide preference for domestic materials over foreign materials.
2. Trade Agreement Act of 1979	19 U.S.C. § 2511	Waiver of the Buy American Act for certain supply contracts.
3. Preference for United States Food, Clothing, and Fibers (Berry Amendment)	Public Law 91-171, § 624	To restrict the Department of Defense from purchasing specified classes of commodities of foreign origin.
4. Labor Surplus Area Concerns (1952)	Defense Manpower Policy No. 4, 32A CFR 33 (Supp. 1972)	To provide preference to concerns performing in areas of concentrated unemployment or underemployment.
5. Required Source for Jewel Bearings	FAR 8.2	To preserve a mobilization base for manufacture of jewel bearings.
6. Prohibition of Construction of Naval Vessels in Foreign Shipyards	Public Law 91-171 (DOD Appropriation Act of 1970), title IV	To prohibit use of appropriated funds for the construction of any Navy vessel in foreign shipyards.
7. Acquisition of Foreign Buses	Public Law 90-500, (DOD Appropriation Act of 1969), sec. 404	To restrict use of appropriated funds to purchase, lease, rent, or otherwise acquire foreign-manufactured buses.
8. Preference to U.S. Vessels	10 U.S.C. § 2631 46 U.S.C. § 1241	To require the shipment of all military and at least half of of other goods in U.S. vessels.

9. Purchases in Communist Areas	FAR 25.702	To prohibit acquisi- of supplies from sources within Communist areas.
10. Use of Excess and Near Excess Currency	FAR 25.304	To provide preference in award to bidders willing to be paid in excess or near excess foreign currency.
Restrictions Governing Supplier Type or Location		
11. Small Business Act	15 U.S.C. § 631-647; see also 41 U.S.C. § 252(b) and 10 U.S.C. § 2301	To place fair portion of Government purchases and contracts with small business concerns.
12. Prison-Made Supplies	18 U.S.C. § 4124	To require mandatory purchase of specific supplies from Federal Prison Industries, Inc.
13. Blind-made Products	41 U.S.C. § 46-48	To make mandatory purchase of products made by blind and other handicapped persons.
14. Prohibition of Price Differential	Public Law 83-179, sec. 644	To prohibit use of appropriated funds for payment of price differential on contracts made to relieve economic dislocation.
Employment Opportunity Considerations		
15. Equal Employment Opportunity (1965)	Exec. Order 11246, Exec. Order 11375 FAR 22.8	To prohibit discrimination in Government contracting. Affirmative Action Programs.
16. Age Discrimination	Exec. Order 11141 (1964) FAR 22.9	Forbids age discrimination.
17. Vietnam Veterans Readjustment Act	38 U.S.C. § 2012 FAR 22.1300	To give employment preference to dis-

		abled veterans and veterans of the Vietnam era.
18. Convict Labor Act	18 U.S.C. § 4082(c)(2) Exec. Order 11755 FAR 22.201	Permits Employment of prison inmates in the performance of Govment Contracts.
Wages, Benefits, and Working Conditions		
19. Walsh-Healey Public Contracts Act (1936)	41 U.S.C. § 36-45	To prescribe minimum wage, hours, age, and working conditions for supply contracts.
20. Davis-Bacon Act (1931)	40 U.S.C. § 276a-1-5	To prescribe minimum wages, benefits and working conditions on construction contracts in excess of $2,000.
21. Service Contract Act of 1965 (1965)	41 U.S.C. § 351-357	To prescribe wages, fringe benefits, and work conditions for service contracts.
22. Contract Work Hours and Safety Standards Act	40 U.S.C. § 328-332	To prescribe forty-hour week, and health and safety standards for laborers and mechanics on public works.
23. Fair Labor Standards Act of 1938 (1938)	29 U.S.C. § 201-219	To establish minimum wage and maximum hours standards for employees engaged in commerce or the production of goods for commerce.
Pursuit of Other National Objectives		
24. Officials Not to Benefit	41 U.S.C. § 22	To prohibit members of Congress from benefiting from any Government contract.
25. Copeland "Anti-Kickback" Act (1934)	18 U.S.C. § 874 40 U.S.C. § 276c	To prohibit kickbacks from employees on public works.

26. Covenant Against Contingent Fees	41 U.S.C. § 51	To void contract obtained by broker for a contingent fee.
27. Gratuities	10 U.S.C. § 2207 FAR 3-201	To provide Government with right to terminate if gratuity is given to a Government employee to obtain contract of favorable treatment.
28. Clean Air Act of 1970	42 U.S.C. § 1857h-4	To prohibit contracting with a company convicted of criminal violation of air pollution standards.
29. Release of Product Information to Consumers	Exec. Order 11566	To encourage dissemination of Government documents containing product information of possible use to consumers.
30. Humane Slaughter Act	7 U.S.C. § 1901-1906	To purchase meat only from suppliers who conform to humane slaughter standards.
31. Miller Act (1935)	40 U.S.C. § 270a-d	To require contractor to provide payment and performance bonds on Government construction contracts.
32. Economic Stabilization Act of 1970	12 U.S.C. § 1904 note	To stabilize prices, rents, wages, salaries, dividends, and interest.
33. Freedom of Information Act (1967)	5 U.S.C. § 522 FAR 24.2	Provides for information to be made available to the public.

CHAPTER FOURTEEN

No Statutes

CHAPTER FIFTEEN

STATUTES

LIABILITY OF PERSONS MAKING FALSE CLAIMS

31 U.S.C. § 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS. Any person who --

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that --

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information:

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) KNOWING AND KNOWINGLY DEFINED -- For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information --

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) CLAIM DEFINED. -- For purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is

requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) EXEMPTION FROM DISCLOSURE. -- This section does not apply to claims records, or statements made under the *Internal Revenue Code* of 1954.

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL. -- The Attorney General diligently shall investigate a violation under § 3729. If the Attorney General finds that a person has violated or is violating § 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. -- (1) A person may bring a civil action for violation of § 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the *Federal Rules of Civil Procedure*. The complaint shall be filed *in camera*, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions *in camera*. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the *Federal Rules of Civil Procedure*.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO *QUI TAM* ACTIONS. -- (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such heaving may be held *in camera*.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for the purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as --

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all disposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted *in camera*. The court may extend the 60-day period upon a further showing *in camera* that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO *QUI TAM* PLAINTIFF. -- (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bring the action relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media), the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED. --

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in § 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.)

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES. -- The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT. -- In civil actions brought under this section by the United States, the provisions of § 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. **False claims procedure**

(a) A supoena requiring the attendance of a witness at a trial or hearing conducted under § 3730 of this title may be served at any place in the United States.

(b) A civil action under § 3730 may not be brought --

(1) more than 6 years after the date on which the violation of § 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under § 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of the law, the *Federal Rules of Criminal Procedure*, or the *Federal Rules of Evidence*, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of § 3730.

§ 3732. **False claims jurisdiction**

(a) ACTIONS UNDER § 3730. --

Any action under § 3720 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by § 3729 occurred. A summons as required by the *Federal Rules of Civil Procedure* shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW. -- The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under § 3720.

§ 3733 **Civil Investigative Demands.**

(text omitted)

CHAPTER SIXTEEN

STATUTES

THE ADMINISTRATIVE DISPUTES ACT OF 1954

(The Anti-Wunderlich Act)

(41 U.S.C. §§ 321-322)

§ 321. LIMITATION OF PLEADING CONTRACT-PROVISIONS RELATING TO FINALITY; STANDARDS OF REVIEW

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent, capricious, or arbitrary or so grossly erroneous as necessary to imply bad faith, or is not supported by substantial evidence. May 11, 1954, c. 199, § 1, 68 Stat. 81.

§ 322. CONTRACT-PROVISIONS MAKING DECISIONS FINAL ON QUESTIONS OF LAW

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board. May 11, 1954, c. 199, § 2, 68 Stat. 81.

CONTRACT DISPUTES ACT OF 1978 P.L. 95-563

(41 U.S.C. § 601)

As Amended by the Federal Courts Improvement Act of 1982, HR 4482.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Contracts Disputes Act of 1978".

§ 601. Definitions

As used in this Act --

(1) the term "agency head" means the head and any assistant head of an executive agency, and may "upon the designation by" the head of an executive agency include the chief official of any principal division of the agency;

(2) the term "executive agency" means an executive department as defined in § 101 of title 5, United States Code, an independent establishment as defined by § 104 of title 5, United States Code (except that it shall not include the General Accounting Office) a military department as defined by § 102 of title 5, United States Code, and a wholly owned Government corporation as defined by § 846 of title 31, United States Code, the United States Postal Service, and the Postal Rate Commission;

(3) the term "contracting officer" means any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. The term also includes the authorized representative of the contracting officer, acting within the limits of his authority;

(4) the term "contractor" means a party to a Government contract other than the Government;

(5) the term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to the Office of Federal Procurement Policy Act;

(6) the term "agency board" means an agency board of contract appeals established under § 8 of this Act; and

(7) 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.

§ 602. Applicability of Law

(a) Unless otherwise specifically provided herein, this Act applies to any express or implied contract (including those of the non-appropriated fund activities described in §§ 1346 and 1491 of title 28, United States Code) entered into by an executive agency for --

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or

(4) the disposal of personal property.

(b) With respect to contracts of the Tennessee Valley Authority, the provisions of this Act shall apply only to those contracts which contain a disputes clause requiring that a contract dispute be resolved through an agency administrative process. Notwithstanding any other provision of this Act, contracts of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system shall be excluded from the Act.

(c) This Act does not apply to a contract with a foreign government, or agency thereof, or international organization, or subsidiary body thereof, if the head of the agency determines that the application of the Act to the contract would not be in the public interest.

§ 603. Maritime Contracts

Appeals under paragraph g of § 8 and suits under § 10, arising out of maritime contracts, shall be governed by the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U.S.C. §§ 741-752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U.S.C. §§ 781-790) as applicable, to the extent that those Acts are not inconsistent with this Act.

§ 604. Fraudulent Claims

If a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim. Liability under this subsection shall be determined within 6 years of the commission of such misrepresentation of fact or fraud.

§ 605. Decision by Contracting Officer

(a) All claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the Government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this Act. Specific findings of fact are not required, but if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not extend to a claim or

dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine. This section shall not authorize any agency head to settle, compromise or pay or otherwise adjust any claim involving fraud.

(b) The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this Act. Nothing in this Act shall prohibit executive agencies from including a clause in Government contracts requiring that pending final decision of an appeal or suit, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the Contracting Officer's decision.

(c)(1) A contracting Officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, and that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 --

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this Act. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

§ 606. **Contractor's Right of Appeal to Board of Contract Appeals**

Within ninety days from the date of receipt of a contracting officer's decision under § 6, the contractor may appeal such decision to an agency board of contract appeals, as provided in § 8.

§ 607. **Agency Boards of Contract Appeals**

(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 duties. 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 § 3105 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. The chairman of each agency board shall receive compensation at a rate equal to that paid a GS-18 under the General Schedule contained in § 5332, United States Code, the vice chairman shall receive compensation at a rate equal to that paid a GS-17 under such General Schedule, and all other members shall receive compensation at a rate equal to that paid a GS-16 under such General Schedule. Such positions shall be in addition to the number of positions which may be placed in GS-16, GS-17, and GS-18 of such General Schedule under existing law.

(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 of such board shall receive compensation at a rate equal to the daily rate paid of a GS-18 under the General Schedule contained in § 5332, United States Code for each day he is engaged in the actual performance of his duties as a member of such board. All other members of such board shall receive compensation at a rate equal to the daily rate paid a GS-16 under such General Schedule for each day they are engaged in the actual performance of their duties as members of such board.

(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) relating to a contract made by its agency, and (2) relating to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the Claims Court.

(e) An agency board shall 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 shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is $50,000 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 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 United States Court of Appeals for the Federal Circuit for judicial review, under § 1295 of title 28, United States Code, as amended herein, 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 § 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 § 1337 of title 28, United States Code, within one hundred twenty days after the date of the decision in any case.

(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.

§ 608. **Small Claims**

(a) The rules of each agency board shall include a procedure for the expedited disposition of any appeal from a decision of a contracting officer where the amount in dispute if $10,000 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 with such concurrences as may be provided by rule or regulation.

(c) Appeals under the small claims procedure shall be resolved, whenever possible, within one hundred twenty days from the date on which the contractor elects to utilize such procedure.

(d) A decision against the Government or the contractor reached under the small claims procedure shall be final and conclusive and shall not be set aside except in cases of fraud.

(e) Administrative determinations and final decisions under this § shall have no value as precedent for future cases under this Act.

(f) The Administrator is authorized to review at least every three years, beginning with the third year after the enactment of the Act, the dollar amount defined in § 9(a) as a small claim, and based upon economic indexes selected by the Administrator adjust that level accordingly.

§ 609. **Judicial Review of Board Decisions**

(a)(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under § 6 to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to § 1337 of title 28, United States Code, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) Any action under paragraph (1) or (2) shall be filed within twelve months 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 pursuant to § 8, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

(c) In any appeal by a contractor or the Government from a decision of an agency board pursuant to § 8, the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with such direction as the court considers just and proper.

(d) If two or more suits arising from one contract are filed in the Claims Court and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the Claims Court may order the consolidation of such suit in the court or transfer any suits to or among the agency boards

involved.

(e) In any suit filed pursuant to this Act involving two or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties.

§ 610. Subpoena, Discovery, and Deposition

A member of an agency board of contract appeals 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 the 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, 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.

§ 611. Interest

Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to § 6(a) from the contractor until payment thereof.

The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

CHAPTER SEVENTEEN

STATUTES

THE TUCKER ACT

28 U.S.C., § 1491,
et seq.

Sections

1491. Claims against United States generally; actions involving Tennessee Valley Authority.
1492. Congressional reference cases.
1494. Accounts of officers, agents or contractors.
1495. Damages for unjust conviction and imprisonment; Claims against United States.
1496. Disbursing Officers' claims.
1497. Oyster growers' damages from dredging operations.
1498. Patent and copyright cases.
1499. Penalties imposed against contractors under eight hour law.
1500. Pendency of Claims in other courts.
1501. Pensions.
1502. Treaty cases.
1503. Set-offs.
1504. Tort claims.
1505. Indian claims.
1506. Transfer to cure defect of jurisdiction.

§ 1491. CLAIMS AGAINST UNITED STATES GENERALLY; ACTIONS INVOLVING TENNESSEE VALLEY AUTHORITY.

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgement, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under § 10(a)(1) of the Contract Disputes Act of 1978. (3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or

founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority. As amended Nov. 1, 1978, Pub. L. 95-563, § 14(i), 92 Stat. 2391; Oct. 10, 1980, Pub. L. 96-417, Title V, § 509, 94 Stat. 1743, Apr 2, 1982, Pub.L. 97-164, Title I, § 133(a), 96 Stat. 39.)

§ 1492. **CONGRESSIONAL REFERENCE CASES.**

Any bill, except a bill for a pension, may be referred by either House of Congress to the chief judge of the United States Claims Court for a report in conformity with § 2509 of this title. As amended Apr 2, 1982, Pub.L. 97-164, Title I, § 133(b), 96 Stat. 40.)

§ 1493. **REPEALED.** July 28, 1953, c. 253, § 8, 67 Stat. 226.

§ 1494. **ACCOUNTS OF OFFICERS, AGENTS, OR CONTRACTORS.**

The United States Claims Court shall have jurisdiction to determine the amount, if any, due to or from the United States by reason of any unsettled account of any officer or agent of, or contractor with, the United States, or a guarantor, surety or personal representative of any such officer, agent, or contractor, and to render judgement thereof where--

(1) Claimant or the person he represents has applied to the proper department of the Government for settlement of the account;

(2) three years have elapsed from the date of such application without settlement; and

(3) no suit upon the same has been brought by the United States. As amended July 28, 1953, c. 253, § 9, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 44(c), 68 Stat. 1242.

§ 1495. **DAMAGES FOR UNJUST CONVICTION AND IMPRISONMENT; CLAIM AGAINST UNITED STATES.**

The United States Claims Court shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned. (As amended Apr 2, 1982, Pub.L. 97-164, Title I, § 133(c)(1), 96 Stat. 40.)

§ 1496. **DISBURSING OFFICERS' CLAIMS.**

The United States Claims Court shall have jurisdiction to render judgment upon any claim by a disbursing officer of the United States or by his administrator or executor for relief from responsibility for loss, in line of duty, of Government funds, vouchers, records or other papers in his charge. (As amended Apr 2, 1982, Pub.L. 97-164, Title I, § 133(c)(1), 96 Stat. 40.)

§ 1497. **OYSTER GROWERS, DAMAGES FROM DREDGING OPERATIONS.**

(Text omitted.)

§ 1498. **PATENT AND COPYRIGHT CASES.**

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Claims Court for recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article, owned, leased, used by, or in the possession of the United States prior to July 1, 1918.

A Government employee shall have the right to bring suit against the Government under this section except where he was in a position to order, influence, or induce use of the invention by the Government. This section shall not confer a right of action on any patentee or any assignee of such patentee with respect to any invention discovered or invented by a person while in the employment or service of the United States, where the invention was related to the official functions of the employee, in cases in which such functions included research and development, or in the making of which Government time, materials, or facilities were used.

(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Claims Court for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in § 504(c) of title 17, United States Code: Provided, That a Government employee shall have right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: Provided, however, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

(c) The provisions of this section shall not apply to any claim arising in a foreign country. As amended Oct. 31, 1951, c. 655, § 50(c), 65 Stat. 727; July 17, 1952, c. 930, 66 Stat. 757; Sept. 8, 1960, Pub. L. 86-726, § § 1, 4, 74 Stat. 855, 856.

(d) Hereafter, whenever a plant variety protected by a certificate of plant variety protection under the laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor or any person, firm, or corporation acting for the Government and with the authorization and consent of the Government, the exclusive remedy of the owner of such certificate shall be by action against the United States in the Claims Court for the recovery of his reasonable and entire compensation as damages for such infringement: Provided, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence or induce use of the protected plant variety by the Government: Provided, however, That this subsection shall not confer a right of action on any certificate owner or any assignee of such owner with respect to any protected plant variety made by a person while in the employment or service of the United States, where such variety was prepared as a

part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used: And provided further, That before such action against the United States has been instituted, the appropriate corporation owned or controlled by the United States or the head of the appropriate agency of the Government, as the case may be, is authorized to enter into an agreement with the certificate owner in full settlement and compromise, for the damages accrued to him by reason of such infringement and to settle the claim administratively out of available appropriations. (As amended Oct 19, 1976, Pub.L. 94-533, § 105(c), 90 Stat. 2599; Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(d), 96 Stat. 40.)

§ 1499. LIQUIDATED DAMAGES WITHHELD FROM CONTRACTORS UNDER CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.

The United States Claims Court shall have jurisdiction to render judgment upon any claim for liquidated damages withheld from a contractor or subcontractor under § 104 of the Contract Work Hours Standards Act. As amended Aug. 13, 1982, Pub.L. 97-164, Title I, § 133(e)(1),(2)(A), 96 Stat. 40, 41.)

§ 1500. PENDENCY OF CLAIMS IN OTHER COURTS.

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act directly or indirectly under the authority of the United States. (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(e)(1), 96 Stat. 40.)

§ 1501. PENSIONS.

The United States Claims Court shall not have jurisdiction of any claim for a pension. June 25, 1948, c. 646, 62 Stat. 942.

§ 1502. TREATY CASES.

Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations. (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(e)(1), 96 Stat. 40.)

§ 1503. SET-OFFS.

The United States Claims Court shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court. (As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(e)(1), 96 Stat. 40.)

§ 1504. TORT CLAIMS.

Repealed H.R. 4482, March 22, 1982.

§ 1505. INDIAN CLAIMS.

(Text Excluded)

FEDERAL COURTS IMPROVEMENT ACT OF 1982

96 Stat. 25; HR 4482, Effective Oct 1, 1982

TITLE I -- UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND UNITED STATES CLAIMS COURT

PART A -- Organization, Structure, and Jurisdiction

Number and composition of Circuits

§ 101. Section 41 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended by striking out "twelve" and inserting in lieu thereof "thirteen" and by adding at the end thereof the following:

"Federal..... All Federal judicial districts."

Number of Circuit Judges

§ 102. (a) Section 44(a) of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96- 452; 94 Stat. 1994), is amended by adding at the end thereof the following:

"Federal..... 12"

(b) Section 44(c) of title 28, United States Code, is amended by adding the following sentence at the end thereof: "While in active service, each circuit judge of the Federal judicial circuit appointed after the effective date of this Act, and the chief judge of the Federal judicial circuit, whenever appointed, shall reside within fifty miles of the District of Columbia."

PANELS OF JUDGES: Number of Judges for Hearings

§ 103. (a) Section 46(a) of title 28, United States Code, is amended by striking out "divisions" and inserting in lieu thereof "panels".

(b) Section 46(b) of title 28, United States Code, is amended --

(1) by striking out "divisions" each place it appears and inserting in lieu thereof "panels";

(2) by inserting immediately before the period at the end of the first sentence the following: ", at least a majority of whom shall be judges of that court, unless such judges cannot si' because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness"; and

(3) by adding at the end thereof the following new sentence: "The United States Court of Appeals for the Federal Circuit Court shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) The first sentence of § 46(c) of title 28, United States Code, is amended by inserting immediately after "three judges" the following: (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide).

(d) Section 46(d) of title 28, United States Code, is amended by striking out "division" and inserting in lieu thereof "panel".

PLACES FOR HOLDING COURT

§ 104. (a) Section 48 of title 28, United States Code, is amended by striking out the first two sentences and inserting in lieu thereof the following:

(a) The courts of appeals shall hold regular sessions at the places listed below, and at such other places within the respective circuit as each court may designate by rule.

(b) Section 48 of title 28, United States Code, as amended by the Fifth Circuit Court of Appeals Reorganization Act of 1980 (Public Law 96-452; 94 Stat. 1994), is amended further by inserting at the end of the table of circuits and places the following:

Federal..... District of Columbia, and in any other place listed above as the court by rule directs.

(c) Section 48 of title 28, United States Code, is amended further by striking out the final paragraph and inserting in lieu thereof the following:

(b) Each court of appeals may hold special sessions at any place within its circuit as the nature of the business may require, and upon such notice as the court orders. The court may transact any business at a special session which it might transact at a regular session.

(c) Any court of appeals may pretermit, with the consent of the Judicial Conference of the United States, any regular session of court at any place for insufficient business or other good cause.

(d) The times and places of the sessions of the Court of Appeals for the Federal Circuit shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the court with as little inconvenience and expense to citizens as is practicable.

ORGANIZATION OF UNITED STATES CLAIMS COURT

§ 105. (a) Chapter 7 of title 28, United States Code, is amended to read as follows:

CHAPTER 7 -- UNITED STATES CLAIMS COURT

Sections

28 U.S.C. 171. Appointment and number of judges; character of court; designation of chief judge.

172. Tenure and salaries of judges.

173. Times and places of holding court.

174. Assignment of judges; decisions.

175. Official duty station; residence.

176. Removal from office.

177. Disbarment of removed judges.

28 U.S.C. § 171. **Appointment and number of judges; character of court; designation of chief judge.**

(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Claims Court. The court is declared to be a court established under article I of the Constitution of the United States.

(b) The President shall designate one of the judges of the Claims Court who is less than seventy years of age to serve as chief judge. The chief judge may continue to serve as such until he reaches the age of seventy years or until another judge is designated as chief judge by the President. After the designation of another judge to serve as chief judge, the former chief judge may continue to serve as a judge of the court for the balance of the term to which appointed.

§ 172. **Tenure and salaries of judges.**

(a) Each judge of the United States Claims Court shall be appointed for a term of fifteen years.

(b) Each judge shall receive a salary at an annual rate determined under § 225 of the Federal Salary Act of 1967 (2 U.S.C. §§ 351-361), as adjusted by § 461 of this title.

§ 173. **Times and places of holding court.**

The principal office of the United States Claims Court shall be in the District of Columbia, but the Claims Court may hold court at such times and in such places as it may fix by rule of court. The times and places of the sessions of the Claims Court shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Claims Court with as little inconvenience and expense to citizens as is practicable.

§ 174. **Assignment of judges; decisions.**

(a) The judicial power of the United States Claims Court with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges.

(b) All decisions of the Claims Court shall be preserved and open to inspection.

§ 175. **Official duty station; residence.**

(a) The official duty station of each judge of the United States Claims Court is the District of Columbia.

(b) After appointment and while in active service, each judge shall reside within fifty miles of the District of Columbia.

JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

§ 127(a). Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

28 U.S.C. § 1295. **Jurisdiction of the United States Court of Appeals for the Federal Circuit.**

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(1) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on § 1338 of this title, except that a case involving a claim arising under any Act of Congress relating to copyrights or trademarks and no other claims under § 1338 (a) shall be governed by §§ 1291, 1292, and 1294 of this title;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on § 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under § 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under § 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by §§ 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Claims Court;

(4) of an appeal from a decision of --

(A) The Board of Appeals or the Board of Patent Interferences of the Patent and Trademark Office with respect to patent applications and interferences, at the instance of an applicant for a patent or any party to a patent interference, and any such appeal shall waive the right of such applicant or party to proceed under § 145 or § 146 of title 35;

(B) the Commissioner of Patents and Trademarks or the Trademark Trial and Appeal Board with respect to application for registration of marks and other proceedings as provided in § 21 of the Trademark Act of 1946 (15 U.S.C. § 1071); or

(C) a district court to which a case was directed pursuant to § 145 or § 146 of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under § 337 of the Tariff Act of 1980 (19 U.S.C. § 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under headnote 6 to schedule 8, part 4, of the Tariff Schedules of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under § 71 of the Plant Variety Protection Act (7 U.S.C. § 2461);

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to §§ 7703(b)(1) and 7703(d) of title 5; and

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to § 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. § 607(g)(1)).

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decisions rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in § 10(b) of the Contract Disputes Act of 1978 (41 U.S.C. § 609(b)). The head of each executive department or agency shall make any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in § 10(b) of the Contract Disputes Act of 1978. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

* * * * *

§ 2411. **Interest**

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at an annual rate established under § 6621 of the Internal Revenue Code of 1954 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

(As amended Apr. 1, 1982, Pub.L. 97-164, title III, § 302(b), 96 Stat. 56.)

* * * * *

EFFECTIVE DATE

§ 402. Unless otherwise specified, the provisions of this Act shall take effect on October 1, 1982.

EFFECT ON PENDING CASES

§ 402. (a) Any case pending before the Court of Claims on the effective date of this Act in which a report on the merits has been filed by a commissioner, or in which there is pending a request for review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit.

(b) any matter pending before the United States Court of Customs and Patent Appeals on the effective date of this Act shall be transferred to the United States Court of Appeals for the Federal Circuit.

(c) Any petition for rehearing, reconsideration, alteration, modification, or other change in any decision of the United States Court of Claims or the United States Court of Customs and Patent Appeals rendered prior to the effective date of this Act that has not been determined by either of those courts on that date, or that is filed after that date shall be determined by the United States Court of Appeals for the Federal Circuit.

(d) Any matter pending before a commissioner of the United States Court of Claims on the effective date of this Act, or any pending dispositive motion that the United States Court of Claims has not determined on that date, shall be determined by the United States Claims Court.

(e) Any case in which a notice of appeal has been filed in a district court of the United States prior to the effective date of this Act shall be decided by the court of appeals to which the appeal was taken

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PUBLIC LAW 85-804

Chapter 29, National Defense Contracts

(50 U.S.C. §§ 1431-1435)

§ 1431. AUTHORIZATION; OFFICIAL APPROVAL; CONGRESSIONAL ACTION: NOTIFICATION OF COMMITTEES OF CERTAIN PROPOSED OBLIGATIONS, RESOLUTION OF DISAPPROVAL, CONTINUITY OF SESSION, COMPUTATION OF PERIOD.

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. The authority conferred by this section shall not be utilized to obligate the United States in an amount in excess of $50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein. The authority conferred by this section may not be utilized to obligate the United States in any amount in excess of $25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed obligation and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees and neither House of Congress has adopted, within such 60-day period, a resolution disapproving such obligation. For purposes of this section, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of such 60-day period. Pub. L. 85- 804, § 1, Aug 28, 1958, 72 Stat. 972, amended Pub. L. 93-155, Title VIII, § 807(a), Nov. 16, 1973, 87 Stat. 615.

§ 1432. RESTRICTIONS.

Nothing in this chapter shall be construed to constitute authorization hereunder for--

(a) the use of the cost-plus-a-percentage-of-cost system of contracting;

(b) any contract in violation of existing law relating to limitation of profits;

(c) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) the waiver of any bid, payment, performance, or other bond required by law;

(e) the amendment of a contract negotiated under § 2304(a)(15) of Title 10 or under § 252(c)(13) of Title 41, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) the formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.

§ 1433. PUBLIC RECORD; EXAMINATION OF RECORDS BY COMPTROLLER GENERAL; EXEMPTIONS: EXCEPTIONAL CONDITIONS; REPORTS TO CONGRESS.

(a) All actions under the authority of this chapter shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be detrimental to the national

security.

(b) All contracts entered into, amended, or modified pursuant to authority contained in this chapter shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions other than actions related to such contracts or subcontracts. Under regulations to be prescribed by the President, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller General of the United States or his designee is not required for the omission of such clause--

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the law of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the process and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2), a written report shall be furnished to the Congress, Pub. L. 85-804, 3, Sept. 27, 1966, 80 Stat. 851.

§ 1434. REPORTS TO CONGRESS; PUBLICATION.

(a) Every department and agency acting under authority of this chapter shall, by March 15 of each year, report to Congress all such actions taken by that department or agency during the preceding calendar year. With respect to actions which involved actual or potential cost to the United States in excess of $50,000 the report shall--

(1) name of contractor;

(2) state the actual cost or estimated potential cost involved;

(3) describe the property or services involved; and

(4) state further the circumstances justifying the action taken.

With respect to (1), (2), (3), and (4), above, and under regulations prescribed by the President, there may be omitted any information the disclosure of which would be detrimental to the national security.

(b) The Clerk of the House and the Secretary of the Senate shall cause to be published in the Congressional Record all reports submitted pursuant to this section.

§ 1435. EFFECTIVE PERIOD.

This chapter shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate. Pub. L. 85-804, § 5, Aug. 28, 1958, 72 Stat. 973.

EXECUTIVE ORDER NO. 10789

Nov. 14, 1958, 23 F.R. 8897, as amended by Ex.Ord. No. 11051, Sept. 28, 1962, 27 F.R. 9683; Ex.Ord. No. 11382, Nov. 28, 1967, 32 F.R. 16247; Ex.Ord. No. 11610, July 22, 1971, 36 F.R. 13755; Ex. Ord. No. 12148, July 20, 1979, 44 F.R. 43239.

CONTRACTING AUTHORITY OF GOVERNMENT AGENCIES IN CONNECTION WITH NATIONAL DEFENSE FUNCTIONS

By virtue of the authority vested in me by the Act of August 28, 1958, 72 Stat. 972, hereinafter called the act [this chapter], and as President of the United States, and in view of the existing national emergency declared by Proclamation No. 2914 of December 16, 1950 [set out as a note preceding § 1 of Appendix to this title], and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

Part I--Department of Defense

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized within the limits of the amounts appropriated and the contract authorization provided therefore, to enter into contracts and into amendments or modification of contract heretofore or hereafter made, and to make advance payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts, whenever, in the judgment of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, the national defense will be facilitated thereby.

1A. (a) The limitation in paragraph 1 to amounts appropriated and the contract authorization provided therefor shall not apply to contractual provisions which provide that the United States will hold harmless and indemnify the contractor against any of the claims or losses set forth in subparagraph (b), whether resulting from the negligence or wrongful act or omission of the contractor or otherwise (except as provided in subparagraph (b)(2)). This exception from the limitations of paragraph 1 shall apply only to claims or losses arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature. Such a contractual provision shall be approved in advance by an official at a level not below that of the Secretary of a military department and may require each contractor so indemnified to provide and maintain financial protection of such type and in such amounts as is determined by the approving official to be appropriate under the circumstances. In deciding whether to approve the use of an indemnification provision and in determining the amount of financial protection to be provided and maintained by the indemnified contractor, the appropriate official shall take into account such factors as the availability, cost and terms of private insurance, self-insurance, other proof of financial responsibility and workmen's compensation insurance. Such approval and determination, as required by the preceding two sentences, shall be final

(b)(1) Subparagraph (a) shall apply to claims (including reasonable expenses of litigation and settlement) or losses, not compensated by insurance or otherwise, of the following types:

(A) Claims by third persons, including employees of the contractor, for death, personal injury, or loss of. damage to, or loss of use of property;

(B) Loss of, damage to, or loss of use of property of the contractor;

(C) Loss of, damage to, or loss of use of property of the Government,

(D) Claims arising (i) from indemnification agreements between the contractor and a subcontractor or subcontractors, or (ii) from such arrangements and further indemnification arrangements between subcontractors at any tier; provided that all such arrangements were entered into pursuant to regulations prescribed or approved by the Secretaries of Defense, the Army, the Navy, or the Air Force.

(2) Indemnification and hold harmless agreements entered into pursuant to this subsection, whether between the United States and a contractor, or between a contractor and a subcontractor, or between two subcontractors, shall not cover claims or losses caused by the willful misconduct or lack of good faith on the part of any of the contractor's or subcontractor's directors or officers or principal officials which are (i) claims by the United States (other than those arising through subrogation) against the contractor or subcontractor, or (ii) losses affecting the property of such contractor or subcontractor. Regulations to be prescribed or approved by the Secretaries of Defense, the Army, the Navy or the Air Force shall define the scope of the term "principal officials".

(3) The United States may discharge its obligation under a provision authorized by subparagraph (a) by making payments directly to subcontractors or to third persons to whom a contractor or subcontractor may be liable.

(c) A contractual provision made under subparagraph (a) that provides for indemnification must also provide for --

(1) notice to the United States of any claim or action against, or of any loss by, the contractor or subcontractor which is covered by such contractual provision; and

(2) control or assistance by the United States, at its election, in the settlement or defense of any such claim or action.

2. The Secretaries of Defense, the Army, the Navy, and the Air Force, respectively, may exercise the authority herein conferred and, in their discretion and by their direction, may delegate such authority to any other military or civilian officers or officials of their respective departments, and may confer upon any such military or civilian officers or officials the power to make further delegations of such authority within their respective commands or organizations: Provided, that the authority herein conferred shall not be utilized to obligate the United States in an amount in excess of $50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or by a departmental Contract Adjustment Board.

3. The contracts hereby authorized to be made shall include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of property or services necessary, appropriate, or convenient for the national defense, or for the invention, development, or production of, or research concerning, any such property or services, including, but not limited to, aircraft, missiles, buildings, vessels, arms, armament, equipment or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment without any restriction of any kind as to type, character, location, or form.

4. The Department of Defense may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance payments upon such contracts of any portion of the contract price, and may enter into agreements with contractors or obligors modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds. Amendments or modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making, or the form, of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

5 Proper records of all actions taken under the authority of the act shall be maintained within the Department of Defense. The Secretaries of Defense, the Army, the Navy, and the Air Force shall make such records available for public inspection except to the extent that they, or their duly authorized representatives, may respectively deem the disclosure of information therein to be detrimental to the national security.

6 The Department of Defense shall, by March 15 of each year, report to the Congress all actions taken within that department under the authority of the act during the preceding calendar year. With respect to actions which involve actual or potential cost to the United States in excess of $50,000, the report shall (except as the disclosure of such information may be deemed to be detrimental to the national security) --

(a) name the contractor;

(b) state the actual cost or estimated potential;

(c) describe the property or services involved; and

(d) state further the circumstances justifying the action taken.

7. There shall be no discrimination in any act performed hereunder against any person on the ground of race, religion, color, or national origin, and all contracts entered into, amended, or modified hereunder shall contain such nondiscrimination provision as otherwise may be required by statute or Executive order.

8. No claim against the United States arising under any purchase or contract made under the authority of the act and this order shall be assigned except in accordance with the Assignment of Claims Act of 1940 (54 Stat. 1029), as amended [§ 203 of Title 31 and § 15 of Title 41].

9. Advance payments shall be made hereunder only upon obtaining adequate security.

10. Every contract entered into, amended, or modified pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bonafide employees or bonafide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

11. Except as provided in the Act of September 27, 1966, 80 Stats. 850 [which amended § 1433 of this title, §§ 2310, 2313 of Title 10, Armed Forces, and § 254 of Title 41, Public Contracts] contracts entered into, amended, or modified pursuant to authority of this order shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of, and involving transactions related to, such contracts or subcontracts. Before exercising the authority provided in the Act of September 27, 1966, 80 Stat. 850 [which amended § 1433 of this title, §§ 2310, 2313 of Title 10, Armed Forces, and § 254 of Title 41, Public Contracts], the Secretaries of Defense, the Army, the Navy or the Air Force, or their designees, shall first determine that all reasonable efforts have been made to include the clause prescribed above and that alternate sources of supply are not reasonably available.

12. Nothing herein contained shall be construed to constitute authorization hereunder for --

(a) the use of the cost-plus-a percentage-of-cost system of contracting;

(b) any contract in violation of existing law relating to limitation of profits or fees;

(c) the negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) the waiver of any bid, payment, performance, or other bond required by law;

(e) the amendment of a contract negotiated under § 2304(a)(15) of title 10 of the United States Code to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) the formalization of an informal commitment, unless the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, finds that at the time the commitment was made it was impracticable to use normal procurement procedures.

13. The provisions of the Walsh-Healey Act (49 Stat. 2036), as amended [§§ 35-45 of Title 41], the Davis-Bacon Act (49 Stat. 1011), as amended [§§ 276a to 276a-5 of Title 40], the Copeland Act (48 Stat. 948), as amended, and the Eight-Hours Law (37 Stat. 137), as amended [§§ 321 and 322 of Title 40], if otherwise applicable, shall apply to contracts made and performed under the authority of this order.

14. Nothing herein contained shall prejudice anything heretofore done under Executive Order No. 9001 of December 27, 1941, or Executive Order No. 10210 of February 2, 1951 [set out as notes under § 611 of this Appendix to this title], or any amendments or extensions thereof, or the continuance in force of an action heretofore taken under those orders or any amendments or extensions thereof.

15. Nothing herein contained shall prejudice any other authority which the Department of Defense may have to enter into, amend or modify contracts, and to make advance payments.

Part II--Extension of Provisions of Paragraphs 1 to 14

21. Subject to the limitations and regulations contained in paragraphs 1 to 14, inclusive, hereof, and under any regulations prescribed by him in pursuance of the provisions of paragraph 22 hereof, the head of each of the following named agencies is authorized to perform or exercise as to his agency, independently of any Secretary referred to in the said paragraphs 1 to 14, all the functions and authority vested by those paragraphs in the Secretaries mentioned therein:

Department of the Treasury

Department of the Interior

Department of Agriculture

Department of Commerce

Department of Transportation

Atomic Energy Commission

General Services Administration

National Aeronautics and Space Administration

Tennessee Valley Authority

Government Printing Office

The Federal Emergency Management Agency

22. The head of each agency named in paragraph 21 hereof is authorized to prescribe regulations governing the carrying out of the functions and authority vested with respect to his agency by the provisions of paragraph 21 hereof. Such regulations shall, to the extent practicable, be uniform with the regulations prescribed or approved by the Secretary of Defense under the provisions of Part I of this order.

23. Nothing contained herein shall prejudice any other authority which any agency named in paragraph 21 hereof may have to enter into, amend, or modify contracts and to make advance payments.

24. Nothing contained in this Part shall constitute authorization thereunder for the amendment of a contract negotiated under § 302(c)(14) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 394), as amended by § 2(b) of the act of August 28, 1958, 72 Stat. 966 [§ 252(c)(14) of Title 41], to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder.

DWIGHT D. EISENHOWER

Amended by H.R. 4482, March 22, 1982

TITLE 28

§ 2501. TIME FOR FILING SUIT.

Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

§ 2503. PROCEEDINGS GENERALLY.

(a) Parties to any suit in the United States Claims Court may appear before a judge of that court in person or by attorney, produce evidence, and examine witnesses.

(b) The proceedings of the Claims Court shall be in accordance with such rules of practice and procedure (other than the rules of evidence) as the Claims Court may prescribe and in accordance with the Federal Rules of Evidence.

(c) The judges of the Claims Court shall fix times for trials, administer oaths or affirmations, examine witnesses, receive evidence, and enter dispositive judgments. Hearings shall, if convenient, be held in the counties where the witnesses reside.

§ 2508. COUNTERCLAIM OR SET-OFF; REGISTRATION OF JUDGMENT.

Upon the trial of any suit in the United States Claims Court in which any set- off, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff.

If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.

The transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records and shall be enforceable as other judgments. June 25, 1948, c. 646, 62 Stat. 977; July 28, 1953, c. 253, § 10, 67 Stat. 227; Sept. 3, 1954, c. 1263, § 47(a), 68 Stat. 1243.

§ 2509. CONGRESSIONAL REFERENCE CASES.

(a) Whenever a bill, except a bill for a pension, is referred by either House of Congress to the chief judge of the United States Claims Court pursuant to § 1492 of this Title, the chief judge shall designate a judge as hearing officer for the case and a panel of three judges of the court to serve as a reviewing body. One member of the review panel shall be designated as presiding officer of the panel.

(b) Proceedings in a congressional reference case shall be under rules and regulations prescribed for the purpose by the chief judge who is hereby authorized and directed to require the application of the pertinent rules of practice of the Claims Court insofar as feasible. Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena and the power to administer oaths and affirmations. None of the rules, rulings, findings, or conclusions authorized by this section shall be subject to judicial review.

(c) The hearing officer to whom a congressional reference case is assigned by the chief commissioner shall proceed in accordance with the applicable rules to determine the facts, including facts

relating to delay or laches, facts bearing upon the question whether the bar of any statute of limitation should be removed, or facts claimed to excuse the claimant for not having resorted to any established legal remedy. He shall append to his findings of fact conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity, and the amount, if any, legally or equitably due from the United States to the claimant.

(d) The findings and conclusions of the hearing officer shall be submitted by him, together with the record in the case, to the review panel for review by it pursuant to such rules as may be provided for the purpose, which shall include provision for submitting the report of the hearing officer to the parties for consideration, exception, and argument before the panel. The panel, by majority vote, shall adopt or modify the findings or the conclusions of the hearing officer.

(e) The panel shall submit its report to the chief judge for transmission to the appropriate House of Congress.

(f) Any act of failure to act or other conduct by a party, a witness, or an attorney which would call for the imposition of sanctions under the rules of practice of the Claims Court shall be noted by the panel or the hearing officer at the time of occurrence thereof and upon failure of the delinquent or offending party, witness, or attorney to make prompt compliance with the order of the panel or the hearing officer a full statement of the circumstances shall be incorporated in the report of the panel.

(g) The Claims Court is hereby authorized and directed, under such regulations as it may prescribe, to provide the facilities and services of the office of the clerk of the court for the filing, processing, hearing, and dispatch of congressional reference cases and to include within its annual appropriations the costs thereof and other costs of administration, including (but without limitation to the items herein listed) the salaries and traveling expenses of the judges serving as hearing officers and panel members, mailing and service of process, necessary physical facilities, equipment, and supplies, and personnel (including secretaries and law clerks). As amended Oct. 15, 1966, Pub. L. 89-681, § 2, 80 Stat. 958.

§ 2510. REFERRAL OF CASES BY COMPTROLLER GENERAL.

(a) The Comptroller General may transmit to the United States Claims Court for trial and adjudication any claim or matter of which the Claims Court might take jurisdiction on the voluntary action of the claimant, together with all vouchers, papers, documents, and proofs pertaining thereto.

(b) The Claims Court shall proceed with the claims or matters so referred as in other cases pending in such court and shall render judgment thereon. As amended March 22, 1982, H.R. 4482.

§ 2514. FORFEITURE OF FRAUDULENT CLAIMS.

A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.

In such cases the United States Claims Court shall specifically find such fraud or attempt and render judgment of forfeiture. June 25, 1948, c. 646, 62 Stat. 978.

§ 2516. INTEREST ON CLAIMS AND JUDGMENTS.

(a) Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof.

(b) Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty- two week United States Treasury bills settled immediately before the date of the judgment.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 139(j)(2), Title III, § 302(d), 96 Stat. 43, 56; Sept. 13,

1982, Pub.L. 97-258, § 2(g)(5), (m)(3), 96 Stat. 1061, 1062.)

§ 2517. PAYMENT OF JUDGMENTS.

(a) Except as provided by the Contract Disputes Act of 1978, every final judgment rendered by the United States Claims Court against the United States shall be paid out of any general appropriation therefor, on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court.

(b) Payment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy, unless the judgment is designated a partial judgment, in which event only the matters described therein shall be discharged.

(As amended Nov. 1, 1978, Pub.L. 95-563, § 14(e), (f), 92 Stat. 2390; Apr. 2, 1982; Pub.L. 97-164, Title I, § 139(k), 96 Stat. 43.)

FREEDOM OF INFORMATION ACT

5 U.S.C. § 552 PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the *Federal Register* for the guidance of the public --

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

(B) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available, or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the *Federal Register* when incorporated by reference therein with the approval of the Director of the *Federal Register*.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying --

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the *Federal Register*; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of the personal privacy, an agency may delete identifying details when it

makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the *Federal Register* that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if --

(i) it has been indexed and either made available or published as provided by this paragraph or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefitting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from complainant. In such case the court shall determine the matter *de novo*, and may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Special Counsel, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Special Counsel recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member of every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions of judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this paragraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this paragraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request-

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need for search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), and (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain juris diction and allow the agency additional time to complete its review of the records. Upon any determination by any agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are --

(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of any agency;

(3) specifically exempted from disclosure by statute (other than § 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with the enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of, an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geographical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include --

(1) The number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(f), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each use, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For the purpose of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. P.L. 89-554, Sept. 6, 1966, 80 Stat. 383; P.L. 90-23, § 1, June 5, 1967, 81 Stat. 54; P.L. 93-502, Nov. 21, 1974, 88 Stat. 1561; P.L. 94-409, Sept. 13, 1976, 90 Stat. 1247. P.L. 95-454, Oct. 13, 1978.

TRADE SECRETS ACT

18 U.S.C. § 1905. DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY.

Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. §§ 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment. (P.L. 96-349, Sept. 12, 1980, 94 Stat. 1158).

EQUAL ACCESS TO JUSTICE ACT

5 U.S.C. § 504

§ 504. Costs and fees of parties.

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section --

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an

increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in § 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in § 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. § 501(c)(3)) exempt from taxation under § 501(a) of such Code, or a cooperative association as defined in § 15(a) of the Agricultural Marketing Act (12 U.S.C. § 1141(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (1) an adjudication under § 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, and (ii) any appeal of a decision made pursuant to § 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605) before an agency board of contract appeals as provided in § 8 of that Act (41 U.S.C. § 607);

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in § 551 of this title apply to this section.

(c)(1) After consulation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to § 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consulation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection. [Added by P.L. 96-481, Oct 21, 1980, 94 Stat. 2325; P.L. 99-80, Aug. 5, 1985, 99 Stat. 183.]

CHAPTER EIGHTEEN

No Statutes

CHAPTER NINETEEN

No Statutes

CHAPTER TWENTY

STATUTES

FRAUD AND FALSE STATEMENTS

18 U.S.C. § 1001

§ 1001. Statements or Entries Generally.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Offsets Against Judgments Against the United States
31 U.S.C. § 3728

§ 3728. Setoff against judgment

(a) The Comptroller General shall withhold paying that part of a judgment against the United States Government presented to the Comptroller General that is equal to a debt the plaintiff owes the Government.

(b) The Comptroller General shall --

(1) discharge the debt if the plaintiff agrees to the setoff and discharges a part of the judgment equal to the debt; or

(2)(A) withhold payment of an additional amount the Comptroller General decides will cover legal costs of bringing a civil action for the debt if the plaintiff denies the debt or does not agree to the setoff; and

(B) have a civil action brought if one has not already been brought.

(c) If the Government loses a civil action to recover a debt or recovers less than the amount the Comptroller General withholds under this section, the Comptroller General shall pay the plaintiff the balance and interest of 6 percent for the time the money is withheld.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 977.)

FALSE, FICTITIOUS OR FRAUDULENT CLAIMS

18 U.S.C. § 287

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

(False Claims Amendments Act of 1986)

PART C -- FALSE CLAIMS, DEBARMENT, BURDEN OF PROOF, AND RELATED MATTERS

§ 931. Increased Penalties for False Claims in Defense Procurement

(a) **Criminal Fines.** -- Notwithstanding § 287 and § 3623 of title 18, United States Code, the maximum fine that may be imposed under such section for making or presenting any claim upon or against the United States related to a contract with the Department of Defense, knowing such claim to be false, fictitious, or fraudulent, is $1,000,000.

(b) **Civil Penalties.** -- Notwithstanding § 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of $2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action.

(c) **Effective Date.** -- Subsections (a) and (b) shall be applicable to claims made or presented on or after the date of the enactment of this Act.

§ 932. Prohibition on Felons Convicted of Defense-Contract-Related Felonies and Penalty on Employment of Such Persons by Defense Contractors

(a) **Prohibition.** -- A person who is convicted of fraud or any other felony arising out of a contract with the Department of Defense shall be prohibited from working in a management or supervisory capacity on any defense contract for a period, as determined by the Secretary of Defense, of not less than one year from the date of the conviction.

(b) **Penalty.** -- A defense contractor who knowingly employs a person under a prohibition under subsection (a) shall be fined not more than $500,000.

(c) **Effective Date.** -- Subsection (a) shall apply only with respect to crimes committed after the date of the enactment of this Act.

§ 933. Burden of Proof in Government Contract Dispute Resolution

In a proceeding before the Armed Services Board of Contract Appeals, the United States Claims Court, or any other Federal court in which the reasonableness of indirect costs for which a contractor seeks reimbursement from the Department of Defense is in issue, the burden of proof shall be upon the contractor to establish that such costs are reasonable.

§ 934. Reimbursement, Interest Charges, and Penalties for Overpayments

(a) **Cost and Pricing Data.** -- If the United States makes an overpayment to a contractor under a contract with the Department of Defense subject to 2306(f) of title 10, United States Code, and the overpayment was due to the submission by the contractor of inaccurate, incomplete, or noncurrent cost and pricing data, the contractor shall be liable to the United States --

(1) for interest on the amount of such overpayment to be computed from the date the payment was made to the contractor to the date the Government is repaid by the contractor at the applicable rate prescribed by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97); and

(2) if the submission of such inaccurate, incomplete, or nonconcurrent cost and pricing data was a knowing submission, an amount equal to the amount of the overpayment.

(b) **Defense Production Act Amendment.** -- Section 719 of the Defense Production Act of 1950 (50 U.S.C. App. § 2168) is amended by striking out the third sentence in subsection (h)(1) and inserting in lieu thereof the following: "Such interest shall be set at a rate established by the Secretary of the Treasury pursuant to Public Law 92-41. Such interest shall accrue from the time such payments were

made to the contractor or subcontractor to the time such price adjustment is effected."

(c) **Effective Date.** -- This section shall apply only to contracts entered into on or after the date of the enactment of this Act.

DEFENSE PRODUCTION ACT OF 1950

50 U.S.C. APP. § 2071

Title I -- Priorities and Allocations

§ 2071. Priority in contracts and orders

(a) **Allocation of material and facilities.** The President is authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate to promote the national defense.

(b) **Critical and strategic materials** The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.

(c)(1) **Domestic energy supplies** Notwithstanding any other provision of this Act (§ 2061 *et seq.* of this Appendix), the President may, by rule or order, require the allocation of or the priority performance under contracts or orders (other than contracts of employment) relating to supplies of materials and equipment in order to maximize domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

(2) The President shall report to the Congress within sixty days after the date of enactment of this subsection of the manner in which the authority contained in paragraph (1) will be administered. This report shall include the manner in which allocation will be made, the procedure for request and appeals, the criteria for determining priorities as between competing requests, and the office or agency which will administer such authorities.

(3) The authority granted in this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials and equipment in the marketplace, unless the President finds that --

(A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, production, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and

(B) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.

(4) During any period when the authority conferred by this subsection is being exercised, the President shall take such action as may be appropriate to assure that such authority is being exercised in a manner which assures the coordinated administration of such authority with any priorities or allocations established under subsection (a) of this section and in effect during the same period. As amended June 30, 1952, 9:36 a.m. E.D.T. c. 530, § § 101, 102, 66 Stat. 296; June 30, 1953, c. 171, § 3, 67 Stat. 129; Dec. 22, 1975, Pub.L. 94-163, Title I, § 104(a) 89 Stat. 878.

FEDERAL CLAIMS COLLECTIONS ACT OF 1966

31 U.S.C. §§ 3701, 3711, 953

SUBCHAPTER I -- GENERAL

§ 3701. Definitions and application

(a) In this chapter --

(1) "administrative offset" means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(2) "calendar quarter" means a 3-month period beginning on January 1, April 1, July 1, or October 1.

(3) "consumer reporting agency" means --

(A) a consumer reporting agency as that term is defined in § 603(f) of the Fair Credit Reporting Act (15 U.S.C. § 1681a(f)); or

(B) a person that, for money or on a cooperative basis, regularly --

(i) gets information on consumers to give the information to a consumer reporting agency; or

(ii) serves as a marketing agent under an arrangement allowing a third party to get the information from a consumer reporting agency.

(4) "executive or legislative agency" means a department, agency, or instrumentality in the executive or legislative branch of the Government.

(5) "military department" means the Departments of the Army, Navy, and Air Force.

(6) "system of records" has the same meaning given that term in § 552a(a)(5) of title 5.

(7) "uniformed services" means the Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of the National Oceanic and Atmospheric Administration, and Commissioned Corps of the Public Health Service.

(b) In subchapter II of this chapter, "claim" includes amounts owing on account of loans insured or guaranteed by the Government and other amounts due the Government.

(c) In § 3716 and § 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local government.

(d) Sections 3711(f) and 3716-3719 of this title do not apply to a claim or debt under, or to an amount payable under, the Internal Revenue Code of 1954 (26 U.S.C. § 1 *et seq.*), the Social Security Act (42 U.S.C. § 301 *et seq.*), or the tariff laws of the United States.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 970; Pub.L. 97-452, § 1(13)(A), Jan. 12, 1983, 96 Stat. 2469.)

§ 3711. Collection and compromise

(a) The head of an executive or legislative agency --

(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency;

(2) may compromise a claim of the Government of not more than $20,000 (excluding interest) that has not been referred to another executive or legislative agency for further collection action; and

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

(b) The Comptroller General has the same authority that the head of the agency has under subsection (a) of this section when the claim is referred to the Comptroller General for further collection action. Only the Comptroller General may compromise a claim arising out of an exception the Comptroller General makes in the account of an accountable official.

(c)(1) The head of an executive or legislative agency may not act under subsection (a)(2) or (3) of this section on a claim that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim, or that is based on conduct in violation of the antitrust laws.

(2) The Secretary of Transportation may not compromise for less than $250 a penalty under § 6 of the Act of March 2, 1893 (45 U.S.C. § 6), § 4 of the Act of April 14, 1910 (45 U.S.C. § 13), § 9 of the Act of February 17, 1911 (45 U.S.C. § 34), and § 25(h) of the Interstate Commerce Act (49 App. U.S.C. § 26(h)).

(As amended Pub.L. 98-216, § 1(5), Feb. 14, 1984, 98 Stat. 4.)

(d) A compromise under this section is final and conclusive unless gotten by fraud, misrepresentation, presenting a false claim, or mutual mistake of fact. An accountable official is not liable for an amount paid or for the value of property lost or damaged if the amount or value is not recovered because of a compromise under this section.

(e) The head of an executive or legislative agency acts under --

(1) regulations prescribed by the head of the agency; and

(2) standards that the Attorney General and the Comptroller General may prescribe jointly.

(f)(1) When trying to collect a claim of the Government under a law except the Internal Revenue Code of 1954 (26 U.S.C. § 1 *et seq.*), the head of an executive or legislative agency may disclose to a consumer reporting agency information from a system of records that an individual is responsible for a claim if --

(A) notice required by § 552a(e)(4) of title 5 indicates that information in the system may be disclosed to a consumer reporting agency;

(B) the head of the agency has reviewed the claim and decided that the claim is valid and overdue;

(C) the head of the agency has notified the individual in writing --

(i) that payment of the claim is overdue;

(ii) that, within not less than 60 days after sending the notice, the head of the agency intends to disclose to a consumer reporting agency that the individual is responsible for the claim;

(iii) of the specific information to be disclosed to the consumer reporting agency; and

(iv) of the rights the individual has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative repeal or review of the claim;

(D) the individual has not --

(i) repaid or agreed to repay the claim under a written repayment plan that the individual has signed and the head of the agency has agreed to; or

(ii) filed for review of the claim under paragraph (2) of this subsection;

(E) the head of the agency has established procedures to --

(i) disclose promptly, to reach consumer reporting agency to which the original disclosure was made, a substantial change in the condition or amount of the claim;

(ii) verify or correct promptly information about the claim on request of a consumer reporting agency for verification of information disclosed; and

(iii) get satisfactory assurances from each consumer reporting agency that the agency is complying with all laws of the United States related to providing consumer credit information; and

(F) the information disclosed to the consumer reporting agency is limited to --

(i) information necessary to establish the identity of the individual, including name, address, and taxpayer identification number;

(ii) the amount, status, and history of the claim; and

(iii) the agency or program under which the claim arose.

(2) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection and at other times allowed by law, the head of an executive or legislative agency shall provide, on request of an individual alleged by the agency to be responsible for the claim, for a review of the obligation of the individual, including an opportunity for reconsideration of the initial decision on the claim.

(3) Before disclosing information to a consumer reporting agency under paragraph (1) of this subsection, the head of an executive or legislative agency shall take reasonable action to locate an individual for whom the head of the agency does not have a current address to send the notice under paragraph (1)(C).

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 971; Pub.L. 97-452, § 1(15), Jan. 12, 1983, 96 Stat. 2470.)

§ 953. Existing Agency Authority to Litigate, Settle, Compromise, or Close Claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims. Pub.L. 89-508, § 4, July 19, 1966, 80 Stat. 309.

§ 3716. Administrative offset

(a) After trying to collect a claim from a person under § 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. The head of the agency may collect by administrative offset only after giving the debtor --

(1) written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanation of the rights of the debtor under this section;

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

(b) Before collecting a claim by administrative offset under subsection (a) of this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on --

(1) the best interests of the United States Government;

(2) the likelihood of collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under § 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years.

(c) This section does not apply --

(1) to a claim under this subchapter that has been outstanding for more than 10 years; or

(2) when a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(Added Pub.L. 97-452, § 1(16)(A), Jan. 12, 1983, 96 Stat. 2471.)

EXCESS PROFITS

10 U.S.C. § 2382

CONTRACT PROFIT CONTROLS DURING EMERGENCY PERIODS.

(a)(1) Upon a declaration of war by Congress or a declaration of national emergency by the President or by Congress, the President is authorized to prescribe such regulations to control excessive profits on defense contracts as he determines are necessary during the period of such war or national emergency. Such regulations shall be prescribed only after consultation with the Secretary of Defense, the Secretary of the Treasury, and the Secretary of Commerce and shall apply to appropriate defense contracts and subcontracts (as determined by the President), and to appropriate major modifications of defense contracts and subcontracts (as determined by the President), that are entered into during such war or national emergency. Such regulations, if prescribed by the President, shall be transmitted to Congress within sixty days after the declaration of such war or national emergency. Any material amendment to such regulations shall be prescribed in the same manner and shall promptly be submitted to Congress.

(2) Such regulations, if prescribed by the President, shall set forth standards and procedures for determining what constitutes excessive profits and shall establish thresholds for coverage of contracts and exemptions (including contracts awarded under competition and contracts for standard commercial articles and services) that will minimize administrative expenses and not impose unfair burdens on contractors.

(3) In this subsection, 'excessive profits' means profits that are unconscionable or amount to an unjust enrichment of contractors or subcontractors, as determined under such regulations as may be prescribed by the President under subsection (a), taking into consideration all relevant circumstances, including the character of the business, complexity of the work or services performed under the contract or subcontract, the amount of assets and capital required to perform the contract or subcontract, and the extent to which profit limitations are imposed on nondefense contractors.

(b) Regulations transmitted by the President under subsection (a) (including any material amendment to such regulations) shall take effect unless both Houses of Congress, within sixty legislative days after the date upon which the President transmits the regulations, adopt a concurrent resolution stating in substance that the Congress disapproves the regulations. For the purposes of the preceding sentence, a legislative day is a day on which either House of Congress is in session.

(c) Regulations not disapproved by both Houses of Congress shall remain in effect for a period of not more than five years after the date on which they take effect unless they are extended by a concurrent resolution adopted by both Houses of the Congress before the date on which they would expire. Any such extension may not be for a period in excess of one year.

(d) The United States Court of Claims shall have exclusive jurisdiction over claims arising from actions taken under this section and under regulations prescribed under this section.

(e) The President shall transmit a report to Congress on the operation of this section at the end of each one-year period during which regulations issued under this section are in effect and at the end of any war or national emergency during which such regulations are in effect. (Aug 10, 1956, c. 1041, 70A Stat. 136; Dec 1, 1981, Pub.L. 97-86, Title IX, § 911(a)(1), 95 Stat. 1120.)

INSPECTOR GENERAL ACT OF 1978

5 U.S.C. App 3

Pub.L. 95-452, Oct 12, 1978, 92 Stat. 1101, as amended Pub.L. 96-88, Title V, 508(n), Oct 17, 1979, 93 Stat. 694; Pub.L. 97-113, Title VII, 705, Dec 29, 1981, 95 Stat. 1544; Pub.L. 97-252, Title XI, 1117(a)-(c), Sep *, 1982, 96 Stat. 750-752.

1. Short title

That this Act be cited as the "Inspector General Act of 1978".

2. Purpose and establishment of Offices of Inspector General; departments and agencies involved

In order to create independent and objective units--

(1) to conduct and supervise audits and investigations relating to programs and operations of the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Education, the Department of Housing and Urban Development, the Department of the Interior, the Department of Labor, the Department of Transportation, the Agency for International Development, the Community Services Administration, the Environmental Protection Agency, the General Services Administration, the National Aeronautics and Space Administration, the Small Business Administration, and the Veterans' Administration;

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and hereby is hereby established in each of such establishments an office of Inspector General.

3. Appointment of Inspector General; supervision; removal; political activities; appointment of Assistant Inspector General for Auditing and Assistant Inspector General for Investigations

(a) There shall be at the head of each Office an Inspector General who shall be appointed by the President, by and with the advice and consent of the Senate, without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. Each Inspector General shall report to and be under the general supervision of the head of the establishment involved or, to the extent such authority is delegated, the officer next in rank below such head, but shall not report to, or be subject to supervision by, any other officer of such establishment. Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.

(b) An Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress.

(c) For the purposes of § 7324 of Title 5, no Inspector General shall be considered to be an employee who determines policies to be pursued by the United States in the nationwide administration of Federal laws.

(d) Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service--

(1) appoint an Assistant Inspector General for Auditing who shall have the responsibility for supervising the performance of auditing activities relating to programs and operations of the establishment, and

(2) appoint an Assistant Inspector General for Investigations who shall have the responsibility for supervising the performance of investigative activities relating to such programs and operations.

4. Duties and responsibilities; report of criminal violations to Attorney General

(a) It shall be the duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established--

(1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment;

(2) to review existing and proposed legislation and regulations relating to programs and operations of such establishment and to make recommendations in the semiannual reports required by § 5(a) concerning the impact of such legislation or regulations on the economy and efficiency in the administration of programs and operations administered or financed by such establishment or the prevention and detection of fraud and abuse in such programs and operations;

(3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of, or preventing and detecting fraud and abuse in, its programs and operations;

(4) to recommend policies for, and to conduct, supervise, or coordinate relationships between such establishment and other Federal agencies, State and local governmental agencies, and non-governmental entities with respect to (A) all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered or financed by such establishment, or (B) the identification and prosecution of participants in such fraud or abuse; and

(5) to keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by § 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations administered or financed by such establishment, to recommend corrective action concerning such problems, abuses, and deficiencies, and to report on the progress made in implementing such corrective action.

(b) In carrying out the responsibilities specified in subsection (a)(1), each Inspector General shall--

(1) comply with standards established by the Comptroller General of the United States for audits of Federal establishments, organizations, programs, activities, and functions;

(2) establish guidelines for determining when it shall be appropriate to use non-Federal auditors; and

(3) take appropriate steps to assure that any work performed by non-Federal auditors complies with the standards established by the Comptroller General as described in paragraph (1).

(c) In carrying out the duties and responsibilities established under this Act, each Inspector General shall give particular regard to the activities of the Comptroller General of the United States with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) In carrying out the duties and responsibilities established under this Act, each Inspector General shall report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.

5. Semiannual reports; transmittal to Congress; availability to public; immediate report on serious or flagrant problems

(a) Each Inspector General shall, not later than April 30 and October 31 of each year, prepare semiannual reports summarizing the activities of the Office during the immediately preceding six-month periods ending March 31 and September 30. Such reports shall include, but need not be limited to--

(1) a description of significant problems, abuses, and deficiencies relating to the administration of programs and operations of such establishment disclosed by such activities during the reporting period;

(2) a description of the recommendations for corrective action made by the Office during the reporting period with respect to significant problems, abuses, or deficiencies identified pursuant to paragraph (1);

(3) an identification of each significant recommendation described in previous semiannual reports on which corrective action has not been completed;

(4) a summary of matters referred to prosecutive authorities and the prosecutions and convictions which have resulted;

(5) a summary of each report made to the head of the establishment under § 6(b)(2) during the reporting period; and

(6) a listing of each audit report completed by the Office during the reporting period.

(b) Semiannual reports of each Inspector General shall be furnished to the head of the establishment involved not later than April 30 and October 31 of each year and shall be transmitted by such head to the appropriate committees or subcommittees of the Congress within thirty days after receipt of the report, together with a report by the head of the establishment containing any comments such head deems appropriate.

(c) Within sixty days of the transmission of the semiannual reports of each Inspector General to the Congress, the head of each establishment shall make copies of such report available to the public upon request and at a reasonable cost.

(d) Each Inspector General shall report immediately to the head of the establishment involved whenever the Inspector General becomes aware of particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations of such establishment. The head of the establishment shall transmit any such report to the appropriate committees or subcommittees of Congress within seven calendar days, together with a report by the head of the establishment containing any comments such head deems appropriate.

(e)(1) Nothing in this section shall be construed to authorize the public disclosure of information which is--

(A) specifically prohibited from disclosure by any other provision of law;

(B) specifically required by Executive order to be protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs; or

(C) a part of an ongoing criminal investigation.

(2) Notwithstanding paragraph (1)(C), any report under this section may be disclosed to the public in a form which includes information with respect to a part of an ongoing criminal investigation if such information has been included in a public record.

(3) Nothing in this section or in any other provision of this Act shall be construed to authorize or permit the withholding of information from the Congress, or from any committee or subcommittee thereof.

6. **Authority of Inspector General; information and assistance from Federal agencies; unreasonable refusal; office space and equipment**

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized--

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

(5) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(6) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of Title 5, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

§ 7. Complaints by employees; disclosure of identity; reprisals

(a) The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

(b) The Inspector General shall not, after receipt of a complaint or information from an employee, disclose the identity of the employee without the consent of the employee, unless the Inspector General determines such disclosure is unavoidable during the course of the investigation.

(c) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or disclosing information to an Inspector General, unless the complaint was made or the information disclosed with the knowledge that it was false or with willful disregard for its truth or falsity.

Legislative History. For legislative history and purpose of Pub.L 95-452, see *1978 U.S. Code Cong. and Adm. News*, p. 2676.

8. Additional provisions with respect to the Inspector General of the Department of Defense

(a) No member of the Armed Forces, active or reserve, shall be appointed Inspector General of the Department of Defense.

(b)(1) Notwithstanding the last two sentences of § 3(a), the Inspector General shall be under the authority, direction, and control of the Secretary of Defense with respect to audits or investigations, or the issuance of subpoenas, which require access to information concerning--

(A) sensitive operational plans;

(B) intelligence matters;

(C) counterintelligence matters;

(D) ongoing criminal investigations by other administrative units of the Department of Defense related to national security; or

(E) other matters the disclosure of which would constitute a serious threat to national security.

(2) With respect to the information described in paragraph (1) the Secretary of Defense may prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena, after the Inspector General has decided to initiate, carry out or complete such audit or investigation or to issue such subpoena, if the Secretary determines that such prohibition is necessary to preserve the national security interests of the United States.

(3) If the Secretary of Defense exercises any power under paragraph (1) or (2), the Inspector General shall submit a statement concerning such exercise within thirty days to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(4) The Secretary shall, within thirty days after submission of a statement under paragraph (3), transmit a statement of the reasons for the exercise of power under paragraph (1) or (2) to the Committees on Armed Services and Government operations of the House of Representatives and to other appropriate committees or subcommittees.

(c) In addition to the other duties and responsibilities specified in this Act, the Inspector General of the Department of Defense shall--

(1) be the principal adviser to the Secretary of Defense for matters relating to the prevention and detection of fraud, waste, and abuse in the programs and operations of the Department;

(2) initiate, conduct, and supervise such audits and investigations in the Department of Defense (including the military departments) as the Inspector General considers appropriate;

(3) provide policy direction for audits and investigations relating to fraud, waste, and abuse and program effectiveness;

(4) investigate fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate;

(5) develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs;

(6) monitor and evaluate the adherence of Department auditors to internal audit, contract audit, and internal review principles, policies, and procedures;

(7) develop policy, evaluate program performance, and monitor contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States;

(8) request assistance as needed from other audit, inspection, and investigative units of the Department of Defense (including military departments); and

(9) give particular regard to the activities of the internal audit, inspection, and investigative units of the military departments with a view toward avoiding duplication and insuring effective coordination and cooperation.

(d) Notwithstanding § 4(d), the Inspector General of the Department of Defense shall expeditiously report suspected or alleged violations of chapter 47 of title 10, United States Code (Uniform Code of Military Justice), to the Secretary of the military department concerned or the Secretary of Defense.

(e) For the purposes of § 7, a member of the Armed Forces shall be deemed to be an employee of the Department of Defense.

(f)(1) Each semiannual report prepared by the Inspector General of the Department of Defense under § 5(a) shall include information concerning the numbers and types of contract audits conducted by the Department during the reporting period. Each such report shall be transmitted by the Secretary of Defense to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives and to other appropriate committees or subcommittees of the Congress.

(2) Any report required to be transmitted by the Secretary of Defense to the appropriate committees or subcommittees of the Congress under § 5(d) shall also be transmitted, within the seven-day period specified in such section, to the Committees on Armed Services and Governmental Affairs of the Senate and the Committees on Armed Services and Government Operations of the House of Representatives.

(g) The provisions of § 1385 of title 18, United States Code, shall not apply to audits and investigations conducted by, under the direction of, or at the request of the Inspector General of the Department of Defense to carry out the purposes of this Act.

8A. **Special provisions relating to the Agency for International Development**

(Text omitted)

9. **Transfer of functions**

(a) There shall be transferred--

(1) to the Office of Inspector General--

(A) omitted

(B) omitted

(C) of the Department of Defense, the offices of that department referred to as the "Defense Audit Service" and the "Office of Inspector General, Defense Logistics Agency", and that portion of the office of that department referred to as the "Defense Investigative Service" which has responsibility for

the investigation of alleged criminal violations; . . . and

(2) such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, except that there shall not be transferred to an Inspector General under paragraph (2) program operating responsibilities.

(b) The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available, of any office or agency the functions, powers, and duties of which are transferred under subsection (a) are hereby transferred to the applicable Office of Inspector General.

(c) Personnel transferred pursuant to subsection (b) shall be transferred in accordance with applicable laws and regulations relating to the transfer of functions except that the classification and compensation of such personnel shall not be reduced for one year after such transfer.

(d) In any case where all the functions, powers, and duties of any office or agency are transferred pursuant to this subsection, such office or agency shall lapse. Any person who, on the effective date of this act [Oct. 1, 1978], held a position compensated in accordance with the General Schedule, and who, without a break in service, is appointed in an Office of Inspector General to a position having duties comparable to those performed immediately preceding such appointment shall continue to be compensated in the new position at not less than the rate provided for the previous position, for the duration of service in the new position.

10. **Conforming and technical amendments**

(Text Omitted)

11. **Definitions**

As used in this Act --

(1) the term "head of the establishment" means the Secretary of . . . Defense . . .;

(2) the term "establishment" means the Department of . . . Defense . . .;

(3) the term "Inspector General" means the Inspector General of an establishment;

(4) the term "Office" means the Office of Inspector General of an establishment; and

(5) the term "Federal agency" means an agency as defined in § 552(e) of Title 5 (including an establishment as defined in paragraph (2)), United States Code, but shall not be construed to include the General Accounting Office.

12. The provisions of this Act and the amendments made by this Act [see § 10 of this Act] shall take effect October 1, 1978.

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