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The purpose of S. 1264 (95th Cong.) is to consolidate and reform the basic laws presently controlling Federal procurement and to replace them with a single, all-inclusive statute. The bill provides for: putting negotiation on an equal footing with formal advertising without written justification; significantly increasing the use of performance type rather than detailed specifications; requiring certified cost and pricing data for sole-source procurements over $10,000; and waiving various surveillance requirements over contractors' activities. The surveillance requirements should not be waived because, although a contractor's business operations may consist of 75% or more commercial and competitive Government contracts, there is no assurance that the other 25% or less of Government contracts is being conducted in a manner to protect the Government's interest. Cost Accounting Standards do not constitute a Government surveillance requirement having an effect on performance of contracts. The provision for executive agency examinations to verify cost data should be altered to provide that examinations be conducted "only when necessary to insure contract performance and/or to evaluate the accuracy, completeness, and currency of data certified under section 305 of the bill." The requirement for purchase descriptions may unduly inhibit the use of definitive specifications in situations where the benefits of standardization outweigh the advantages of such descriptions. (Author/QM)

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Statement of

Elmer B. Staats
Comptroller General of the United States

before the

Committee on Governmental Affairs
Subcommittee on Federal Spending Practices and Open Government
United States Senate

on

S. 1264 - To Provide Policies, Methods, Criteria
for the Acquisition of Property and
Services by Executive Agencies

Mr. Chairman and Members of the Committee:

We are pleased to appear here this morning to present our views on the proposed legislation, S. 1264, to provide policies, methods, and criteria for the acquisition of property and services by executive agencies. As requested, we will present our views on Title VII--Protests--at the planned hearing on July 27.

The purpose of the bill is to consolidate and reform the basic laws presently controlling Federal procurement and to replace them with a single, all-inclusive statute. The bill's underlying aim is to update management of Federal procurement as proposed by the Commission on Government Procurement. Among other things, its purposes are to move toward greater reliance on

effective competition, to minimize sole-source awards, and to cut back on the use of detailed product specifications and regulatory controls.

The Commission on Federal Paperwork has also endorsed consolidation of the two basic procurement statutes. It recommended further that reform legislation be directed toward reducing or eliminating unnecessary paperwork and lessening the administrative burden on the procurement process.

We can certainly support these objectives; the question is, how can we best achieve them and at the same time protect the interest of the Government as a buyer?

The Procurement Commission recommended that legislation be enacted to eliminate inconsistencies in the two primary procurement statutes and that they be consolidated to the extent appropriate. In addition to consolidation, the proposed legislation would make some substantive changes. For example, the bill provides for (1) putting negotiation on an equal footing with formal advertising without written justification, (2) significantly increasing the use of performance type rather than detailed specifications, (3) requiring certified cost and pricing data data for sole-source procurements over $10,000 instead of $100,000 as now provided for, and (4) waiving various surveillance requirements over contractors' activities. A more detailed comparison of the more pertinent Procurement Commission recommendations with related provisions of S. 1264 is presented in attachment 1.

We certainly support the general objectives of the legislation and are pleased with the initiatives which you have taken in introducing S. 1264. We believe that the bill takes a constructive approach toward the solution of a number of long standing procurement problems. There are some areas, however, where changes in the bill appear desirable and we will limit our comments to those areas. A complete statement of our views, including comments on areas of lesser significance, is contained in a letter to the Chairman (see attachment 2). A highlight of comments follows.

Government Surveillance Requirements--Section 509

An important point in section 509 is to reduce Government regulation and surveillance where more than 75 percent of a contractor's business, as measured by total sales volume, is being conducted under commercial and competitive Government contracts. This provision of the bill is very similar to a program adopted by the Department of Defense several years ago called the Contractor Weighted Average Share in Cost Risk, or CWAS. Under this program, evaluations of the reasonableness of certain allowable indirect expenses are eliminated for contractors having a high percentage of fixed-price Government contracts and non-Government business. The argument is that such contractors have enough competitive motivation to minimize overhead costs.

We at GAO strongly support eliminating unnecessary Government regulations. It is very important, however, to keep essential controls.

The term "Government surveillance requirements" denotes reviews by Government officials of contractor activities affecting performance of Government contracts. The surveillance requirements that could be waived under the bill include (1) agency management, procurement system, and property reviews, (2) determinations of the reasonableness of indirect costs, (3) provisions of the Cost Accounting Standards Act, (4) advance agreements for independent research and development and bid and proposal activities, and (5) provisions of the Renegotiation Act. The controls were developed over time as their need was demonstrated through experience in administering contracts. We believe they are still needed. We oppose removing these controls and urge that the entire section be deleted. The Procurement Commission did not recommend eliminating such controls, except in regard to advance agreements for independent research and development and bid and proposal activities as discussed on page 8.

It is our opinion that although a contractor's business operations may consist of 75 percent or more commercial and competitive Government contracts, there is no assurance that the other 25 percent or less of Government contracts is being conducted in a manner to protect the Government's interest. Like any mechanical approach the formula gives an appearance of control which may have no relationship to quality and effectiveness of the contractor's operations. Our opinion is based on the following.

Regarding agency management, procurement system, and property reviews, on March 8, 1976, we issued a report to the

Congress entitled, "Second GAO Report on Need for Better Control Over Government-Furnished Material Provided to Defense Overhaul and Repair Contractors" (PSAD-76-78). We found that the Air Force did not have adequate control over more than $200 million of material given to overhaul and repair contractors every year. We found one case of apparent misuse of $2.5 million of Government-furnished material. We recommended increased surveillance by Government property administrators when the contractor is doing commercial and Government work at the same location.

On December 27, 1976, we issued a report to the Congress entitled, "Administration of Repair Contracts Needs Improvement" (PSAD-76-179). We found that a number of contractors who were awarded contracts for repair and overhaul of Government equipment ordered and received about $2.2 million of Government-furnished material during 1974 and 1975. These contractors were responsible for keeping accounting records of this material. In some cases we could not determine from the contractors' records how the material was actually used. We recommended increased property reviews by the General Services Administration.

In regard to determinations of the reasonableness of indirect costs, on March 9, 1977, we issued a report to the Joint Committee on Defense Production entitled, "Increased Costs to Government under the Department of Defense Program to Reduce Audits" (PSAD-77-80). We found that even though contractors met the CWAS conditions for eliminating agency

reviews of the reasonableness of indirect costs, there was no guarantee that contractors were effectively controlling such costs. For example, because of CWAS, the reasonableness of a contractor's expenses for use of private aircraft that exceeded equivalent commercial travel costs by $733,000 in a 2-year period could not be questioned. At another CWAS qualified plant location, the reasonableness of automatic data processing equipment leasing costs amounting to $12.4 million could not be questioned. At another plant of the same contractor that was non-CWAS qualified, however, the Defense auditors questioned the reasonableness of excess lease costs over ownership costs. The costs of ownership would have amounted to $561,000 less than the $3.3 million in lease costs.

On May 19, 1977, we issued a report to the Congress entitled, "Contractor Pension Plan Costs: More Control Could Save Department of Defense Millions" (PSAD-77-100). We pointed out that nine Department of Defense contractors had over $100 million in questionable pension plan costs that were or will be charged to the Government as indirect expens.. These charges resulted from

--unrealistic actuarial assumptions used in computing annual pension plan contributions,

--inequitable allocation of pension plan costs to Government contracts,

--questionable changes in actuarial cost methods that increased charges to the Government, and

--inadequate Department of Defense audits of contractor pension plan charges to Government contracts.

Although the Department of Defense had obtained some fairly large reductions in improper charges to the Government for pension plan costs, in May 1975 the Department suspended its requirement for conducting pension plan reviews at contractor locations that were CWAS-qualified. In response to our recommendation for a reinstatement and strengthening of its pension plan reviews, the Department advised that an evaluation of the CWAS program is underway and our recommendation will be considered.

It is also important to note that while both the Defense CWAS program and section 509(b) provide for relieving qualified contractor profit centers from any Government questioning as to the reasonableness of indirect overhead costs, the Government auditors can and should review the allocation and allowability of such costs to Government contracts. In many cases, we believe little additional audit work is required to determine the reasonableness of costs over that required to evaluate allocation to and allowability of such costs under Government contracts.

Further, we do not agree that the Cost Accounting Standards constitute a Government surveillance requirement having an effect on performance of Government contracts. The principal functions of Cost Accounting Standards are to achieve (1) increased uniformity in accounting practices among Government contractors

and (2) consistency in accounting treatment of costs by individual Government contractors. We believe that the authority to waive the applicability of the Cost Accounting Standards should remain with the Cost Accounting Standards Board. In this regard, the Board is now considering a further exemption of certain categories of contracts designed particularly to reduce their applicability to small business or segments of companies which have only a small percentage of their business in work covered by the standards.

In regard to advance agreements for independent research and development and bid and proposal activities, such agreements could be waived for contractors meeting the 75-percent provision. When advance agreements are negotiated, agency officials perform technical evaluations of such activities, review costs for reasonableness and allocability, consider relevance to agency operations, and establish ceilings reducing proposed costs. These essential agency controls should not be eliminated. Our position on this matter is not in accord with the majority recommendation of the Procurement Commission, but agrees with that of the dissenting position of 5 of the 12 commissioners.

In regard to the Renegotiation Act, this requirement is not a contractor activity having a bearing on contract administration or performance, and should be left in the hands of the Renegotiation Board.

Access to Records--Section 306

Section 306(a) provides that the Comptroller General and executive agencies are entitled to access to records pertaining

to a negotiated contract, subcontract, or amendment, stating in part,

> "***including for the purpose of evaluating the accuracy, completeness and currency of data certified under section 305, all such books, records and other data relating to the negotiation, pricing, or performance of the contract or subcontract."

While we do not believe it is the intent of the bill, this language could be interpreted to mean that our Office can only use data relating to "negotiation, pricing, or performance" to check the accuracy, etc., of certified cost data. Presently, we can use all pertinent data, including that related to "negotiation, pricing, or performance," for such purposes as evaluating the reasonableness of a contractor's price, the effectiveness of agencies' negotiation procedures or, as this section provides, the adequacy of certified cost or pricing data. We must have full access to all pertinent contractor data in order to fulfill our responsibility to report to the Congress on whether the Government's interests are being properly protected in the award and performance of contracts and subcontracts. To avoid any possibility of misunderstanding, we recommend that reference to the Comptroller General be eliminated from the section 306(a) and a new section be added as follows:

> "Until expiration of 3 years after final payment under a contract negotiated or amended under this title, the Comptroller General of the United States, or his authorized representatives, are entitled to inspect the plants and examine any books, documents, papers, records, or other data of the contractor and his subcontractors

that pertain to and involve transactions relating to the contract or subcontract, or the amendment thereof, including data relating to the negotiation, pricing, or performance of the contract or subcontract. This provision may be waived for any contract or subcontract with a foreign contractor or subcontractor if the Agency head determines, with concurrence of the Comptroller General, that waiver would be in the public interest."

As a further point, while section 306(a) provides for executive agencies to have access to contractors' books and records to evaluate the accuracy, completeness, and currency of certified cost data, section 306(b) states that inspections and examinations by executive agencies under subsection (a) shall be conducted "***only when necessary to insure contract performance."

It is possible that examinations to verify cost data could be considered unnecessary to insure contract performance. We believe it is essential for the executive agencies to be able to conduct such examinations. To avoid any ambiguity, we recommend that the first sentence of section 306(b) be altered to provide that executive agency examinations shall be conducted "***only when necessary to insure contract performance and/or to evaluate the accuracy, completeness, and currency of data certified under section 305."

Invitation for Sealed Bids--Section 202

This section provides that purchase descriptions are required to be set forth in functional terms "to the extent practicable and consistent with the needs of the agency." The agency head (or, upon designation, the head of a procuring

activity) is required to approve the preparation and use of definitive product specifications. We believe this requirement may unduly inhibit the use of definitive specifications in situations where the benefits of standardization may outweigh the advantages of using a purchase description stated in functional terms. For example, it could be necessary to use detailed drawings and specifications for specific parts or components to be used in the repair of previously acquired end items.

This completes our statement, Mr. Chairman. We will be glad to respond to any questions.

Comparison of Applicable Procurement Commission Recommendations and Related Provisions of Federal Acquisition Act

Commission Recommendations	Treatment in S. 1264
A-2. Consolidate existing legislation to provide a common statutory basis for establishing fundamental procurement policies and procedures applicable to all executive agencies	S.1264 consolidates and goes beyond the existing basic procurement statues, the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949. The principal areas where S.1264 goes beyond the Procurement Commission recommendations are as follows: 1. Negotiated procurement is put on an equal footing with formally advertised procurement and written justifications are no longer required for negotiated procurement. 2. The use of performance type specifications is given strong endorsement and use of detailed specifications is discouraged. 3. Certified cost and pricing data is required for sole source procurements over $10,000 instead of $100,000 as now required. 4. Waivers of certain Government surveillance requirements are authorized when contractor operations are largely conducted under commercial and competitive Government contracts. The waivers apply to (1) agency mangement, procurement system and property reviews; (2) determinations of the reasonableness of indirect overhead costs; (3) provisions of the Cost Accounting Standards Act; (4) advance agreements for independent research and development and bid and proposal activities; and (5) provisions of the Renegotiation Act.

A-3. Authorize competitive negotiation as an acceptable, alternative to formal advertising, but require documented reasons for its use in procurements over $10,000	Sec. 101(b) places competitive negotiation on an equally valid alternative basis with competitive sealed bids and small purchase method without requiring written justification for its use.
A-4. Extend competitive negotiated procurement provisions to all agencies, provide for competitive rather than maximum number of solicitations, facilitate use of clarifying discussions, and require evaluation criteria in solicitations if basis of expected award is other than lowest cost	Sec. 302(a) is basically in agreement; it provides for soliciting a sufficient number of sources and for evaluation factors where price is not expected to be deciding factor. Sec. 303(a) provides for clarifying discussions.
A-5. Require debriefings when requested by unsuccessful proposer in negotiated procurement	Sec. 303(d) does not require debriefings and only requires prompt notification of award to all unsuccessful offerors.
A-6. Authorize sole-source procurement when competitive procedures cannot be used, but require appropriate documentation for procurements over $10,000 and agency approval at higher administrative levels	Sec. 304(a) is in agreement.
A-7. Raise $2,500 ceiling for use of simplified purchase procedures to $10,000; OFPP reexamine at least every 3 years	Sec. 401(a)(b) is in agreement.
A-8. Authorize use of multiyear contracts with annual appropriations for clearly specified, firm requirements	Sec. 504 is in agreement. We are suggesting a change to the effect that payment of obligations after first year be made subject to availability of appropriations.
A-9. Repeal contractors' subcontract notification requirement	10 U.S.C. 2306 and 41 U.S.C. 254(b) requiring contractors' subcontract notification is repealed by Section 802.
A-10. Establish a single Government-wide coordinated system of procurement regulations under control of OFPP	Sec. 102(a) is in agreement and establishes a 2 year requirement for completion.

B-10. Establish a policy recognizing that independent R&D and bid proposal costs should receive uniform Government-wide treatment as necessary, with agency policy exceptions approved by OFPP. For contractors with more than 50 percent cost-type contracts, use present DOD approach with trade-offs permitted between IR&D and B&P dollar ceilings and make amounts allowable relevant to agency function; for contractors with less than 50 percent cost-type contracts, accept IR&D and B&P without question as to amount (with dissent)	Sec. 509 treatment of IR&D and B&P costs is basically in accord except that the 50 percent or less threshold of cost-type contracts for accepting IR&D and B&P without question is reduced to 25 percent. Under these circumstances, the agency head may grant a waiver from advance agreements with the contractor for a period not to exceed 2 years.
J-2. Extend Truth-in-Negotiations Act to all procurement agencies; develop coordinated regulations for interpreting and applying act	Sec. 305 extends the Truth-in-Negotiation Act to all executive agencies but makes the following changes in its provisions: 1. Distinguishes between cost data and price data. 2. Requires certified cost and price data for sole-source procurements of over $10,000 instead of $100,000, and a defective pricing clause in the contract. 3. Certified price data required for all other procurements over $10,000. 4. For procurements over $10,000 but less than $500,000, the contracting officer at his discretion may require certified cost data.
J-4. Extend Renegotiation Act to contracts of all Government agencies	Sec. 509 authorizes waiver of Renegotiation Act provisions for contracts and subcontracts with a contractor who has 75 percent sales under commercial and competitive Government contracts. There is no provision for extension of the Renegotiation Act to all Government contracts. This would, of course, be more appropriately covered in the Renegotiation Act.

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-183079

The Honorable Abraham Ribicoff
Chairman, Committee on
Governmental Affairs
United States Senate

Dear Mr. Chairman:

By letter dated May 25, 1977, you requested our views on S. 1264, 95th Congress, to provide policies, methods, and criteria for the acquisition of property and services by executive agencies.

This bill is directly related to a prior bill, S. 3005 introduced during the 94th Congress. The proposed legislation incorporates several new and reworked provisions many of which are responsive to the comments submitted to your Committee by a number sources, including this Office (B-183079, September 28, 1976 copy enclosed) regarding S. 3005.

The purpose of this bill, like S. 3005, is to consolidate and modernize Federal procurement and to promote effective competition.

Our initial comments are directed towards Sections 308 and 509 which concern the operations of this Office. As requested, we will present our views on Title VII, Protests, separately on July 27.

Section 308 - Access to Records

This section includes a provision which states that the Comptroller and executive agencies are entitled to access to records which pertain to the negotiated contract, subcontract or amendment "including for the purpose of evaluating the accuracy, completeness and currency of data certified under Section 305, all such books, records and other data relating to the negotiation, pricing or performance of the contract or subcontract." While we do not believe it is the intention of the bill, this language in the access-to-records provision could be interpreted to mean that our Office can use data relating to "negotiation, pricing or performance" only to check the accuracy, etc. of certified cost and price data. Presently we use all pertinent data, including that related to "negotiation, pricing or performance" for such purposes as reporting on the reasonableness of a contractor's price, the effectiveness of agencies' negotiation procedures or, as this section provides, to determine the adequacy,

/

etc. of certified cost or pricing data. Full access to such data is needed to fulfill our responsibility to report to the Congress on whether the Government's interests are being properly protected in the award and performance of contracts. To avoid any possible misunderstanding, we recommend that reference to the Comptroller be eliminated from the present Section 306(a) and a new section added as follows:

> "Until expiration of three years after final payment under a contract negotiated or amended under this title, the Comptroller General of the United States or his authorized representatives are entitled to inspect the plants and examine any books, documents, papers, records or other data of the contractor and his subcontractors that pertain to, and involve transactions relating to the contract or subcontract or to the amendment thereof, including data relating to the negotiation, pricing, or performance of the contract or subcontract. This provision may be waived for any contract or subcontract with a foreign contractor or subcontractor, if the Agency head determines, with concurrence of the Comptroller General, that waiver would be in the public interest."

Further, while Section (a) provides for executive agencies to have access to contractor's books and records for the purpose of evaluating the accuracy, completeness, and currency of certified cost data, Section (b) states, that inspections and examinations by executive agencies under Section (a) shall be conducted "only when necessary to insure contract performance". This creates a possible ambiguity as examinations to verify cost data may not be considered as "necessary to insure contract performance." To avoid any ambiguity we recommend that the first sentence of Section (b) be altered to provide that executive agency examinations shall be conducted "only when necessary to insure contract performance and/or to evaluate the accuracy, completeness and currency of data certified under Section 305."

Government Surveillance Requirements - Section 509

An important thrust of the bill in Section 509 is to reduce Government regulation and surveillance where more than 75 percent of the business activity of that part of a contractor's operations, as measured by total sales volume, is being conducted under commercial and competitive Government contracts. This provision of the bill is very similar to a program adopted by the Department of Defense several years ago called the Contractor Weighted Average Share in Cost Risk or CWAS. Under this program, evaluations of the reasonableness of certain indirect overhead costs are eliminated for contractors having a high percentage of fixed-price

Government contracts and non-Government business. The theory is that such contractors have sufficient competitive motivation to minimize overhead costs.

We, at GAO, strongly support the elimination of unnecessary Government regulations. It is very important, however, to maintain essential controls. On March 9, 1977, we issued a report to the Joint Committee on Defense Production entitled, "Increased Costs to Government under the Department of Defense Program to Reduce Audits" (PSAD-77-80). In our review, we found that CWAS did not guarantee that overhead costs would be controlled effectively. For example, because of CWAS, the reasonableness of a contractor's expenses for use of private aircraft that exceeded equivalent commercial travel costs by $733,000 in a 2-year period could not be questioned. At another CWAS qualified plant location, the reasonableness of automatic data processing equipment leasing costs amounting to $12.4 million could not be questioned. At another plant of the same contractor that was non-CWAS qualified, however, the Defense auditors questioned the reasonableness of excess lease costs over ownership costs. The costs of ownership would have amounted to $581,000 less than the $3.3 million in lease costs.

On May 19, 1977, we issued a report to the Congress entitled "Contractor Pension Plan Costs: More Control Could Save Department of Defense Millions," (PSAD-77-100). In this report, we pointed out that nine Department of Defense contractors had over $100 million in questionable pension-plan costs that were or will be charged to the Government as overhead expense. These changes resulted from

--unrealistic actuarial assumptions used in computing annual pension-plan contributions;

--inequitable allocation of pension-plan costs to Government contracts;

--questionable changes in actuarial cost methods that increased charges to the Government; and

--inadequate audits by the Department of Defense of contractor pension-plan charges to Government contracts.

Although the Department of Defense had obtained some fairly large reductions in improper charges to the Government for pension-plan costs, in May 1975, the Department suspended its requirement for conducting pension-plan reviews at contractor locations that were CWAS-qualified. In response to our recommendation for a reinstatement and strengthening of its pension-plan reviews,

the Department advised that an evaluation of the CWAS program is underway and our recommendation will be considered.

It is also important to note that while both the Defense CWAS program and Section 508.b) provide for relieving qualified contractor profit centers from any Government questioning as to the reasonableness of indirect overhead costs, the Government auditors can and should review the allocation and allowability of such costs to Government contracts. In many cases, we believe little additional audit work is required to determine the reasonableness of costs over that required to evaluate allocation and allowability of such costs to Government contracts. Thus, we recommend that the waiver of the determinations of the reasonableness of indirect over-head costs be dropped from the bill.

The list of waivers also includes (1) agency management, procurement system and property reviews, (2) determinations of reasonableness of indirect over-head costs, (3) provisions of the Cost Accounting Standards Act, (4) advance agreements for independent research and development and bid and proposal activities, and (5) provisions of the Renegotiation Act. We are opposed to removing these controls and urge that the entire section be deleted. The controls were developed by the Government to safeguard its contract administration interests and we believe they are still needed. In regard to the Renegotiation Act, this requirement is not a contractor activity having a bearing on contract administration or performance.

The principal functions of Cost Accounting Standards are to achieve (1) an increased uniformity in accounting practices among Government contractors and (2) consistency in accounting treatment of costs by individual Government contractors. We believe that the authority to waive the applicability of the Cost Accounting Standards should remain with the Cost Accounting Standards Board.

In regard to advance agreements for independent research and development and bid and proposal activities, such agreements could be waived for contractors meeting the 75 percent provision. When advance agreements are negotiated, agency officials perform technical evaluations of such activities, review costs for reasonableness and allocability, consider relevance to agency operations and establish ceilings reducing proposed costs. These essential agency controls should not be eliminated. Our position on this matter is not in accord with the majority Recommendation B-10 of the Procurement Commission but agrees with that of the dissenting position of five of the Commissioners.

However, in the event this section is retained we offer the following comments regarding the text of the section.

Section 509(a)

This provision states that the 75 percent threshold for waiver of Government surveillance requirements be applied only to separately managed and accounted for portions of a contractor's operation.

The final portion of this section has been written to provide in part, "* * * where the Government awarded firm fixed-price type contracts or where price was the deciding or a significant factor for award." This appears to be an attempt, by the addition of the phrase, "or where price was the deciding or a significant factor for award" to provide that the competitive fixed-price contracts referred to be contracts where price is a significant factor in the award. However, this phrase does not accomplish this purpose because the introduction of the added phrase by the words "or where" makes it unclear that the contracts referred to must be competitive fixed-price contracts. This may be remedied by eliminating the "or where" between the words "contracts" and "price" in the penultimate line and substituting the word "and" instead.

Section 509(b)

The surveillance requirements which may be waived by the agency head are specifically limited to those listed in the bill. Further, we note that this section permits revocation of the waiver by an agency head. We favor this provision since it provides the Government with an opportunity to revoke a waiver if an agency head determines that the contractor's activities so warrant.

Section 2(a) Findings:

This section provides that the laws controlling Federal purchasing have become outdated, fragmented and inconsistent and that existing statutes need to be modernized to focus on competition and new technology. It is further stated that the Commission on Government Procurement (Commission) has recommended that a new consolidated statutory base is needed.

In this connection the Commission recommended (Recommendation A-2) that legislation be enacted to eliminate inconsistencies in the two primary procurement statutes and (Recommendation J-1) that a program be established for developing the technical and formal

changes needed to consolidate the procurement statutes to the extent appropriate in Title 41.

In our view the bill should not include matters which are inconsistent with the changes suggested in the Commission's Recommendations.

Section 3 - Definitions

Since this section contains at subsection (h) a definition of the term price data we believe that it would be appropriate to also include the following definition of cost data:

> "The term 'cost data' means all factual and verifiable information including data in support of judgmental factors applied in projecting from the available data to estimates which can reasonably be expected to have a significant bearing on the costs of a contract. It includes both the facts related to costs already incurred and those related to future costs."

Title II - Acquisition by Competitive Sealed Bids

Section 201 - Criteria For Use

This provision states that acquisition by competitive sealed bids should be used when all the listed criteria are present. The use of the word "should" appears to allow OFPP some latitude in implementing these procedures. Further we note that criterion #6 provides that the competitive sealed bid method is to be used if "the property is to be acquired and/or used within the limits of the United States and its possessions." We believe that the place of use is irrelevant and recommend that this criterion be changed so that only the fact that the property or service is to be acquired within the limits of the United States and its possessions is pertinent.

Correspondingly, Section 301 provides that competitive negotiation should be used when the criteria for the use of competitive sealed bids contained in Section 201 or established pursuant to Section 101(b) are not met. We favor the language in Section 301 of the subject bill which appears to permit OFPP to establish, pursuant to Section 101(b) of the subject bill, additional criteria for the use of competitive negotiation.

Further, in view of the Commission Recommendation A-3, that competitive negotiation be used as an acceptable and efficient alternative to formal advertising and that procurement files disclose the reasons for using competitive methods other than formal advertising, we recommend that the bill be altered to make it clear that the reasons for the use of negotiation be written and included in the procurement file.

Section 202 - Invitation For Sealed Bids

Section 202(c) provides that purchase descriptions are required to be set forth in functional terms "to the extent practicable and consistent with the needs of the agency." The agency head is required to approve any use of definitive product specifications.

The thrust of this section is to reduce the use of detailed product specifications. This provision would apply not only to commercial products which were the subject of Commission Recommendations D-3 and D-4 but to all products procured by agencies pursuant to Title II of the subject bill. We believe this requirement may unduly inhibit the use of definitive specifications in situations where the benefits of standardization may outweigh the advantages of purchase descriptions stated in functional terms.

We note that a new section has been added setting forth a sealed bid procedure which parallels the present two-step formal advertising procedure set forth in the Armed Services Procurement Regulation (ASPR) 2-500 (1976). We favor this section; however, we suggest that a provision be added like that contained in ASPR 2-503.1 (1976) stating that the Government may request additional information and hold discussions with offerors in connection with the unpriced technical proposals.

Title III - Acquisition By Competitive Negotiation

Section 301 - Criteria For Use

Our comments concerning this section are set forth under Section 201.

Section 302 - Solicitations

Section 302(a) provides that offers shall be solicited from a sufficient number of qualified sources so as to obtain effective competition and that solicitations be publicized in accordance with the Small Business Act and provided to interested sources upon request.

This provision is in accordance with the general thrust of Commission Recommendation A-4(b), which states that existing legislation should be altered to provide for a competitive rather than a "maximum" number of sources, for the public announcement of procurements and for honoring reasonable requests from other sources to compete. Although the bill sets out the requirement for the solicitation of sources in terms slightly different from the "competitive" number of sources used in the Commission Recommendation, we feel that the provision as drafted would be a beneficial addition to the procurement system.

Section 302(c) states that "solicitations shall not prescribe performance characteristics based on a single approach." We believe that this provision, although consistent with the recommendations of the Commission contained in Volume 2, Part C of the Commission Report dealing with the procurement of major systems is not appropriate for all negotiated procurements which may also include procurements for supply, service or construction requirements. If retained it could prevent the Government from designing and procuring by negotiation separate components or subsystems of a larger system. Further, it would inhibit the procurement by negotiation of any supplies or services for which the Government wished to specify the design of the service, supplies, or construction project it required.

Accordingly, we recommend that this provision be altered to state: "to the maximum extent practicable solicitations shall not prescribe performance characteristics based on a single approach."

Single Source Exceptions

Section 304

Section 304(a) provides that sole-source negotiations can be conducted only upon a determination by the agency head after the initiation of competitive negotiation procedures that it is impractical to continue with competitive negotiation because only one prospective source is available; public exigency prevails; or a national emergency is declared by the Congress or the President.

The Commission recommended (Recommendation A-6) that sole-source procurements be authorized in those situations where formal advertising or other competitive procedures can not be utilized, subject to appropriate documentation and in such classes of procurements as determined by OFPP subject to the determination being approved at such level above the head of the procuring activity as is specified in agency regulations.

The bill goes beyond the Commission recommendation by requiring in every case that the head of the agency make the necessary determination and by requiring in every case that a formal solicitation of offers be made. In many instances the award of sole-source contracts is necessitated because there is clearly only one prospective supplier who can fulfill the Government's needs. In these and other instances it does not seem worthwhile to require the agency to go through formal competitive negotiations with other prospective suppliers.

In addition we note that Section 3(b) defines an executive agency as including each military department. Thus it seems that a military department head would have the authority to select, and proceed with the design and development of, a non-competitive (single concept) system for a major system acquisition if he determines that only one prospective source is available.

On the other hand, OMB Circular A-109 defines the Department of Defense as an executive agency and the Secretary of Defense would be the agency head. The Circular requires that the Secretary of Defense, and not the military department head, give the authorization to proceed with the development of a single concept major acquisition. In view of mission area overlaps between the military departments, and the amounts involved in major acquisitions, we believe that for major acquisitions, the authority to proceed with a single solution should be with the Secretary of Defense.

Accordingly, it is recommended that Section 304(a) be deleted from the bill and Sections corresponding to Commission Recommendation A-6 and to the above recommendation concerning major systems added.

Section 305 - Price Analysis and Cost Data

Section 305(a) provides that prior to any negotiated award, change or modification of any contract or subcontract the contractor and any subcontractor shall be required to submit, or identify in writing, with his proposal, price data. This data shall be certified. In addition this section provides that price analysis shall be used where: (1) the price is less than $500,000, (2) a catalog or market price is involved, (3) the price is set by law, (4) adequate price competition exists or (5) there was a recent competitive purchase of the item.

We note that this section requires that all contractors and subcontractors certify to the accuracy, currency and completeness of the price data submitted. However, Section 305(c) only

provides for a contract price adjustment in the case of improperly certified cost data. We do not believe that any purpose is served by requiring a contractor or subcontractor to certify his price data.

Section 305(b) requires the submission and certification of cost data in connection with sole-source contracts and for other negotiated contracts where the conditions set forth in 305(a) are not met. (For our definition of cost data see our comment on Section 3 of this bill.)

It is often not evident how the estimated cost included in the contractor's or subcontractor's proposed price is derived from the factual cost data submitted or identified in writing. We suggest, therefore, that Section 305(b)(1) be revised as follows:

> "The contractor and any subcontractor shall be required to submit or identify in writing, with his proposal, cost data bearing on the reasonableness of the estimated costs included in the offered price and on the judgmental factors applied in projecting from the available cost data to the estimated costs."

Further, in this regard we note that, there is no requirement in this bill for a contractor to furnish with his own submission, the cost and price data of a prospective subcontractor. Since proposed subcontract prices may be a substantial factor in a prime contractor's proposal a requirement for subcontractor cost and price data similar to that contained in ASPR 3-807.3(b)(1) (1978) should be added.

Section 305(a) in connection with Section 305(b) substantially alters the present statutory and regulatory scheme concerning cost or pricing data. The bill contemplates a dual system with separate criteria for the submission of price data and for the submission of cost data. We believe that the dual system created by the bill and as modified by the suggested changes represents a significant improvement over the present system.

Title IV - Acquisition By Competitive Small Purchase Procedures Method

Sections 401 and 402

These provisions allow the use of small purchase procedures in procurements up to $10,000. It permits OFPP to determine

whether inflation has affected the $10,000 ceiling and to increase the $10,000 amount, if required.

This section follows Commission Recommendation A-7 regarding the expanded use of small purchase procedures. We believe the provision should be adopted.

Title V - General Provisions

Section 501 - Contract Types

Section 501(b) provides that the preferred form for all contracts is the fixed-price type and that where technical or financial risks are substantial, fixed-price contracts for shorter work increments are preferred to longer cost-type contracts. We believe that the contracting agency should determine by analysis of all the factors pertinent to a particular procurement which type of contract is most suitable. Accordingly, we recommend that this provision be deleted.

Section 504 - Multiyear Contracts

This section provides that agencies can make contracts for property or services for periods of not more than 5 years, except for longer periods upon certification by the agency head, when appropriations are adequate for the first year and the agency head determines that the Government's need is firm and continuing and that such a contract will serve the best interests of the United States.

The provision is in accordance with Commission Recommendation A-8, which urges that all agencies be granted the authority to enter into multi-year contracts.

However, we believe that the section should be altered to provide that the payment of obligations after the first year be made subject to the availability of funds.

We appreciate the opportunity to comment on S. 1264 and we would be glad to provide any additional comment or information you may wish in connection with this matter.

Sincerely yours,

Comptroller General
of the United States

Enclosure