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United States Senate

February 8, 1988

Naval War College Review
U.S. Naval War College
Newport, Rhode Island 02840

Dear Friends:

The Subcommittee on Defense Industry and Technology of the Senate Armed Services Committee is reviewing the operation of the defense acquisition process. It is our view that the acquisition system must enhance the ability of the United States to maintain technological superiority over potential adversaries, and must facilitate the effective application of that technology to meet national security needs.

Last August, the Subcommittee established a Defense Industry Advisory Group, and we asked the group to identify those aspects of the acquisition process that stifle innovation, drain good talent away from the defense industries, and threaten our technological lead. We are enclosing a copy of the Advisory Group's report for your review and comments.

In making this report immediately available for comment, we should note that it has not been approved in whole or part by the full Subcommittee or any of its individual members. We have endeavored to avoid passing judgment on the merits of any of the issues discussed in the Advisory Group report because our goal is to promote a wider dialogue within industry, and between industry and DoD, before we formally review these issues in Congress.

In reviewing the Advisory Group's report, it would be most helpful to the Subcommittee if your comments addressed the following questions:

1. Are the problems presented in these papers of sufficient magnitude to warrant a regulatory or legislative change?

2. Do the proposed solutions adequately address the stated problems?

3. Are there alternative approaches that would better address the problems?

4. Are there other issues and proposals that warrant higher priority attention?

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We are hopeful that circulation of this report will stimulate a broad range of comments on the acquisition system. We would be most grateful to receive your comments, and we urge you to provide the report to others who might make a useful contribution to our Subcommittee's review of the issues.

Comments on the report should be sent to:

Subcommittee on Defense Industry and Technology
Senate Armed Services Committee
Russell Senate Office Building
Washington, D.C. 20510

Comments will be most useful in our preparation of draft legislation if we receive them by March 4, 1988. Further opportunities to comment will be provided before the Subcommittee marks up the acquisition policy section of the fiscal year 1989 Defense Authorization Act in the latter half of April.

If you have any questions, please feel free to contact Andrew Effron or Jon Etherton of the staff of the Armed Services Committee at 202/224-3871.

Sincerely,

Phil Gramm
Ranking Minority Member

Jeff Bingaman
Chairman
Subcommittee on Defense
Industry and Technology

Enclosure

PRESS RELEASE

United States Senate
Committee on Armed Services

Sam Nunn, Georgia
Chairman

SR-222 Russell Senate Office Building Washington D.C. 20510 (202) 224-3871

February 5, 1988

The following joint statement was released today by Senator Jeff Bingaman, Chairman of the Defense Industry and Technology Subcommittee of the Senate Armed Services Committee, and Senator Phil Gramm, Ranking Minority member of the Subcommittee.

"We are pleased to release for public review and comment a report on acquisition policy prepared by the Subcommittee's Industry Advisory Group.

"Our national security requires a defense program that ensures the long-term technological superiority of the United States over potential adversaries, and that promotes the effective application of that technology to meet our military requirements. During the Subcommittee's hearings in 1987, we found that we risked substantial erosion of the strength of our technological and industrial bases as a result of a significant deterioration in government-industry relations. In our report on the National Defense Authorization Bill for Fiscal Years 1988 and 1989 (Senate Report 100-57), the Armed Services Committee expressed concern that this could have a "serious impact on risk-taking and innovation" in the defense acquisition process.

"We determined that the Subcommittee should take the initiative in fostering a dialogue between industry and government. We set a goal of determining whether a consensus could be achieved as to necessary changes in statutes, regulations, and policies. Last August, as a first step, we established a Defense Industry Advisory Group of thirteen senior defense industry officials to identify issues for the Subcommittee on Defense Industry and Technology to consider.

"Under the leadership of John Rittenhouse, Senior Vice President of General Electric's RCA Aerospace and Defense Group, the panel has sought to identify those aspects of the acquisition process that stifle innovation, drain good talent away from the acquisition system, and threaten our technological lead.

"The Advisory Group has drafted a series of issue papers, which are contained in the attached report. Members of the Subcommittee have endeavored to avoid passing judgment on the merits of any of the issues discussed in the Advisory Group's Report because our goal is to promote a wider dialogue within industry, and between industry and DoD, before we formally review these issues in Congress. The Subcommittee has not taken any action on the report, and the views therein solely reflect the judgment by members of the Advisory Group that these are issues worthy of public debate.

"We are hopeful that this report will receive wide circulation and dissemination. The Subcommittee welcomes comments on the report, including suggestions for action on any issues not addressed by the Advisory Group.

"To assist in review of the Advisory Group's report, examples of legislative changes are set forth as a separate document. These provisions are for illustrative purposes only, and do not reflect the policy views of the Subcommittee Members, nor do they necessarily reflect the manner in which Advisory Group members might draft such legislation.

"In reviewing the Advisory Group's report, it would be most helpful to the Subcommittee if persons submitting comments addressed the following questions:

"1. Are the problems presented in these papers of sufficient magnitude to warrant a regulatory or legislative change?

"2. Do the proposed solutions adequately address the stated problems?

"3. Are there alternative approaches that would better address the problems?

"4. Are there other issues and proposals that warrant higher priority attention?

"In our view, the Report of the Industry Advisory Group is an important first step in the process of bringing stability to the acquisition process."

Comments on the Report should be sent by March 4, 1988 to:

Subcommittee on Defense Industry and Technology
Senate Armed Services Committee
SR-222, Russell Senate Office Building
Washington, D.C. 20510

GE Aerospace

John D. Rittenhouse
Senior Vice President

RCA Aerospace and Defense
General Electric Company
Route 38, Cherry Hill, NJ 08358
609 486-6251

February 5, 1988

Honorable Jeff Bingaman, Chairman
Honorable Phil Gramm, Ranking Minority Member
Subcommittee on Defense Industry and Technology
Senate Committee on Armed Services
United Sates Senate
Washington, D. C. 20510

Dear Senators Bingaman and Gramm:

The members of your Ad Hoc Industry Advisory Committee are pleased to present to you the Advisory Committee's first report.

Our purpose is to provide your Subcommittee with advice on how the problems of defense acquisition can be resolved in what we believe to be the best interest of our nation. To do this, we found it necessary to first define the goals of defense acquisition and from them derive the issues which should be of greatest concern to Congress, the Defense Department and Industry.

We believe the basic goals of defense acquisition are to provide for the needs of our armed forces in peace or war and to ensure the continued advancement of technology and industrial productivity necessary to national security. Further, those goals must be achieved within the fiscal constraints which exist. Finally, and of utmost importance, public policy must impose and maintain controls which ensure that the fiduciary relationship between government, industry, and the taxpayer is guarded carefully. There is an urgent need for Congress, DoD, and industry to reestablish a more open and collaborative (rather than adversarial) climate to achieve these objectives.

In this first report the Ad Hoc Committee has focused on those issues which can prevent our nation from achieving these goals. We have addressed eighteen issues encompassed by three basic themes: (a) people: the procurement work force, and organizational relationships within DoD; (b) the process:

streamlining and stablizing the process, including issues of contractor financing and investments; and (c) trust: the relationship among all three; Congress, the Executive branch, specifically DoD, and industry.

Within those three basic themes, our report identifies areas in which stability and reasonableness can and should be restored. We believe, collectively, that industry, Congress, and DoD must make the tough choices and commit to the difficult actions which can take these solutions and make them work.

Our issue papers focus upon some fundamental questions of how DoD should do business:

- The most essential business equation, in which measurable risk is balanced by profit potential, no longer describes defense business. How can this balance be restored?
- Current policies discourage investment in technology and productivity. How should they be changed?
- Small manufacturing firms are forced to pay a high price for participating in the government market by having to give up the fruits of their innovation. What effect does this have on competition?
- How can the quality of leadership and professionalism in the procurement work force be assured?
- How can we improve our working relationships, reestablish trust and cooperation between government and industry, and make the self governance principle really work?

We have presented both our view and the historical concerns of those who may disagree. Neither the issues stated, nor the solutions proposed, necessarily represent the unanimous view of the members of your advisory committee. We expect that some in industry, DoD, and Government will disagree with both the issues identified and the solutions proposed. We do not presume to say that the issues we have identified are the only ones which should concern the Subcommittee. We claim only the

intent to identify issues which can be solved in a businesslike manner; by measuring the costs to the government and the benefits to the government of each of the solutions we propose for the benefit of America's security and the Americans we serve.

Our industry has a responsibility to the nation. We take this responsibility seriously and offer our counsel and our personal commitment to reaching the goals of public policy in which we all share. We look forward to continuing working with your Subcommittee during this important year.

Sincerely,

John D. Rittenhouse, Chairman
GE/RCA Aerospace and Defense

William R. Hoover
Computer Sciences Corporation

Norman R. Augustine
Martin Marietta Corporation

Fred Israel
Israel & Raley Chartered

Kent M. Black
Rockwell International Corp.

Frank J. Pawlowski
Essex Electro Engineers, Inc.

Robert A. Fuhrman
Lockheed Corporation

William J. Perry
H&Q Technology Partners

Paul J. Gross
Rexnord

Warde F. Wheaton
Honeywell Aerospace & Defense

Clifford Hall
Sundstrand Corporation

Donald H. White
Hughes Aircraft Company

Earle C. Williams
BDM International, Inc.

REPORT TO THE
SUBCOMMITTEE ON DEFENSE INDUSTRY AND TECHNOLOGY
SENATE ARMED SERVICES COMMITTEE

THE PEOPLE

"Our study convinces us that lasting progress in the performance of the acquisition system demands dramatic improvements in our management of acquisition personnel at all levels within DoD."

...Final Report of the President's Blue Ribbon Commission on Defense Management (June 1986)

QUALITY OF PROCUREMENT WORKFORCE

ATTRACTING COMPETENCE IN KEY POSITIONS

THE ISSUE

People are the most important element of any management process. Defense acquisition is no exception. Given the complexity of the acquisition process, the sums of money involved, the critical national objectives tied to defense acquisition, and the potential for loss of public credibility, the overall quality of the workforce should receive priority treatment. Unfortunately, there exists a considerable reason to question whether we will be able to attach and keep in Government the desired mix of technical skills and management talents to handle efficiently, and economically our nation's procurement requirements.

BACKGROUND

There has been a tendency in government to conclude that almost anyone can buy. This attitude, and a failure to accord professional status to the acquisition management workforce, has begun to have a serious adverse effect on the overall quality of acquisition personnel.

Technical skills, specialized knowledge, and a disciplined approach to acquisition call for professional status of this workforce. There is little chance that the acquisition process will become less complex as time progresses. We need a highly motivated, college-educated workforce. Specialized training and career management after recruitment is also very important. Initiatives to improve the acquisition process will be only marginally effective unless priority attention is given to this issue.

Government, moreover, requires private sector skills in the executive branch just as it attracts talent in the legislative branch. There can be no question about the need to attract competent industry-trained men and women into vital upper-middle level appointee positions in the Pentagon. "Revolving Door" legislation, however well intended, defeats this need. The stigma of evil associated with the "revolving door" issue is most unfortunate and largely unwarranted. The subject should be readdressed and resolved in a more appropriate manner than has been the case in the past.

HISTORICAL CONCERNS

The establishment of alternative federal workforce plans has raised concerns regarding the proliferation of inconsistent personnel policies and procedures.

Appointment from industry of senior level acquisition managers or executives not subject to post government service employment restrictions may result in conflicts of interest inimical to the exercise of independent discretionary authority in the best interests of the government.

SOLUTIONS

Legislative action is needed to establish a Career Acquisition Management Intern Program for contracting personnel in all executive agencies having procurement authority, and the creation of a government-wide Acquisition Management Service Corps. One approach to such a solution is that of Senator Bingaman in S-1477, which creates an alternative personnel system for individuals involved in scientific and technical work or acquisition.

Through oversight, reevaluation of present law dealing with the "Revolving Door" issue with attraction of private sector personnel into Government appointive positions is appropriate.

ACQUISITION EXECUTIVE SELECTION PROCESS

THE ISSUE

The Department of Defense tends to function largely as a decentralized organization. This is especially true in the area of acquisition, where the military departments acquire, support, and maintain weapon systems and other defense equipment through their buying commands. With such an organizational structure, there have been substantial differences in approach among the military departments and their buying commands as to acquisition policies and practices. This has resulted in confusion for vendors, with one department often using procedures in variance with one another.

The recommendation of the Packard Commission, enacted into law by Congress, to establish an Under Secretary of Defense for Acquisition, renewed attention to the need for uniform procurement policy throughout the Department of Defense. The resignation of the first holder of that office after less than one year in the position raises questions about whether the position is achieving the purpose expressed at the time it was created.

BACKGROUND

The Packard Commission, during its work in 1986 to analyze the defense acquisition process, concluded that it was essential to have a high level individual in the Office of the Secretary of Defense supervising the acquisition process. Accordingly, the Commission recommended the establishment of the Undersecretary of Defense for Acquisition. This individual, in the view of the Commission, was to be a Level II in the Executive Schedule, thus placing him at the same level as the Deputy Secretary.

Shortly after the Packard Commission recommendation was received, the Congress enacted legislation to establish this position, with the responsibility to supervise the acquisition process. The Department of Defense recruited Richard P. Godwin, a former senior executive with the Bechtel Corporation, into the job. Mr. Godwin was confirmed by the Senate. He served in the position for slightly less than a year, and resigned against the wishes of the senior management of the Defense Department.

Hearings were held in both the House and the Senate to consider the events giving rise to Mr. Godwin's resignation. Essentially, it appears that Mr. Godwin was not satisfied with

the fact that a decision of the Defense Acquisition Board (DAB), which provided approvals for defense systems at various milestones in development and production, was not final approval. Budget decisions by the Defense Resources Board (DRB) could effectively overturn DAB decisions.

It appears that Mr. Godwin may have made some errors in approaching the job. His lack of specific experience with the defense industry or with the Department of Defense was a major drawback. In addition, some believe that Mr. Godwin became overly involved with individual defense programs, and did not involve himself in larger policy and procedural issues, where he probably could have been more effective and had more of an impact on the defense acquisition system.

The apparent problems with Mr. Godwin's tenure as Undersecretary do not in any sense suggest that the need for the position has been diminished. It is essential that there be uniform acquisition policies throughout the Defense Department. The services have demonstrated over the years unwillingness to voluntarily assure such unformity in policy. Accordingly, the individual speaking with the authority of the Secretary of Defense must be able to establish and direct the implementation of department-wide policies.

This is not the case only from the standpoint of rational organized management in presenting a common face to the vendor. It also recognizes the fact that, with respect to most issues, there is a preferable management approach. Once the Secretary of Defense has decided on this preferable management approach, then observance of it by all of the military departments should be pursued.

HISTORICAL CONCERNS

There has been continuing tension between those who favor strong military departments and those who favor a strong Office of the Secretary of Defense. Those who favor the services will argue that as long as the services have the actual acquisition responsibility, they should have the right to control policy. The predominant view today, however, appears to be that the Office of the Secretary of Defense must provide greater integration and coordination of service activities.

SOLUTIONS

There appeared to be a consensus among the members of the House and Senate committees overseeing the Godwin resignation that further legislation to strengthen that position was not necessary. It would appear that two things are necessary. First, it would be desirable in the future to have an individual in the position who is highly knowledgeable about the defense industry and the operations of the Department of Defense. Second, the Undersecretary should recognize that his position is first and foremost a policy position. Though he has responsibility to chair the DAB and to serve as the acquisition executive for the Department, he can most directly affect the acquisition process by establishing and enforcing desired policies on a uniform basis throughout the Department. No further legislative or regulatory authority is required to do this. He simply should recognize the need for a policy orientation.

In confirmation hearings for future Secretaries of Defense, the Senate Armed Services Committee should ask the nominees for a commitment to support the Under Secretary of Defense for Acquisition (USD(A)) in his determinations of Department acquisition policy.

At the commencement of the selection process for future USD(A)'s, the Senate Armed Services Committee should strongly urge the Secretary of Defense to choose someone in whom he places great trust and confidence. In addition, the Committee should seek to ensure that the position is only filled by someone who has extensive experience in defense industry programs, and who is an aggressive manager who will seek to mandate uniform policies and procedures throughout DoD.

These same criteria should also be applied to the service acquisition executives.

THE PROCESS

Our nation faces a compelling need to improve the defense acquisition system. Faced with smaller budgets, we must do more with less. Congress, DoD and the defense industry share the responsibility to make the acquisition system more efficient and cost-effective. The keys to meeting this challenge are streamlining and program stability.

Program instability remains a significant roadblock to procurement efficiency and cost-effectiveness. Instability is due, in part, to the absence of clearly-defined, long-term strategic objectives tied to realistic budget expectations. The inability to establish long-term direction and funding makes it difficult to match security needs, programs and resources. The result is stops, starts and uneconomic programs.

The acquisition process has become overburdened with unnecessary management layers, excessive delays in program decision approval, inordinate redirections in programs and cumbersome and often inconsistent oversight and regulation. The resulting added costs to the taxpayer are too high and the risks to our national security too great.

THE CONFLICT BETWEEN PROFIT AND INVESTMENT POLICIES

THE ISSUE

The government's acquisition policy seeks to create incentives for contractors to make investments which benefit the government and to provide reasonable profits from which such investments can be made. This policy became confused over the past two years as a result of conflicting legislative and regulatory initiatives. Without resolution of the conflict, this policy will fail.

BACKGROUND

Since 1964 the Defense Department has used a system called the "weighted guidelines" to derive its positions for negotiating the profit element of major contracts. This method is premised on recognition of the fact that profit is a negotiated element of the price of virtually all major defense contracts. Under the weighted guidelines method, values are assigned to contractor investment in working capital and facilities, technical risk and difficulty, and a variety of other elements. The guidelines are applied against various cost factors to determine DoD's position for the negotiations.

Under Section 9105 of P.L. 99-500, the Continuing Resolution on Appropriations for FY 1987, DoD was directed to change its profit policy to:

> "...increase emphasis on facilities capital employed and contractor risk and (to)... not provide an explicit fixed rate for working capital and (to)... not include profit based on specific individual elements of contract costs...".

DoD's implementation of this mandate came soon after its imposition of several policies which place extraordinary demands on contractors' investment capital. DoD policies on cost sharing on major system development and fixed price-type contracts for development work required high levels of contractor investment in ongoing contracts. These high levels of investment are made exceptionally risky by the fact that, without assurance of future production, they may never be recovered. These investments often exceed $250 million. At that level, the future of a company may rest on the single investment. No attainable level of negotiated profit can offset such risk.

Congress' other actions which lead to the conflict, when coupled with DoD's policies, include mandated contractors' investments in production special tooling and test equipment; reduced progress payments; and, changes in tax law.

DoD's attempts to deal with these changes have failed to recognize that their effects are interrelated. The new profit rule prohibits profit on IR&D, arguably the highest risk investment a contractor makes. It fails to provide profit on the special tooling and test equipment investment. It does not account for reductions in profit due to the added financing burden of lowered progress payments. It fails to recognize the burden of cost sharing under which contractors invest hundreds of millions of dollars in developing systems which they may never get to produce and earn profit on. The rule on special tooling purchases leaves profit to the contracting officer's discretion, which virtually ensures that it will not be paid.

The cumulative effort of these changes is a great disincentive for companies to try to win major contracts. It is, in many ways, more profitable and less risky to win a "second source" contract because less investment is required and the chances of recovering them are greater than for the "first place" winner.

The conflict between DoD's profit and investment objectives is the simultaneous demand for contractors' investments and risk taking as the basis for higher profit and the denial of profit on the most substantial and risk-laden investments.

DoD and Congress must realize that profit and investment policies are the foundation of industry's ability to serve the nation's needs. National security is not well served by policies which make defense business a poor investment.

HISTORICAL CONCERNS

Arguments have been made that industry makes investments of little value to DoD and should be given profit only on investments of direct benefit to current DoD programs. Others have argued that industry should be given no profit on overhead expenses, and little or no profit on investments in buildings and land because those assets can be converted to other use. Most of these arguments have been adopted in the 1987 profit rule issued by DoD.

SOLUTIONS

Congress should require that reward be commensurate with risk.

Congress should direct DoD to resolve the conflict between profit and investment by providing profit on high-risk investments which benefit the government such as IR&D, and by ending practices such as cost sharing which cannot be sufficiently offset by higher profits.

PROFITS AND COSTS

THE ISSUE

Financial policies enacted in recent years to reduce DoD outlays and the federal deficit will increase procurement costs and reduce national security in the long term. Profits account for less than 10% of defense procurement expenditures, while contract costs account for more than 90%. Attention should focus on the Many of these costs are the result of unnecessary government regulation. Attention should focus on the non-productive costs.

BACKGROUND

Legislative and regulatory changes in financial policies have decreased profits for defense contractors while, at the same time, increasing contractors' working capital requirements. Mark-up has been reduced by more than 1% and many necessary business expenses are unallowable. Contractors are now required to invest more in working capital: progress payments have been cut from 90% to 75%; special tooling and test equipment investment by contractors has been increased to 50%.

Ad hoc changes in contract pricing and financial policies have focused on the wrong issue: profits, instead of the non-productive costs. Defense industry studies suggest that procurement expenditures could be trimmed by acquisition reform -- without reducing the quantity or quality of goods purchased. Some of these cost reductions could be achieved by accomplishing the policy changes outlined in the accompanying paper entitled "Streamlining the Defense Acquisition Process". Potential savings on the profit side pale in comparison -- especially when the long-range, harmful effects of those short-term savings are calculated.

Simultaneously, cutting profits and re-directing working capital investment reduces the discretionary capital contractors can invest in IR&D, capital equipment, and productivity improvements. These are precisely the investments the defense industry has made and must continue to make in order to maintain the technological superiority of U.S. forces and to cut future production costs. Under current legislation, contractors have little incentive to take on projects that involve technological risk and innovation. Scarcer dollars could go into safer investments. The technological superiority that is a cornerstone of our nation's defense will be lost.

Less investment in research will also reduce the ability of the defense industry to attract outstanding young people. With our significant long-range challenges and opportunities, the industry will not be able to overcome the recruiting disadvantages of low public esteem for the defense industry and the threat of going to jail for honest errors or oversights.

SOLUTION

Adopt integrated defense acquisition strategy that provides incentives for investments aimed at reducing future production costs and advancing technology. Such a strategy could still accommodate deficit reduction measures if the focus was on non-productive costs instead of profit. Return mark-up, progress payment rates and tooling/test equipment investment requirements to FY 86 levels.

GOVERNMENT POLICY ON INDEPENDENT RESEARCH AND DEVELOPMENT (IR&D)

THE ISSUE

For the past several years, Congress has established ceilings on Government-allowable Independent Research and Development (IR&D) and Bid and Proposal (B&P) costs. These ceilings inhibit industry investment in advanced technologies and new products.

This year, Congress will consider whether to alter or eliminate the Government's traditional support for independent research and development. Because IR&D is at the foundation of the technological superiority of our armed forces, the IR&D system should be strengthened as an investment in the future.

BACKGROUND

To a large extent, the strength of this nation lies in its technology. The Congress and the President have consistently emphasized the importance of research and development to the nation's technical and economic leadership. Especially now, when that leadership is being repeatedly challenged by foreign nations, research and development is vital to ensure a flow of new concepts, products and systems. Other countries, having observed the important role R&D has played in the U.S., are achieving a close partnership of mutual government and industry R&D cooperation to compete even more effectively with the U.S. in world markets.

What is IR&D and B&P

Independent research and development (IR&D) is a term employed by industry to distinguish company-initiated, company-funded work from the research and development which is performed directly under government contract. IR&D is a company's investment in its future, its means of assuring its competitive position by exploring advanced concepts to improve existing products or developing new ones. It is not an optional effort -- it is absolutely essential for the company that intends to stay in business.

IR&D funding permits a company to apply its resources selectively, pursuing technology advancements in areas where the company's capabilities are greatest and where success will most likely benefit both company and customer. The process stimulates competition, both technical and cost-related, and allows company management to anticipate future requirements of potential customers and to develop the technology to meet

those requirements in a timely manner. Inherently flexible, IR&D can be changed quickly -- expanded, redirected or terminated -- as needs change without the formalities associated with contracted R&D.

The modifier "independent" is important because a company must be free to determine what areas of research it should pursue to remain technologically competitive. A company -- or an industry -- needs a source of discretionary funds to provide the technology base that is the wellspring of innovative concepts for commercial, military and space related markets. IR&D is a necessary cost of doing business, and in normal business practice, such costs are recovered as an element of overhead expense included in the price of the company's products. However, the U.S. government refuses to accept its proportionate share of IR&D costs on Government contracts, and instead imposes an annual ceiling on the amount of such costs for each major contractor.

The term Bid and Proposal (B&P) is used to describe a company's technical and supporting effort directed at preparing and submitting proposals (solicited or unsolicited) to a customer to meet customer requirements. For purposes of cost recovery on Government contracts, IR&D and B&P costs are pooled together and are interchangeable (as long as the total is not changed) in order to respond to unanticipated bidding opportunities.

Government Constraints Have Adversely Impacted IR&D/B&P

For years the U.S. Government, acting through the Department of Defense, has placed limits on the amount of IR&D and B&P costs that each major DoD contractor can recover through overhead allocations on Government contracts. The process leading to the negotiation by DoD of annual "ceilings" on recoverable IR&D/B&P costs for each contractor is cumbersome and costly for both the Government and industry. Further, since 1983, Congress has limited the aggregate amount of allowable IR&D/B&P costs that the DoD can negotiate with industry each year.

As issued to implement Public Law 91-441, the DoD regulations controlling IR&D/B&P effort require that IR&D Technical Plans (brochures) be prepared every year by each company at great expense in time and money. These submissions are required to include future plans as well as a description of the past year's activities. The military services review these plans to assure that a potential military relationship exists, and to assign numerical scores based on the technical quality of the plans.

Further requirements have evolved for each company to submit two additional IR&D project summary reports each year: a "before-the-fact" summary before the fiscal year begins, and

an "after-the-fact" summary after year-end. A primary purpose of these reports is to determine the potential military relationship (PMR) of each planned IR&D project and then to assess any changes in PMR as a result of project changes that may occur during the year.

In addition to this technical documentation by each company and the rating process by the military services, on-site reviews of IR&D efforts are performed on a 3-year cycle, involving travel by hundreds of DoD personnel to companies' facilities throughout the country. Each on-site review usually involves hundreds of hours of preparation by each company, two or three days of presentations to the government review team, and many days of follow-up administrative effort to record and return evaluator comments to the company.

The reporting and administrative practices required by DoD have become ever more rigorous and costly to both industry and the DoD. These administrative costs are estimated to be about 3-5 percent of IR&D/B&P expenditures and total around $300M annually.

Defense contractors are also being subjected to many changes in the acquisition process which significantly increase financial risk and reduce the capital available for investment in IR&D/B&P. Included among these changes are:

1. Changes in profit policy to reduce profits.
2. Major cost sharing requirements by the procuring agencies (e.g., the Advanced Tactical Fighter).
3. Firm fixed-price contracts utilized for complex development programs.
4. Reduced progress payments.
5. More categories of unallowable costs.
6. Investment requirements for special tooling and test equipment.

IR&D/B&P ceilings prevent defense contractors from adequately recovering their IR&D/B&P costs through overhead in the price of products sold. This, combined with the other simultaneous pressures on profit margins, is acting to erode industry's ability to sustain necessary levels of investment in IR&D and B&P, and there has been no real growth in industry IR&D/B&P expenditures since 1984.

Many contractors have been forced to reduce their IR&D/B&P investments -- particularly as compared to similar investments in the commercial sector. For example, during the past four years, one major contractor's R&D/B&P investments in its commercial sector have increased from 7% to about 10% of sales and, over the same period, its IR&D/B&P investments in the

Government sector have declined from 6% to 5% of sales. Another adverse factor is a shift in mix toward more B&P expenditures in the Government sector due to rising demands for proposals and supporting details, brought about by increased government emphasis on competitive procurements -- thereby further shrinking the funds available for IR&D investments.

The House Appropriations/Defense Subcommittee Report on the FY 1988 Appropriations Bill suggests that "it may be possible to eliminate the costly IR&D/B&P ceiling negotiation process and allow a small but fair increase in profit on DoD contracts to cover IR&D/B&P activities". While such a change can create the appealing illusion of equitably reimbursing contractors for IR&D/B&P costs, shifting these costs to company profit would most likely result in both less contractor profit and less contractor IR&D/B&P investment as other factors present in the defense acquisition environment begin to erode the 4-5% incremental increase in profit margin needed to cover the average contractor's IR&D/B&P costs.

Each Government contractor should be free to decide the proper level of IR&D/B&P investment needed each year to fit its own business situation. Like a commercial business, the contractor must balance its motivation to invest sufficient resources to be technically competitive against its motive to reduce costs to remain economically competitive. This is the business framework within which company resource allocation decisions must be made by every contractor, and it is this decision process that will contribute best to a more efficient and productive aerospace/defense industry.

National Benefits of IR&D

IR&D benefits a company by stimulating a flow of new ideas from company scientists and engineers leading to development of advanced technology and new products that improve competitive strength. IR&D is a valuable source of creative new ideas because company scientists and engineers can explore and develop imaginative concepts without the inhibiting restrictions associated with contractual requirements.

IR&D benefits government agencies, mainly the Department of Defense and NASA, by providing a source of new technologies that contributes to the U.S. defense and space postures. It also provides an industrial technology community that complements and multiplies the capabilities of government managers, scientists and engineers. IR&D has traditionally addressed government needs and has often provided solutions to critical deficiencies before formal government recognition of

such deficiencies. By demonstrating the feasibility of innovative solutions, IR&D reduces the risks associated with the formal development of advanced systems.

IR&D benefits the nation as a whole because it expands the national industrial technology base and strengthens the U.S. competitive posture in international trade.

IR&D covers the widest possible spectrum of R&D activities, including expansion of basic knowledge, exploitation of scientific discoveries, improvement of current technologies and creation of new ones, and has contributed substantially to technology forming the basis of our nation's space program.

There are hundreds of examples of benefits that have accrued from IR&D accomplished by industry. The examples range from small projects lasting a year to large, multiyear efforts involving millions of dollars. A variety of illustrative examples are presented in a brochure entitled "National Benefits of IR&D" published recently by the Aerospace Industries Association. Collectively they underline the extraordinary innovative ingenuity that characterizes industry IR&D and the attendant benefits to the company, the government and the nation. These examples are representative of the IR&D process and serve to illuminate a highly productive, but little understood, program that has been eminently successful in the aerospace/defense industry.

There is no alternative to IR&D/B&P. For industry, it is essential for survival; for government it is essential for maintaining its technological position in defense and space; and for the overall health of our national economy, it is essential for competing effectively in the international market.

HISTORICAL CONCERN

Critics of the support given IR&D predicate their arguments on two assumptions: first, that the Government gains little from the advances in technology produced through IR&D and should therefore directly contract for needed research and development; and second, that the management direction and accounting controls placed on IR&D fail to accomplish their goals. An October, 1987 report by the DoD Inspector General said that although the process used by the Services to administer the IR&D program was effective, the "military relevance" guidelines should be made clearer. In their report on the FY 1988 DoD Appropriations Act, the House Appropriations Committee indicated that they planned to revise the entire IR&D system in the coming year, including whether

"it may be possible to allow a small but fair increase in profit on DoD contracts to cover IR&D/B&P activities while eliminating the current system." (H. Rept. 100-410, page 204).

SOLUTIONS

Ensure that the Congressional cap on IR&D, mandated in previous years, be omitted for FY 1989 and thereafter.

Publish Congressional Committee report language explaining the benefits of IR&D/B&P to the government.

Request through Congressional Committee report language that DoD establish a joint DoD/Industry working group to develop and recommend regulations which will encourage appropriate levels of contractor investment in IR&D while providing adequate DoD visibility and beneficial technical interactions at reduced administrative expense with a report to the Congress from DoD by July 1, 1988.

SHIFTING UNDUE RISK TO THE CONTRACTOR

THE ISSUE

Disregarding the lessons learned from failures of similar procurement methods in the past, the DoD is now employing procurement methods which shift unmeasurable risks to contractors in three different ways. First, contractors are being required to pay a portion, sometimes substantial, of the development cost of Defense Department systems under a practice called "cost sharing". Second, contractors are being required to enter into fixed-price contracts early in development, when the uncertainty is so substantial that it is virtually impossible to know the precise costs of new systems. Third, contractors are being asked to provide the Defense Department with priced production options before full scale development has begun. A recent policy letter issued by the Under Secretary of Defense (Acquisition) recognizes the second problem and proposes to change DoD policy on this subject. All of these requirements shift undue risk for the contractor, drain industry resources from investments in technology and productivity, and will ultimately affect our nations' ability to maintain technological superiority.

BACKGROUND

Forced cost sharing in defense acquisition is in part a reflection of the fact that the Defense Department does not have the financial resources to purchase the present five-year defense plan, especially if it insists upon acquisition strategies that call for carrying two development sources through the prototype phase. This is an exceedingly expensive acquisition strategy, and one of questionable value. The funding problem is so substantial that even if major defense contractors were prepared to accept all contracts on a no-profit basis, DoD would still have insufficient resources to purchase all in its program.

There is an attitude in the Defense Department today that defense contractors should subsidize the defense effort. The defense industry as a whole, as well as each defense contractor, has limited resources available for investment. In order to maintain our national defense capability, contractor resources should be invested in a manner that is balanced among new programs, independent research and development, and more efficient production for mature systems. Forced cost sharing, coupled with other recent initiatives which reduce earnings and cash flow, diverts resources from ongoing programs and essential research.

The design and production of a complex new weapon system or other items of defense equipment typically involves development and application of new technology. Thus, it is virtually impossible to know with any certainty how much that development will cost. Technical superiority is a fundamental principle of American military strategy, and development contracts should be structured in a way which provides the government and the contractor flexibility to continually incorporate emerging technology and to trade-off cost and technical requirements to meet evolving threats.

Congress has evidenced its recognition of some of these problems by including a Section 8118 in the Fiscal Year 1988 DoD Appropriations Act. This section is intended to regulate the use of fixed price contracts in excess of $10 million with regard to major system acquisition, by requiring a determination by the Undersecretary of Defense for Acquisition that such a contract can only be used where program risk has been reduced to the extent that realistic pricing can occur, and that the contract type would permit an equitable and sensible allocation of program risk between the contracting parties. While this is a step in the right direction, it does not specifically preclude cost sharing nor does it inhibit the Government's practice of seeking priced (or not-to-exceed) production options prior to development. Industry is also skeptical about DoD's willingness to execute these limitations appropriately.

HISTORICAL CONCERNS

The primary concern which DoD may express regarding this proposal is that it has only a limited amount of funds for each program, and that it simply cannot afford to give each contractor developing a new system an open-ended commitment to pay whatever development expenses are incurred. In addition, DoD has asserted that cost-type contracts may encourage contractors to incur more costs, rather than trying to find least-cost solutions to difficult problems. Finally, the Department would probably assert that the involvement of the Secretary in each acquisition decision is unrealistic and unduly burdensome on him.

In response to these concerns, first, it is not suggested by industry that open-ended commitments be made. The responsibility to manage a development program within the available funds should be equally shared by the government and the contractor. This can be accomplished by assignment of qualified government program managers and acquisition personnel. Second, contractors can be motivated through incentive provision and statements of work which require cost trade-offs between various technical solutions. Further, contractors will recognize that their ability to survive

downstream production competition is dependent upon their ability to offer innovative and cost-effective development solutions. Third, the Service Secretary will only find this solution burdensome if the Service as a rule tries to continue the current practice. Compliance with the proposed legislative language should limit his involvement to only a very small number of programs.

SOLUTIONS

The solution to this problem would provide that, as a general rule, only cost-type contracts should be used for development. In order to enforce this, the concurrence of the Secretary of Defense should be obtained before a fixed-price development contract is used. In addition, DoD should be prohibited from requiring contractors to provide fixed priced production options until after two years of initial production of the system. Recent changes to DoD Directive 5000.1, as well as the previously mentioned policy letter, are generally consistent with this solution. It should be noted, however, that the extent of compliance by the military departments with the new directive and letter is uncertain.

As a minimum, the language regarding fixed price development contracts in Sec. 8118 of the FY '88 Continuing Resolution should be strengthened and expanded to prohibit cost sharing and premature pricing of production options prior to the results of the development and incorporated into permanent law.

THE ROLE OF THE CONTRACTING OFFICER

THE ISSUE

The Government has historically relied on its contracting officers as its official representative in all dealings with contractors. During the past several years, however, there have been a significant number of statutory, regulatory and administrative actions which have substantially eroded the authority of the Defense Department's contracting officers.

BACKGROUND

The Federal Government relies on selected trained individuals, the contracting officers, to represent the Government in its dealings with contractors providing goods and services to the Government. These contracting officers are the only category of government employees who can bind the government to future performance or payment. Surprisingly, there is no explicit statutory provision regarding the selection or appointment of government contracting officers, although there are detailed criteria in the FAR to guide the process. As a result, there has been an ebb and flow in the responsibility and authority of the contracting officer.

In today's defense contracting environment, the contracting officer is only the first word, not the last, on matters over which he alone has been charged with the responsibility to act. For example, the contracting officer has competitors within his own organization -- from the powerful auditors of DCAA to those, like small business specialists who must consent to the actions proposed to be taken. Although the DoD Inspector General has been a part of the problem as well, we recognize the unique and important role that the office has in monitoring defense procurements.

The report of every commission or study of the defense acquisition process highlights "instability" among the largest and most persistent problems. One key to solving the problem of instability is the contracting officer. Several commentators have noted that, with respect to both program managers and contracting officers, they are more salesmen for their initial ideas rather than professionals with the knowledge, authority and flexibility to carry out their responsibilities. The clear impact of this diminution of authority has been to belittle the position and power of the contracting officer, delay or stretch procurement administrative lead-time while the contracting officer seeks guidance or approval from his vast array of advisors and "checkers", and to confuse the contracting community.

For example, 10 USC 2324(f), enacted as part of the Defense Procurement Improvement Act of 1985, prohibits the contracting officer from resolving any costs questioned by DCAA auditors without expressly and specifically reflecting in the settlement agreement "the amount of individual questioned costs that are paid." By requiring contracting officers to specifically address the concerns raised by the auditors, Congress has seriously hampered the ability of the contracting officer to exercise professional judgment.

In Section 932 of the 1986 Department of Defense Authorization Act, Congress directed the Secretary of Defense to develop a "plan for a personnel initiative designed to enhance the professionalism of, and career opportunities available to, acquisition personnel of the Department of Defense". The law also required the Secretary to assess the "feasibility and desirability of... the designation of certain acquisition positions" of DoD as professional positions. The Secretary submitted his report to the Congress. In partial response to that report, and to initiatives previously undertaken, Senator Jeff Bingaman (D-NM) has introduced legislation to create within the Federal Government an alternative personnel system for scientists, engineers and other selected professionals. In addition, Congressman Dennis Hertel (D-MI) has introduced legislation (H.R. 3267) to establish within the Department of Defense a "defense acquisition corps". No action has yet been taken on these legislative proposals.

A 1987 report by the Public Contract Law Section of the American Bar Association, entitled "The DoD Contracting Officer" carefully examined the changing role of these key individuals. The report seeks to provide an objective analysis of the legal basis for, and limitations on, the contracting officer. The report's first conclusion was that:

> "The role of the DoD contracting officer is changing from the traditional to a less well-defined position of diminished significance and shared authority... (T)he current acquisition environment blankets the contracting officer with oversight, laws and regulations... Such diffusion of authority can only mean a diminished role for the contracting officer which, extended to the ultimate conclusion, will result in no identifiable Government official at the operating level being responsible for efficient contracting practices or accountable for contracting failures." (Report at page 93.) Excerpts from the ABA paper are attached as an appendix.

SOLUTIONS

Steps must be taken immediately to reverse this trend. The contracting officer needs to be reinstalled as the business manager of a procurement with all the necessary authority. He should not be able to be overruled by special interest advocates or auditors, for failing to follow their preferences.

No single action will, by itself, "restore" the authority of the contracting officer. Several steps will help immeasurably, however.

First, contracting officers should be granted professional status in the civil service. This was the first recommendation of the ABA study, and a consistent conclusion of studies ranging from the 1972 Commission on Government Procurement to the 1986 Packard Commission report. (See ABA report at page 96.) Historically, however, there has been resistance from government personnel officers to singling out one narrow category of government employee for specialized treatment; and

Second, the contracting officer should be designated as the decision-making authority with respect to all contractual matters. Auditors, competition advocates, and other should be "advisors" to, not judges of, the contracting officer. Historically, however, there have been concerns that contracting officers have been unwilling, or unable, to devote the time or attention to aspects of the acquisition system that deserve priority attention. Some argue that the contracting officer's principle interest in "getting the procurement out" precludes an unbiased review of critical issues such as competition, the resolution of disputes over certain costs, or small business issues, for example.

APPENDIX
EXCERPT FROM ABA RECOMMENDATIONS

1. Contracting Officer's Job Status: "A significant number of DoD contracting officers should be granted professional status in the Civil Service and such status should be reflected in their selection, education, and career management". (Similar proposals have previously been made by the Commission on Government Procurement, the U.S. General Accounting Office, and the Packard Commission.)

2. The Contracting Officer - Program Manager Role: "The present line of authority from the contracting officer, through the HCA, to the Service Senior Acquisition Official should be preserved. Program managers should be provided with more contracting officer support earlier in the acquisition cycle. The contracting officer should be the program manager's business planning advisor and representative to industry. Contracting officers and program managers should train together".

3. The Contracting Officer - Auditor Relationship: "The decision-making role of the contracting officer in audit matters should be preserved, with the auditor as a key advisor to the contracting officer". (Recent legislation and regulations, while not changing this relationship in theory, have done serious damage to the traditional relationship between the contracting officer and the contract auditor. While in theory the contract auditor continues to be an advisor (rather than a decision-maker), recent legislative and regulatory changes have begun to erode this relationship. While in theory the contracting officer continues to be the decision-maker, recent legislative and regulatory changes have begun to require the contracting officer to formally justify any decisions which are contrary to those recommended by the auditor.

STREAMLINING THE DEFENSE ACQUISITION PROCESS

THE ISSUE

The defense acquisition process has become so encumbered with procedures that it now takes fifteen years or more for a new weapon to be researched, developed, manufactured, and given to the active armed services. This delay deprives our armed forces of critical technological advances and adds non-productive costs.

BACKGROUND

The laws and regulations governing defense acquisition have evolved in much the same way as our tax laws. Each year they have grown in complexity and length to accommodate hundreds of unrelated domestic and foreign policy concerns.

Scattered attempts have been made to make the system more efficient. Congressional and executive initiatives such as multi-year procurement, program baselining, and longer budget cycles have, because of the limitations placed on their application, produced only minimal benefits.

In 1985, the Defense Science Board conducted a study to determine why some programs succeeded quickly while others suffered delays and increased costs. The DSB chose to compare five successful commercial programs with 26 defense programs, some of which had suffered significant problems and some which had clearly succeeded. Included among the commercial programs were the IBM 360 computer, the Boeing 767, and a Hughes commercial satellite. Among the defense programs were successes like the Polaris and the Minuteman missiles, the air-launched cruise missile, several "black" programs, and some problem programs such as the M-1 tank, and the HARM missile.

The DSB study examined the major elements of management in these programs. It found a common ground among all the successful programs in both the commercial and defense arenas: streamlining and stability. They found common ground among the problem programs as well.

A comparison of the common strengths and weaknesses is revealing:

> Many people, with different and often conflicting degrees of authority and interests, controlled the problem programs. The successful programs, both

defense and commercial, had a CEO or equivalent who could make a firm decision and ensure its implementation;

In the problem programs, the choice of what to acquire was made in a highly politicized environment where the costs of performance were ignored and requirements became both overstated and unchangeable. The successful programs ensured cost vs. performance trade-offs were made for both production costs and the costs of delay;

Commercial success was dominated by the fact that users have choices in whether and from whom to buy a product. Timing of user demand imposed a schedule discipline which was lacking in problem programs, particularly in defense; and

Successful contracts were characterized by commitment of adequate resources, understanding and provision for risks, and the continued influence of users.

This study was used as the basis for the Packard Commission's "Formula for Action" on acquisition reform. Congress and DoD began adopting these ideas in the Goldwater-Nichols DoD Reorganization Act, the 1987 DoD Authorization Act, and DoD initiatives.

The DSB study and the Packard Commission identified barriers to efficiency and productivity which encumber the defense acquisition system. Much has already been accomplished. As a result, Congress created the Undersecretary of Defense for Acquisition. Single acquisition executives have been created in each of the services, and the services have been directed to establish "program executive officers" to centralize the decision making process in major procurements. An experimental system of "defense enterprise programs" has been created to streamline the management of a few procurements. Multi-year procurements have been used for several major programs. But the fundamental problems still exist.

More needs to be done. Congress should examine its own role in the DoD budgeting and authorizing process to determine whether it can be streamlined as well, for the Congressional role is a key to both the problems and the solutions.

The defense procurement process is like any other manufacturing system. As the number of items produced increases, the price can go down if the producer is able to take advantage of the savings which accrue from learned production efficiencies. The peak of this learning curve usually has been reached after two or three years of

production. In defense procurements, the emphasis on competition and the limitations placed on multi-year contracting have made these efficiencies unattainable in far too many cases. As the DSB study concluded:

> "Congress has some of the authority held by the commercial CEO. No service or OSD official has sufficient authority to fully mirror the CEO's role. Oversight staff is growing instead of being reduced or controlled."

Congress has a proper constitutional role in the authorization and appropriation process which it shares with the Executive Branch. It should reexamine how it can best assert its shared authority in ways which shorten the procurement cycle and achieve the cost savings which occur in more stable production.

The Packard Commission recognized the problem of excessive audits and inspections of contractors' operations in its 1986 reports. It recommended that the new Undersecretary of Defense for Acquisition be given authority over DoD audit policy and that the relative powers of auditors and contracting officers be resolved to strengthen the contracting officer.

However, DoD's implementation of the DoD Reorganization Act has exacerbated the problem. According to the Commission's letter to the President of July 10, 1987:

> "Policy decisions have been made, for example, that severely undercut the role of contracting officers and the ability of program managers to direct programs successfully. Auditors have been given responsibilities outside their competence and have been afforded a separate chain of command in a way that, in effect, makes them rivals of contracting officers, undercutting the acquisition plan set forth for you...This problem results both from legislation which gives authority for audit policy to the Inspector General instead of the Undersecretary of Defense for Acquisition, and from Defense Department implementation which assigns to Defense auditors contractual responsibilities previously held by the contracting officer" (emphasis added).

The Packard Commission's June 1986 report stated the need to streamline the management of defense programs by greatly reducing the number of people involved in the decision making process. The Packard Commission recommended a solution of deregulation and removal of unneeded management bureaucracy for the problems of defense program management. It found that

these changes would be the most effective way to overcome the barriers between defense program managers and the proven practices of their commercial counterparts.

Further, the Commission set forth the need for stabilization of procurements as one of its principal recommendations. It said: "Program stability must be enhanced in two fundamental ways. First, DoD should institutionalize "baselining" for major weapon systems at the initiation of full scale engineering development. Second, DoD and Congress should expand the use of multi-year procurement for high-priority systems."

The first part of this recommendation became law in the FY 87 Defense Authorization Act. The baselining requirement can now be found at 10 U.S. Code Section 2435. Increasing multi-year procurement, and its underlying predicate, milestone authorization, remain subject to severe limitations.

Milestone authorization is the process by which Congress authorizes DoD to contract for the whole in the acquisition process such as full scale development, low rate initial production, or high rate final production. Under 10 U.S. Code Section 2347 it is limited to the few programs which DoD designates as "Defense Enterprise Programs", those intended to have the streamlined management recommended by the Packard Commission (see 10 U.S. Code Section 2346).

If these processes are to work, Congress must fully adopt the Packard Commission's recommendation for changes in the DoD Authorization and Appropriation process. The United States is the only major power which changes its defense acquisition plans every year. As a 1986 Rand Corporation study pointed out, many analysts' conclusion that our NATO allies' procurement is superior to ours is wrong in every sense but one: the instability caused by the annual authorization and appropriations changes to DoD's plans. To make milestone authorizations and multi-year contracts work, the adoption of a two-year cycle should be a minimum.

SOLUTIONS

Eliminate current restrictions on multi-year procurement. The current threshold test requiring a demonstration of 12% or more cost savings should be eliminated. Multi-year procurements on major systems and subsystems should be the rule. At the same time, administrative requirements for full funding of termination liability, which also restricts multi-year contracting, should be rescinded.

The benefits of deregulation and milestone authorization now limited to Defense Enterprise Programs should be made the rule for all major weapon system procurements, rather than the exception. By making these procedures uniform, Congress would retain necessary controls to stop or curtail the development or production of major systems but would reduce disruptive annual changes. This creates the needed stability in contracting so that cost savings can be achieved to the greatest extent and delays can be minimized.

Establish a mandatory cost-benefit test to be imposed on all current and new regulations which delay procurements or add overhead costs.

Give the USD(A) authority over DoD audit policy.

Eliminate auditors' supervision over contracting officers' activities in negotiating and settling questions of cost allowability;

Revise DoD implementation of the DoD Reorganization Act to clarify the auditor's role as an advisor to, and not a supervisor of, the actions of the contracting officer; and

Congress should adopt an internal rule which requires the DoD authorization and appropriation process to be conducted on a biannual basis.

GOVERNMENT OVERSIGHT OF DEFENSE CONTRACTORS

THE ISSUE

Uncertainty and instability have been the only constant in the modern defense acquisition process. Through a variety of actions and inactions, the relationship between Government and its contractors have gone from mutual partnership to distrust and hostility. As a result, Government has had both the requirement, and the desire, to substantially increase its oversight over all phases of a contractor's day-to-day business operations. Because this is counterproductive and wasteful of Government resources, the adversarial process should be changed.

BACKGROUND

The Government requires adequate access to contractor's books and records to protect its financial interests. Under current law, regulation, and contract clauses, however, several agencies within DOD have the authority to "audit" and oversee contractors. They have vigorously used that authority. Similar authority exists in the civilian agencies and has resulted in similar experiences.

Audits fall into four categories: pre-contract, operational, special (such as IG investigations into alleged fraud or misconduct), and contractor practices. Pre-contract audits include proposal audits and forward pricing audits. Operational audits include annual overhead audits, cost-incurred audits, spare parts pricing audits, government property audits, program reviews, and many others. Contractor practices audits include purchasing system audits, compensation rate audits, "should cost" audits, independent cost analysis, and wall-to-wall reviews like "contractor operations reviews" where the government examines every record and piece of equipment at a contractor's plant and interviews dozens of its employees. For each audit, contractor employees must take time to accompany the auditors and answer their questions. Thus, any proliferation of audits and contractor oversight in absolute terms, as well as in the duplication of effort, is a significant problem.

In January and March 1985, Congressional hearings focused on the duplicative and excessive DOD "audits" of contractors as an impediment to an effective acquisition system. Based on that testimony, the Senate Armed Services Committee's Report noted that

> "...the Secretary of Defense should establish procedures which ensure coordination of all

> audit efforts, and which assign one entity in the Department lead responsibility with regard to each type of audit conducted. The Secretary should provide to the Committee, not later than January 1, 1986, a report on actions he has taken to ensure that there is no unnecessary duplication of Defense Department audit efforts." (S. Rept. 99-41, at P 214.)

In response to that Committee's direction, the DoD IG conducted an inquiry into contractor complaints of duplicative audits.

In a December 20, 1985 report, the IG found that there was unnecessary duplication in 14 of 25 cases it reviewed. It found that the concept of limiting direct access to contractor records to DCAA and the buying agency was not working. The IG concluded that "unless specific actions are taken to address the problems of coordination, unnecessary duplicative review (of this sort) are likely to continue". In transmitting the IG's report to the Senate Armed Services Committee on February 24, 1986, Defense Secretary Weinberger also noted that "two other reviews by my Inspector General and the General Accounting Office had documented duplicative oversight of defense contractors..." The Secretary noted that, with the issuance on January 10, 1985 of DoD directive 7600.2, entitled "Audit Policies", DoD had "established a sound foundation to preclude unnecessary duplication of Defense audit efforts".

As part of the Packard Commission's review of defense management, the Commission engaged Arthur Andersen and Company to study contract auditing and oversight. The Andersen study concluded that "duplication in the oversight process is extensive. Changes are clearly required to enhance efficiency and reduce costs to both contractors and the government". The Packard Commission commented that changes would not be accomplished without consolidating the authority to make and implement contract audit policy in a senior DoD official.

As part of the Congressional implementation of the Packard Commission's recommendations, and as part of the legislation establishing the position of the new Under Secretary of Defense for Acquisition, Congress directed in 10 U.S.C. 133(d) that the Under Secretary "prescribe policies to ensure that the audit and oversight of contractor activities are coordinated and carried out in a manner to prevent duplication by different elements of the Department of Defense." DOD has initiated a program in which the administrative contracting officer is made responsible for supervising the plant visits of a variety of auditors and inspectors. However, this plan fails to give the ACO the ability to exercise any meaningful control over the number or type of governmental visits and inspections.

Congress also chose to leave the responsibility for DOD "audit policy" in the Office of the Inspector General rather than assign it to the Under Secretary of Defense for Acquisition.

HISTORICAL CONCERN

Historically, however, there has been a concern that such centralized planning will delay or prevent an audit or contractor review which one agency or official believes needs to be conducted. In addition, given the unique statutory roles of the IG and the GAO, there has been a great deal of concern that such centralization could compromise the auditor's independence, referred to as "audit integrity."

SOLUTIONS

Oversight of contractor activities should be coordinated so that the costs and delays caused by repetitive audits and inspections can be minimized. Any inspections and audits should carry a decisional value so that all government agencies would have to accept the work product of any other which had conducted the same type of review in any given year. Further, all DOD agencies (with the exception of the IG and the DCIS) should be required to coordinate an annual plan for audits and inspections to eliminate duplication and to ensure that the government's resources are used effectively.

In addition, Congress should reconsider its earlier decisions to separate the internal DOD authority for "audit coordination" functions of the Under Secretary of Defense for Acquisition, the "audit policy" functions of the IG, and the conduct of audits by DCAA. Historically, however, the IG and DCAA have been separate entities with independent authority. Congress reaffirmed this view just one year ago.

CONTRACTOR LIABILITY AND INDEMNIFICATION

THE ISSUE

Government procurement policy generally does not require contractor indemnification against liability caused by acts or omissions of the government or losses resulting from catastrophic accidents. Indemnification would apply to damages in excess of commercially available insurance or self-insurance coverage. While some agencies have granted contractor indemnification, the actual practice of granting protection is not uniform. The absence of a uniform comprehensive policy or legislative directive is a major concern to non-indemnified contractors.

BACKGROUND

Many Federal contractors supply products and services employing state-of-the-art technology that are inherently hazardous. The possibility of a catastrophic accident, allegedly caused by a contractor's product or service, is real. In areas such as defense, space, transportation, and communications, the specter of liability and the difficulty in determining proportion of fault has prompted many Federal contractors to reassess the financial risk of contracting with the Federal government.

This, along with recent litigation involving contractor/Federal government liability, has surfaced two insurance issues that have fueled contractor interest in securing indemnification legislation:

1. A government contractor can be left totally liable for damages caused by acts or omissions of the government and/or its employees, based on a 1977 Supreme Court ruling in Stencel vs. U.S.... This ruling stipulated that contractors cannot sue the government for relief in cases where military employees are injured by the contractor's products, even if the government were partly or totally at fault in the accident.

2. Historically, the insurance industry has been relied upon to respond to program and product losses. However, the nature of the liability exposure, represented by the systems supplied to the government, far exceed those of consumer or industrial products, and, in many cases (e.g., satellite launches, air traffic control systems, weather reporting, etc.) exceeds the capacity of the insurance industry.

The aforementioned insurance issues, notwithstanding the availability of commercial insurance or self insurance coverage, represent serious financial risks for contractors unprotected against liability in excess of commercially available/self insured coverages. To the extent that contractors are unable to secure government indemnification protection, the threat of financial ruin discourage contractors from participating in U.S. Government initiatives requiring speculative technology.

In 1957, Congress enacted the Price-Anderson Act which provided a comprehensive plan for limiting the potential financial liability of the nuclear power plant builders and operators only. This Act includes mandatory insurance provisions and guarantees of indemnification for claims which exceed the amounts of privately available insurance. The Act also caps the aggregate liability for those covered by the law.

Congress enacted Public Law 85-804, which grants defense contractors "extraordinary" relief under some circumstances for irreparable financial damage arising from the performance of a contract. This authority has rarely been used.

However, the insurance needs of today's national defense contractors are not able to be met because no protection comparable to the Price-Anderson Act exists for them. The result is levels of liability exposure which cannot be met through existing private insurance could render virtually any company insolvent because of a single catastrophic event.

HISTORICAL CONCERNS

Opponents of a broader indemnification argue that contractor liability ensures accountability and attention to detail. Opponents also criticize proposals which establish blanket coverage for contractors rather than retaining contract-by-contract discretion. Finally, there is some question whether it is practical for the government to assure unlimited liability for contractor actions.

SOLUTION

Enact legislation providing for a consistent, uniform government-wide indemnification policy. Currently, legislation has been introduced in the House of Representatives (HR 2378) that would provide such a comprehensive system.

To this end, such legislation, if adopted, should be based on the premise that, given the potential for catastrophic accidents, allegedly arising from products/services supplied to the government, a comprehensive system for assuring compensation to injured parties should be implemented that would indemnify government contractors for liability in excess of reasonably available commercial or self coverage insurance. The legislation should also provide for an equitable reduction of liability, in any judgment rendered against the contractor, by the proportion of fault of the U.S. Government.

Currently, there exists legislation introduced in the House of Representatives, that would provide such a comprehensive system. We encourage support of this broad-based legislation, which is bi-partisan in content, and which provides for the most realistic, economical approach for resolving this issue.

FOREIGN SELLING COSTS

THE ISSUE

Through a series of regulations and laws enacted since 1979, the U.S. inhibits and discriminates against aerospace exports, which is one of the few areas in which the U.S. has a healthy trade surplus.

BACKGROUND

Domestic and foreign sales costs are current costs which will hopefully bring in future business. These costs are customarily charged to overhead.

In 1979, DoD revised its regulations to prohibit allocating selling costs associated with foreign sales of defense equipment to overhead costs allocated to DoD domestic contracts.

In the FY '85 and FY '86 appropriations bills, Congress included language which prohibited the use of any funds to reimburse overhead costs associated with foreign sales. DoD then issued new regulations which made foreign selling costs unallowable, rather than unallocable. This means that a proportionate share of foreign selling costs must be allocated to DoD overhead, and is then disallowed.

The change in policy was not based on economic or accounting criteria, but in response to a shift in the policy of the Carter Administration with respect to arms sales overseas.

The defense industry has consistently opposed the change as being inconsistent with normal business practices, sound accounting principles and sensible government policy. All marketing costs had always been treated as indirect costs allocated across-the-board -- in the same manner as other legitimate G&A costs.

In October of 1987, Deputy Secretary William Taft sent a letter to the Appropriations Committees urging that the provision on foreign selling costs be dropped in FY 1988, so that DoD may once again treat legitimate selling costs -- foreign or domestic -- in the same fashion. This change, which conforms to Cost Accounting Standards, would allow expenses associated with international marketing to be spread over current domestic and international business.

Foreign sales lower the unit costs of U.S. purchases. A study by the Congressional Budget Office has estimated that such savings to the Department of Defense range from 10 to 16 per cent of the value of exports. Using the lowest estimate, that means foreign sales in 1983 lowered the nation's defense procurement costs by nearly $2 billion. Foreign sales also keep U.S. production lines operating.

Whenever equipment is exported, non-recurring costs such as research and development are spread over a larger base, and thus costs to the U. S. Government are lowered. For the last three fiscal years, such R&D recoupment has averaged nearly $200 million per year. It is inequitable for the government to benefit from such sales while refusing to accept an allocation of the cost responsible for generating them.

U.S. Government policy inhibiting foreign sales activity by domestic defense contractors weakens the nation's industrial defense base. Foreign sales that would help support America's security objectives are being curtailed. These sales would normally allow the maintenance of a larger industrial defense base, which would be available for surge capacity in case of emergency. Foreign sales also help increase standardization of equipment with the allies.

Because of existing laws and DoD regulations many companies, which already have considerable foreign business, have established separate accounting pools for foreign and domestic sales, so that all foreign selling costs can be charged to the international cost center. This is countrary to the general Administration objectives of standardizing and simplifying accounting procedures. It is also likely to increase the cost of U.S. contracts to DoD, as foreign sales will no longer absorb part of the cost of doing business with DoD.

The provision discourages small companies from entering the export market. Since foreign selling costs cannot be charged to domestic sales, a company which is not currently exporting must absorb out of profits all selling costs aimed at producing initial foreign sales. This is contrary to the U.S. objective to encourage small companies to export.

HISTORICAL CONCERNS

There are several historical concerns regarding the allowability of foreign selling costs: first, the benefiting party is the foreign government and the U.S. government should not be subsidizing these costs; second, foreign marketing will continue regardless of the allowability; third, a policy change would result in significant increased cost to the U.S. government with only a nebulous benefit from potentially increased sales; and fourth, foreign sales admittedly benefit DoD, but no benefit is seen from allowing foreign selling costs.

SOLUTIONS

Language was included in the 1987 supplemental appropriations act that the Secretary of Defense may allow reasonable costs to promote American aerospace exports at domestic and international exhibits. This language was also incorporated into the Continuing Resolution on Appropriations for FY 1988 (Pub. Law 100-202). However, the prohibition to reimburse overhead costs associated with foreign sales was retained. In addition, the law calls for DoD to revise its profit policy calculations to provide incentives. A report to Congress from DoD to reflect the proposed profit regulations is due May 1, 1988.

Permanent legislation should be passed which returns selling costs associated with foreign sales of defense equipment to their pre-1979 status as an allowable GNA expense.

INCENTIVES FOR INNOVATION

THE ISSUE

Since 1983, the Department of Defense has aggressively sought to increase competition by transferring proprietary, privately owned, detailed product, manufacturing and process data to prospective competitors. While this may reduce the acquisition cost for old technology, it discourages the investment of private funds on the next generation of technology.

BACKGROUND

Since 1983, industry and DOD have debated the trade-offs to government of lower unit costs achieved through forced competition versus the resulting reduction of privately-funded innovation for government use. The legislation and regulations have attempted to increase competition while still trying to encourage private innovation. Unfortunately these two objectives, as they are pursued in today's procurement environment, are often incompatible.

Until recently, military competition worked to encourage innovation at private expense down to the component level. Now, military requirements for buying the identical product from more than one source are reducing, if not eliminating, the incentive to innovate.

When a product is developed with private funds, the risk posed by competitors of an identical product is multiplied. The developer is betting on a protected market position and the high perceived value of his product to give him a return on the development cost. That return also helps to provide the funds for future product development. The anticipated return on investment decreases when prices are forced down by "clones", or sales volume declines. DOD's approach to competition assures one or the other or both will occur. The resources for investment in future innovations will be less. The incentive to use those resources for military purposes will be much less. This is particularly true for the smaller, innovative subcontractor.

In 1983, the Services adopted contract requirements that required a private expense developer to give away rights in technical data in order to participate on a program. As a result legislation to prevent exclusion of privately developed items from defense markets solely on the basis of the availability of reprocurement rights in technical data was passed by Congress in 1986 and reinforced in 1987.

The requirement for competition between "clones" has not disappeared with the improvements in data rights legislation

and regulation. On many programs, private expense developers must still assure a second source for future competitions as a condition of winning a current contract because the ability to second source subcontracted items has become a competitive factor in the prime source selection.

For those programs where subcontractor competition is a factor, the need for competition is determined in the planning process. When the need for competition is combined with logistical considerations, it is translated into a need for competition between clones.

Market driven, privately funded development and innovation has contributed greatly to the technological superiority of American defense systems. This works better than central planning of development and the government does not get involved with the management of innovation. The government should be free to purchase unique, privately developed items when they represent an excellent value. Competing procurements on the basis of form, fit, and function will encourage innovation that yields better values in procurements. On the other hand, requiring a second source of a cloned product will work to assure these innovations are not available.

HISTORICAL CONCERNS

Privately developed proprietary items and components will always be sole sourced because defense logistical needs dictate one part for one application; i.e., competition between different technologies will introduce more complexity into the logistics function.

The government will be charged "excessive" prices because the market place is not providing the necessary price competition.

SOLUTIONS

The law should be amended to ensure that: if an item, component or process has been developed exclusively at private expense, the government must show that creating a second source will not discourage future private expense innovation by the developer of the item; that the market size justifies a second source so that more than one source will be clearly economically viable; and that prices paid for data and/or licensing to the developer are the commercial market value and provide incentives for future innovation.

Proprietary items developed at private expense that contribute to the system's design and manufacturing requirements and/or mission essential performance characteristics based on best value, should be exempt from the competition requirements.

Current law requiring dual sourcing should be repealed.

PRICE ONLY COMPETITION

THE ISSUE

Competition has become the prevalent strategy of the Government in its efforts to reduce defense procurement costs. As a result, the Competition in Contracting Act's goal of "full and open" competition has generally been interpreted to require competition based entirely on price, with quality and technology left unrewarded. The task of purchasing technologically superior systems, reliable replacement parts, and quality services has become dominated by the objective of increasing the percentage and dollar volume of competitive procurement actions in order to obtain the cheapest price. Too often this is done without consideration being given to the cost effectiveness of the competition.

DISCUSSION

In 1984 Congress passed the Competition in Contracting Act (CICA) in order to allow the Government to enjoy the presumed benefits of competition in the greatest possible number of its procurements.

On the whole, increased competition has resulted in significant savings for the Government, and industry vigorously supports competition when it is sensibly and appropriately applied. However, the increasing misuse of competition is threatening to result in more expensive and less reliable weapons, lower quality services, and a slowing of technological progress.

CICA recognizes that competition is not based on price alone and negotiated procurements are cited as a form of "full and open" competition. Negotiated procurements and "sole source proposals" are considered appropriate, and other-than-price related evaluation factors are acceptable criteria. However, regulations and management practices under CICA have made it extremely difficult for contracting officers to award contracts to other than the lowest bidder, and price has become the dominant criterion in source selection.

The impact of price-driven competition varies. Competitive prototyping for major weapon systems could result in the development of a superior system at a competitive price. However, DoD demands that research and development costs be shared by the contractor, coupled with the magnitude of those costs, results in companies having to forego participation in some competitions. Even the winner is taking an increased risk because of the far longer time it takes to recover the investment and make a profit. The longer time, the less likely that competition will permit the recovery of investment at all.

Price-only competition works to defeat the objective of technological superiority which is dependent on innovation. If price-only competition is used where there are significant variations in technical characteristics, there is a high probability that the Government will find itself in the position of choosing less advanced technology or an unrealistic bid. The first situation has an obvious consequence; the second has the potential to weaken the company that has responded too enthusiastically to price competition by submitting a bid price insufficient to provide an adequate return over time. Innovation is an expensive process, and in order for companies to continue to invest in the process, they must have adequate and timely return on their investments.

Both competition for its own sake and price-only competition affect the contractor-subcontractor relationship. The blanket pursuit of second sources for an item or process is being passed down to subcontractors in an effort to get good competition statistics. Reliable, quality suppliers are losing business so that the Government is able to meet its competition requirements. The contractor is not free to make subcontracting choices based on value and the integrity of the weapon system.

For specialized requirements such as research and development and professional and technical services, price-based competitions threaten the quality and effectiveness of the products and services being procured. Contracting officers and their technical counterparts need the freedom to make awards on the basis of quality, innovativeness, and other non-price factors, as well as cost reasonableness.

Finally, the overemphasis on price as the driving competition criterion will, over time, result in a disproportionate amount of Government business going to a relatively small number of low-cost contractors. As a consequence, fewer companies will be involved in defense work, resulting in less competition and, more importantly, a weakened defense industrial base.

HISTORICAL CONCERNS

During the past several years, the focus on competition has increased the number of new businesses doing business with the Federal government. Every military department and most civilian agencies have been able to demonstrate that competition has significantly reduced the overall costs of goods and services to the government, without compromising quality or schedule. Furthermore, there are sufficient provisions in current law and regulations to permit those limited circumstances when the government determines that it is necessary to limit competition to only one or a limited number of offerors.

SOLUTIONS

Congress should change the "full and open" standard under CICA to "effective competition". By so doing, it would make it clear that it does not endorse competition for competition's sake but seeks effective and appropriate competition that leads to real cost reductions, maintains quality, and encourages technological progress.

Government contracting authorities should be given greater freedom to use sole-sourcing or other non-competitive procedures where such procedures would result in a new technology or a new application of an existing technology, assure critical program integrity, or effect improved quality in products or services. Contracting agencies should be given increased flexibility to take a contractor's previous performance into account and to give preference to contractors with superior track records in quality and reliability.

The importance of quality in the source selection process should be recognized in law.

DEFENSE INDUSTRIAL BASE AND TECHNOLOGICAL ADVANCEMENT

THE ISSUE

America's security depends upon industrial development of new technologies which enable us to deter and defeat enemies whose forces far out number ours. Moreover, America relies on industry to respond in time of war by producing the arms and equipment our forces need in sufficient quantity and with sufficient speed to meet the threat. Since World War II, we have not had a national policy to ensure that these needs can be met.

BACKGROUND

During World War II, the War Resources Board had the responsibility to ensure that industry developed new technologies to counter the superior weapons of our adversaries. It also was responsible for converting peacetime industrial assets, such as automobile factories, to wartime use and creating other industrial production facilities which did not exist. Since the war, only the President and Congress have had the task of planning to meet the industrial needs of future conflicts.

The result is a lack of coordination between defense policy and the ability of industry to respond. No one has the responsibility to ensure the existence of needed technologies or the ability of industry to respond to the surging demands of any war. This failure of policy coordination was best demonstrated in 1980 in the extensive hearings held by the Readiness Subcommittee of the House Armed Services Committee, then chaired by Cong. Richard Ichord.

What the Ichord hearings showed then is still true today: industry could not expand its production to meet wartime demands in less than eighteen months. War reserves for the U.S. and our allies amount to less than thirty days' supplies. Fanciful war scenarios like the one described in Tom Clancy's novel Red Storm Rising predicate American victory on wartime resupply efforts which cannot be accomplished because the equipment and materials do not exist and cannot be produced in time. Thus, the President would be faced with the choice of losing or resorting to nuclear weapons in any war which lasted more than a few weeks.

Our adversaries have realized the value of coordinating industrial capabilities with defense needs. All of Soviet industry is integrated into plans for conventional and nuclear conflicts which provide for developing and sustaining the capabilities and capacities their plans require.

Even the Ichord hearings did not expose the other principal dangers posed by the lack of coordinated policies: the failure of Government to ensure the continuing independent research and development upon which our technological superiority depends.

For the past forty years, industrial investment in new technologies has been a foundation of our strategy of deterrence. Dr. Malcolm Currie, former Under Secretary of Defense for Research and Engineering best summarized the value of this independent research and development when he wrote:

> "An effective modern system of defense could not exist without such vital assets as aircraft, jet engines, radars, lasers, semiconductors, and microcircuits. Yet none of these technologies originated as a military requirement or specification - nor did most of the primary technologies that are the basis of today's national defense...the original ideas were conceived and the initial explorations carried out largely independent of specific military input, by industrial and academic researchers, as projects for the advancement of science or as initiatives designed to secure competitive advantage through innovation." (Armed Forces Journal International, September 1986)

Today's defense acquisition policy seems calculated to discourage companies from investing in IR&D. Ceilings on recovery of IR&D costs limit industry's recovery to about 40 cents on each dollar invested in IR&D. DoD's new profit policy specifically excludes IR&D from the contractor's costs used in calculating profits. Instead of encouraging contractors to take the risks needed to advance technology, penalties are imposed.

In the recently passed Continuing Resolution on Appropriations for Fiscal 1988 Congress directed DoD to report on the readiness of the industrial base by May of 1988. DoD's report will provide Congress with a foundation for further action.

Further attention to the industrial base problem is being focused through discussion of S-1892, Sen. Alan Dixon's "Industrial Base Preservation Act". Sen. Dixon has characterized his bill as a "point of departure" for debate on the industrial base. The bill proposed clarifying the duties and responsibilities of the Undersecretary of Defense for Acquisition in respect to developing policies to ensure the adequacy of the industrial base. The bill also establishes controls over purchasing from foreign sources to maintain domestic sources for critical goods and services.

Undersecretary of Defense for Acquisition Dr. Robert Costello has, with Undersecretary for Policy Fred Ikle, developed a series of readiness categories which are linked to defense postures to ensure that industry's readiness is keyed to the nation's reactions to world events. This, along with Costello's plans for industry-DoD committees to study industrial base and technology base issues will help develop the policies which must be implemented.

The Dixon bill, Dr. Costello's initiatives, and the provisions of the 1988 Defense Authorization Act each recognize the need for incremental improvements in the development and maintenance of an adequate defense technology and industrial base. Initiatives focused on the linkage between war fighting ability and industrial capability are the keys to bringing all of these together into a cohesive plan for industrial support of national security needs.

Investments in technology represent half of the needed policy direction. Technology can only be translated into war fighting capability if the industrial resources exist to meet "surge production" demands (i.e. the ability to increase production rates of weapons already designed and on order) and mobilization (which is the ability to multiply the volume of production to meet wartime demand).

America has deficiencies in both surge and mobilization capacities at both the supplier and manufacturer levels. The conflict between the cost of maintaining excess capacity in peace time and the need to respond quickly at the outset of war has never been resolved.

"Defense Guidance" is the policy definition of both the threat we face and the means to meet it. It is decided upon and signed by the President as a direction to the Secretary of Defense. It should also form the basis for a coordinated defense/industrial plan.

A combination of legislation and regulations are needed to provide policy coordination between national security and industrial capability and to ensure sufficient investment in innovative technologies.

HISTORICAL CONCERNS

The principal argument voiced by opponents to solving the industrial base problem has been the cost. Any solution which stabilized defense industrial resources at wartime levels clearly will have major costs both directly, in budget impact, and indirectly in possible interference in peacetime markets through production of goods and services not needed by the Government. An accompanying argument is that the free market should maintain the industrial resources needed for defense

and that unprofitable companies should be allowed to fail regardless of national security impact. However, the evidence of the past forty years shows that commercial markets do not support defense needs.

Another argument is that modern war plans only envision the use of resources in being at the outset of the conflict. The intention to limit intra-theater nuclear weapons and strengthen the conventional deterrent belies that argument.

Yet another concern is that contractors will not invest wisely and recover too great a level of costs against government contracts if limitations are not placed on recovery of investment costs such as IR&D/B&P. We are unaware of any evidence to support this objection.

SOLUTIONS

Every two years, the Secretary of Defense should be required to compare Defense Guidance to industrial capability to produce and support the equipment and materials necessary to meet the threat in accordance with the strategy the Guidance contains. This comparison should be reported to the chairmen of both Armed Services and Appropriations Committees in a report which also contains a plan to ensure that the essential industrial resources are built and maintained.

Independent research and development must be rewarded and increased. Profit and investment policies should be changed to specifically provide profit on IR&D.

MANDATORY UNCOMPENSATED OVERTIME

THE ISSUE

Mandatory uncompensated overtime is defined as those hours in excess of the standard 40-hour workweek that professional employees, who are exempt from the Fair Labor Standards Act, are required to provide without additional compensation. Mandating that these exempt personnel must work uncompensated overtime in fulfilling a U.S. government contract runs contrary to established national labor policies and violates the intent and spirit of OMB policy letter number 78-2, dated March 29, 1978, as implemented in the Federal Acquisition Regulations (22.1101 et seq.).

BACKGROUND

As a result of the implementation of the Competition in Contracting Act (CICA), a practice has recently arisen in the professional and technical services industry that threatens to erode the long-term dedication and commitment of its personnel doing work in the defense sector and which is inconsistent with longstanding national labor policy and labor management relationship principles. The practice involves, for those personnel, a mandatory workweek in excess of 40 hours without additional compensation for these excess hours. It is being used to secure a cost advantage in bidding federal contracts, a practice called "mandatory uncompensated overtime".

While CICA has brought about the desired increase in competition, it has resulted in greater emphasis being placed on those award criteria which have encouraged price to become the overwhelming and deciding factor in the source selection process at the expense of quality. Given this environment, an increasing number of companies, in responding to DoD RFPs, have adopted the use of mandatory uncompensated overtime as a technique to create the appearance of lower costs. The use of this practice has introduced a new form of "gamesmanship" into the competitive process. Typically, bids are being submitted for professional services at a constant annual salary for a workweek in excess of 40 hours with the result that the hourly labor rate is lower than that based on a normal 40-hour workweek. Once a company wins a contract based on a proposal which includes mandatory uncompensated overtime, its employees are forced to work the extra hours proposed without additional compensation because of Truth in Negotiations act certifications submitted by the company at the time of contract award.

The government had earlier reflected its concern over the mistreatment of professional employees when it issued OMB policy letter number 78-2 (entitled "Preventing Wage Busting

for Professionals"). At that time, the concern focused on successor contractors reducing the compensation of professional employees that were hired from the incumbent contractor and on the need to prevent such inequities as "wage busting". Extending the workweek without additional compensation is the most current version of wage busting. In essence, the practice of bidding lower hourly rates through the use of mandatory uncompensated overtime to win a government contract reduces the employee's effective compensation rate. This is a "wage busting" technique contrary to the provisions of FAR 22.1101.

The concept of a standard workweek of 40 hours has been present in labor management relations in the United States for decades and has been a principle of public policy reflected in legislation.

The U.S. government, as an employer, has legislatively established the standard of the 40-hour workweek for all its employees, including those engaged in professional, scientific, or technical activities, and such employees are entitled to premium pay for hours worked in excess of the basic workweek (5 U.S.C. 5504, 5542, 6101). The 40-hour workweek standard has been established legislatively for non-governmental workers by the enactment of the Fair Labor Standards Act for workers covered by the Act (29 U.S.C. 207). The Act, however, is not applied to exempt professional, management, and administrative personnel. This category of personnel comprises a large portion of the labor costs involved in government contracts for professional and technical services and are the ones being subjected to mandatory uncompensated overtime.

The professional and technical services industry favors competition, both technical and price, and strongly believes that the government should receive the best value for its dollar. However, the practice of mandatory uncompensated overtime is having a negative impact on the government's ability to obtain quality professional services and on the professional services industry as a whole. These impacts are significantly affecting three important areas: procurement, productivity and labor. The minimum foreseeable results are increased problems for source evaluation personnel attempting to perform price analysis on dissimilar and unlike bids, a reduction in the quality of work with serious impacts in safety and reliability areas, and a migration of highly-skilled professionals away from the defense industry thereby weakening the nation's defense mobilization base.

The practice of mandatory uncompensated overtime tests the shared responsibility of the industry and the government to salaried professional employees. There is an urgent need to preserve the contributions and working conditions of professional and technical services personnel by establishing a procurement methodology for professional and technical services which uses the person-year as the basis for cost proposal preparation and for evaluation of these proposals. Monthly, weekly or hourly rates can then be determined by a common standard. Based on the national standard of a 40-hour workweek, the evaluation should be performed on the basis of 2080 hours per year.

HISTORICAL CONCERN

The Senate Armed Services Committee Report on the National Defense Authorization Act for FY 1988 and 1989, May 8, 1987 (report 100-57, page 14) recognizes uncompensated overtime as a practice contributing to the deterioration of government-industry relations.

The Senate Appropriations Committee in its December 4, 1987 report on the Department of Defense Appropriation Bill, 1988, (report 100-235, page 101) cited the growing concerns over firms bidding mandatory uncompensated overtime and requests DoD to prepare a report on and evaluation of mandatory uncompensated overtime. The report is to be submitted to the Committee by April 15, 1988.

DoD in response to congressional queries has taken the position that it neither encourages nor discourages the use of mandatory uncompensated overtime and that the issue involves hours of work and compensation which are a matter of concern only to the employer and the employee.

SOLUTION

The Committee in exercise of its oversight function should communicate its view to DoD that it should take regulatory action through the Federal Acquisition Regulations to assure that mandatory uncompensated overtime is not permitted and that the evaluation of professional and technical services contract proposals should be performed on the basis of the 40-hour workweek/2080 person-year standard.

IMPLEMENTATION OF COMMERCIAL PRODUCT AND PRACTICES ACQUISITION PROGRAM

THE ISSUE

There are three issues. First, DoD has yet to implement with any degree of effectiveness the Packard Commission recommendations and Congressional requirements that DoD buy, to the maximum extent practical, existing commercial products instead of products manufactured to military specifications. Second, DoD has yet to implement Packard Commission recommendations that "commercial practices" be used when buying products and services. Third, there is a high degree of inconsistency in buying procedures for commercial products within the government.

BACKGROUND

Implementation of a comprehensive commercial product acquisition program that relies on "off-the-shelf" products has been recommended by various government panels for over fifteen years. Most recently, Congress passed legislation that requires DoD to purchase, to the maximum extent practicable, commercial products and other non-developmental items. In addition, the adoption of commercial buying practices is viewed as a means of reducing costs, enhancing the defense industrial base, and increasing the number of available competitors by reducing the administrative burdens for both the government and commercial product vendors.

To date, DoD procurement policy makers have made little effort to change the actual buying practices of field level procurement personnel. Visible support for innovative or alternative acquisition techniques has been non-existent. Acquisition regulations still favor traditional techniques, training is unavailable, and positive recognition and other personnel incentives have not been established.

Commercial product acquisition should be viewed as an acquisition tool to be used when appropriate in order to provide the government with lower cost, higher quality products that can meet government needs. Its use requires acquisition planning and trained procurement personnel that have the full support of supervisors and policymakers.

HISTORICAL CONCERNS

The concerns which DoD may express include problems of logistical support such as configuration control, standardization, replacement parts, and maintenance; performance trade-offs including operation in a specific military environment; and evaluation difficulties due to the desirability of determining life-cycle costs, the comparison of similar but not identical products, and difficulties associated with writing product descriptions that do not favor a particular product.

While each of these concerns can indeed be valid, proper use of commercial product acquisition techniques including proper acquisition planning can help assure that military needs are met in the most cost effective manner. Commercial products need not be purchased in every situation; what is needed is the realization that commercial products can often meet actual needs in the most cost-effective manner.

SOLUTIONS

The solution to this problem is increased attention by DoD procurement management that results in changes in acquisition regulations, procedures, training and incentives. In addition, Congress needs to ensure the proper amount of attention is given commercial product acquisition through oversight of those efforts.

In particular, DoD should establish by regulation a mandatory uniform government contract for commercial products to the maximum extent allowed by existing laws.

RESTORING TRUST

There are few more fundamental obligations of the federal government than that of providing the military force essential to guarantee national security. In recent years, however, we have seen an almost total breakdown of trust and confidence between the Congress, the Executive Branch and the defense industry. This lack of trust has led to serious problems throughout the entire defense acquisition process putting into question our very ability to meet national security objectives.

At issue is not only dollars spent, but the confidence of the American people in our ability to provide effectively and resourcefully for our nation's defense. We must begin to restore public confidence by reestablishing trust among Congress, DOD and the industry. Although we have unique roles in the acquisition process, we have a common goal in providing for our national defense.

First and foremost we need to address ways and means to rebuild trust and confidence in the system, to give people the responsibility they need to get their job done effectively and to be held accountable for their actions. The fundamental objective should be to restore the cooperative environment and relationships needed to accomplish national security objectives. The issues addressed require more than the short term "band-aid" regulatory and legislative fixes implemented in the last several years. Improving relationships is the shared responsibility of Congress, the DoD and the Defense Industry.

RESTORING TRUST IN THE DEFENSE ACQUISITION PROCESS

THE ISSUE

The level of trust and cooperation among participants in the defense acquisition process -- Congress, DoD and the defense industry -- is dangerously low. The rhetoric has framed a public perception that none of us can be trusted with the highest of national obligations; to protect our citizens and our national interests. The national security implications of our inability to marshal public support for and confidence in our joint efforts are dire.

BACKGROUND

The lack of trust in the defense acquisition process has diverted time and energy into unproductive activity, obscured lines of authority and fields of expertise, added significant costs to defense procurement, impeded technological advances, and extended our schedules.

Congress, DoD and industry have added layer upon layer of auditors, investigators and regulators. The result is that we often generate -- and pay for -- more paper than product. A defense budget that is shrinking in real terms is whittled away by efforts that produce no tangible goods.

Mistrust has also misdirected the attention of Congress to line-item scrutiny -- attentions that would be better focused on more clearly defining national strategic objectives. With Congress telling DoD how to do its job, the DoD often reacts by telling industry how to do their job. The result is significant in terms of efficiency and lower morale.

Despite the unique relationships among Congress, DoD and the defense industry, we dare not be adversaries. Yet, that is the relationship we are on the verge of institutionalizing. Congress, DoD and the defense industry must work together to prevent a permanent polarization of the defense acquisition process and avoid the long-term adverse consequences to the

SOLUTIONS

Publish a Senate Armed Services Committee "public statement" stressing the urgency of restoring trust and cooperation among Congress, DoD and the defense industry.

Recognize the progress made by the defense industry in its wide-spread efforts at improved self-governance and productivity -- the Defense Industry Initiative (DII).

Discontinue criminalization of inadvertent errors, mistakes, and normal business issues which were previously resolved by administrative means.

Establish a clear acquisition strategy and delineate the broad boundaries within which DoD and the defense industry may work cooperatively and creatively to achieve their mutual goal of meeting challenges to our nation's security.

SUSPENSION AND DEBARMENT

THE ISSUE

The Federal Acquisition Regulations do not ensure due process to contractors suspended or debarred from being awarded government contracts. While some agencies have issued procedures which make a better attempt to provide contractors due process, these procedures are themselves insufficient, and are not uniform.

Currently, the Federal Acquisition Regulations provide minimal due process to contractors accused of being non-responsible. Proposed Federal Acquisition Regulations amendments published in the Federal Register this summer would weaken, rather than strengthen, due process protection. For instance, these proposed regulations would require an automatic and immediate government wide suspension prior to any right to be heard whenever any federal agency issues a Notice of Proposed Debarment against a contractor.

In addition, the mere threat of suspension can be used, or misused, by a government agency as a powerful weapon against its contractors. In a letter dated September 24, 1987, Representative Les Aspin wrote to Deputy Secretary of Defense, William H. Taft IV:

> "It appears, however, that in some instances the department is holding the threat of a suspension over the heads of contractors being investigated on suspicion of fraudulent or other criminal activities. In so doing a company is often faced with agreeing to certain fines and penalties, even if innocent, in order to reach a settlement so the company will not be suspended. Most companies cannot afford to take the chance of being suspended, as a failure to receive contract awards for even a short period can affect their very existence. As such the department's actions can amount to coercion, and could effectively force an innocent contractor to agree to an admission of guilt and payment of a fine to avoid the more onerous sanction of suspension."

BACKGROUND

The power to suspend and debar a contractor and its affiliates from receiving further federal contracts is the power to deny those contractors and their employees of their livelihoods. In effect, the power to suspend and debar is the power to destroy.

These suspension and debarment powers are currently exercised administratively, without the basic safeguards which Americans

expect to receive from their legal system. Currently, a company can be suspended -- and thereby denied its livelihood -- without notice, without a hearing, without being able to examine the evidence presented against it, without being able to cross-examine the witnesses testifying against it, and without having its fate decided by an independent decision maker.

Under Federal Acquisition Regulations, each agency is permitted to establish its own suspension and debarment procedures. Accordingly, there is no uniformity in these matters. For instance, while some agencies' procedures permit some limited discovery, other agencies do not even permit a contractor the right to confront the witnesses appearing against it. The only uniformity provided at present are the suspension and debarment procedures set forth in the Federal Acquisition Regulations. It is to these that we address the remainder of our comments.

Under the Federal Acquisition Regulations, the imposition of a suspension order is an ex-parte proceeding. The agency internally considers its own evidence. The contractor has no right to be heard or even to be informed that a suspension proceeding is underway. It is only after a suspension is ordered, and thus after further government contracts are being denied the contractor, that the contractor has an opportunity to be heard.

If an agency decides to suspend a contractor, then a suspension order is issued and the suspended contractor receives notice of the suspension. This notice only provides a general description of the nature of the "irregularities" so that none of the Government's evidence is disclosed to the contractor. A Notice of Intent to Debar must state the "reasons" and "causes" of the proposed debarment, but need not advise the contractor of the facts considered material to the debarment.

Without being provided the opportunity to review the evidence presented against it and without the opportunity to confront the witnesses who may have testified against it, the contractor is then given thirty days to submit its evidence to the suspending/debarring official.

The suspending/debarring official then decides whether or not to allow the contractor a hearing. A hearing may be denied for any of the following reasons: (1) the suspension was based on an indictment, or the debarment was based on a conviction or judgment; (2) the Department of Justice believes that "the substantial interests of the government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced", or (3) the suspending/debarring official does not believe that the contractor's submission raises a genuine dispute

over material facts. Even where a hearing is allowed, there is no discovery. While the contractor has the right to present its own evidence and to cross examine "any person the agency presents", the contractor cannot subpoena witnesses and still cannot see the evidence or cross-examine the witnesses originally brought to the suspending official by the agency when it was issued its suspension.

Finally, there are no standards governing the qualifications or independence of the suspending official. The "suspending official" may be both "prosecutor" and "judge" in the same case.

It is true that an Agency may voluntarily choose to share its evidence with the contractor, may agree to hold a hearing, and may voluntarily bring all its witnesses to the hearing. It is also true, however, that an agency might do none of these things. Different agencies have enacted different procedures -- but none of these procedures provide sufficient due process rights and procedures to contractors.

We need a uniform approach which guarantees contractors essential rights such as being able to view the evidence marshalled against them, as being able to cross-examine their accusers, as being assured that their fate will not be determined on the basis of hearsay, as being assured that their case will be reviewed by an independent judicial officer before they may be punished by a suspension from future federal contracts.

The agencies justify their current procedures on the basis that the contractor's interests are outbalanced by the Government's right to do business with responsible contractors. Additionally, the more serious due process deficiencies occurring during suspensions have been justified on the theory that suspensions are "temporary" matters.

Two very real problems have arisen. First, as a practical matter, the suspension from government business for even a very short period of time can cripple or even kill a business. Second even a "temporary" suspension can last up to 18 months or until the end of any legal proceedings -- whichever is longer. The number of suspensions and debarments of federal contractors has grown dramatically in the last few years. These increases along with a new widespread recognition of the very minimal due process rights which are provided to affected contractors has developed a foul atmosphere throughout the defense industry. Unless defense contractors can be assured of basic due process, the broad defense industrial base which has made this country strong will erode -- and talented defense contractors will begin applying their talents elsewhere.

It has been recognized for some time that the minimal due process procedures for administrative suspensions and debarment were neither just nor in the best interest of this government and its people. In 1982, the American Bar Association House of Delegates adopted a resolution urging Congress to enact legislation incorporating some 36 principles as set forth in a proposed Debarment and Suspension Reform Act. This proposed Act had been drafted by the ABA's Section of Public Contract Law, Committee on Debarment and Suspension, after a year-long study. The proposed Act recommended the establishment of an independent Debarment and Suspension Board, and various other procedural changes including; the right to notice and a hearing prior to a suspension or debarment, the right to discovery, the right to cross-examine witnesses, and the right to a full evidentiary hearing before an independent administrative law judge.

It has been five years since that recommendation was made. Indeed, if the changes to the FAR proposed by the FAR Council on July 31, 1987 are any guide to the future, there is good reason to be more concerned.

In the past five years, however, one thing has occurred which make the implementation of these necessary reforms much easier and much less costly. Effective October 1982 Congress established the United States Claims Court. That court is comprised of independent judges experienced in federal procurement matters. It has rules of procedure, discovery and evidence already in place. It regularly hears urgent pre-award injunction cases and thus is already equipped and experienced in expeditiously handling difficult procurement matters and issues such as the ones raised by suspension and debarment.

HISTORICAL CONCERNS

The agencies justify their current procedures on the basis that the contractor's interests at stake are small and outbalanced by the Government's right to do business with responsible contractors. Additionally, the more serious due process deficiencies accorded during suspensions have been justified on the theory that suspensions are "temporary" matters.

SOLUTIONS

To ensure due process, we propose that Congress grant the United States Claims Court exclusive jurisdiction over all suspension and debarment matters. Suspension and Debarment

hearings may be held on an expedited basis with full due process afforded all interested parties. The interests of the United States in dealing only with responsible contractors can thereby be achieved without subjecting government contractors to the increasing possibility of being thrust into a proceeding where a mere accusation can do immediate (and possible irreparable) harm to the contractor.

Alternatively, Congress could enact certain minimal due process standards for suspension and debarment proceedings. These same standards could be adopted regulatorally by all agencies or by DoD alone.

CORPORATE SELF-GOVERNANCE IN THE DEFENSE INDUSTRY

DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS AND CONDUCT

THE ISSUE

Over the last several years, many in Congress, industry, and the media have questioned the effectiveness of the Government's controls over contractor activities. New laws, regulations, and management practices have sought to ensure adequate oversight of agencies' and contractors' expenditure of tax dollars. This new emphasis on oversight has resulted in an ever-increasing burden of audits and inspections. DoD had justified the burden, in part, by citing the instances where contractors have violated procurement laws and pled guilty to criminal charges of such violations. The defense industry believes that the most effective way to address this set of issues is by emphasizing self-governance of defense contractors, and an energetic program has been developed to do that. At issue is whether DoD will modify its regulatory activities to reflect this enhanced corporate self-governance activity.

BACKGROUND

The Packard Commission emphasized in its final report to the President the need for enhanced defense contractor corporate self-governance. In response to these recommendations, the defense industry has created the Defense Industry Initiative on Business Ethics and Conduct. There are now 45 company signatories to this Initiative, each of which has agreed to:

1. Develop a written code of conduct;
2. Distribute the code to all employees and orient new employees with regard to the code;
3. Establish ethics training programs and related programs in contract compliance procedures;
4. Establish an ombudsman or hotline to receive employee concerns about corporate compliance with procurement laws and regulations;
5. Establish a procedure for evaluating the appropriateness of voluntary disclosure in appropriate circumstances;
6. Participate in industry-wide Best Practices Forums; and,
7. Participate in a program of public accountability, whereby each signatory completes a questionnaire on the extent to which it has implemented the initiative principles, and an external independent body compiles and issues publicly the results of these questionnaires.

A report issued in January, 1988, by the Ethics Resources Center shows that the Defense Industry Initiative has been exceedingly successful, and each signatory has fulfilled its commitments as outlined above.

HISTORICAL CONCERN

Government has historically been skeptical that corporate self-governance can substitute for government audit and review.

SOLUTION

DoD should review all regulations and management practices to determine which oversight activities can be reduced in reliance on industry self-governance. A test of reduced oversight should be conducted to determine the degree to which industry's efforts are succeeding.

TRUTH IN NEGOTIATIONS

THE ISSUE

In the last four years we have seen a criminalization of defense contract administration. The Government contract environment has become adversarial and confrontational. Government employees ("Government") have adopted practices which appear to dare a contractor to set a fair price and make an honest profit. The businessman's faith that buyers and sellers should deal fairly with each other is being eroded. In negotiating contract prices, the Government demands all the offeror's data while refusing to share the basis of its own conclusions. As businessmen become disillusioned with the Government as a customer, they will turn their skills to fairer and more profitable markets; the committed defense industrial supply base will shrink. A first step towards restoring mutuality to the Government buyer - seller relationship requires making the Truth in Negotiations Act and its related regulations a cooperative undertaking.

BACKGROUND

Truth in negotiations should be a two-way street. The purpose of the Truth in Negotiations Act is to ensure that the Government has the same level of knowledge as the contractor when entering price negotiations and thus assure that the Government enters into contracts at fair and reasonable prices. To comply with the law, offerors are required to submit cost or pricing data to the Government. This cost or pricing data are required to be certified by the offerer to be complete, accurate and current at the time the price agreement is made. "Cost and pricing data" means all facts that prudent buyers and sellers would reasonably expect to significantly affect price negotiations.

The Government performs a price and cost analysis on proposals submitted to it. Price analysis may be accomplished in various ways including the following:

1. Comparing of price quotations submitted;
2. Comparing prior quotations and contract prices with current quotations for the same or similar products;
3. Using rough yard sticks;
4. Comparing prices set forth in published price lists; or
5. Comparing proposed prices with cost estimates independently done by the Government.

Cost analysis is a process which the Government engages in when it reviews and evaluates an offeror's cost data. This process includes the appropriate verification of cost data, the evaluation of specific elements of costs, and the projection of these data to determine the effect on price of factors such as the following:

1. The necessity for certain costs;

2. The reasonableness of the dollar amount estimated for the necessary cost;

3. Allowances for contingencies;

4. The basis used for allocation of indirect cost; or

5. The appropriateness of allocations of particular cost to the proposed contract.

Government cost analyses include verification that the offeror's cost submissions are in accordance with cost principles, comparisons with previous costs and forecast of future trends in cost based on historical cost experience.

Except for comparing the price of competing quotations, all of the cost and price analyses described above are performed on data supplied by the offeror.

The Government refuses to supply contractors with audit, pricing and technical reports. The Government does not believe that truth in negotiations should be a two way street. FAR 15.803 states:

> "Since information from sources other than an offeror's or contractor's records may significantly affect the Government's negotiation position, Government personnel shall not disclose to an offeror or contractor any conclusions, recommendations, or portions of administrative or contracting officer or auditor reports regarding the offeror's or contractor's proposal without the concurrence of the contracting officer responsible for negotiation. This prohibition does not preclude disclosing discrepancies of fact (such as duplications, omissions and errors in computation) contained in the cost or pricing data supporting the proposal."

The business standard which should be applied in all negotiations between the Government and an offeror is "fair prices fairly arrived at," with a mutual commitment to fundamental fairness, - e.g., if one side is required to disclose its data, both sides are required to disclose their

data. If doing business with the Government continues to become less and less attractive, businessmen will seek other avenues on which to expend their entrepreneurial skills and resources -- this will surely erode the industrial base on which the Department of Defense must rely for meeting its needs.

SOLUTIONS

Contracting officers should be required to provide the Contractor with the Government's Audit and Pricing reports. The reports generally comment on the data provided by or made accessible by the contractor and may question the contractor's cost conclusion(s). The reports should be provided to the Contractor within five (5) days of their completion and at least ten (10) days prior to the start of negotiations.

The Government should specifically identify to the Contractor the data it considers material to the price agreement. Only material data so identified may give rise to a defective pricing claim. It the Government questions a cost proposed by the Contractor, the Government's negotiators shall provide the Contractor with all data relating to the specific cost questioned.

The Government shall certify to any small business required to submit cost and pricing data that all its cost and pricing data has been supplied to the Contractor and that such data is complete, accurate and current.

Illustrative bill language implementing the Report of the Industry Advisory Group to the Subcommittee on Defense Industry and Technology, Senate Armed Services Committee

DRAFT: FEBRUARY 5, 1988

Based on the report of the Industry Advisory Group, the following implementing package has been prepared. This draft, which consists primarily of bill language, is an effort to illustrate the Advisory Group's policy recommendations with specific provisions in order to stimulate and facilitate comment on the recommendations in the Advisory Group's Report. This draft is not, however, a part of the Advisory Group's Report. Because this draft is for illustrative purposes only, and deals with several complicated matters in summary fashion, readers should focus on the text of the Advisory Group's Report when reviewing this draft.

The Advisory Group's Report has not been approved by the Subcommittee. The provisions in this draft package do not reflect the views of the Subcommittee or the staff; nor do these provisions necessarily reflect the views of members of the Advisory Group.

The provisions are arranged in the order in which the related recommendations appear in the Advisory Group's report. There has been no effort at this point to develop a single, comprehensive bill.

1. DRAFT RELATING TO RECOMMENDATION ENTITLED "QUALITY OF THE PROCUREMENT WORKFORCE/ATTRACTING COMPETENCE IN KEY POSITIONS"

SEC. ___. DEPARTMENT OF DEFENSE PROCUREMENT PERSONNEL

(a) IN GENERAL.—Chapter 85 of title 10, United States Code. is amended by adding at the end the following:

"§ 1625. Career Acquisition Management Internship Program

"(a) ESTABLISHMENT.—The head of each agency named in section 2303 of this title shall establish a Career Acquisition Management Internship Program (hereafter in this section referred to as the 'Program').

"(b) PURPOSE.—The purpose of the Program is to promote the recruitment and training of highly qualified persons to serve as contracting officers or as senior acquisition managers.

"(c) PROGRAM STRUCTURE.—The head of each agency referred to in subsection (a) shall prescribe a detailed structure for the Program that insures appropriate education. training, and rotating work assignments for interns in the Program. The Acquisition Executive of the agency shall administer the Program.

"(d) PROFESSIONAL STANDARDS.—The head of each agency referred to in subsection (a) shall consult with the Administrator of the Office of Federal Procurement Policy in the formulation of the Program of such agency in order to insure that the minimum standards of professional accreditation, training, conduct, and management established for interns in such Program are at least as stringent as those that are established for Federal employees outside the Department of Defense who are training in Government contracting.

"(e) RECRUITMENT OF INTERNS.—The head of each agency referred to in subsection (a) shall recruit persons for appointment as interns in the Program each fiscal year.

"(f) SELECTION OF INTERNS.—Interns in the Program shall be selected from among graduates of institutions of higher education who demonstrate, through any combination of competitive written examination, oral interview, academic standing, or course of study, a special potential for excellence as a contracting officer or senior acquisition manager.

"(g) MOBILITY AGREEMENT.—Each intern in the Program in an agency referred to in subsection (a) shall execute a written agreement to accept the appointment or successive appointments of the head of the agency to a position or positions as a contracting officer or senior acquisition manager at any location for a period of ___ years.

"(h) EXEMPTIONS FROM REDUCTIONS IN FORCE.—The head of an agency may not terminate the employment of an intern in the Program in carrying out a reduction in force in the agency unless authorized by a law specifically referring to the interns in the Program. This subsection does not limit the authority to remove an intern for cause.

"(i) RECORDS.—The head of each agency shall maintain a record of the assignments, professional progress, and career development of all participants in the agency's Program and of all contracting officers and senior acquisition managers of the Federal Government who completed the requirements of the Program. The head of the agency shall furnish information contained in such record to the Administrator of the Office of Federal Procurement Policy upon the request of the Administrator.

"(j) ACTIVE DUTY MILITARY PERSONNEL.—Members of the uniformed services on active duty may not be interns in the Program. This subsection does not prohibit such personnel from serving as contracting officers.

"§ 1626. Defense Acquisition Management Service Corps

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish within each military department and the Defense Logistics Agency an Acquisition Management Service Corps (hereafter in this section referred to as the 'Service Corps').

"(b) ELIGIBILITY.—A person who has served in an acquisition management position in the grade of GS–15 (or its equivalent) or higher or in the Senior Executive Service shall be eligible for appointment in the Service Corps.

"(c) APPOINTMENT.—The Secretary of a military department or the head of the Defense Logistics Agency may appoint an eligible person in the Service

Corps in such department or agency after review and examination of his job performance, education, professional training, experience, and other relevant qualifications.

"(d) PAY.—The Secretary of a military department or the head of the Defense Logistics Agency shall fix the rates of pay of members of the Service Corps in such department or agency without regard to civil service laws.

"(e) PERFORMANCE REVIEW.—The Secretary of a military department or the head of the Defense Logistics Agency shall review the job performance, career development, and continuing education and training of each member of the Service Corps in such department or agency at least once each year, and shall consider such member for advancement to a more responsible available position at least once every two years.

"(f) INCENTIVE AWARDS; BONUSES.—Members of the Service Corps shall be eligible to receive any incentive award, performance award, and bonus available to members of the Senior Executive Service.

"(g) SABBATICAL.—Members of the Service Corps may be given sabbatical leave for the purpose of pursuing a program of advanced education leading to an accredited degree in a field or area of study directly related to their professional duties.

"(h) PRIVATE SECTOR INTERNSHIP.—The Secretary of Defense may authorize members of the Service Corps to perform an internship with a Government contractor for a period of not more than one year.

"(i) OTHER BENEFITS.—Members of the Service Corps shall be entitled to all benefits and rights that are available to other employees of the Federal Government unless superseded by the provisions of this section.

"(j) MOBILITY AGREEMENT.—Each member of the Service Corps in a military department or the Defense Logistics Agency shall execute a written agreement to accept any appointment or successive appointments approved by the Secretary of Defense to any acquisition management position in the Department of Defense at any location as long as the member is a member of the Service Corps. No member may be appointed to a position in a military department or a Defense Agency without the concurrence of the Acquisition Executive of such department or agency.

"(k) FAILURE TO ADVANCE.—A member of the Service Corps of a military department or the Defense Logistics Agency may be discharged from the Service Corps upon failure to be selected for advancement to a more responsible available position such number of times as the Secretary of such military department or the head of such agency may prescribe. A person discharged from the Service Corps under this subsection shall, upon discharge, be subject to the same civil service laws as are applicable to persons not in the Service Corps.

"(l) RESIGNATION.—A member of the Service Corps may resign from the Service Corps at any time unless such member is serving a period of obligated service resulting from a sabbatical authorized under subsection (g).

"(m) ADVISORY BOARD.—(1) The head of a military department or the head of the Defense Logistics Agency, as the case may be, shall appoint an advisory board on the selection and management of the Service Corps of such department or agency. The members of such advisory board shall be appointed from among members of the Service Corps nominated by the Acquisition Executive of such department or agency.

"(2) The advisory board of a military department or the Defense Logistics Agency shall make recommendations to the Secretary of such department or the head of such agency on the selection, performance reviews, and promotions of members of the Service Corps. The board shall meet at the call of the Acquisition Executive.

"(n) SIZE OF SERVICE CORPS.—The size of the Service Corps shall be fixed by the Secretary of Defense in consultation with the Acquisition Executives of the military departments and appropriate Defense Agencies.

"(o) CODE OF PROFESSIONAL ETHICS.—All members of the Service Corps must subscribe to a code of professional ethics prescribed by the Secretary of Defense.".

(b) TABLE OF SECTIONS.—The table of sections at the beginning of such chapter is amended by adding at the end the following:

"1625. Career Acquisition Management Internship Program.
"1626. Defense Acquisition Management Service Corps.".

[ADAPTATION OF S.1477, "THE FEDERAL SCIENCE, TECHNOLOGY, AND ACQUISITION REVITALIZATION ACT OF 1987" REFERRED TO IN THE RECOMMENDATION:]

SEC. ___. ALTERNATIVE MANAGEMENT SYSTEMS FOR SCIENTIFIC, TECHNICAL, AND ACQUISITION PERSONNEL

(a) IN GENERAL.—(1) Title 5, United States Code, is amended by inserting after chapter 55 the following new chapter:

"CHAPTER 56—ALTERNATIVE MANAGEMENT SYSTEMS FOR SCIENTIFIC, TECHNICAL, AND ACQUISITION PERSONNEL

"§ 5601. Purposes

"The purposes of this chapter are—

"(1) to enable the Federal Government to attract, retain, motivate, and improve the skills of scientific and technical employees of the Government and of the Federal Government acquisition work force;

"(2) to improve the quality of scientific, technical, and acquisition activities of the Federal Government and the quality of laboratories operated by the Federal Government; and

"(3) to improve the overall ability of the Federal Government to perform scientific and technical activities and to conduct its acquisition programs more efficiently.

"§ 5602. Definitions

"For the purposes of this chapter—

"(1) 'acquisition employee' means an employee assigned to perform duties relating to acquisitions, including an employee serving in a managerial or supervisory capacity who—

"(A) has considerable knowledge in acquisition program management, contracting, business management, financial management, production, logistics, quality assurance, or a related field; or

"(B) has completed or is currently pursuing a baccalaureate degree at an institution of higher education in an acquisition-related discipline;

"(2) 'agency' has the same meaning as provided in section 5721(1) of this title, except that the term does not include the government of the District of Columbia;

"(3) 'alternative personnel management system' means an alternative personnel management system established under section 5603 of this title;

"(4) 'Director' means the Director of the Office of Personnel Management;

"(5) 'employee' has the same meaning as provided in section 2105 of this title, but does not include a prevailing rate employee (as defined in section 5342(a)(2) of this title);

"(6) 'pay structure' means a range of basic pay consisting of minimum and maximum rates;

"(7) 'scientific and technical employee' means an employee, including an employee serving in a managerial or supervisory capacity—

"(A) who—

"(i) is required to have an advanced level of knowledge in one of the mathematical, computer, physical, or natural sciences or in chemical, electrical, mechanical, or other engineering and is usually expected to have acquired such advanced level of knowledge in an extensive program of specialized academic instruction and study in an institution of higher

education (rather than in a program of general academic education, a program of apprenticeship, or a program of training in the performance of routine mental, manual, mechanical, or physical activities); and

"(ii) is engaged in the performance of work which consistently requires the exercise of discretion and judgment and is of such character that the output or other result of such work cannot be standardized in relation to any period of time; or

"(B) who has completed an extensive program of specialized academic instruction and study described in clause (A)(i) and is performing related work under appropriate direction or guidance to qualify the employee as a scientific and technical employee described in clause (A);

"(8) 'senior scientific, technical, and acquisition employee' means a scientific and technical employee, acquisition employee, or other employee of an agency organization referred to in section 5603(b)(2) of this title who is covered by an alternative personnel management system and is serving in a position in an agency equivalent to a position in the Senior Executive Service (as determined by the head of that agency), but does not include an employee whose position is required to be filled by an appointment by the President, by and with the advice and consent of the Senate; and

"(9) 'special award' means a nonmonetary award or a lump-sum monetary payment which is awarded on the basis of tangible savings or intangible benefits realized by the Federal Government as a result of special actions or services performed by the recipient outside normal job responsibilities, including suggestions and inventions, a scientific achievement, or an act of heroism.

"§ 5603. Establishment

"(a) Under regulations prescribed by the Director in section 5604 of this title, the head of each agency may establish an alternative personnel management system or systems in that agency to carry out the purposes stated in section 5601 of this title.

"(b) The alternative personnel management systems in an agency may be established—

"(1) on an occupational basis to promote—

"(A) high quality performance by scientific and technical employees and acquisition employees of that agency; and

"(B) high levels of retention of such employees;

"(2) on an organizational basis to promote—

"(A) high quality performance by all agency employees who are serving in positions in agency organizations selected by the head of that agency which perform scientific, technical, or acquisition missions of that agency and whose performance is critical to the performance of those missions; and

"(B) high levels of retention of such employees; or

"(3) on both an occupational basis and an organizational basis to promote high quality performance by and high levels of retention of such employees.

"§ 5604. Provisions of an alternative personnel management system

"(a) The Director shall prescribe regulations for the operation of each alternative personnel management system established under section 5603 of this title.

"(b) In prescribing regulations for the operation of an alternative personnel management system, the Director shall provide for—

"(1) equal rates of pay for substantially equal work performed by employees under that system; and

"(2) pay distinctions under that system which reflect (A) substantial differences in skills, effort, responsibilities, and working conditions, and (B) performance appraisals.

"(c) The regulations prescribed pursuant to subsection (a) shall—

"(1) require—

"(A) the establishment of job evaluation plans which—

"(i) reflect internal job alignment determined on the basis of the level of skill, effort, responsibility, and working conditions required to perform the job; and

"(ii) recognize labor market factors as the primary basis for setting pay; and

"(B) the evaluation of jobs pursuant to such plans;

"(2) include procedures for the head of an agency—

"(A) to establish, for positions of scientific and technical employees, acquisition employees, and other employees of agency organizations referred to in section 5603(b)(2) of this title, pay structures which (i) are competitive with pay structures applicable to similar positions outside the Federal Government, and (ii) reflect job evaluations made under a job evaluation plan established under clause (1); and

"(B) to adjust such pay structures annually;

"(3) provide for the rate of basic pay of an agency employee to be set and adjusted within pay structures based on such factors as the head of that agency may prescribe, including—

"(A) the experience and achievement of the employee;

"(B) labor market factors;

"(C) the position of such employee in a pay range before the rate of basic pay is changed;

"(D) job responsibilities;

"(E) rates of pay for similar jobs outside the Federal Government; and

"(F) consistent with section 5334 of this title, changes in positions or types of appointments;

"(4) provide for supervisory and managerial pay differentials (which shall be considered part of basic pay only for the purposes of chapters 81, 84, and 87 of this title and subchapter III of chapter 83 of this title);

"(5) include methods for determining appropriate total pay and benefits for an employee which are consistent with the purposes of this chapter and provide for consideration of such factors as those described in clause (3);

"(6) ensure that the total cost of the pay (including pay differentials) and benefits of personnel covered by an alternative personnel management system does not exceed the total cost of pay and benefits that such personnel would receive under the systems of pay and benefits that would apply to such personnel if they were not covered by the alternative personnel management system;

"(7) include a performance appraisal system which—

"(A) provides for peer comparison and ranking of agency employees when considered appropriate by the head of that agency;

"(B) affords appeal rights comparable to those afforded under chapter 43 of this title; and

"(C) is otherwise in accordance with section 4302 of this title;

"(8) authorize lump-sum performance awards and special awards not to exceed $25,000 under this chapter (which shall not be considered part of basic pay for any purpose);

"(9) authorize other forms of performance recognition determined appropriate by the head of the agency that is providing the recognition;

"(10) provide special direct hire procedures for recruiting personnel;

"(11) establish a Senior Scientific, Technical, and Acquisition Personnel Service and authorize the head of each agency to designate senior scientific, technical, and acquisition employees of that agency to be members of such Service; and

"(12) provide for an employee development program or programs.

"(d) The regulations prescribed under subsection (c)(11) for the operation of Senior Scientific, Technical, and Acquisition Personnel Service shall provide for benefits comparable to those provided for—

"(1) members of the Senior Executive Service under section 6304 of this title, relating to the accumulation of annual leave;

"(2) career appointees of the Senior Executive Service under section 3396(c) of this title, relating to sabbaticals;

"(3) career appointees in the Senior Executive Service under section 4507 of this title, relating to presidential rank awards;

"(4) newly appointed members of the Senior Executive Service under section 5723 of this title, relating to payment of the appointee's travel and transportation expenses to the appointee's duty station;

"(5) candidates for Senior Executive Service positions under section 5752 of this title, relating to payment of travel expenses of candidates for preemployment interviews; and

"(6) career appointees in the Senior Executive Service under section 3392(c) of this title, relating to retention of pay and benefits by an employee in such Service who receives a Presidential appointment to a position outside such Service.

"§ 5605. Designations of covered positions

"(a)(1) The head of an agency may designate the scientific and technical positions, the acquisition positions, and other positions held by employees of agency organizations referred to in section 5603(b)(2) of this title to be covered by an alternative personnel management system.

"(2) Each employee serving in a position at the time the position is designated to be covered by an alternative personnel management system shall be given written notice of the designation in accordance with procedures prescribed by the Director.

"(b)(1) The head of an agency may designate, under an alternative personnel management system, certain scientific and technical positions, certain acquisition positions, and certain positions held by employees of agency organizations referred to in section 5603(b)(2) of this title as positions which require specially qualified scientific and technical employees, specially qualified acquisition employees, or other specially qualified employees. Such positions may include managerial and supervisory positions.

"(2) The number of agency positions that may be designated under paragraph (1) may not exceed the number equal to 5 percent of the total number of positions covered by all alternative personnel management systems in that agency.

"§ 5606. Employment authority

"(a) Except as otherwise provided in this chapter, the procedures for the selection and appointment of any individual for a position of employment under an alternative personnel management system shall be consistent with the procedures that would apply to the selection and appointment of an individual for that position under other Federal civil service laws.

"(b)(1) Notwithstanding any other provision of law, except as provided in paragraph (2), an individual's examination for employment under an alternative personnel management system is complete, and selection for appointment to a position covered by that system is final, only when the individual has satisfactorily completed (in accordance with regulations prescribed by the Director) a 3-year probationary period of service.

"(2) An employee who has satisfactorily completed a total of 3 years of service in the competitive service, excepted service, or Senior Executive Service and, during such 3-year period, has completed any probationary period of service applicable to such employee, shall not be required to complete the probationary period of service under paragraph (1).

"(c) The head of an agency may appoint a person to an agency position designated under section 5605(b) of this title without regard to provisions of law requiring competitive examinations.

"§ 5607. Special provisions relating to pay and benefits

"(a) Under regulations prescribed pursuant to section 5604 of this title, the head of an agency may—

"(1) classify the positions of employees covered by an alternative personnel management system in that agency; and

"(2) set and annually adjust the pay and other benefits of such employees so as to be competitive with pay and other benefits provided personnel employed in similar positions outside the Federal Government.

"(b)(1) Except as provided in paragraph (2), the rate of basic pay of an individual employed under an alternative personnel management system may not exceed the rate of basic pay for level IV of the Executive Schedule under section 5315 of this title.

"(2)(A) The head of an agency may prescribe the maximum rate of basic pay for an agency position designated under section 5605(b) of this title without regard to the pay structure otherwise applicable to such position pursuant to section 5604(c)(2) of this title. The head of that agency shall prescribe such rate at a level which is competitive with the rates of pay for personnel employed in similar positions outside the Federal Government, including, in exceptional cases individually approved by that head of an agency, the rates of pay of scientific and technical personnel at national research laboratories of the Federal Government operated by persons or organizations other than the Federal Government.

"(B) The maximum rate of basic pay prescribed for an employee under subparagraph (A) may not exceed the maximum rate of basic pay prescribed for the head of a laboratory referred to in such subparagraph, except that the maximum rate of pay prescribed shall be at least equal to the rate of basic pay for level IV of the Executive Schedule under section 5315 of this title.

"(c) Notwithstanding sections 1341, 1342, 1349 through 1351 of title 31 and the provisions of subchapter II of chapter 15 of such title, whenever the rate of basic pay for level IV of the Executive Schedule is increased pursuant to section 5318 of this title or section 225 of the Federal Salary Act of 1967 (81 Stat. 642; 2 U.S.C. 351 et seq.), the rates of basic pay of scientific and technical, acquisition, and other employees serving in positions covered by an alternative personnel management system in an agency may be adjusted by the head of that agency if appropriate (as determined by the head of that agency) to maintain rates of basic pay of such employees at levels competitive with rates of basic pay paid scientific, technical, acquisition, and other personnel employed in similar positions outside the Federal Government.

"(d) A lump-sum performance award or special award authorized under this chapter may be paid to an employee without regard to any other provision of law limiting either the amount or the rate of basic pay that an employee may receive in a single year.

"(e) The rate of basic pay payable to an employee serving in a position on the day before the position becomes covered by an alternative personnel management system may not be reduced by reason of the position being covered by such system.

"§ 5608. System approval; oversight

"(a) The Director shall review each alternative personnel management system proposed to be established by the head of an agency under section 5603 of this title and determine whether the system meets the requirements of law and the regulations issued under this chapter.

"(b) The Director shall, on a continuing basis, monitor the establishment and administration of each alternative personnel management system under this chapter to ensure compliance with the provisions of this chapter, other applicable provisions of law, and the regulations prescribed under this chapter.

"§ 5609. Transition provisions

"(a) The Director shall prescribe procedures for converting positions to an alternative personnel management system.

"(b) The Director shall prescribe procedures for converting positions covered by an alternative personnel management system to the General Schedule, the performance management and recognition system under chapter 54 of this title, the Senior Executive Service, or another appropriate personnel management system in the event the alternative personnel management system is terminated.

"§ 5610. Continuing professional qualification

"(a) The head of each agency shall regularly review the level of professional competence of the scientific and technical work force of that agency and the acquisition work force of that agency. The head of each agency shall take appropriate actions for the improvement of such work forces, including actions to provide for additions to or modifications of the critical occupational skills needed by such work forces, if appropriate.

"(b) The head of each agency shall regularly review the professional training needs of acquisition personnel of that agency, including any need for postgraduate education.

"(c)(1) The head of each agency shall establish an appropriate acquisition training program to ensure that acquisition personnel of that agency receive adequate professional training. The training program shall be managed and funded by that agency.

"(2) Under a program established under paragraph (1), an employee in an agency may be selected and assigned for training for a purpose described in section 4107(c) of this title. The agency may pay the cost of such training directly or may reimburse an employee for the cost of such training.".

(2) The table of chapters at the beginning of part III of such title is amended by inserting after the item relating to chapter 55 the following new item:

"56. Alternative Management Systems for Scientific, Technical, and Acquisition Personnel ..... 5601".

(b) REQUIREMENT FOR ISSUANCE OF REGULATIONS.—The Director of the Office of Personnel Management shall issue regulations under chapter 56 of title 5, United States Code (as added by subsection (a)(1) of this section), not later than 180 days after the date of the enactment of this Act.

(c) CONFORMING AMENDMENTS.—(1) Section 2102(a)(1) of title 5, United States Code, is amended—

(A) by striking out "and" at the end of subparagraph (B);

(B) by inserting "and" at the end of subparagraph (C); and

(C) by inserting after subparagraph (C) the following new subparagraph:

"(D) positions designated under section 5605(b) of this title.".

(2) Section 2108(3) of such title is amended by striking out "or the General Accounting Office;" and inserting in lieu thereof "the General Accounting Office, or the Senior Scientific, Technical, and Acquisition Personnel Service referred to in section 5604(c)(11) of this title;".

(3) Section 3104(b) of such title is amended to read as follows:

"(b) The provisions of subsection (a) of this section shall not apply to any Senior Executive Service position (as defined in section 3132(a) of this title) or to any position designated under section 5605(b) of this title.".

(4) Section 3132(a) of such title is amended—

(A) by striking out "or" at the end of paragraph (2)(E)(ii);

(B) by inserting "or" at the end of paragraph (2)(E)(iii); and

(C) by adding at the end the following:

"(iv) any position in an agency covered by an alternative personnel management system established under section 5603 of this title:".

(5) Section 4303(f) of such title is amended—

(A) by striking out "or" at the end of paragraph (2);

(B) by striking out the period at the end of paragraph (3) and inserting in lieu thereof: ", or"; and

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

"(4) the reduction in pay, the reduction from one pay range to another, or the removal of an employee who, pursuant to section 5606(b) of this title, is serving a probationary or trial period under an initial appointment to a position covered by an alternative personnel management system established under section 5603 of such title.".

(6) Section 4501(2) of such title is amended—

(A) by striking out "and" at the end of subparagraph (A); and

(B) by inserting after subparagraph (B) the following:

"(C) an individual employed by an agency in a scientific and technical or acquisition position covered by an alternative personnel management system established under section 5603 of this title; and".

(7) Section 5102(c) of such title is amended—

(A) by striking out "or" at the end of paragraph (27);

(B) by striking out the period at the end of paragraph (28) and inserting in lieu thereof ": or"; and

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

"(29) employees covered by an alternative personnel management system established under section 5603 of this title.".

(8) Section 5363 of such title is amended by adding at the end the following new subsection:

"(d) Subsections (a) through (c) of this section shall not apply to an individual covered by an alternative personnel management system established under section 5603 of this title. The pay retention rights applicable to such individual shall be the pay retention rights, if any, prescribed by the Director of the Office of Personnel Management pursuant to chapter 56 of this title.".

(9) Section 5373 of such title is amended—

(A) by striking out "or" at the end of paragraph (3);

(B) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or"; and

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

"(5) chapter 56 of this title.".

(10)(A) Section 7501(1) of such title is amended to read as follows:

"(1) 'employee' means an individual in the competitive service—

"(A) who is not serving a probationary or trial period under an initial appointment; or

"(B) who is serving in a position other than a position covered by an alternative personnel management system established under section 5603 of this title and has completed 1 year of current continuous employment in the same position or similar positions under other than a temporary appointment limited to 1 year or less; and".

(B) Section 7511(b) of such title is amended—

(i) by striking out the period at the end of paragraph (2) and inserting in lieu thereof: "; or"; and

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

"(3) who is serving a probationary period pursuant to section 5606(b) of this title in a position covered by an alternative personnel management system established under section 5603 of such title.".

(d) GENERAL ACCOUNTING OFFICE REVIEW AND EVALUATION.—(1) The Comptroller General of the United States shall review and evaluate alternative personnel management systems established under chapter 56 of title 5, United States Code (as added by subsection (a) of this section).

(2)(A) Not later than 5 years after the date of enactment of this Act, the Comptroller General shall transmit to the Congress and to the Office of Personnel Management a report on the review and evaluation carried out under paragraph (1).

(B) The report required by subparagraph (A) shall include an evaluation of the implementation and operation of the alternative personnel management systems referred to in paragraph (1), an assessment of the acceptability of the systems to employees and managers of the Federal Government, and such recommendations for changes or improvements in the systems as the Comptroller General considers appropriate.

2. DRAFT RELATING TO RECOMMENDATION ENTITLED "ACQUISITION EXECUTIVE SELECTION PROCESS"

SEC. ___. ACQUISITION EXECUTIVE SELECTION PROCESS

Section 133(a) of title 10, United States Code, is amended by inserting "and extensive management experience in the defense industry" before the period at the end.

3. DRAFT RELATING TO RECOMMENDATION ENTITLED "CONFLICT OF INTEREST/REVOLVING DOOR"

SEC. ___. LIMITATION ON EMPLOYMENT OF CERTAIN FORMER DEPARTMENT OF DEFENSE OFFICIALS BY CONTRACTORS

Section 2397b of title 10, United States Code, is amended—

(1) by striking out "(a)(1) Subject to" and all that follows through the end of paragraph (1) of subsection (a) and inserting in lieu thereof the following:

"(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 the person performed, on a majority of the person's working days during such two-year period, procurement functions relating to a major defense system and, in the performance of such functions, participated personally and substantially, and in a manner involving decisionmaking responsibilities, with respect to a contract for that system through contact with the contractor."; and

(2) by striking out subsection (c) and inserting in lieu thereof the following:

"(c) This section does not apply to any person with respect to duties described in subsection (a)(1) which were performed while such person was serving—

"(1) 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

"(2) as a member of the armed forces in a pay grade below pay grade O–4.".

4. DRAFT RELATING TO THE RECOMMENDATIONS ENTITLED "CONFLICT BETWEEN PROFIT AND INVESTMENT POLICIES" AND "PROFITS AND COSTS"

SEC. ___. PROFIT AND INVESTMENT POLICY IN DEFENSE PROCUREMENT

(a) INCENTIVES FOR CONTRACTORS TO TAKE REASONABLE RISKS.—Clause (5) of section 2301(b) of title 10, United States Code, is amended to read as follows:—

"(5) provide incentives sufficient to encourage contractors—

"(A) to take contractual risks which are commensurate with the value of such incentives;

"(B) to make investments designed to reduce production costs or to advance technology; and

"(C) to take other 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;".

(b) REPEAL OF CERTAIN LIMITATIONS AND OTHER REQUIREMENTS RELATING TO PROGRESS PAYMENTS, FACILITIES CAPITAL AND CONTRACTOR RISK, AND PRODUCTION SPECIAL TOOLING AND PRODUCTION SPECIAL TEST EQUIPMENT.—Section 9105 of the Department of Defense Appropriations Act, 1987 (as contained in section 101(c) of Public Laws 99–500 and 99–591) is repealed.

[*NOTE:* Some relief from the limitations relating to production special tooling and production special test equipment was provided by the enactment of 10 U.S.C. 2329 in section 810 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 (Public Law 100–180; 101 Stat. 1130).]

(c) PROFIT FACTOR FOR INDEPENDENT RESEARCH AND DEVELOPMENT.—Section 2305 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(e) A contracting officer, in planning for a procurement involving discussions with offerors on contract price, in preparing the solicitation for such procurement, and evaluating contract offers for such procurement, shall—

"(1) include in the estimated profit an appropriate allowance for independent research and development costs and bid and proposal costs; and

"(2) for the purpose of computing the working capital adjustment factor, exclude independent and development costs and bid and proposal costs from the costs financed by the contractor.".

[Regulatory Changes Related to the amendment made by subsection (e):

[It will be necessary to modify section 215.970–1(a) and 215.970–(c)(1) of the Defense Acquisition Regulations to make such regulations consistent with the amendment.]

5. DRAFT RELATING TO RECOMMENDATION ENTITLED "GOVERNMENT POLICY ON INDEPENDENT RESEARCH AND DEVELOPMENT (IR&D/B&P)

SEC. ___. INDEPENDENT RESEARCH AND DEVELOPMENT COSTS.

(a) FINDINGS.—Congress makes the following findings:

(1) The national security of the United States is heavily dependent on the maintenance of technological superiority.

(2) In order to maintain technological superiority, the United States must have a defense industrial base composed of contractors that are strongly motivated to develop innovative products and processes and to make significant investments in independent research and development and bid and proposal programs.

(3) There are major constraints in Department of Defense procurement procedures which inhibit contractors from making necessary investments in independent research and development, including—

(A) a requirement for the Department of Defense to negotiate advance agreements with certain contractors which establish an annual limitation on the amount of independent research and development costs and bid and proposal costs which may be included in overhead rates allocated to Department of Defense contracts: and

(B) limitations on the aggregate amount that the Department of Defense may negotiate in contractor independent research and development and bid and proposal agreements.

(b)(1) Not later than October 1, 1988, the Secretary of Defense shall issue regulations which provide for the following:

(A) Negotiation of advance agreements referred to in section 203(a)(1) of Public Law 91–441 (10 U.S.C. 2358 note) solely on the basis of the requirements provided in such section, but without regard to requirements to specify overall dollar ceilings in such agreements;

(B) Implementation of uniform procedures and criteria for negotiating advance agreements under such section.

(C) Implementation of a two-year documentation cycle for advance agreements under such section.

(2) The regulations issued pursuant to paragraph (1) shall apply to negotiations (of advance agreements referred to in such paragraph) which commence on or after October 1, 1990.

(c) PROFIT FACTOR FOR INDEPENDENT RESEARCH AND DEVELOPMENT.—(1) Section 2305 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(e) A contracting officer, in planning for a procurement involving discussions with offerors on contract price, in preparing the solicitation for such procurement, and evaluating contract offers for such procurement, shall—

"(1) include in the estimated profit an appropriate allowance for independent research and development costs and bid and proposal costs; and

"(2) for the purpose of computing the working capital adjustment factor. exclude independent and development costs and bid and proposal costs from the costs financed by the contractor.".

(2) The Secretary of Defense shall modify section 215.970–1(a) and 215.970–(c)(1) of the Defense Acquisition Regulations as appropriate to carry out the amendment made by paragraph (1).

PROPOSED INDEPENDENT RESEARCH AND DEVELOPMENT REPORT LANGUAGE

Effective with the fiscal year 1989 Department of Defense budgeting cycle, the Committee has agreed to eliminate the congressional practice of limiting the aggregate amount of allowable independent research and development/bid and proposal costs that the Department of Defense can negotiate with defense contractors each year.

In addition to these constructive actions, the Department of Defense has requested, and the Committee has agreed to recommend, reconsideration of the ceiling constraints placed upon the Department of Defense and its contractors by Public Law 91–441 with a view toward amending this law in a manner consistent with motivating the defense industry toward increasing their development of innovative products and processes and their investments in independent development and research and development and bid and proposal. The review of Public Law 91–441 will be scheduled following receipt and evaluation by the Congress of the report on the current independent research and development management process published by the Rand Corporation.

Finally, the Committee requests that the Department of Defense establish joint Department of Defense/industry working groups to develop and recommend policies and procedures which will encourage appropriate levels of contractor investment in independent research and development while providing the Department of Defense adequate accountability and the beneficial technical interactions at reduced administrative burden and expense. The Secretary of Defense is directed to report to the Committee by July 1, 1988, and periodically thereafter as necessary, on the results and recommendations of that review.

6. DRAFT RELATING TO RECOMMENDATION ENTITLED "SHIFTING UNDUE RISKS TO THE CONTRACTOR"

SEC. ___. LIMITATIONS ON USE OF FIXED PRICE DEVELOPMENT CONTRACTS

Section 2306 of title 10, United States Code, is amended by adding at the end the following:

"(i)(1) The head of an agency may not award a firm fixed-price contract for the development of a major system or a subsystem of a major system in excess of $10,000,000 unless the Under Secretary of Defense for Acquisition determines, in writing, that—

"(A) program risk has been reduced to the extent that realistic pricing can occur; and

"(B) the use of a firm fixed-price contract permits an equitable and sensible allocation of program risk between the United States and the contractor.

"(2) The Under Secretary of Defense for Acquisition may not delegate his authority under paragraph (1) to any person who holds a position outside the Office of the Secretary of Defense or a position below the level of Assistance Secretary of Defense.

"(3) The Under Secretary shall transmit to the Committees on Armed Services and Appropriations of the Senate and the House of Representatives once each quarter a written report containing a list of all contracts described in paragraph (1) that have been awarded during such quarter.".

7. DRAFT RELATING TO RECOMMENDATION ENTITLED "THE ROLE OF THE CONTRACTING OFFICER"

SEC. ___. PROFESSIONALISM OF DEPARTMENT OF DEFENSE CONTRACTING OFFICERS

(a) PROFESSIONAL STATUS IN THE CIVIL SERVICE.—Department of Defense contracting officers shall have a professional status in the civil service of the Federal Government.

(b) DECISIONMAKING AUTHORITY OF CONTRACTING OFFICERS.—(1) Chapter 137 of title 10, United States Code, is amended by inserting after section 2303 the following new section:

"§ 2303a. Authority of Contracting Officers

"(a) A contracting officer of an agency named in section 2303 of this title acts for the head of the agency in the solicitation, evaluation, award, and administration of a contract except to the extent that the authority to act for the head of the agency under specified conditions or in a particular case is specifically assigned to or reserved for another official by law or in regulations issued by the head of the agency on or after the first day of the fourth month that begins after the date of the enactment of this section.

"(b) A decision made by a contracting officer in the exercise of authority recognized in subsection (a) may not be modified, set aside, or otherwise overridden by any official in such agency other than the following officials except as may otherwise be specifically provided in law:

"(1) The head of the agency of the contracting officer.

"(2) Any other official of such agency who is designated as the senior acquisition official of such agency.

"(3) The head of the contracting activity of the contracting officer.".

(2) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2303 the following new item:

"2303a. Authority of Contracting Officers.".

(c) THE ROLE OF AUDITORS IN THE SETTLEMENT OF CLAIMS FOR CERTAIN CONTRACT COSTS.—Section 2324(f) of title 10, United States Code, is amended by striking out paragraph (4).

8. DRAFT RELATING TO RECOMMENDATION ENTITLED "STREAMLINING THE DEFENSE ACQUISITION PROCESS"

SEC. ___. STREAMLINED DEPARTMENT OF DEFENSE ACQUISITION PROCEDURES

(a) MULTIYEAR CONTRACTING.—Section 2306(h) of title 10, United States Code, is amended—

(1) in paragraph (1) by striking out ", whenever he finds—" and all that follows through the period at the end of clause (E) and inserting in lieu thereof a period; and

(2) in paragraph (5) by adding at the end (flush to the margin) the following:

"The availability of sufficient funds to pay the costs of cancellation or termination of a multiyear contract is not a prerequisite to the award of such contract on a multiyear basis.".

(b) DEREGULATION AND MILESTONE AUTHORIZATION FOR MAJOR DEFENSE ACQUISITION PROGRAMS.—(1) The second sentence of section 2436(b) of title 10, United States Code, is amended by inserting "and each major defense acquisition program" after "subsection".

(2) Section 2437(a)(1) of title 10, United States Code, is amended by inserting "and, subject to paragraph (2), shall designate each major defense acquisition program" after "title)".

(c) COST-BENEFIT ANALYSIS OF PROPOSED PROCUREMENT REGULATIONS.—Section 2302 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(d) Further, it is the policy of Congress that no regulation relating to the procedures for the award or administration of contracts should be issued by

the head of such agency (other than those regulations required for the implementation of the Federal Acquisition Regulations) unless the head of such agency has first determined whether the benefits to be derived from the issuance of such regulation outweigh the costs (including procurement delays and overhead costs) expected to result from the issuance of such regulation.".

(d) RESPONSIBILITY FOR AUDITS.—(1) Section 133(d) of title 10, United States Code, is amended by striking out paragraphs (2) and (3) and inserting in lieu thereof the following:

"(2) In addition to the other duties and responsibilities specified in this section, the Under Secretary shall, with respect to acquisition activities of the Department of Defense, develop policy, evaluate program performance, and monitor actions taken by all components of the Department of Defense in response to contract audits, internal audits, internal review reports, and audits conducted by the Comptroller General of the United States.

"(3) In carrying out this subsection, the Under Secretary shall consult with the Inspector General of the Department of Defense.

"(4)(A) Except as provided in subparagraph (B), nothing in this subsection shall affect the authority of the Inspector General of the Department of Defense in carrying out the functions of the Inspector General under the Inspector General Act of 1978 (Public Law 95–452; 5 U.S.C. App. 3).

"(B) Notwithstanding section 8 of such Act, the Inspector General does not have responsibility for matters within the responsibility of the Under Secretary of Defense for Acquisition under paragraph (2).".

(2) Section 8(f) of the Inspector General Act of 1978 (Public Law 95–452; 5 U.S.C. App. 3) is amended—

(A) by striking out "(f)(1) Each semiannual report" and all that follows through the period at the end of paragraph (1); and

(B) by redesignating paragraph (2) as subsection (f).

(e) RELATIONSHIP BETWEEN AUDITORS AND CONTRACTING OFFICERS.—(1) Section 2324(f) of title 10, United States Code, is amended by striking out paragraph (4).

(2)(A) Chapter 137 of title 10, United States Code, is amended by inserting after section 2303 the following new section:

"§ 2303a. Authority of Contracting Officers

"(a) A contracting officer of an agency named in section 2303 of this title acts for the head of the agency in the solicitation, evaluation, award, and administration of a contract except to the extent that the authority to act for the head of the agency under specified conditions or in a particular case is specifically assigned to or reserved for another official by law or in regulations issued by the head of the agency on or after the first day of the fourth month that begins after the date of the enactment of this section.

"(b) A decision made by a contracting officer in the exercise of authority recognized in subsection (a) may not be modified, set aside, or otherwise overridden by any official in such agency other than the following officials except as may otherwise be specifically provided in law:

"(1) The head of the agency of the contracting officer.

"(2) Any other official of such agency who is designated as the senior acquisition official of such agency.

"(3) The head of the contracting activity of the contracting officer.".

(B) The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 2303 the following new item:

"2303a. Authority of Contracting Officers.".

(f) BIENNIAL AUTHORIZATIONS AND APPROPRIATIONS.—Section 114 of title 10, United States Code, is amended by adding at the end the following new subsection:

"(f) Each law authorizing or making an appropriation to or for the use of any armed force for an entire fiscal year shall specify an authorization or appropriation, as the case may be, for both such fiscal year and the succeeding fiscal year.".

9. DRAFT RELATING TO RECOMMENDATION ENTITLED "GOVERNMENT OVERSIGHT OF DEFENSE CONTRACTORS"

SEC. ___. GOVERNMENT OVERSIGHT OF DEFENSE CONTRACTORS

(a) RESPONSIBILITES OF THE UNDER SECRETARY.—Section 133(d) of title 10, United States Code, is amended—

(1) by adding at the end of paragraph (1) the following: "In order to prevent such duplication. the Under Secretary shall prescribe an annual plan for the conduct of audit and oversight of each contracting activity other than audits and oversight conducted by the Inspector General or the Defense Criminal Investigative Service.";

(2) by striking out paragraphs (2) and (3) and inserting in lieu thereof the following:

"(2) In addition to the other duties and responsibilities specified in this section, the Under Secretary shall, with respect to acquisition activities of the Department of Defense, develop policy, evaluate program performance, and monitor actions taken by all components of the Department of Defense in response to contract audits, internal audits. internal review reports, and audits conducted by the Comptroller General of the United States.

"(3) In carrying out this subsection, the Under Secretary shall consult with the Inspector General of the Department of Defense.

"(4)(A) Except as provided in subparagraph (B), nothing in this subsection shall affect the authority of the Inspector General of the Department of Defense in carrying out the functions of the Inspector General under the Inspector General Act of 1978 (Public Law 95–452; 5 U.S.C. App. 3).

"(B) Notwithstanding section 8 of such Act, the Inspector General does not have responsibility for matters within the responsibility of the Under Secretary of Defense for Acquisition under paragraph (2).

"(5)(A) Except as provided in subparagraph (B), a finding resulting from an audit or oversight conducted by the Office of the Secretary of Defense or any military department or Defense Agency (other than the Inspector General or the Defense Criminal Investigative Service) shall be accepted as final and conclusive (with respect to the period and matters covered by the finding) in the Department of Defense unless the finding is disapproved by the Secretary of Defense or the Under Secretary.

"(B) The Inspector General and the Defense Criminal Investigative Service are not required to accept a finding referred to in subparagraph (A) as final and conclusive.".

(b) RESPONSIBILITIES OF THE INSPECTOR GENERAL.—Section 8(f) of the Inspector General Act of 1978 (Public Law 95–452; 5 U.S.C. App. 3) is amended—

(A) by striking out "(f)(1) Each semiannual report" and all that follows through the period at the end of paragraph (1); and

(B) by redesignating paragraph (2) as subsection (f).

10. DRAFT RELATING TO RECOMMENDATION ENTITLED "CONTRACTOR LIABILITY AND INDEMNIFICATION"

[H.R. 2378 was introduced in the House of Representatives on May 12, 1987, by Mr. Feighan and relates to contractor liability and indemnification. It is the bill referred to in the report to the Subcommittee on Defense Industry and Technology of the Committee on Armed Services of the Senate. The text of the bill is set out below.]

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Procurement Liability Reform Act of 1987".

SEC. 2. INDEMNIFICATION OF CONTRACTORS.

(a) INDEMNIFICATION—

(1) GENERAL REQUIREMENT.—The United States shall hold harmless and indemnify any contractor meeting the requirements of this section against any liability (including liability for death, personal injury, illness,

loss of use of or damage to property, or economic loss) arising out of or resulting from goods or services supplied by the contractor pursuant to a contract with the United States to the extent that such liability exceeds the amount against which the contractor is protected by the commercial insurance or self-insurance required under subsection (b)(1).

(2) APPLICABILITY.—This section applies only with respect to—

(A) any contract with the United States entered into by a contractor on or after the date of the enactment of this Act, and

(B) any such contract entered into before such date the performance of which has not been completed by such date.

(3) LIMITATIONS.—

(A) SIMILAR USES BY NONGOVERNMENTAL PURCHASERS.—The indemnification required by paragraph (1) shall not be provided for liability arising out of or resulting from goods or services supplied pursuant to a contract which are also sold by the contractor to nongovernmental purchasers for nongovernmental uses or applications substantially the same in nature, magnitude, and scope as the uses or applications made or to be made of the goods and services by the United States.

(B) NEGLIGENCE, MISCONDUCT, LACK OF GOOD FAITH.—The indemnification required by paragraph (1) shall not be provided for liability caused by the gross negligence, intentional misconduct, or lack of good faith of any director, officer, or managing official of the contractor. For purposes of this paragraph, the term "managing official" means any manager, superintendent, or other equivalent employee of the contractor who has supervision or direction over—

(i) a substantial portion of the contractor's business,

(ii) a substantial portion of the contractor's operations at any one plant or separate location in which the contract is being performed,

(iii) a substantial portion of a major industrial operation connected with performance of the contract, or

(iv) a substantial portion of a program or project connected with performance of the contract.

(b) CONTRACTOR INSURANCE REQUIREMENT.—A contractor shall secure and maintain commercial insurance or self-insurance of such type and in such amounts as—

(1) the contractor and the United States may agree upon in the contract at the time the contract is entered into, or

(2) in the absence of such an agreement, is reasonable under the circumstances at the time liability is incurred.

(c) CONTRACTOR CLAIMS REQUIREMENTS.—

(1) NOTICE TO UNITED STATES.—A contractor shall give notice to the United States within a reasonable period of time of any claim or action against the contractor which the contractor reasonably expects to give rise to a claim for indemnification under subsection (a). The United States, at its election, may control or assist in the settlement or defense of any such claim or action against the contractor.

(2) PRESENTATION AND DETERMINATION OF CLAIM.—A contractor seeking indemnification under subsection (a) shall present a claim for indemnification to the executive agency with which the contractor has entered into a contract. The claim shall be determined by the agency in accordance with the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.). A contractor aggrieved by a determination of the agency concerning such claim may appeal such determination pursuant to the Contract Disputes Act of 1978.

(d) DISCHARGE OF OBLIGATION.—The United States may discharge its obligation to provide indemnification under subsection (a) by making payments directly to the contractor involved or to third persons to whom the contractor may be liable.

(e) GUIDELINES.—The Administrator for Federal Procurement Policy shall establish, after opportunity for a hearing on the record (in accordance with sections 553, 556, and 557 of title 5, United States Code), guidelines for determining—

(1) whether the limitation on indemnification in subsection (a)(3)(A) applies, and

(2) whether the amount of commercial insurance or self-insurance secured and maintained by contractors under subsection (b) is reasonable under the circumstances.

(f) LIMITATION.—The provisions of this section shall not apply with respect to any risks against which indemnification may be obtained under section 170d. of the Atomic Energy Act of 1954 (42 U.S.C. 2110d.). The provisions of this section shall not limit or prevent the use of existing statutory authority to provide indemnification for liability, harm, or expense for which indemnification is not required under this section.

(g) SOURCE OF FUNDING.—(1) Each executive agency is authorized to make payments under subsection (a) from—

(A) funds obligated for the performance of the contract from which the contractor's liability arises,

(B) funds which are available to the agency for the same type of contract as the contract from which the contractor's liability arises, and which are not otherwise obligated,

(C) funds specifically appropriated for such payments, and

(D) funds appropriated pursuant to section 1304 of title 31, United States Code.

(2) Section 1304 of title 31, United States Code, is amended by adding at the end the following new subsection:

"(d) Necessary amounts are appropriated to pay indemnification claims when—

"(1) payment is not otherwise provided for;

"(2) payment is certified by the Comptroller General; and

"(3) the claim is payable under section 2 of the Federal Procurement Liability Reform Act of 1987.".

(3) The provisions of sections 1341, 1349 through 1351, and 1512 through 1519 of title 31, United States Code, and section 3732 of the Revised Statutes of the United States (41 U.S.C. 11) shall not apply to this section.

SEC. 3. EQUITABLE REDUCTION OF LIABILITY.

(a) DETERMINATION OF PROPORTION OF FAULT.—In any civil action which is brought in any State court or any district court of the United States alleging liability of a contractor arising from injury to or death of an officer or employee of the United States—

(1) which is caused by a product or service supplied to or for the United States by or through the contractor pursuant to a contract, and

(2) for which the officer or employee, or a family member or other dependent or survivor of the officer or employee, is entitled to receive benefits from the United States under title 10, 37, or 38, United States Code, or under chapter 81 of title 5, United States Code,

the court, upon the request of any party, shall make findings of fact as to the proportion that the fault of the United States bears to the total fault of all persons and the United States in causing the injury or death giving rise to the claim of liability.

(b) REDUCTION OF LIABILITY OF CONTRACTOR.—In any action described in subsection (a), the court shall reduce any judgment for liability rendered against the contractor by the proportion of fault of the United States found by the court.

(c) FACTORS IN DETERMINING PROPORTION OF FAULT.—In determining the proportion of fault of the United States under subsection (a), the court shall consider such evidence of fault as may be introduced by the parties in accordance with the rules of evidence and shall consider, among other relevant factors, the following:

(1) The nature of contract provisions or specifications associated with acts or omissions contributing to the injury or death, the relative responsibility of the United States and the contractor for the existence of such provisions or specifications, and the relative degree of knowledge, skill, and expertise of the contractor and the United States with regard to potential harm which might have been associated with contract performance or nonperformance under such provisions or specifications.

(2) The existence of officially promulgated standards of the United States which are associated with acts or omissions contributing to the injury or death.

(3) The degree to which products or services furnished by the United States to the contractor under the contract are associated with acts or omissions contributing to the injury or death, and the relative degree of knowledge, skill, and expertise of the contractor and the United States with regard to potential harm which might have been associated with use of such products or services.

(4) Acts or omissions in performance of the contract by employees of the contractor or the United States which contributed to the injury or death and the relative responsibility of the contractor and the United States for the occurrence of such acts or omissions.

(5) The degree of control or care exercised by the United States in the use, application, and maintenance of the product or service after delivery by the contractor pursuant to the contract.

(d) REDUCTION IN REIMBURSEMENTS TO UNITED STATES.—The amount the United States is entitled by law to be reimbursed, through right of subrogation or subrogation lien or otherwise, for benefits provided under title 10, title 37, or title 38, United States Code, or chapter 81 of title 5, United States Code, as a result of injury or death for which the contractor involved is or may be held liable in an action described in subsection (a) shall be reduced by the proportion of fault of the United States in causing the injury or death as found by the court under subsection (a).

(e) NOTICE TO ATTORNEY GENERAL; INTERVENTION AND REMOVAL.—(1) A reduction of a judgment against a contractor in a civil action shall not be made under subsection (b) unless the contractor gives written notice to the Attorney General of the United States, within 90 days after the filing of the civil action, that the contractor intends to seek an equitable reduction of liability under subsection (b). For cause, the court before which the civil action is pending may at any time extend the 90-day period specified in the preceding sentence. Except as otherwise directed by the Attorney General, the contractor shall promptly furnish to the Attorney General a copy of all pertinent papers received or filed with respect to such civil action.

(2) The United States shall have the right, for a period of 90 days following receipt of any notice under paragraph (1), to intervene as a party in the civil action with respect to which the notice is given. Any such civil action commenced in a State court in which the United States has intervened, together with any related pending action by the plaintiff in such civil action, may be removed, at the election of the United States, without bond at any time before a trial on the merits to the district court of the United States for the district and division embracing the place in which the State court action is pending. Should a United States district court determine, pursuant to an evidentiary hearing on a motion to remand held before the trial on the merits, that there is no substantial evidence of any fault on the part of the United States in causing the injury or death for which liability is alleged, such civil action shall be remanded to the State court.

(f) PRESERVATION OF CONTRACT COMPLIANCE DEFENSE.—This section shall not alter or affect the application of any defense based on a contractor's compliance with a contract or contract specifications which may be provided by State or Federal law in actions covered by subsection (a).

(g) PREEMPTION OF STATE LAW.—This section supersedes any State law to the extent State law is inconsistent with the provisions of this section.

SEC. 4. DISCLAIMER OF LIABILITY.

Nothing in this Act shall be construed to create any liability of the United States Government to any person other than to contractors for indemnification under section 2.

SEC. 5. DEFINITIONS.

As used in this Act—

(1) the term "contractor" means any person who has entered into a contract with the United States to supply a product or service, and includes such person's subcontractors and suppliers at any tier under such contract;

(2) the term "executive agency" has the meaning given such term by section 105 of title 5, United States Code;

(3) the term "liability" means the legally binding obligation to pay damages as provided for in final judgments of courts of law, settlements, or arbitration decisions:

(4) the term "officer or employee of the United States" includes members of the United States Armed Forces, and members of the National Guard while engaged in duty for which benefits may be received under title 10, title 37, or title 38, United States Code:

(5) the term "person" includes any State or local unit of government:

(6) the term "State" includes the District of Columbia and all territories and possessions of the United States; and

(7) the term "United States" means the legislative and judicial branches of the Government and the executive agencies.

SEC. 6. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act. Section 3 applies to civil actions brought against contractors based on causes of action accruing on or after such date.

11. DRAFT RELATING TO RECOMMENDATION ENTITLED "FOREIGN SELLING COSTS"

SEC. ___. ALLOWABILITY OF FOREIGN SELLING COSTS

Section 2324(f)(1) of title 10, United States Code, is amended by adding at the end thereof the following new clause:

"(Q) Foreign selling costs, including costs incurred at domestic and international exhibits to promote the export of products of the United States aerospace industry, which are to be allowable to the extent allocable, reasonable, and not otherwise unallowable, notwithstanding the treatment of such costs under any other provision of law or under section 31.205–38(b) of the Federal Acquisition Regulation as in effect on April 1, 1984.".

12. DRAFT RELATING TO RECOMMENDATION ENTITLED "INCENTIVES FOR INNOVATION"

SEC. ___. INCENTIVES FOR INNOVATION

(a) USE OF PROCEDURES OTHER THAN COMPETITIVE PROCEDURES.—Section 2304(d)(1) of title 10, United States Code is amended—

(1) by striking out "and" at the end of clause (A);

(2) by striking out the period at the end of clause (B) and inserting "; and"; and

(3) by adding after clause (B) the following new clause:

"(C) in the case of a contract for an item, component, or process developed exclusively at private expense, the item, component, or process shall be considered to be available from only one source, and follow-on contracts for such items may continue to be awarded to only one source if award to other than the original source would—

"(i) discourage future private expense innovation by the original source;

"(ii) jeopardize the economic viability of the original source through division of market size: or

"(iii) result in cost to the United States for data or licensing which are not expected to be recovered through competition.".

(b) MATTERS TO BE CONSIDERED IN AWARDING NONCOMPETITIVE CONTRACT.—Section 2305(d) of such title is amended by adding at the end thereof the following new paragraph:

"(4) Items, components, or processes developed by a contractor or subcontractor at the expense of the contractor of subcontractor that are determined by the head of an agency to contribute to a system's design and manufacturing requirements, or to mission-essential performance on the basis

of best value to the United States, shall be considered to satisfy the proposal requirements of an offerer pursuant to paragraphs (1) and (2) and the negotiation objectives of paragraph (3).".

13. DRAFT RELATING TO RECOMMENDATION ENTITLED "PRICE ONLY COMPETITION"

SEC. ___. MODIFICATION OF DEFINITION OF FULL AND OPEN COMPETITION

(a) DEFINITION OF FULL AND OPEN COMPETITION.—Paragraph (3) of section 2302 of title 10, United States Code. is amended to read as follows:

"(3) The term 'full and open competition' means, in connection with the award of any contract, that a sufficient number of responsible sources are permitted to submit sealed bids or competitive proposals on the contract as is necessary to ensure effective competition while maintaining quality and encouraging technological progress.".

(b) TECHNICAL AMENDMENT.—Section 2302 of such title is further amended by adding at the end the following new paragraph:

"(5) The term 'responsible source' has the same meaning provided for such term in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).".

14. DRAFT RELATING TO RECOMMENDATION ENTITLED "DEFENSE INDUSTRIAL BASE AND TECHNOLOGICAL ADVANCEMENT"

SEC. ___. REPORT ON COMPARISON OF DEFENSE GUIDANCE WITH INDUSTRIAL CAPABILITIES

On or before September 1 of each even numbered year, the Secretary of Defense shall submit to Congress a report, in both classified and unclassified versions, on the ability of domestic industries to accomplish the tasks necessary for the performance of the strategic and tactical plans contained in the presidential Defense Guidance directive most current at the time such report is submitted. The report shall include the following:

(1) A description of the tasks which domestic industries will have to perform in order to satisfy the strategy and tactics provided for in the Defense Guidance directive.

(2) A description of any inability of domestic industries, in terms of capacity, technology, or skills to accomplish the tasks provided for in the Defense Guidance directive which has occurred or which the Secretary of Defense determines will likely occur before the next report is submitted to Congress under this section.

(3) Congressional and Executive actions that are necessary to ensure the industrial responsiveness needed to perform the tasks set forth in the most recent Defense Guidance directive for domestic industries and the Armed Forces for the year concerned.

15. DRAFT RELATING TO RECOMMENDATION ENTITLED "MANDATORY UNCOMPENSATED OVERTIME"

SEC. ___. CONGRESSIONAL POLICY REGARDING UNCOMPENSATED OVERTIME

It is the sense of Congress that mandatory uncompensated overtime services by professional employees of defense contractors should not be permitted and that the evaluation of professional and technical services contract proposals should be performed on the basis of a 40–hour workweek and a 2,080–hour year standard.

[Regulatory Changes Related to the Recommendation Entitled "Mandatory Uncompensated Overtime:

[It is necessary to modify the Federal Acquisition Regulations and the Department of Defense Supplement to the Federal Acquisition Regulations to ensure that mandatory uncompensated services by professional employees of defense contractors is not permitted and that the evaluation of professional and technical services contract proposals is performed on the basis of a 40–hour workweek and a 2,080–hour year standard.]

16. DRAFT RELATING TO RECOMMENDATION ENTITLED "IMPLEMENTATION OF COMMERCIAL PRODUCT AND PRACTICES ACQUISITION PROGRAM"

SEC. ___. CONGRESSIONAL POLICY REGARDING THE IMPLEMENTATION OF COMMERCIAL PRODUCT AND PRACTICES ACQUISITION PROGRAM

(a) CONGRESSIONAL POLICY.—It is the sense of Congress that the Secretary of Defense should, at the earliest practicable time after the date of the enactment of this Act, take such action as may be necessary to require all components of the Department of Defense to implement a comprehensive commercial product acquisition program that utilizes to the maximum extent possible procurement of "off-the-shelf" products to meet the needs of the Department of Defense.

(b) REPORT.—The Secretary shall submit to Congress, not later than 6 months after the date of the enactment of this Act, a detailed report on the actions taken by the Secretary to implement the policy expressed in subsection (a), including a discussion of the extent to which existing laws and regulations regarding the procurement of existing commercial products, rather than the procurement of products made to Department of Defense specifications, have been implemented.

17. DRAFT RELATING TO RECOMMENDATION ENTITLED "RESTORING TRUST IN THE DEFENSE ACQUISITION PROCESS"

SEC. ___. RESTORATION OF TRUST IN DEFENSE ACQUISITION PROCESS

(a) IN GENERAL.—The Secretary of Defense shall submit to Congress a report on actions that can and should be taken to restore trust and confidence between the United States and defense contractors in the defense acquisition process. In carrying out such study the Secretary shall—

(1) consider the ongoing efforts of contractors to improve their reliability and productivity under the Defense Industry Initiative program; and

(2) consider the advisability of modifying or repealing laws and regulations which establish certain administrative errors and normal business practices as crimes.

(b) DEADLINE FOR REPORT.—The Secretary shall submit the results of such study to Congress, not later than 90 days after the date of the enactment of this Act, together with such comments and recommendations for legislative and administrative action as the Secretary considers appropriate to increase mutual trust between the United States and contractors in the defense acquisition process.

18. DRAFT RELATING TO RECOMMENDATION ENTITLED "DEBARMENT AND SUSPENSION"

[Alternative No. 1]

SEC. ___. DEBARMENT AND SUSPENSION

(a) ESTABLISHMENT OF ADVISORY PANEL.—The Secretary of Defense shall appoint a Debarment and Suspension Advisory Panel to study and make recommendations to the Secretary regarding the need for improvement in due process procedures in the case of persons whom the Department of Defense proposes to debar or suspend from contracting with the Department of Defense or any component of the Department of Defense.

(b) COMPOSITION OF PANEL.—The Secretary shall appoint persons to the advisory panel who are especially qualified to serve on such panel by virtue of their education, training, and experience in government contracting and judicial procedures. Not more than two members may be officers or employees of the Federal Government and not less than two members shall be from private industry. The Secretary shall designate the chairman of the advisory panel.

(c) REPORT.—(1) The Secretary shall require the advisory panel to submit its findings and recommendations to him not later than 180 days after the date on which the panel is appointed.

(2) The Secretary shall transmit a copy of the report of the advisory panel to Congress, together with such comments and recommendations thereon as the Secretary determines appropriate, within 30 days after the date on which the report is submitted to the Secretary.

[Alternative No. 2]

SEC. ___. DEBARMENT AND SUSPENSION OF DEFENSE CONTRACTORS

(a) SHORT TITLE.—This section may be cited as the "Debarment and Suspension Reform Act of 1988".

(b) AMENDMENT TO TITLE 10.—Title 10, United States Code, is amended by adding after chapter 145 the following new chapter:

"CHAPTER 146—DEBARMENT AND SUSPENSION OF CONTRACTORS

"Sec.

"§ 2461. Jurisdiction of United States Claims Court

"(a) No person may be debarred or suspended from being awarded contracts by the Department of Defense, or subcontracts that require Department of Defense approval, unless ordered pursuant to a civil action brought by the United States in the United States Claims Court.

"(b) Exclusive jurisdiction is conferred on the United States Claims Court with respect to actions referred to in subsection (a) and shall have jurisdiction over any person against whom such an action is commenced in accordance with the provisions of any contract entered into between such person and the Department of Defense.

"§ 2462. Requirements for debarring

"(a) In a civil action referred to in section 2461 of this title, the United States shall be required to prove by clear and convincing evidence that the person proposed for debarment, suspension, or denial of approval will not substantially perform all current material obligations and requirements in accordance with applicable legal and contractual obligations.

"(b) An obligation or requirement shall not be considered material unless it relates to (1) honest and fair dealing, or (2) a duty imposed by a statute which authorizes debarment or suspension as a remedy for its breach.

"(c) Upon proof that a person will not substantially perform all material obligations and requirements, the United States Claims Court may issue an appropriate court order which debars such person for a period not exceeding 3 years.

"(d) A court order issued under subsection (a) shall (1) provide that during the period of the order the person against whom the order is issued may not be awarded or accept award of a contract or subcontract requiring the consent of the United States, or (2) provide a reasonable and practical alternative to the debarment.

"(e) A court order referred to in subsections (c) and (d) shall provide that if the head of the department or agency concerned determines that there is a compelling need for the products or services of such person and states the reasons for such need, then a contract or subcontract may be awarded to and accepted by such person. Such determination may not be delegated below the level of assistant secretary. Such determination shall not be subject to judicial review.

"§ 2463. Time limit on decision

"Any action brought by the United States under this chapter shall be decided within 120 days. Appeal from the decision of the United States Claims Court may be taken only by the person against whom the action is brought to the United States Court of Appeals for the Federal Circuit. The United States Court of Appeals for the Federal Circuit shall decide the appeal within 60 days after receiving notice of the appeal.

"§ 2464. Temporary order in cases where irreparable injury alleged

"(a)(1) The head of any department or agency may make a personal nondelegable determination that the United States will suffer irreparable injury unless the person against whom the action is brought is debarred from being awarded or accepting contracts or subcontracts requiring government approval by that department or agency.

"(2) Upon such determination, the head of the department or agency may request a temporary order denying the person the right to be awarded or to accept an award of a contract (or subcontract requiring a department or agency's approval) from that department or agency for a period not exceeding 60 days.

"(b) The United States Claims Court may not issue a temporary order debarring or suspending a person except upon a determination by the court that there is a strong likelihood that the United States will prevail on the final order and that there is an imminent danger of irreparable injury to the complaining department or agency. If a temporary order is granted, the civil action on the order shall be decided within the effective period of the temporary order.

"§ 2465. Extensions of time

"The time limits set for the civil action and temporary order provided for in this chapter shall not be extended except upon the application of, or consent of, the person against whom the civil action is instituted. If such person applies for the time extension the temporary order may be extended for the period applied for or any shorter period.

"§ 2466. Costs and damages

"If a temporary order is granted but a permanent order is denied, the person against whom the civil action was brought shall be entitled to receive the costs and legal fees incurred in defending the civil action, plus damages for the loss of contract profits and payment for indirect costs and salary or wages to be paid to the person's employees who were affected by the temporary order.

"§ 2467. Vacation of order

"The court may vacate its order before the termination date of the order if the person against whom the order was issued proves by clear and convincing evidence that the grounds for the order no longer exist, but a motion to vacate

may not be filed within 6 months of the effective date of the order or within 1 year after a decision of the court that the person did not make a showing sufficient to vacate the order.

"§ 2468. Right of debarred party; rights of parties to appeal

"(a) A person who believes that he has been debarred or suspended by the Department of Defense in violation of the laws or regulations relating to such actions may bring an action against the United States in the United States Claims Court to enjoin his debarment or suspension and for damages arising from such debarment or suspension, including the costs and legal fees associated with the action, plus the loss of contract profits and payment for indirect costs and salaries or wages to be paid to the person's employees adversely affected by the debarment or suspension.

"(b) Either party may take an appeal from any judgment arising under this section. Such an appeal shall be brought in the United States Court of Appeals for the Federal Circuit. An injunction entered by the United States Claims Court under this section may not be stayed or vacated by the United States Court of Appeals for the Federal Circuit until the final decision is rendered in the appeal. The time limits of section 2463 are applicable to this subsection.".

(b) APPLICATION TO PERSONS DEBARRED BEFORE EFFECTIVE DATE.—Any person debarred or suspended by any determination by the Department of Defense before the effective date of this section may bring an action in the United States Claims Court enjoining the continuance of the debarment or suspension. The injunction shall issue unless the United States proves by clear and convincing evidence that the person will not perform all material obligations as provided in section 2462 of title 10, United States Code, as added by subsection (a). The United States Claims Court may award costs and legal fees upon a finding that there was not clear and convincing evidence in the department or agency records, including any documents or statements of the person, required to support the debarment or suspension. The United States Claims Court shall decide any action brought under this section within a period of 60 days.

(c) TECHNICAL AMENDMENT.—The table of chapters at the beginning of subtitle A and at the beginning of part IV of subtitle A of title 10, United States Code, are each amended by inserting after the item relating to chapter 145 the following new item:

"146. Debarment and Suspension of Contractors ..... 146.".

(d) EFFECTIVE DATE.—This section shall take effect 90 days after the date of enactment of this Act.

19. DRAFT RELATING TO RECOMMENDATION ENTITLED "CORPORATE SELF-GOVERNANCE"

SEC. ___. INDUSTRY SELF-GOVERNANCE

(a) REVIEW BY SECRETARY OF DEFENSE.—The Secretary of Defense shall conduct a review of all regulations and Department of Defense management practices for the purpose of determining what oversight activities of the Department of Defense can be reduced or eliminated as part of a program to increase industry self-governance on defense contracts. The Secretary shall take such action as he determines appropriate on the basis of such review.

(b) The Secretary shall monitor industry's response to any action taken by him pursuant to subsection (a) and report the results of that monitoring to Congress not later than one year after the date of enactment of this Act together with such recommendations as the Secretary considers appropriate based upon the actions taken by the Secretary and industry's response to those actions.

20. DRAFT RELATING TO RECOMMENDATION ENTITLED "TRUTH-IN-NEGOTIATIONS"

SEC. ___. TRUTH-IN-NEGOTIATIONS

(a) IN GENERAL.—The Secretary of Defense shall—

(1) review the regulations implementing the provisions of chapter 137 of title 10, United States Code, that were initially enacted by the Act entitled "An Act to amend chapter 137, of title 10, United States Code, relating to procurement", approved September 10, 1962 (Public Law 87–653; 76 Stat. 528), commonly referred to as "The Truth in Negotiations Act"; and

(2) determine whether it is desirable for the Department of Defense, before agreeing on a contract price during the evaluation of a contract offer, to disclose to the contractor any Federal Government audit of the cost and pricing data submitted by the contractor in connection with such offer.

(b) REPORT.—Not later than 180 days after the date of the enactment of this Act, the Secretary shall submit a report to the Committees on Armed Services of the Senate and the House of Representatives containing the determination of the Secretary with respect to the matter described in subsection (a)(2).