SIMPLIFYING AND STREAMLINING THE FEDERAL PROCUREMENT PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

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SIMPLIFYING AND STREAMLINING THE FEDERAL PROCUREMENT PROCESS

TUESDAY, FEBRUARY 28, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:35 p.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Flanagan, Davis, Fox, Bass, Clinger, Maloney, and Spratt.

Staff present: J. Russell George, staff director; Ellen B. Brown, procurement counsel; Susan Marshall, procurement specialist; and Andrew G. Richardson, clerk.

Mr. HORN. Ladies and gentlemen, the Subcommittee on Government Management, Information, and Technology will come to order. We have some excellent witnesses this afternoon, and we are going to try to keep on schedule.

Let me remind the witnesses that your entire statement will be automatically entered into the record. We ask you to then summarize your statement in 5 minutes. We will abide by the 5-minute rule. Each member of the panel alternating between Republicans and Democrats will then have 5 minutes to question the panel.

We'll have all witnesses speak first, then open it up to the Members. We will have a second round of questions. Now, we won't be able to meet everybody's needs in terms of the Members on questions, so bear with us if we ask you to respond to some written questions to follow up. We will print your answers in the record as submitted.

And you should also know at the beginning of this hearing that it is the practice of the Committee on Government Reform and Oversight to swear in witnesses. And unless the witnesses agree to the oath, they are not permitted to testify. That has been our consistent rule over the last few years, regardless of the witness, and regardless of his position.

We will swear in each panel as a panel. I would like the first panel to come forward, and then I will have an opening statement, and the chairman of the full committee, Mr. Bill Clinger, who I'm delighted has joined us, will give an opening statement. And Mrs. Maloney, Representative from New York, will give an opening statement. We would ask the other Members to file their opening statements so we can then proceed with the panel.

If the first panel would come forward, we will swear you in. We have Dr. Kelman, Ms. Preston, and Mr. Murphy. And I will introduce each of you just before you testify, rather than all at once. Because nobody will ever remember who you are if we do it all at once.

We thank you all for coming. You're well-known experts on this subject.

[Witnesses sworn.]

Mr. HORN. The witnesses all affirmed. Thank you. Please be seated.

Mr. Chairman, why don't you go first, and I'll follow you.

STATEMENT OF HON. WILLIAM F. CLINGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. CLINGER. I thank you very much, Mr. Chairman. And I'm pleased to be here today to hear testimony from the knowledgeable procurement community on their proposals for further streamlining and simplifying the Federal procurement system.

Mr. Chairman, the Federal Acquisition Streamlining Act of 1994 was enacted last year to reform the Federal procurement system. Despite the fact that the U.S. Government spends approximately $200 billion a year on the procurement of needed goods and services, the procurement system has operated in an inefficient and, I might say, Byzantine way in recent decades.

It has been burdened with an outmoded and fragmented statutory foundation and regulatory and procedural proliferation beyond comprehension. FASA certainly was a direct attack on a system that had gone haywire. But we must go further.

The bill that I introduced last Friday, along with Chairman Spence and Chairman Gilman, is just the beginning for this next phase of streamlining and simplifying the Federal procurement process. Although we do not intend a new procurement reform effort to be as comprehensive as FASA, we must continue to push for reforms which will make the Federal procurement system work better and cost less.

And I might say that we are looking forward with great anticipation to working with the administration. I know that the administration has a bill forthcoming which I think we can work in harmony with in cooperation to achieve our joint goals, our mutual goals, which are to make the procurement system work better, cost less, and be more competitive.

So I look forward to that effort. And I had a chance to talk with Dr. Kelman and Ms. Preston about this matter. And we are looking forward to that cooperative effort. I look forward to hearing from our witnesses today and to working with them and our colleagues from the other side of the aisle on further simplification of the streamlining processes.

I would also like to make note of the fact that my predecessor and mentor in my present capacity, Mr. Frank Horton, who I learned a great deal about this job from, is in the audience. And we're delighted to have him with us.

[The prepared statement of Hon. William F. Clinger follows:]

PREPARED STATEMENT OF HON. WILLIAM F. CLINGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, I am pleased to be here today to hear testimony from the knowledgeable procurement community on their proposals for further streamlining and simplifying the Federal procurement system.

As you noted, Mr. Chairman, the Federal Acquisition Streamlining Act of 1994 was enacted last year to reform the Federal procurement system. Despite the fact that the U.S. government spends approximately $200 billion a year on the procurement of needed goods and services, the procurement system has operated in an inefficient and Byzantine way. It has been burdened with an outmoded and fragmented statutory foundation, and regulatory and procedural proliferation beyond comprehension. FASA certainly was a direct attack on a system that had gone haywire. But we must go further.

The bill that I introduced last Friday along with Chairman Spence and Chairman Gilman is just the beginning for this next phase of streamlining and simplifying the Federal procurement process. Although we do not intend a new procurement reform effort to be as comprehensive as FASA, we must continue to push for reforms which will make the Federal procurement system work better and cost less.

I look forward to hearing from our witnesses today and to working with them and our colleagues from the other side of the aisle on further simplification and streamlining proposals.

Mr. HORN. Thank you very much, Mr. Chairman.

Representative Maloney.

STATEMENT OF HON. CAROLYN MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mrs. MALONEY. Thank you, Mr. Chairman.

Last year, this committee reached a bipartisan consensus that the Federal acquisition system was fundamentally flawed and needed to be fixed. Federal procurement was complicated and confusing, wasting billions of scarce taxpayers' dollars.

The 200 billion a year spent by the Federal Government purchasing goods and services often went to pay for unnecessary paperwork and duplicative requirements, the committee's consensus crystallized into the Federal Acquisition Streamlining Act of 1994, FASA.

In broad terms, FASA stands for the proposition that the Federal Government should, whenever possible, purchase commercial items, reduce the need for cost or pricing data, encourage the use of commercial financing practices, establish an electronic method for Federal purchasing, and reduce the number of meritless bid protests through the process of agency debriefings.

FASA was passed by this committee with strong bipartisan support only after extensive consultation with most of the witnesses who will be testifying here today, including the Office of Federal Procurement Policy, the Department of Defense, and representatives from large and small defense, aerospace, and other commercial sector companies.

Now, FASA must be implemented. Last week, OFPP administrator Steven Kelman testified that while the administration is ahead of schedule on drafting the FASA regulations, several of the most important regulations still have not been proposed. We can all anticipate that it may be many more months before all of the final FASA regulations are issued.

The Deputy Undersecretary for Acquisition Reform at the Department of Defense, Ms. Preston, testified that agency officials are now being educated about the requirements of FASA. However, it

is difficult to see how agency officials can be adequately trained on FASA's requirements until the FASA regulations are finalized.

My point is that much work remains to be done by the administration and this committee on FASA. I also want to note that the chairman of the full committee introduced a procurement bill last Friday, and I look forward to subcommittee hearings on that particular bill.

Mr. Chairman, we need a procurement system that is driven by full and open competition, a system that encourages creativity and innovation, and a system that carefully balances the cost and the value of the goods and services purchased by the Federal Government.

I want to applaud the chairman of the subcommittee, Mr. Horn, for calling this hearing and for putting together a fair and balanced list of witnesses. I look forward to hearing their testimony. Thank you very much.

Mr. HORN. Thank you very much for your thoughtful statement. I believe Mr. Fox wants to insert a statement in the record.

STATEMENT OF HON. JON FOX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. FOX. Thank you, Mr. Chairman.

Indeed, the Federal procurement purchases from the private sector provide the opportunity for participating businesses to expand and new service-oriented companies be created.

Procurement expenditures generate secondary and related consumer spending, and I'm looking forward to working with subcommittee Chairman Horn and Chairman Clinger, along with the other members of the committee, to evaluate the priorities and to address these issues.

And I'll submit, if I may, Mr. Chairman, with your permission, the rest of my statement for the record.

[The prepared statement of Hon. Jon Fox follows:]

PREPARED STATEMENT OF HON. JON FOX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, federal procurement has become a prominent issue of debate. Therefore, I am glad we are holding this hearing today.

Indeed, the federal procurement purchases from the private sector provide the opportunity for participating businesses to expand and new service-oriented companies to be created. Procurement expenditures generate secondary and related consumer spending.

However, the growth of federal procurement during the past decade has resulted in a proliferation of complex and overlapping federal regulations that often hinders an agency's ability to procure the best goods and services at the lowest cost.

The Federal Streamlining Act, signed into law last year, was a step in the right direction. Nevertheless, the measure does not reach far enough. We need to move ahead with the fundamental objective of improving the effectiveness and efficiency of the procurement of property and services by government agencies.

Procurement reform is one of Chairman Clinger's priorities and I look forward to working with him on this issue.

STATEMENT OF HON. STEPHEN HORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HORN. Thank you very much, Representative Fox.

I will put my own statement in the record, and just make one comment that last Friday, Chairman Clinger, along with the chair-

man of National Security, Mr. Spence, and the chairman of International Relations, Mr. Gilman, introduced a bill that will serve as the foundation for procurement reforms beyond those provided in FASA.

We have the opportunity to continue the procurement reform initiative begun in the last Congress with the enactment of FASA and develop further simplification and streamlining proposals.

Streamlining the Federal procurement system is no easy task, as everyone in this room knows. The system is huge, it's complex, it's confusing, and it has cost too much, has involved too much red tape, and thus, it has ill served the taxpayer and industry.

The enactment of FASA was a good beginning. We can build on that effort with additional reforms. We can do this on a bipartisan basis. And today, we're going to hear from many very qualified witnesses with varied experiences in government contracting matters.

I look forward to all of that testimony and working with you all to develop further procurement reform legislation.

[The prepared statements of Hon. Stephen Horn and Hon. Frank Mascara follow:]

PREPARED STATEMENT OF HON. STEPHEN HORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

The Subcommittee on Government Management, Information and Technology will come to order.

The Subcommittee is meeting today to solicit from interested parties legislative proposals for simplifying and streamlining the Federal procurement process.

The Federal Acquisition Streamlining Act of 1994 (FASA) was enacted last year to reform the complex Federal procurement system. Although FASA is considered the most comprehensive procurement reform effort in more than a decade, several key proposals were not included in the final FASA package.

Last Friday, our Committee Chairman Clinger, along with National Security Chairman Spence and International Relations Committee Chairman Gilman, introduced a bill which will serve as the foundation for procurement reforms beyond those provided in FASA. We have the opportunity to continue the procurement reform initiative begun last Congress with the enactment of FASA and develop further simplification and streamlining proposals.

Streamlining the Federal procurement system is no easy task. The system is huge, complex and confusing. It has cost too much, has involved too much red tape, and has ill-served both the taxpayer and industry. The enactment of FASA was a good beginning, and we can build on that effort with additional reforms.

Today, we will hear from many qualified witnesses with varied experiences in government contracting matters. I look forward to all of the testimony and to working with all of you to develop further procurement reform legislation.

PREPARED STATEMENT OF HON. FRANK MASCARA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

I am very pleased that we are taking the time today to take testimony on how the Federal Acquisition Streamlining Act enacted last fall can be further improved.

As a small businessman and former county commissioner, I have had experience with procurement systems and strongly support any reform that will reduce paperwork and waste, encourage the purchase of so-called "off-the-shelf" items, and help small business secure more government contracts.

During the full committee hearing on this issue last week, I was very impressed with the testimony presented showing that this major new procurement law will go along way toward ensuring the government is no long purchasing very day goods such as salad dressing and hammers at hundreds of dollars above the cost paid by the average consumer.

Workers throughout the federal government have been motivated by this law to find creative ways of buying the goods their agencies need at competitive, and in some cases, truly discount prices. This is a practice we need to encourage and if ex-

perts in this area feel further reform is desirable, I say lets study their ideas and move forward.

However, I must say I am some what troubled that we could be taking this reform a bit too far. One of the major motivations behind FASA was to help small business secure further government contracts. I want to make sure that the additional reforms being proposed will not inhibit their right to protest an unfavorable contracting decision.

Moreover, I think we need to make sure that particularly in regard to military equipment, we are not ignoring the need to ensure the items and equipment purchased operate safely and do not endanger those young men and women serving in the armed services.

As I told my staff last week, salad dressing is one thing, o-rings and tanks are quite another. I think we must be aware of that fact as we proceed.

Thank you Mr. Chairman and I look forward to listening to today's testimony.

Mr. HORN. Let me introduce the first witness in the first panel. Most of you know him well. He comes to government with a distinguished record.

Dr. Steven Kelman is the administrator for Federal procurement policy in the Office of Management and Budget, Executive Office of the President.

Dr. Kelman.

STATEMENT OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET; COLLEEN A. PRESTON, DEPUTY UNDERSECRETARY FOR ACQUISITION REFORM, DEPARTMENT OF DEFENSE; AND ROBERT P. MURPHY, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE

Mr. KELMAN. Chairman Horn, Chairman Clinger, Representative Maloney and other members of the committee, thanks very much. I will keep to my 5 minutes. I know you'll make me, anyway. And I just want to say a few things.

The first thing I would like to say especially to Chairman Clinger is that the administration was very pleased to learn about the introduction of your Federal Acquisition Improvement Act of 1995 last Friday and that you've addressed in that bill the issues of procurement integrity, streamlining, and recoupment.

The administration supports the direction of the changes and reforms you've proposed in those areas, and we have included them in our own bill, as well. We are very appreciative of the leadership that you are showing in making these further reform efforts possible. And along with all of the other members of the committee, we look forward very much to working with you on your bill.

Second, the committee will be hearing later today testimony from the Acquisition Reform Working Group, with various suggestions for further changes and improvements for this year. We haven't examined them in detail, but the administration intends to examine those proposals very seriously, and we urge the committee to give them very serious and thoughtful consideration, as well. They have been a strong friend of procurement reinvention over the years.

Third, just generally speaking, on the themes of this year's package that the administration is transmitting today, the themes really are the same as the themes in last year's bill. They're the same as the overall strategy of the administration's efforts to improve the procurement system.

And they can really be summarized in four concepts—streamlining, quality, partnership between government and industry, and empowerment to the work force. Those were the themes last year. Those continue to be the themes.

What I would say is that last year's bill addressed mostly small purchases. This year's bill is much more oriented toward bringing these same principles into the world of larger purchases. And that's, I guess, one way I would characterize the difference between FASA and the package the administration is introducing this year.

I want to concentrate the specifics of my testimony on one of the most crucial parts of the administration's package, our efforts to reduce the level of litigation that plagues government information technology procurements.

Disappointed bidders, as you all know, have the right in our system to protest government contract award decisions. And we believe that protests can and do perform a necessary, positive role to improve perceptions of fairness and correct occasional incidents of arbitrary decisionmaking.

But what I would say to the committee is, bid protests are like most medicines—taken as directed, they aid the patient; in overdoses, they kill the patient.

And we believe that currently, the protest system of the GAO is working well. The GAO protest forum provides a low-cost opportunity for bidders to show that a government decision was not rationally based. The amount of litigation of the GAO is reasonable.

By contrast, the special system for hearing bid protests of information technology procurements that was set up by Congress a decade ago at the General Services Board of Contract Appeals, or GSBCA, is not working. According to figures provided by the General Accounting Office, 45 percent of information technology procurements, 45 percent of procurements over $25 million are currently being protested at the GSBCA.

And I would ask each member of the committee to consider that statistic for a moment. Imagine if in your life as an individual or as a businessperson, close to one-half of the major commercial transactions that you entered into got you involved in litigation. That is just unacceptable.

And this excessive level of litigation is creating three problems. No. 1, it inhibits partnership between government and industry. As I sometimes have said, we would like to have a situation where people spend more time satisfying their customers, less time suing their customers. No. 2, it stymies innovation and creativity. And No. 3, the threat of protest causes delay.

And GAO will be issuing a study shortly reporting that IT—information technology bid protests to GSBCA add significantly to procurement lead times.

And in our legislation, we have proposed a number of measures to cut back on the successive level of bid protests at the GSBCA. We urge the committee's very serious consideration for this major impediment to procurement reform and reinvention efforts, and we look forward to continuing to work with the committee.

Thanks very much.

[The prepared statement of Mr. Kelman follows:]

PREPARED STATEMENT OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Mr. Chairman, Representative Collins, Chairman Horn, Representative Maloney, and Members of the Committee, I am very pleased to appear before you today to discuss a legislative proposal developed by the Administration that would complement and augment the important reforms initiated with the passage of the Federal Acquisition Streamlining Act (FASA). If enacted, this proposal would move us another step closer to a system that emulates the efficiency and effectiveness of buying practices used in the commercial world and provides the taxpayer with better service for less cost.

I would like to mention at the outset, Chairman Clinger, that I was delighted by your introduction, last Friday, of the "Federal Acquisition Reform Act of 1995," addressing procurement integrity and recoupment of non-recurring research and development charges for products sold through the foreign military sales program. Both of these areas are much in need of reform, but unfortunately were not addressed by FASA. The Administration strongly supports the direction of your desired reforms and has included provisions in these areas in our proposal as well.

As you know from my remarks last week, I believe FASA is the most significant piece of procurement legislation in over a decade. But, like you, the Administration has identified additional reforms that need to be made to ensure that the payoff of further streamlining for which we are jointly striving is not hindered by problems that have been incompletely addressed.

Broadly speaking, we must further ease the burdens which slow our procurements down. We must eliminate many bureaucratic review and approval layers that discourage acquisition officials from using common sense and creativity. We must continue to expand the options available to buyers for securing quality products at good prices. And we must fully embrace those practices of mutual respect between business partners, and concern for the needs of the customer, that are common to successful transactions in the commercial marketplace.

It is these themes—of streamlining, empowerment, quality, and partnership—on which our proposal is based. Today, I would like briefly to discuss how our proposal would further each of these important objectives.

STREAMLINING

For years, we have struggled with a system that has made it more and more difficult for agencies to be responsive to taxpayer demands. Calls for legislative streamlining and simplifying were finally answered by FASA which, among other things, authorized expanded use of simplified procedures and reduced burdensome cost and pricing data and other unique requirements when buying commercial products. FASA, however, did not do enough to streamline larger buys—processes that now often take several years. We would propose several additional measures, including the following:

• Authorization to limit the competitive range to no more than three offerors for purposes of efficiency. Currently, because of the fear that a procurement will be delayed by protests, contracting officers tend to include an offeror in the competitive range unless that offeror clearly has no chance whatsoever of being awarded the contract. In addition to being time-consuming, this practice causes the government to expend extensive resources evaluating large numbers of proposals that may be marginal in quality. It also lures offerors with little chance of getting the contract into expending valuable resources that could be better utilized seeking other opportunities.

The Administration's proposal would permit, after an initial review of the proposals received in a negotiated procurement, reduction of the competitive range for reasons of efficiency. By focusing negotiations on as few as the three highest qualified firms in the competition who have the best chance of being awarded the contract, all parties participating in the procurement save time and money.

• Authorization to use two-phase selection procedures. Traditionally, the design and construction of a public building or other facility, and development of an information technology system has involved a contract for design of the project followed by a separate contract for construction or implementation. The Administration's proposal would give agencies the flexibility to use, in appropriate circumstances, a two-phase approach that would allow the government to look to the contractors who will actually do the work to compete to develop the most innovative and efficient design. In the first phase, there would be wide initial competition. Successful offerors would then be requested to submit their detailed design and cost proposals for consideration in a second phase. The two-phase approach would only be used when the head of the agency anticipates that five or more offerors would be interested in participat-

ing and that design work must be performed before an offeror can develop a cost proposal for the contract. Because it identifies the offerors least likely to succeed in the first phase, it is anticipated that this approach can provide greater efficiency in certain instances and mitigate the high cost of proposal preparation.

• Exemption from 15-day wait period when using detailed synopses. The primary purpose of requiring notice in the Commerce Business Daily (CBD) is to improve small business access to acquisition information and enhance competition. However, even after FASA is implemented, agencies will still be required, for purchases over the simplified acquisition threshold, to wait at least 15 days after publication of a notice before issuing solicitations. In instances where a contracting activity provides in its synopsis the information required to be in a solicitation, a wait period serves no purpose—a potential offeror already has all the information in hand for deciding whether to submit an offer. In such cases, the 15-day notice slows the process down and adds no value. Accordingly, the Administration proposal would waive the 15-day mandatory wait period under these circumstances.

• Authorization to permit the effective testing of innovative procurement procedures. We have already begun to see the effectiveness of innovative procurement procedures through the work of the reinvention labs throughout government as well as the Federal Aviation Administration's test pilot authorized by FASA. I believe we would all like to see more of these successes. To that end, we are asking for expanded test authority which, to the extent required, would permit the OFPP Administrator to authorize experiments with innovative procurement procedures. This authority would encourage Federal acquisition officials to experiment with more efficient and effective ways of conducting competitions and give us valuable insight for future improvements.

• Streamlining of Procurement Integrity Requirements. The Administration proposal, like your bill, Mr. Chairman, would considerably clarify existing procurement ethics laws by adding new provisions that address disclosing and obtaining sensitive procurement information.

The proposal would increase the general understanding of the conduct expected and limitations imposed, by focusing on the information to be protected, rather than the status of persons who might disclose or obtain the information, or the stage of a Federal agency procurement when the information may be generated. Current provisions are so complex that individuals typically must request written legal opinions to interpret the rules that apply to their conduct. This is wrong.

Also, we propose eliminating the current complex and burdensome system of bureaucratic certifications to ensure compliance. These certification requirements are unlikely to deter deliberate criminal conduct, nor do they ensure that clear guidance is provided to the great majority of Government and contractor employees who want to abide by the rules.

Finally, we are proposing to increase the maximum criminal penalties for violations of the laws regarding protected information. As we remove unnecessary bureaucratic burdens on the vast majority of government officials and contractor personnel who are honest, we must demonstrate our willingness severely to punish those few who exploit the system for monetary gain.

• Authorization for agencies to contract directly with section 8(a) companies. Currently, under section 8(a) of the Small Business Act, the Small Business Administration (SBA) enters into contracts with agencies and awards subcontracts for performing those contracts to eligible small, disadvantaged businesses. Many have pointed out that this contracting structure is redundant and unnecessary. It adds time, but no value. The Administration proposal would streamline this process by authorizing SBA to permit agencies to contract directly with section 8(a) firms, enabling greater and more efficient use of this socioeconomic program.

• Authorization to negotiate with incumbent lessors for continued occupancy of space. When the government acquires a new leasehold interest in real property, it incurs costs such as those associated with altering the space to meet specific needs. Such costs can be substantial if the occupying agency must move to other space upon expiration of the lease space. The Administration's proposal would permit agencies to negotiate only with the incumbent lessor for continued occupancy of space in buildings under certain circumstances where a formal recompetition is impractical and the existing lessor is willing to continue to provide the space at a fair market price.

• Creation of a $1,000,000 simplified acquisition threshold for the regulation of services conducted as a small business set-aside. The Administration proposal would revise the definition of simplified acquisition threshold to include an acquisition of $1,000,000 for services or construction conducted as a total competitive small business set-aside. This would promote procurement streamlining by introducing simplified procedures at the higher threshold. There is a large pool of highly qualified,

economical small business firms in service industries. However, burdensome procedures for competing individual requirements encourage agencies to aggregate their requirements into large task order contracts that may be more expensive to the government. This new provision would counteract that disincentive to contract with small business firms.

EMPOWERMENT

Successful reinvention of the procurement process requires more than just streamlining. It requires the innovative and creative thinking that comes with employee empowerment. The Administration's proposal would encourage this type of thinking by eliminating many review and approval layers that create bureaucracy but add little value, placing the authority for basic contract management squarely in the hands of the acquisition official.

It would also empower by requiring that the decisions of line officials be given greater deference before the various protest bodies. Acquisition officials would still be held accountable for their actions—thus ensuring that they act in a rational manner. But gone would be the routine second-guessing that has made them unwilling to exercise the discretion that could make our system operate in a more commercial-like style.

I can speak to this issue from personal experience. During my time as Administrator, it has been my pleasure to meet face-to-face with literally hundreds of front-line procurement officials. Many have expressed to me their frustration about how the system makes their jobs harder by discouraging the exercise of discretion. I believe, our proposed legislation would act to take away that frustration and give contracting personnel the authority they need to more easily meet taxpayer needs in a sensible, responsible way.

QUALITY

While agencies have increasingly moved away from low price purchasing and towards "best value" buying, they continue to find that securing good quality and fair prices oftentimes cannot be done within reasonable time frames. The Administration proposal would increase an agency's ability to gain timely access to suitable products and technologies in the commercial market.

One provision, for example, would make clear an agency's ability to tailor their specifications and evaluation factors once a solicitation for a commercial item has been issued. Agencies recognize that the fast pace of product evolution that occurs in today's commercial market makes it futile to try to ensure product suitability through detailed specifications that address every product characteristic. Yet many acquisition officials fear that this is the only way they can ensure the purchase of suitable, high quality products without being challenged. As a result, agencies spend much time and cost developing specifications and frequently are unable to acquire preferable capabilities that users learn about during the course of competitive negotiations. The authority provided in the proposal would recognize that the commercial acquisition process is an evolutionary one where the buyer's focus is to learn about and evaluate alternative product designs and select the one that represents the best value available in terms of the tradeoff among cost and quality factors.

By allowing use of this and other more flexible commercial style buying approaches, the Administration's proposal would help the government to more readily attain the type of quality that has come to be expected in the commercial market.

Incumbent contractors may also have an incentive to continually provide high quality if doing so might enable them to get follow-on work without having to go through a full and open competition. Under the test authority provision we are proposing, an agency could develop a plan for testing the use of adequate competition for a recompetition of a continuing requirement where an incumbent contractor has been performing well. Such a plan might include a requirement that the agency head certify that the incumbent contractor has met or exceeded the cost, schedule, and performance requirements established in the current contract.

PARTNERSHIP

While concern for customer satisfaction and a desire to seek long term business relationships is a given in the commercial world, such behavior is too often absent in government contracting. We can never expect to come even close in our purchasing practices to the efficiency of the commercial sector so long as our system includes requirements premised on views that see all contractors as untrustworthy and government contracts as entitlements. I cannot emphasize this point enough. Unless we take significant steps to address these unhealthy attitudes, significant reform will never be fully realized. Let me explain further.

• Viewing contractors as untrustworthy. Both the NPR and the 800 Panel recognized the harmful, chilling effect the current procurement integrity statutory provisions have on legitimate, necessary, exchange of information between contractors and procuring agencies. As we move from the use of government contract specifications that dictate contract performance to the use of specifications that describe the Government's needs in functional terms, effective information exchange is crucial. Agencies need to be able to gather information on the latest and best that industry has to offer to meet the Government's needs.

Also, contractors need enough information to intelligently decide whether or not to bid on a specific contract. We believe our legislative proposal on procurement integrity strikes the appropriate balance between the need to protect the integrity of the procurement process and the equally important need to allow for effective exchange of information between Government and industry.

• Viewing contracts as an entitlement programs. In the private sector, contractors realize that good will and high customer satisfaction are critical to success. Without it, survival is impossible. However, not all contractors take this same attitude when dealing with the Federal government. Perhaps because public monies are being spent on the work, they inappropriately feel they have a right to perform it. This ignores the interests of taxpayers in assuring good performance and good prices. As a result, while "protests"—challenges to contract awards—are unheard of in the commercial marketplace, they have become a problem to our system.

I acknowledge that protests can perform a necessary role in our public procurement system to improve perceptions of fairness and correct occasional incidents of arbitrary decision making that should not be permitted where taxpayer money is involved. But bid protests are like most medicines. Taken as directed, they aid the patient. But overdoses can kill the patient.

Today, there are four places outside of the agency a contractor may go if it wishes to challenge an agency's procurement action: the General Accounting Office (GAO), the General Services Administration Board of Contract Appeals (GSBCA)—if the procurement is for information technology—the Court of Federal Claims, or a federal district court. Studies of the procurement system conducted in recent years, including the Vice President's National Performance Review and the 1993 Acquisition Law Advisory Panel to the U.S. Congress on Streamlining Defense Acquisition Law (know as the "800 Panel") have concluded that this many fora are unnecessary. Both of these studies recommended that there be only one judicial forum to consider bid protests: the Court of Federal Claims. Our proposal would carry through on this suggestion. With national jurisdiction, the Court of Federal Claims could effectively serve as a unified judicial forum with contract expertise, eliminating forum shopping and promoting the application of consistent legal principles that lawyers generally welcome.

The Administration believes that the protest system at the GAO is working well. It provides a low-cost forum for protesters to show that a government decision was not rationally based. The amount of litigation at the GAO is reasonable. To go back to my medicine analogy, the medicine is helping the patient.

By contrast, the system for hearing bid protests of information technology procurements at the GSBCA is not working. Currently, 45% of information technology procurements over $25 million are being protested to the GSBCA.

I ask the members of this Committee to think about this statistic for a moment. Imagine if, in your own life as a consumer or a businessperson, one-half of your commercial dealings got you involved in litigation. This is the kind of litigation abuse the federal procurement system is being asked to bear. This level of litigation is unacceptable. The Administration asks your help in curbing it.

Every participant in information-technology procurement knows there is abuse of the GSBCA litigation process. Incumbent contractors who have lost a re-competition routinely protest, simply to delay the start of the new contract so the old contractor can continue to receive revenues while the litigation is going on. Company officials in charge of preparing losing bids urge protests so their bosses can't criticize them for not having done "everything they can" to win the contract.

This sort of excessive litigation is creating three problems:

First, partnership between government and industry is being inhibited. An academic study some years ago of contract-related litigation in the commercial world showed that suppliers and customers sued each other almost only when their business relationship had irretrievably broken down. Suppliers and customers that sued each other stopped doing business with each other, and as long as a supplier and customer planned to continue doing business together, they did their utmost to avoid litigation. Yet in government in the information technology area, our suppliers and we are constantly in litigation. This creates a terrible climate for the partnership we are trying to build.

Second, innovation and creativity are being stymied. I can tell you that every time I work to encourage a new way of doing business in our federal agencies, the most common objection I hear from government officials is "it will increase our exposure to protests." For example, we have been working to encourage the common-sense idea that when we award new contracts, we should look at how contractors have performed on previous contracts. One federal agency has been involved in litigation with the GSBCA over a contract where the award decision turned around the quality of past performance. At a deposition with lawyers for the protesting firm, a senior government official was asked whether the agency had ever counted past performance so heavily in a previous procurement. No, she responded, this was a new, innovative program. The attorney tried to suggest that the very newness of the effort somehow meant the agency was biased against the protester! Excessive protests are one of the most important barriers to innovation.

Third, the threat of protests causes delay. The greater the exposure to protests, the slower the procurement process. Contracting officials may be overly cautious and take unnecessary actions to ensure success in defending against possible challenges—even unfounded protests that would be dismissed, withdrawn, or denied on the merits. And protests themselves delay the process further. A study to be issued shortly by the GAO will report that IT bid protests to the GSBCA add significantly to procurement lead times.

And what have we gotten for this very high level of costly litigation in the GSBCA? Probably not what Congress was expecting when it created this specialized bid protest forum a decade ago. It is widely believed—as discussed most recently in Senator Cohen's report on computer procurement last year—that information technology is the most troubled area of government procurement. Thus, the excessive amounts of litigation have not prevented the problems from being worse than in any other area of government contracting. And the resistance to innovation and barriers to partnership contribute to problems with information technology acquisitions.

The Administration believes that the level of litigation of information technology procurements must come down significantly. To promote this end, we have made a number of legislative proposals we strongly urge you to endorse. Time will tell whether further measures to stop litigation abuse are necessary. These are the main measures we are recommending:

(A) We must adopt one standard and score of review for all of the protest bodies. Currently, the various protest bodies follow different practices with respect to the type of review applied to agency decisions. The GAO, for example, will review an agency's decision on the record and uphold that decision unless it lacks a rational basis. By contrast, the GSBCA allows protesters to introduce, and agencies are required to defend their decisions in light of, evidence beyond that contained in the agency's file, even if such evidence was never brought to the attention of the agency nor available to the contracting officer at the time the decision was made. In some senses, the GSBCA reconducts the entire evaluation process.

We are proposing that the uniform standard require that decisions be evaluated on the agency record and overturned only if not rationally based. We believe this will effectively hold decision makers accountable for their actions, without curtailing innovation and creativity through a fear of being second-guessed.

(B) We must stop losing bidders from recovering their litigation costs. Current practices allow contractors to charge the taxpayer for such costs as part of their indirect cost pool, if the contractor is doing cost-reimbursement business with us, even if they lose the case. I know of no other example in any legal system anywhere where the winners in court pay the legal costs of losers! We are seeking your support for our efforts to end this abuse of taxpayer dollars.

(C) We must find less costly and less time-consuming ways to resolve protests. We applaud the steps taken in FASA last year to improve debriefings and hope they will contribute to reducing protests. We are also examining ways that agencies can provide more effective alternatives as part of our overall initiative to expand the use of alternative dispute resolution techniques in government contracting. In this regard, we would appreciate your help. The Administration's proposal includes provisions designed to encourage agencies to establish—and potential protectors to use—informal, inexpensive, and quick internal agency procedures for senior agency officials to resolve complaints raised by offerors. Under our proposal, if an agency establishes such procedures but a protector fails to take advantage of them, then the protector will be barred from receiving protest costs even if the protector prevails before one of the protest fora outside the agency.

I am pleased to say that some contractors have expressed an interest in seeking protest relief from internal agency procedures rather than external agency protest fora. To assist contractors that refrain from protesting contract decisions to fora out-

side the contracting agency, the Administration's proposal would encourage such contractors to include statements in their proposals that they will refrain from protesting to such outside fora.

(D) We must curb behavior aimed at abusing the protest process and interfering with a forum's ability to act with appropriate dispatch. Our proposal would do this by authorizing the GAO to recommend the imposition of, and the GSECA to impose, liability for protests that are frivolous or brought in bad faith. This will help to prevent agency programs from being tied up by unfounded actions.

(E) We must permit agencies to decide whether a procurement should proceed in the face of a protest. Currently such determinations are made by the GSBCA, when protests of IT procurements are taken to this body. This denies the agency the discretion to continue with actions that are non-prejudicial to the protest process and the protester's interests.

(F) We must deal with the problem of bid protests under electronic commerce. We must preclude the filing of protests to the Comptroller General, GSBCA or any other fora other than protests to the procuring agency where the protested contract actions concern the award of procurements conducted through the Federal Acquisition Computer Network (FACNET) and are under the simplified acquisition threshold. FACNET has the potential to promote efficiency and streamlining by substituting electronic transactions for paper ones and to increase competition by making it easier to gain access to contracting opportunities—especially in the small dollar range. But with vastly more bidders—and many more losing bidders—our exposure to bid protests will go up significantly When we get say 100 bids instead of three, our vulnerability to protest is, just as a matter of probability, increased thirty-fold. If any significant number of these electronic procurements become involved in protests, the simplification and productivity savings of electronic commerce can easily be lost.

We are relying on electronic commerce to make a significant contribution towards meeting the workforce savings goals Congress and the Administration have demanded. The vulnerability of electronic commerce to increased protest levels jeopardizes those savings. Inasmuch as FACNET will dramatically increase the visibility of procurement opportunities to small businesses around the country, we feel an appropriate tradeoff for that increased opportunity to compete is to prevent a dramatic increase in government exposure to protests that would undermine the efficiency goal without appreciably increasing competition.

CONCLUSION

Working together to enact FASA, the Administration and Congress took a first—and significant—step in transforming our procurement system from one that is rule-bound, paper-burdened, and incapable of adequately supporting agencies' missions to one that can be more responsive, commercial-like, and better able to deliver the economical support government programs need and taxpayers deserve. As you can see from this legislative proposal, the Administration believes that additional acquisition reform is critical to our reinvention endeavors. I note that we are also seriously studying the proposals of the Acquisition Reform Working Group and urge you to do the same.

With your continued cooperation, I believe we can bring about the changes needed to ensure that our government works better and costs less. I look forward to working with you on your legislative initiatives and hope that you will carefully consider ours.

This concludes my prepared remarks. I will be happy to answer any questions you may have.

Mr. HORN. Thank you, Dr. Kelman. We appreciate your statement.

Our next witness is Colleen Preston, the Deputy Undersecretary for Acquisition Reform, Department of Defense. You've earned the respect of this committee, and we're delighted to see you again.

Ms. PRESTON. Thank you, Mr. Chairman. Chairman Clinger, Representative Maloney, and members of the committee, I'm pleased to be able to return this week to continue our discussion of acquisition reform and, in particular, the administration's proposal to build upon the reforms that were enacted last year in the Federal Acquisition Streamlining Act, which we in DOD call "FASTA," a little take on one of our late-night sessions, where we

decided we were going to do things faster and better and, as such, came up with "FASTA" instead of "FASA."

As I said last week, the Department believes that FASTA gave us 95 percent of the authority we need to reengineer the acquisition process and adopt the acquisition processes of world-class customers and suppliers. I join my colleagues here today to talk about how we could even improve on that.

As I also mentioned last week, DOD's acquisition vision is to meet warfighter needs as the world's smartest buyer of best value goods and services delivered efficiently, on time, while maintaining the public trust and supporting the Nation's socioeconomic goals.

We are on the threshold of an exciting yet challenging time for our acquisition process. In a few more months, we will have new regulations adopted and will begin the Herculean task of educating an entire acquisition workforce on the changes brought about by FASTA.

In addition, the Department has itself a number of initiatives that it is pursuing internally, both from a centralized policy standpoint within each of the services and defense agencies, and at the local activity level. We believe it is important to strike now while the iron is hot to remove the remaining 5 percent of the legislative impediments that keep us from becoming world-class customers.

Today, I will outline for you in keeping with your request that we confine our comments to 5 minutes only a few of the provisions that we propose to offer. Some of them are included in the administration proposal, and others will be incorporated into the Omnibus National Defense Authorization Bill for fiscal year 1996.

Getting into the specific sections, first of all, Dr. Kelman mentioned empowering our acquisition personnel. We want to make sure we empower our front-line decisionmakers by allowing our procurement professionals to exercise their judgment without constant second-guessing by raising the dollar thresholds for approvals to higher levels for justifications for other than full and open competition.

In addition, we want to reward agencies that conduct a high percentage of competitive acquisitions by exempting them from having to get sole-source justifications approved at higher organizational levels, as long as they maintain these high standards.

We want to give the contracting officer flexibility to determine the reasonableness of a contractor's fee, given the particular circumstances of that contract, by repealing statutory fee limitations on specified types of contracts, including architect and engineering services contracts.

We want to correct an anomaly in the Truth In Negotiations Act that was created last year by FASTA that allows for contracts under the $500 threshold. Actually, it permits rather than requires the use of all available tools to establish price reasonableness before requesting price or sales data.

Dr. Kelman also mentioned the issue of bid protests. And this is a very significant problem for the Department, as well, something that we wholeheartedly support.

We also—I don't believe he mentioned—would like to see the award of costs for frivolous protests, so that we don't see protests that are filed for the 31 cents that it takes to mail a package or

an envelope to GAO. And we are also very concerned about the length of time that the protest takes.

One initiative that was done several years ago as part of the Defense Authorization Bill which we would like to see emulated in FASTA in the new acquisition reform proposal is the availability of funds be extended beyond the period of time which they would normally be authorized in order not to force a contracting officer into making a decision to award a particular contract simply out of fear that if they get a protest, they will lose the money because it's the end of the fiscal year before a decision is granted.

We provided that for bid protests, but we did not do it for other administrative actions. And that is something that we need to add into this legislative proposal.

We would like to encourage agencies to establish internal protest resolution procedures as an effective alternative to the courts, GAO, and the GSBCA, while maintaining the protester's leverage by precluding contract award or performance during the agency and any subsequent GAO or GSBCA review of the protest.

I would also like to mention just a few other initiatives. We think that it would be appropriate to also provide exemptions from synopsizing requirements for procurements that are above the simplified acquisition threshold but are using the FACNET system, the computerized system. We believe the same rationale applies for that.

And the rest of these provisions, I think I can put in a few categories. Basically, there's nothing sexy or glamorous about most of them. They either repeal unnecessary laws because there are regulations that implement them or because they are duplicative, they clarify provisions of last year's act, or they provide additional flexibility that we have found that we need in existing statutes in order to reengineer our business processes.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Preston follows:]

PREPARED STATEMENT OF COLLEEN A. PRESTON, DEPUTY UNDERSECRETARY FOR ACQUISITION REFORM, DEPARTMENT OF DEFENSE

SECTION BY SECTION ANALYSIS

(FOR SELECTED SECTIONS OF ADMINISTRATION PROPOSAL)

(* DENOTES PROVISIONS THAT ARE EXPECTED TO BE PROPOSED AS PART OF THE FY1996 NATIONAL DEFENSE AUTHORIZATION BILL)

Section 1002/1052. Modification of Approval Levels—Empowering the Front-Line Decision-makers.

- Allow front-line procurement professionals to exercise their judgment without constant second-guessing by raising the dollar thresholds for approvals at higher levels for Justifications for Other than Full and Open Competition (levels for DoD are different than for the civilian agency because they are set to coincide with approval authorities for major defense systems, and in recognition of the higher value contracts let by DoD organizations with same titles as civilian agency organizations)
- Reward agencies that conduct a high percentage of competitive acquisitions by exempting them from having to get sole source justifications approved at higher organizational levels as long as they maintain these high standards

Section 1021/1071. Repeal of Fee Limitations.

- Give the contracting officer flexibility to determine the reasonableness of a contractor's fee given the particular circumstances of that contract by repealing existing fee limits on specified types of contracts, and the 6% fee limit on architect-engineering services contracts (fee limits discourage potential competitors and are a dis-

incentive to providing high quality services; in A&E contracts indirectly leads to higher negotiated prices and encourages reliance on standard designs, leading to increased contract modifications, protests, repairs and maintenance; also results in increased administrative burden because of requirement to track costs subject to limit)

Section 1101. Truth in Negotiations Act (TINA)—Required Regulations
• Corrects an anomaly in TINA created by FASTA that for contracts under the threshold permits rather than requires use of all available tools to establish price reasonableness before requesting price or sales data

Section 1201/1435. GAO Requirement to Rule on Dispositive Motions
• Saves time and money for all parties involved by setting a 5 day limit for filing dispositive motions with GAO and 20 day limit for GAO to rule on them (incentivizes timely and substantive filing by allowing extension of other proceedings while dispositive motions are pending)

Section 1202. Award of Costs for Frivolous Protests.
• Prevent frivolous protests by contractors by authorizing GAO to recommend an award of costs to the government when a contractor files a frivolous protest (this authority will act as a deterrent to frivolous protests; since the GAO may not direct an executive agency, guidance will be added to the FAR to permit an agency head to initiate action to collect payment from a contractor based upon a GAO recommendation)

Section 1205. Availability of Funds Pending Administrative Procedure.
• Make sure contracting officers are not "forced" into a decision to award to a particular contractor simply out of fear that if they get a protest, they will loose the money before a decision is rendered (amends 31 U.S.C. 1558 to ensure funds remain available for obligation while an administrative proceeding, such as a small business size challenge, is ongoing; this parallels language protecting funds from expiration when a GAO or GSBCA protest has been lodged (section 813 of Public Law 101–189))

Section 1443. Sense of Congress on Agency Resolution of Protests.
• Will encourage agencies to establish internal protest resolution procedures as effective alternatives to the courts, GAO and the GSBCA, while maintaining a protester's leverage by precluding contract award or performance during the agency (and any subsequent GAO or GSBCA) review of the protest

Section 2001/2051. Vestiture of Title.
• Would clarify conflicting precedents on property "ownership rights" set by Federal bankruptcy courts and the U.S. Claims Court by clarifying that progress payments made pursuant to 10 U.S.C. 2307 and the comparable civilian statute, so that when contract progress payments are made, title to property acquired or produced passes to the Government ("vests") when the property is allocable or chargeable to the contract

Section 2251. Divestiture of District Courts of Dispute Jurisdiction.
• Provides a means for expeditious and fair resolution of contract claims through uniform interpretation (by a single court, rather than any district court or by the Court of federal claims)) of laws and implementing regulations (amends the Tucker Act to give the Court of Federal Claims exclusive jurisdiction to consider protests and claims alleging violations of procurement law or regulation (without this amendment, bid protests can be considered, resulting in a confusing process)

Section 2252. Contract Disputes Act Improvement.
• Encourages quick dispute resolution and simplifies the litigation process by making the time for filing an appeal at the Court of Federal Claims and agency boards of contract appeals the same (90 days)

Section 2302. Waivers from Cancellation of Funds.
• Would authorize two categories for which funds will remain available for obligation (without time limit) until the contract purpose is achieved
- Satellite incentive fees (funds available until fee is earned)
- Shipbuilding (funds available for contract price adjustments, close-out costs, settlement of claims, etc.)

Section 4201. Repeal of Duplicative Authority for Simplified Acquisition Purchases.
• Repeals duplicative authority for simplified acquisition procedures
- FASTA Section 4201 placed authority in a new Section 31 of the Office of Federal Procurement Policy Act which duplicates authority at 10 U.S.C. 2304(g) and 41 U.S.C. 253g

Section 4203. Procurement Notice Wait Periods.

• If synopsis provides information required to be in a solicitation, an agency is not required to publish a separate CBD synopsis 15 days before issuing solicitation

• Gives contracting officers flexibility to compress solicitation timeframes when business needs and marketplace support doing so

Section 4204. Exemption from Synopsizing Requirements.

• Exempts procurements accomplished on FACNET from procurement notice synopsizing requirements

• Permits establishment of flexible wait periods

Section 4205. Repeal of Duplicative Procurement Notice Provision.

• This section repeals the duplicative procurement notice provision in subsection 8(e) of the Small Business Act

• Since this same law is set forth in Section 18 of the Office of Federal Procurement Policy Act, repeal eliminates the risk that an amendment to one act will not be duplicated in the other, resulting in conflicting statutes

Section 4301. Micropurchases.

• Makes it easier for front line managers to use micropurchase authority

• They can make the required "noncompetitive determination" without having to involve a contracting officer

Section 7004. Test Program for Negotiation of Comprehensive Subcontracting Plans.

• Will allow firms covering a wider range of supplies and services (thus enhancing business opportunities for small/small and disadvantaged businesses to participate in the comprehensive subcontracting plan test by:

- Allowing multiple purchasing activities in each service to take part
- Reducing the number and total value of contracts required for a contractor to participate (3/$5M vs. 5/$25M)
- Changing the base period from FY89 to the fiscal year preceding the current fiscal year
- Allowing new contractors to enter the program after FY94

Section 7101. Repeal of Walsh-Healey Public Contracts Act.

• Allows the repeal of a redundant and outdated law that duplicates provisions of the Fair Labor Standards Act which applies to all employers, including federal contractors, and mandates minimum wage, overtime, working conditions, age requirements and convict labor; limits competition and access to commercial technology by requiring suppliers to be "regular dealers or manufacturers;" and impedes the use of simplified purchases

DOD UNIQUE PROVISIONS

*Section. 18 Month Limitation on Shipbuilding Claims

• Would prevent an inundation of contract claims by clarifying that the 18 month limit on shipbuilding claims for contracts entered into before enactment of FASTA applies to both the Board of Contract Appeals, courts, and Service Secretaries (counters a recent Federal Circuit Court of Appeals decision that the 18 month limitation period applies only to Service Secretaries clarify conflicting precedents on property "ownership rights" set by Federal bankruptcy courts and U.S. Claims Court)

*Section. Extraordinary Contractual Relief.

• Would allow the use of this statutory authority to provide indemnification against unusually hazardous risks (without budgeting for the full amount of the liability) in peacetime, as is done now, without the facade of a declaration of a national emergency (which has at present been in effect since the Korean War)

*Section. Unit Cost Reports.

[DoD to insert]

*Section. Defense Acquisition Pilot Programs

• Expands the range of statutory waivers available to FASTA-authorized pilot programs to:

- Permit decisions concerning developmental and operational testing to be made by milestone decision authority (MDA) not by the OSD OT&E Director
- Allow use of standard commercial warranties against manufacturer's defects
- Allow program status reports in format set by DoD regulation (vice unique Selected Acquisition Report/Unit Cost Report formats)
- Eliminate separate manpower analysis and allow independent cost estimate to be done at MDA level (vs. OSD CAIG)

• Authorizes several new additional pilot programs

*Section. Testing.
• Would make some very necessary minor clarifying changes in the testing statutes without changing any of the essential requirements by:
• Substituting "vulnerability" for "survivability" throughout the statute (clarifies that live-fire testing addresses the probability of kill given a hit vice survivability, which includes a larger spectrum of considerations, i.e., maneuver, jamming, tactics, etc.)
• Requiring that testing begin at the component, subsystem and subassembly level
• Allowing the SecDef to authorize expanded use of contractors if impartiality is assured (i.e., the system contractor would be allowed to provide analytic and logistics support; a contractor could support both developmental and operational test analysis; but could not establish criteria for data collection, performance assessment or evaluation activities)

*Section . Bar on Documenting Economic Impact.
• Would get rid of an unnecessary statutory provision that duplicates a regulation banning the use of government contract funds to show the economic impact of a government contract

*Section . Undefinitized Contract Actions.
• Would allow contracting personnel flexibility and some relief from the restrictions on use of undefinitized contracts to support special operations such as peacekeeping, humanitarian assistance, and disaster relief missions

*Section . Contract: Delegations.
• Would clean up the statutes by repealing an unnecessary law authorizing Service secretaries to delegate specified research contracting authorities (unnecessary because the secretaries have inherent authority to delegate)

*Section . Coordination and Communication of Defense Research Activities.
• Change would provide flexibility needed to reflect changing acquisition processes (i.e., may or may not have Milestones 0, I and II) by authorizing technological issues to be addressed at "all decision reviews" and eliminating the requirement that they be considered and documented specifically at Milestones 0, I and II).

*Section . Technical correction in Authority to Procure for Experimental Purposes.
[DoD to insert]

*Section. Repeal of Spare Parts Quality Control.
[DoD to insert]

*Section . Arms and Ammunition: Immunity from Taxation
• Exempt military department purchases of "heavy wheeled vehicles and trailers" from federal excise tax which is then reimbursed anyway, but not until after considerable administrative headache (i.e., eliminates the administrative burden/costs of paying taxes, and the complications that arise when unanticipated shipping destination changes "turn on/turn off" need to pay taxes)

*Section . Independent Cost Estimates.
• Align level of organizational responsibility for independent cost estimating with the level of the program decision, which would allow independent cost estimates for acquisition category IC programs to be done by:
- Army Directorate of Cost Analysis
- Naval Center for Cost Analysis
- Air Force Office of Cost and Economics

*Section . Contracting for Department of Defense Commercial or Industrial Functions.
[DoD to insert]

*Section . Fees for Samples, Drawings.
• Resolve inconsistency in two statutes dealing with fees charged to commercial users of Major Range Test Facility Bases (MTRFBs) to require MTRFBs to charge direct costs and allow them to charge indirect costs

*Section . Factories and Arsenals: Manufacture At.
• Consolidate and make consistent two statutes dealing with manufacture of supplies at Army and Air Force-owned factories/arsenals by giving both services discretionary authority to manufacture in-house (Army previously had to seek a waiver not to produce in-house)

*Section . Naval Salvage Facilities.
• Streamline acquisition laws by consolidating (without substantive change) all statutes pertaining to contracting for naval salvage facilities

*Section . Civil Reserve Air Fleet.
• Increases flexibility of CRAF operations by permitting DoD to grant CRAF contractors limited commercial use of CONUS airfields during operations requiring less than "full" CRAF activation

*Section . Disposition of Naval Vessels.
• Makes the consolidated statue identical to the previously existing laws by permitting transfer of vessels in U.S. territories as well as states

*Section . Amendment to Conform Procurement Notice Posting Thresholds.
• Raises the defense procurement notice posting threshold (currently $5,000) to make it the same as that for civilian agencies ($10,000)

*Section . Defense Acquisition Workforce Act Improvements.
• Amends 10 U.S.C. 663 to authorize the Secretary of Defense to exclude military members of the Acquisition Corps (defined in 10 U.S.C. 1731) who have graduated from the Senior Acquisition Course at the Industrial College of the Armed Forces, from the mandatory joint duty requirement if the individual is to be assigned to a Critical Acquisition Position (defined in 10 U.S.C. 1733) so that they will not be assigned to acquisition career fields in which they are not certified; to joint billets that don't require acquisition expertise; or their promotion competitiveness penalized simply because there are generally more acquisition graduates than expected joint billets
• Corrects adverse effects on the acquisition workforce, increases management flexibility in employing innovative practices, and recognizes the realities of downsizing and related personnel turbulence, by eliminating the three year mandatory assignment for persons assigned to critical acquisition positions (10 U.S.C. 1734(a)

*Section. Inapplicability of Prohibition on Gratuities.
• In order to take advantage of the simplified acquisition procedures and purchase commercial products, as authorized by FASTA, would exempt contracts under the simplified acquisition threshold and contracts for commercial items

Sections 6101–6103. Technology Innovation.
• Allows Federal agency employees to copyright, not just patent, computer software they develop as part of their official duties under, or related to, a cooperative research and development agreement (CRADA) because many private sector organizations will not enter into CRADAs and attempt technology transfer without protection of the intellectual property underlying the technology (promotes the commercialization of software developed with federal research funds, thus strengthening the nation's economy, and serving the goal of maximizing technology transfer)
• This amendment also allows for the period of election to be shortened to four months, giving the federal agency sufficient time to review the invention and have a patent application prepared and filed, and amends 35 U.S.C. 202(c)(3) to encourage contractors to file for patent protection in a timely manner if they elect to retain title to an invention, thus speeding the entry of technology into the commercial market

*Section . Patent and Copyright Cases.
• Amends 10 U.S.C. 2386 to substitute "technical data and computer software" for "designs, processes and manufacturing data" to update terminology

*Section . Policy Objectives Relating to Defense International Trade.
[DoD to insert]

*Section . Competitiveness of United States Companies.
• Repeals requirement to recoup non-recurring R&D charges on products sold through the Foreign Military Sales program and increases competitiveness of U.S. companies in world markets

*Sections . Establishment of New Defense Trade Chapter in Title 10.
• Adds new "Chapter 173—DEFENSE TRADE AND COOPERATION" to Title 10
• Section 800 panel recommendation to create a consolidated new subchapter on the "Purchase of Foreign Goods" with updated definitions
• Incorporates existing sections of Title 10 in a single related chapter
• Except where noted, changes are specific recommendations of the Section 800 panel

*Purchase of Foreign Goods: Definitions
• Specifically defines foreign (non-American) goods
• Defines "United States" in terms of specific locations instead of general terms such as "any place under the jurisdiction of the United States"

*Determinations of Public Interest Under the Buy American Act
• Retains existing 10 U.S.C. 2533 as amended by the FY 95 Defense Authorization Act

*Miscellaneous Limitations on the Procurement of Goods other than United States Goods
• Retains existing 10 U.S.C. 2534 as amended by the FY 95 Defense

*International and Cooperative Agreements: Definitions
• Section 800 panel recommendation to create a consolidated new subchapter on "International and Cooperative Agreements" with updated definitions
• Consolidates definitions used throughout the new subchapter

*Defense International Agreements
• Establishes requirements regarding defense international agreements
• Includes considerations on how the agreements are made and implemented
• Requires a review of the effects of agreements on U.S. industry

*Foreign Contributions
• Consolidates existing 10 U.S.C. 23501 concerning foreign contributions for cooperative projects

*Offset Policy
• Consolidates existing 10 U.S.C. 2532 defining offset policy
• Requires a report to the Secretary of Defense for U.S. firms that contract to sell a weapon system or defense-related item to a foreign country of firm if the contract is subject to an offset arrangement greater than $50 million

*Cooperative Projects
• Consolidates existing 10 U.S.C. 2350a and 2350b
• Provides complete authority and flexibility to the Secretary of Defense to conduct cooperative projects
• Eliminates the need to cross-reference to the Arms Export Control Act

*Cooperative Military Airlift Agreements
• Incorporates existing 10 U.S.C. 2350c on the same subject

*Cooperative Logistic Support Agreements
• Incorporates existing 10 U.S.C. 2350d on the same subject, with changes
• A major change permits organic DoD depots to compete for NATO Maintenance and Supply Organization (NAMSO) work on a cost reimbursement basis

*AWACS Program
• Incorporates existing 10 U.S.C. 2350e, establishing Secretary of Defense authority in carrying out the AWACS program

*Stockpiling of Defense Articles for Foreign Countries
• Incorporates Section 514 of the Foreign Assistance Act of 1961, which provides for earmarking, reserving, or setting aside defense articles within the U.S. inventory for foreign countries

*Loan of Materials, Supplies, and Equipment for Research and Development Purposes
• There was no recommendation by the Section 800 Panel in this area
• Incorporates existing 22 U.S.C. 2796d to consolidate law relating to international cooperative programs in Title 10
• Changes "NATO or major non-NATO ally" to "friendly foreign country" to expand the Secretary of Defense's authority to make or accept these loans

*Exchange of Personnel
• Provides statutory authority to exchange personnel between DoD and Foreign Defense Departments or Ministries

*Acquisition, Cross-servicing Agreements, and Standardization
• Creates a new consolidated subchapter
• Retains statutory provisions on acquisition and cross-servicing agreements
• Adds provisions on operational and burdensharing agreements, and NATO standardization

*Amendments to the Authority to Acquire Logistic Support, Supplies and Services for Armed Forces Deployed Outside the United States
• Contains technical amendments to correct cross-references in the consolidated new chapter

*Cross Servicing Agreements
• Contains technical amendments to correct cross-references in the consolidated new chapter
• Contains technical amendments to correct cross-references in the consolidated new chapter

*Procurement of Communications Support and Related Supplies and Services
• Consolidates 10 U.S.C 2350f with an amendment to permit the furnishing of temporary reciprocal communications support, and supplies and services, without formal agreement for not longer than 90 days

*Authority to Accept Contribution
• Consolidates 10 U.S.C 2350g with an amendment to permit direct payment or contribution from a foreign country in accordance with a mutual defense agreement, to be credited to appropriations available for that fiscal year

*Standardization of Equipment with NATO Members
• Incorporates 10 U.S.C 2457, which sets policy for standardization with NATO
• Adds reporting requirements

*Policy Objectives Relating to Defense International Trade
• Establishes Congressional policy that the U.S. attain national defense technology and industrial base objectives by fully coordinating domestic defense acquisition practices with both defense trade and cooperation (Chapter 173) and foreign military sales and assistance (Title 22)

*Conforming Amendments
• Incorporates changes identified above
• Repeals 10 U.S.C. 2350h, which provides for a DoD Ombudsman for Foreign Signatories
• Repeals various domestic source restrictions

*Section. Repeal of Domestic Source Restriction.
[DoD to insert]

Mr. HORN. We thank you very much on that, and we'll get further development of some of your thoughts in the question period.

Mr. Murphy, the general counsel of the General Accounting Office, a fellow member of the legislative branch. Welcome.

Mr. MURPHY. Thank you, Chairman Horn. Chairman Clinger, Mrs. Maloney, members of the subcommittee, I, too, am pleased to be here today to discuss once again a subject that is always timely and pressing, reform of the government's acquisition system.

As we have discussed, Mr. Chairman, the last Congress took a significant step toward reforming the motley mosaic of often contradictory requirements that constitute our acquisition system. That step was the Federal Acquisition Streamlining Act of 1994.

We vigorously supported the bipartisan FASA effort, and we believe that it represents the most significant advance in at least a decade in reinventing the complex process of supplying the Federal Government with the goods and services it needs. We are currently assisting the Congress in its oversight of the administration's effort to implement the reforms of FASA.

As momentous as that effort was, most of those involved believed that it represented a beginning step, a start, not a culmination. This subcommittee is taking the lead in the second phase of reform by holding this hearing for the purpose of airing further ideas for streamlining the process.

There are currently a number of reform proposals under discussion, including the draft administration bill, which we have seen,

and suggestions from industry groups. The preliminary draft that we saw is a particularly fruitful source of good ideas, and we address many of its provisions in this testimony.

While we have conducted audits and evaluations addressing virtually every phase of the process and review almost 3,000 bid protests yearly, I want to emphasize that we have not had the opportunity to study these proposals in depth, and we may not have data useful in evaluating them. What we express today are our preliminary opinions on proposals that we believe merit congressional consideration.

The first area which I would like to address among the ideas in my written text is a simplified acquisition threshold. The concept of the threshold was in FASA, under which streamlining procedures are used and government-specific requirements are to be waived. And it's a sound one.

The expansion of the concept ought to be considered. For example, it might be worthwhile to consider raising the simplified acquisition threshold from $100,000 set forth in FASA to 200,000. This would result in simplifying an additional 11,000 procurements worth over $1.5 billion based on fiscal 1994 data.

I might say here that we sought to quantify the costs of government requirements on contractors 1½ years ago for this committee. We had insufficient documentation to verify them, but the companies we reviewed estimated an average of 19 percent in additional costs due to Federal procurement laws, regulations, practices, and specifications.

In December, a study for the Secretary of Defense came up with almost the same number: 18 percent cost premiums at 10 contractor sites that were reviewed.

Not only are we paying more for these relatively small buys, but as testimony in support of FASA last year showed, the government is hampered in buying commercially produced goods. The simplified acquisition threshold can reduce these costs.

A related idea concerns FACNET. That's the Federal Acquisition Computer Network, the governmentwide electronic commercial architecture by which firms will receive notice of government acquisitions by computer and be able to submit offers in response electronically. FACNET would transform a cumbersome, paper-driven process into a modern, computer-based system readily accessible to government and private sector users.

We recommend cutting the link currently in FASA between the implementation of FACNET and the use of the simplified acquisition procedures up to the full dollar limit of the simplified acquisition threshold. Under FASA, the simplified procedures can only be used for acquisitions up to $50,000 until FACNET is implemented. Then it goes up to $100,00 for 5 years.

While this linkage was intended to encourage the early implementation of electronic commerce through FACNET, we believe that both the simplified procedures under the simplified acquisition threshold and electronic commerce are independently meritorious and that each should not necessarily be sacrificed for the other. As each benefits the government and contractors, each should be implemented as soon as possible.

Second, we believe that the Commerce Business Daily notice of the procurement opportunities even as streamlined by FASA could be further modernized by removing the requirement that all acquisitions not conducted through FACNET be subject to a 15-day delay between the publication of the notice in the CBD and the issuance of the solicitation, and the requirement that in all acquisitions above the simplified acquisition threshold, the solicitation must remain open for offers at least 30 days.

We understand the administration favors the proposal that contracting agencies establish reasonable deadlines under the particular circumstances of the acquisition, instead of the mandated timeframes if the CBD meets certain standards of detail and clarity. This is a sound suggestion. It further simplifies and streamlines the process.

Similarly, the companion proposal seems to be meritorious that a statutory timeframe should be eliminated for any acquisition conducted through FACNET, no matter what its dollar value.

A critical objective as we move on the path toward a more commercial type acquisition system is the removal of nonvalue-added restrictions on the government's acquisition workforce. One of the ideas which we have explored is allowing contracting officers to reduce the competitive range, the number of companies which they conduct discussions with during the competition.

Our studies have shown that 60 to 90 percent of all firms that submit offers that are admitted to the competitive range are asked to submit revised proposals, and negotiations are continued with them. We think that the Congress could well look at an opportunity to reduce that burden on the system.

Finally, protests, another area where further streamlining and reform may be possible, and one with which we at GAO are particularly well acquainted, the protest system.

We believe that the administrative and judicial forums that hear bid protests would benefit from a single statutory standard of review by which all protest cases would be decided.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF ROBERT P. MURPHY, GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE

Chairman Horn, Ms. Maloney, and Members of the Subcommittee:

I am pleased to be here today to discuss once again a subject that is always timely and pressing, reform of the Government's acquisition system. As you well know, Mr. Chairman, the last Congress took a significant step towards reforming the motley mosaic of contradictory requirements that constitute our acquisition system. That step was the Federal Acquisition Streamlining Act of 1994 (FASA).

The Act established a simplified acquisition threshold and a preference for commercial items, as well as addressing a wide spectrum of issues regarding the administrative burden associated with the Government's specialized requirements. These ranged from cost accounting standards, to socio-economic laws, to the Government's oversight tools, which over the years have resulted in extraordinary differences between the Government and commercial marketplaces. FASA sought to establish a simplified, commercial-based system and to minimize the undesirable consequences of many of these well-intentioned provisions, in an effort to strike a balance between efficiency and oversight.

We vigorously supported the bipartisan FASA effort, and we believe that it represents the most significant advance in at least a decade in reinventing the complex process of supplying the Federal Government with the goods and services it needs. We are currently assisting the Congress in its oversight of the Administration's efforts to implement the reforms of FASA, an effort in which the Government Reform

and Oversight Committee has shown a keen interest by holding hearings last week during which key Administration figures were called upon to explain the status of the implementation process.

As momentous as the FASA effort was, most of those involved believe that it represented just a beginning step, a start to true reform, rather than a culmination of reform. You, Mr. Chairman, have established yourself as a leader in the second phase of reform by holding this hearing for the purpose of airing further ideas for streamlining the process so that it can be the vehicle for the acquisition of better quality and less costly goods and services needed in these times of budgetary constraints.

There are currently a number of reform proposals under discussion, including a preliminary draft Administration bill and suggestions from industry groups. The Administration's preliminary draft is a particularly fruitful source of good ideas, and we address many of its provisions in this testimony. While we have conducted audits and evaluations addressing virtually every phase of the acquisition process, and review almost 3,000 bid protests yearly, it is important to emphasize that we have not had the opportunity to study these proposals in depth, and we may not have data useful in evaluating them. What we express today are our preliminary opinions on proposals that we believe merit further consideration and study. These reform proposals support the three fundamental principles we articulated just about a year ago in a joint hearing in support of FASA before the Senate Committees on Governmental Affairs and Armed Services. We believe these principles remain as the cornerstones of true reform.

1. Buy smarter. We need to eliminate requirements that impede our ability to take advantage of what industry has to offer.

2. Simplify. We need to reduce further the complexity of the acquisition system to make the maximum use of diminishing Government resources.

3. Manage better. We need further improvements in how we manage the procurement process, including making the necessary investments in people and systems.

COMMERCIAL ITEMS

FASA set an important precedent when it established a preference for the acquisition of commercial items and provided for an expanded exemption for such items from the requirement for certified cost or pricing data contained in the Truth in Negotiations Act (TINA). To finish the initiative begun in FASA, serious consideration ought to be given to exempting ALL commercial items that fit within the definition in title VIII of FASA from the certified data and audit requirements of TINA and from the corresponding requirements of the cost accounting standards. We recognize that some will argue that the commercial market forces will not have sufficient impact on some items contained within the title VIII definition—those items not yet in the commercial market, but that evolve out of existing commercial items—to ensure fair and reasonable prices without the assistance of certified data. Nevertheless, we think that the impact of the free market on the basic item should be sufficient. In order to take full advantage of the commercial market, the Government must be willing to bear the same risks as any other large customer.

With regard to services, we think the proposal in the draft Administration bill to free the definition of commercial services contained in title VIII from the requirement that the services be sold in the commercial marketplace at established catalog prices, as opposed to market prices, is one that should be given serious consideration. We can think of no particular reason why the existence of a catalog ought to be the defining criterion.

SIMPLIFIED ACQUISITION THRESHOLD

The concept of a simplified acquisition threshold set forth in title IV of FASA, under which streamlined procedures are to be used and Government-specific requirements are to be waived, is a laudable one. The expansion of that concept ought to be considered. For example, it would be worthwhile to consider raising the simplified acquisition threshold from $100,000 set forth in FASA to $200,000. This would result in simplifying an additional 11,000 procurements worth over $1.5 billion, based on fiscal year 1994 data. Similarly, it may be reasonable to raise the micro-purchase threshold from $2,500 to a higher amount. Under FASA, such micro-purchases are exempt from the small business reservation applicable to all other SAT purchases and are configured so as to enable non-procurement professionals to make them. This would result in considerably simplifying significant numbers of low-dollar value procurements.

FACNET

FASA established the Federal Acquisition Computer Network, or FACNET, a Government-wide electronic commerce architecture whereby firms will receive notice of Government acquisitions by computer and be able to submit offers in response electronically. The implementation of FACNET will transform the current cumbersome, paper-driven process into a modern, computer-based system readily accessible to Government and private sector users. This should significantly reduce staff time for all parties using the system and result in substantial savings. The Administration should be encouraged to pursue vigorously the development and implementation of full FACNET capability on the schedule set forth in FASA.

We recommend, however, cutting the link currently in FASA between the implementation of FACNET and the use of the simplified acquisition procedures up to the full dollar limit of the SAT. Under FASA the simplified procedures can only be used for acquisitions up to $50,000 until FACNET is implemented, at which time the simplified procedures can be used for acquisitions up to the full $100,000. Those procedures will remain in effect at the $100,000 level for 5 years. Then, unless the agency successfully implements a more advanced form of FACNET, the threshold for the simplified procedures reverts to $50,000. While this linkage was intended to encourage the early implementation of electronic commerce through FACNET, we believe that both the simplified procedures under the SAT and the use of electronic commerce are independently meritorious and that one should not necessarily be sacrificed for the other. As each benefits the Government and contractors, each should be implemented as soon as possible.

NOTICE

Similarly, we believe that the Commerce Business Daily (CBD) notice of Government procurement opportunities, even as streamlined by FASA, could be further modernized by removing the requirement that all acquisitions not conducted through FACNET be subject to a 15-day delay between the publication of the notice in the CBD and the issuance of the solicitation, and the requirement that in all acquisitions above the SAT the solicitation must remain open for offers for at least 30 days. We understand the Administration favors a proposal that contracting agencies establish reasonable deadlines under the particular circumstances of the acquisition instead of the mandated timeframes if the CBD notice meets certain standards of detail and clarity. This is a sound suggestion, as is a companion proposal that statutory timeframes be eliminated for any acquisition conducted through FACNET no matter what its dollar value.

COMPETITIVE RANGE

A critical objective as we move on the path towards a more commercial-type acquisition system is the removal of non-value added restrictions on the Government's acquisition workforce. The Government will never be able to compete successfully in the open market similar to a commercial customer unless rigid restrictions are removed and its workforce is empowered to make decisions based upon the particular circumstances presented by each individual acquisition.

A good example of such a rigid restriction is the current interpretation of the competition statutes that results in the mandatory inclusion in the competitive range—for purposes of conducting discussions—of all competing firms that may have a chance of receiving award. Our studies have indicated that under this rule agencies are including 60 to 90 percent of all firms that compete. For example, a recent survey of 40 information technology competitions by one agency showed that an average of 19 firms submitted proposals. The agency engaged in discussions with an average of 15 of those firms, and then asked them to submit another round of revised proposals.

Almost always the award ultimately goes to one of the top three firms submitting initial proposals. The conduct of negotiations with and the evaluation of best and final proposals from all these firms represents an enormous expense on the part of both industry and Government. This cost would be greatly reduced if contracting officers could, based on their assessment of the market conditions and the needs of the agency, limit the competitive range in a particular acquisition to no more than the three top-rated firms.

PROTESTS

Another area where some further streamlining and reform may be possible is one with which we at GAO are particularly well acquainted, the protest system. First, we believe the administrative and judicial forums that hear bid protests would bene-

fit by a single statutory standard of review by which all protest cases would be decided. That would bring needed clarity and consistency in decision-making and hopefully would put an end to the constant debate over which forum offers either the Government or vendors the best result. The draft Administration bill takes this approach.

Another Administration suggestion that we think has merit is the expansion of the new FASA debriefing process to include, where appropriate, preaward debriefings for those that have been excluded from the competitive range. This would help eliminate preaward protests that are often filed by offerors primarily because they have been given little or no information as to why their proposals were rejected.

DOMESTIC SOURCE RESTRICTIONS

In order to further integrate the commercial and government markets we suggest easing the Government-unique domestic source restriction in the Buy American Act by replacing the 50-percent domestic component test with the "substantial transformation" test found in the Trade Agreements Act. In order to establish that an item is domestic under the Buy American Act, as it currently is implemented, a firm must be able to show that its domestically produced item is made from domestic components that comprise over 50 percent of the total cost of all components—a difficult task in today's global market. Under the Trade Agreements Act test, the company need only be able to establish that the item was "substantially transformed" from its components into its current form domestically.

We also believe that the current domestic restrictions scattered throughout the U.S. Code, as well as in various authorization and appropriations acts, should be revisited to ensure that they reflect today's markets and today's defense needs. Further consideration should be given to creating a comprehensive consolidated statutory provision containing those restrictions considered essential.

TEST PROGRAMS

FASA made great strides in establishing the framework for testing innovative concepts through pilot programs to be conducted by the Administrator for Federal Procurement Policy. The requirement in FASA that the exercise of this authority be delayed until the agency proposing to conduct the test has implemented full electronic commerce—full FACNET—unnecessarily impedes improvements in the acquisition process. As stated earlier, FACNET is an important program that has great merit on its own, and it should be implemented as soon as possible. Testing innovations is also important and should be pursued independently.

We suggest that consideration be given to adding two additional test programs to the list already in FASA: first, a test of a more limited form of competition than the current standard of "full and open" competition to be used in the acquisition of a continuing requirement where there is a successful incumbent, and second, a test of evaluation criteria providing for a substantial advantage to satisfactorily performing incumbents in order to recognize the importance of longer-term supplier relationships with firms that provide the Government with value for its expenditures. Similarly, a disadvantage could be assessed against a poorly performing incumbent that is not actually defaulting on its contract obligations. These concepts could show promise in addressing the dilemma faced by agencies that would benefit from longer-term relationships with high quality, high value contractors, but may be hampered from doing so under current rules.

Finally, it may be appropriate to complement the use of simplified procedures under the SAT by testing an exemption of acquisitions conducted pursuant to those procedures from the formal protest process. Our experience is that there have been few successful protests filed under the pre-FASA small purchase procedures ($25,000 or less). A pilot program limiting protests of such acquisitions to those filed with the contracting agencies might facilitate a streamlined, commercial-like process for the government's most routine acquisitions. After 3 or 4 years of experience we could conduct an assessment of whether, absent the possibility of bid protests, agencies complied with the applicable procurement statutes and regulations.

SMALL BUSINESS

We recommend that the Congress consider reducing some of the current rules regarding the participation of small business firms in the acquisition process. First, the Small Business Administration's (SBA) Certificate of Competency (COC) authority, under which the SBA determines the responsibility of a small business, could be amended to exclude negotiated procurements in which the contracting officer evaluates a firm's past performance as a part of the technical evaluation. Since

FASA requires an assessment of each competing firm's past performance during the selection process, we believe that the SBA's role in determining this element of responsibility as a part of its COC authority conflicts with the responsibility of contracting officers to make the judgments needed to select the best contractor.

Similarly, we believe SBA's (8)(a) program, under which the SBA enters into contracts with small and disadvantaged businesses for work to be performed for other Federal agencies, should be streamlined. Agencies that actually are receiving the performance should make the awards themselves without the need, in every instance, for the SBA to participate in the contracting process.

Mr. Chairman, this concludes my prepared statement. I would be pleased to address any questions you or the Members may have.

Mr. HORN. Thank you. We will pursue some of those. You've made some very helpful suggestions.

I'm going to ask Chairman Clinger to open the questioning. Then, Representative Maloney will be next.

Mr. CLINGER. Thank you very much, Mr. Chairman.

And this question would be addressed to either Dr. Kelman or Ms. Preston. I gather, having not had a chance to review the bill, that you are going to be recommending significant changes in the core functions of the protest system in the legislation that you're presenting. And I guess my question would be, have you gotten any formal comments on the proposal from both GAO and GSBCA? It seems to me that we really ought to have some sense from both of those organizations—because what we have are two systems. And I think it would be helpful to the committee, at least, if you haven't received those, if you could request that and submit it for the committee's consideration.

Mr. KELMAN. We will be pleased to submit that. We have begun that process. It's not done yet. We'll be pleased to submit that very promptly for the record.

Mr. CLINGER. Thank you. The only other comment I would have, we have alluded here to the fact that we passed very major comprehensive procurement reform last year with the FASA, which was designed to streamline and certainly simplify the whole procurement system.

And our objective then, I think as now, was to rid the system of some unique government provisions that didn't exist elsewhere. And it represented a burden on government contractors who do business with the Federal Government.

So the question is: Why at the time when we are engaged in an effort to begin to streamline and simplify the process by considering repealing further requirements that are unique to the government procurement system—why, then—and this is perhaps putting you on the spot a bit, but why is the administration proposing to add, basically, a government unique requirement prohibiting the use of striker replacement?

That's a very red flag kind of an issue, which is going to—may complicate our problem in dealing with this. And I would direct it to you, Dr. Kelman.

Mr. KELMAN. As you know, the administration has had a view for a long period of time on the effect of using permanent striker replacements in a climate of labor-management cooperation in the workplace and a feel that it's not good for the long-term competitiveness of the American economy, in terms of quality and productivity and so forth to have those kinds of confrontational labor relationships.

And similarly, the government as a buyer has a long-term interest in that kind of quality and productivity. I think that stands at the basis of the President's judgment on this and the administration's judgment.

We have been working as the procurement community in the context of that broad view. I'm not a labor-management expert, so I'm not an expert on the broad view. But within the context of that broad view of the negative impact of confrontational labor relations on quality and productivity, we have been working to make sure that the Executive order does not put any real significant burdens on the overwhelming majority of companies that have never and have no intention of hiring striker replacements.

According to BNA, there were only 28 incidents all last year, all of 1994, where permanent replacement strikers were hired. It's an infinitesimal proportion of what goes on in the workplace and what goes on in government contracting.

And the overwhelming group of companies that do not and have no intention of hiring striker replacements will be completely unaffected by this Executive order. So for 99.9999999 percent of Federal contractors, this Executive order will not have any effect on them.

Mr. CLINGER. Well, I hope you're right. But I do think that it seems to me to be a little schizophrenic. We're going in a couple of different directions. We're trying to simplify on the one hand, but it seems to me that this compounds the problem to some extent, on the other hand. So I hope that your suggestion that it will have very minimal impact will, in fact, turn out to be correct.

Mr. Chairman, with that, I would yield back the balance of my time.

Mr. HORN. Thank you very much, Mr. Chairman. The committee will now go into recess for approximately 15 minutes to get over to the floor, vote, and return. Representative Maloney will begin the questioning when we return.

So bear with us. This is the Contract with America, and we vote till about 8 or 9 or 10 or midnight.

[Recess.]

Mr. HORN. The hearing will resume.

I'll now ask Representative Maloney, the ranking minority member on the subcommittee, to pursue the questioning for 5 minutes.

Mrs. MALONEY. Thank you very much, Mr. Chairman.

I would like to ask Mr. Kelman, you mentioned in your testimony the very astonishing fact that 45 percent, almost half of all information and technology bids, end up in protest.

Yet testimony we got earlier from the computer and communications industry association asserts that the amount of protest litigation is actually very small. And they indicate that less than 5 percent of all procurements are protested to either the GAO or the General Services administration.

So there's a huge discrepancy in the numbers that I've seen. And I would like to see this GAO report. Staff says they haven't seen this report. Does this report that has been issued have the 45 percent number?

Mr. KELMAN. Let me have Mr. Murphy answer that question.

Mr. MURPHY. Mrs. Maloney, that's a report that has been prepared for the Senate Governmental Affairs Committee. It's going to be released, as I understand it, tomorrow.

Mrs. MALONEY. So we cannot have access to that report until tomorrow; is that correct?

Mr. MURPHY. Yes, ma'am.

Mrs. MALONEY. But there is a huge difference between the numbers used in the testimony—the number used in the unissued GAO report is 45 percent; the number in testimony that we will hear today from computer and communications industry is that only a small percentage point ends up in protest.

Mr. KELMAN. I think what we need to do, first of all, is to distinguish between protests to the GAO and protests on information technology procurements to General Services Board of Contract appeals.

The volume of litigation and the proportion of litigation going to GAO is very reasonable. It's a small number of contract decisions that are protested.

As we indicated earlier, we believe that system fairly balances, on the one hand, the legitimate functions that the protest system creates or serves, on the one hand, and the desire for a nonadversarial relationship between customers and suppliers and the need for innovation in the procurement system on the other. So we think GAO works well.

The high number of protests is in this one specific forum, a specially created forum for bid protests for information technology procurements. And anybody who reads the computer government trade press will see that almost any time there's an article in 1 week's issue about "Government Awards Big Contract" on something or other, in the next week's issue, there's an article about that contract being protested.

Protests, specifically in the information technology area in this one specific forum, have become a routine, everyday part of these large information technology procurements.

Mrs. MALONEY. Mr. Kelman, the bill we passed, FASA, provides for agency debriefings to reduce the number of protests; yet your draft bill has sweeping changes to the bid protest system in order to reduce the number of protests. Shouldn't we wait and see how the debriefing process works from FASA, which hasn't been completely implemented, before we move forward with yet more sweeping changes to the bid protest system?

Mr. KELMAN. That's a fair question. Let me try to answer it. We applaud the improvements in FASA on debriefing, and we are hopeful, at least, that they will have some effect on this volume of litigation. We support them.

At the same time, I would like to make two observations. One is that the changes in FASA only reflect situations or problems leading to bid protests that are "the government's fault," that the government has debriefed badly or hasn't given enough information. And certainly, sometimes, it is the government's fault, and we do need to improve debriefings.

However, there was nothing in FASA to address the abuse of the protest system by contractors who, for example, routinely when an incumbent contractor is denied award to recompete in the informa-

tion technology area—those decisions are routinely almost all the time protested by the incumbent contractor for one very simple reason—they can delay the award of the new contract, often at cost to the government, because the new contractor is coming in at a lower dollar than the old contractor; and meanwhile, they continue to get their revenues in while the protest is going on.

There is nothing in FASA that has sort of a balanced scale. All of the efforts in FASA to improve or to get litigation down come from things that the government should do better. We think we need to change some of the incentives in the system that produce, particularly in the information technology area, abuse of the protest system on the contractor end.

Mrs. MALONEY. Yet in the expedited procedures that we put in the FASA bill, wouldn't that or shouldn't that lower the number of protests and the time that you have to wait and that type of thing?

Mr. KELMAN. No. Those only apply under 100,000. We're talking about very large, multi hundred million dollar procurements.

Mrs. MALONEY. How many frivolous protests are filed each year? Do you have any number?

Mr. KELMAN. To some extent, obviously, frivolity is in the eyes of the beholder. I think the courts are, for good reason, very hesitant to say that a protest is so extremely unmeritorious that it's frivolous.

We do have language in the administration bill addressing award of costs on frivolous protests. I wouldn't regard that as the major provision in the administration's bill. I think it's largely a statement of saying that when there are frivolous lawsuits, we want to come down hard against them, not that something that meets a legal standard of frivolousness happens all the time.

I think there are other features of the administration's package of reform proposals on bid protests that we would regard as more central to getting down the excessive level of litigation.

Mr. HORN. Thank you, Dr. Kelman.

The gentleman from Virginia, Mr. Davis.

Mr. DAVIS. Thank you.

Dr. Kelman, let me just go along the lines Mrs. Maloney talked about. What percent of this 45 percent over $20 million that are being protested go on to a final decision?

Mr. KELMAN. I don't have those numbers. We'll have to see what's in the——

Mr. DAVIS. It has been my experience, a lot of times, that's the only way of getting meaningful discovery, is to file a protest, because the debriefing process doesn't always work as it should.

Mr. KELMAN. I think that happens sometimes. I wouldn't say by any means that—certainly, it's not, in my view, the only reason or even close to the only reason for filing protests.

Mr. DAVIS. No, it's not, but it has been my experience in the business that that happens with some regularity. It would be interesting to see what percent of that 45 percent go on to a final decision. If you have any way of getting that in a real-time way, I would like to see that.

Mr. KELMAN. We'll provide that information to the committee. I want to indicate that going to final decision isn't the only measure of the degree of delay or problems that the system creates.

Mr. DAVIS. I understand that. But it gets at my question in terms of why these protests are filed, in some cases. With the dollars being scarcer sometimes for the government now to contract out in companies, you not only find the group going after the new procurement, but you have your legal group working on the protest even before the decision is made.

Mr. KELMAN. Sir, if I may say so, that's exactly the kind of situation that we feel abuses the process. You have the legal group working on a protest even before the decision is made. That's exactly the problem.

Mr. DAVIS. You have to. You have to, because whether you win or whether you lose, you get hit with it. If you win, you get protested, as well. You have to be prepared for that.

Mr. KELMAN. But again, that's exactly the dysfunctional and adversarial problem we're trying to deal with in that proposal.

Mr. DAVIS. I agree. And I guess to follow up with another issue Mrs. Maloney raised—and this could be addressed to Mr. Murphy, I guess, as well. Chairman Clinger and other Members of the House and Senate worked tirelessly last year to enact FASA.

But many of the items the administration is proposing retrace old ground that's already covered. And we're just beginning to implement FASA. We don't really know how that's going to work. So how do you consider legislating this proposal before we have had a chance to see FASA work?

Mr. KELMAN. Could I just make a brief comment on that?

Mr. DAVIS. Sure.

Mr. KELMAN. Yes, the instructions that we in the procurement reinvention team and the administration got from the Vice President were, "Be bold." I don't think I need to tell any person here that this is a bold time and a time of rethinking in this town.

And in light of that moment and in light of the opening up and questioning of traditional ways of doing business that's characterizing the debate in our political system this year, we felt that it was appropriate to be bold.

Mr. DAVIS. I've got one other question. Just looking in the draft legislation, Section 4001, the simplified acquisition threshold, it talks about "to revise the definition of simplified acquisition threshold to establish a $1 million threshold when an acquisition for services or construction is conducted as a total small business set-aside." Can you tell me the thinking behind that?

Mr. KELMAN. Yes. Basically, the thinking behind that, sir, is that we believe there are lots of highly competitive small startup businesses in the service area, many of them high tech businesses and so forth, that are of very good quality and that have, frankly, good prices. They often have a young workforce, low medical care costs, low overhead, low bureaucracy.

But the complexity of doing a procurement using other than simplified procedures, a lot of times, agencies will choose—just to avoid that complexity, they will aggregate their service requirements into larger contracts. We're trying to level the playing field and let an agency make a decision based not on how complex the procurement is, but on what makes sense in terms of who can satisfy the needs best and most cheaply.

Mr. DAVIS. I guess my question back would be, does that level the playing field, or does that tilt it when you put that $1 million threshold for small business?

Mr. KELMAN. We feel it levels it, because the current situation tilts it in the direction of aggregating requirements that then only large business can bid for.

Mr. DAVIS. That's interesting. Thank you.

I yield back.

Mr. HORN. The gentleman from New Hampshire, Mr. Bass.

Mr. BASS. No questions, Mr. Chairman.

Mr. HORN. Thank you very much.

Let me pursue a few questions here. Mr. Murphy, you stated that consideration should be given to cutting the linkage in FASA between the implementation of the electronic commerce system and the threshold for the use of simplified procedures under the threshold.

Since the link was established in order to encourage the agencies to have electronic commerce up and running as soon as possible, what suggestions do you have for encouraging the early implementation of this system in the absence of the link?

Mr. MURPHY. Well, let me say, Mr. Chairman, that we strongly support oversight of the administration's continuing effort to implement FACNET. We have been reviewing the administration's implementation for a number of months, and while we haven't reached preliminary conclusions, it's apparent to us the administration is committed to bringing FACNET fully online just as soon as it's practical to do so.

The challenge of doing that, though, can't be overemphasized. We have been focusing a lot of our attention on the troublesome issue of ensuring adequate security. Other issues relate to the registration of vendors, developing standards, creating a single face to the industry, and, of course, the adequacy of resources devoted to the effort.

There are a lot of tools available to the Congress to provide oversight of the administration. This is one of them, having administration officials appear before the subcommittee. What we are suggesting is that both of these goals are so important that the Congress should consider using other oversight mechanisms, such as hearings.

Recently, the Congress has estimated that reforms of executive branch procedures would save a certain number of dollars. They have cut the budget of the agency that amount of dollars to motivate the agency to do it. There are a lot of tools available. We're just suggesting that maybe the Congress should consider not using this one.

Mr. HORN. Let me ask both Dr. Kelman and Ms. Preston, a lot of the contracts with which you're familiar involve the use of patented technology.

What are your experiences with some firms that bid on contracts, and you find out later that they really don't own the technology they're planning to use to fulfill that contract? Other companies might well own it. What kind of problems have occurred? I would think defense has had more than its fair share of some of these.

Ms. PRESTON. Actually, that has not come up as an issue, in terms of acquisition reform. I know from past experience that there are often cases where a person bidding does not own the patent rights. And in that case, the Federal acquisition regulations provide that they may bid and that the government will indemnify the patentholder if the government awards the contract to someone who does not own the patent rights.

Mr. HORN. But the Department of Defense would know at the time of the bid that they did not own the rights to certain things they have said?

Ms. PRESTON. Yes, sir.

Mr. HORN. That is required to be filled out?

Ms. PRESTON. Yes, sir. I believe that in every procurement, they would ask if there was a patented item that was being offered whether or not they owned the patent rights. Because they would have to know that in order to——

Mr. HORN. Or at least have access or are paying royalties, whatever. I'm curious as to the degree to which that is known by the person that expects performance under the contract.

Ms. PRESTON. I think it would be known to the contracting officer. I'm not certain that it would be known to the ultimate user. But it just hasn't come up as an issue in my time in the department.

Mr. HORN. Let me ask you, Dr. Kelman, and again, Ms. Preston, the industry has indicated to us that the use of statutory and regulatory certification in the government contracting process has created counterproductive administrative burdens on already expanding overhead rates and has increased nonvalue-added costs of goods and services purchased by the Federal Government.

Chairman Clinger's proposed legislation, which is H.R. 1038, attempts to deal with this issue with respect to the procurement integrity provision. The industry evidence shows that the problem stems primarily from administratively imposed certifications. Are you doing anything in the name of streamlining to rid the system of burdensome, nonvalue-added requirements? And if so, what?

Mr. KELMAN. Chairman Horn, as you know, first of all, the administration bill endorses the provision in Chairman Clinger's bill that eliminates these nonvalue-added contractor and government certifications under procurement integrity that just seem to fly in the face of common sense.

Somebody who's going to be selling government secrets and getting money for it is hardly going to be deterred by signing a statement saying, "I promise not to do this." So we fully endorse the provision in Chairman Clinger's bill on this.

We asked the industry for information about nonvalue-added certifications, many of which are in the defense FAR supplement, some of which are in the FAR. We asked them to provide us a list and to provide us some information. They just recently provided that to us. We are looking at it within the administration.

As a matter of principle, we are strong supporters of keeping these kinds of certifications to a minimum and feel that frequently, they don't add value to the procurement process.

Mr. HORN. Thank you.

Ms. Preston.

Ms. PRESTON. I would second what Dr. Kelman has said. We are advocating now a total rethinking and relooking at the certification provisions. Some of them were put in for the reason that you indicated.

Sometimes, they were placed into the regulations to enable us to have a forum in which to charge an individual in a way that was easier than if they had not signed a certification. You can get them on a false statement a lot easier than you can sometimes on the underlying activity.

But in any event, we are participating in the review, and we will do everything in our power to make sure that we minimize the number of certifications.

Mr. HORN. Thank you.

Representative Maloney, do you have a——

Mrs. MALONEY. I would like to comment on and question Dr. Kelman on one of the suggested changes in the draft bill to prohibit protests in procurement below the simplified acquisition threshold of 100,000.

And as a matter of public policy, why shouldn't a business which is wrongfully denied a Federal contract or who believes they could do it better and cheaper for the American taxpayer and government be able to protest, just because the contract is under 100,000? Why should we limit this possible ability to save taxpayers' money?

Mr. KELMAN. Representative Maloney, the provision the administration has submitted on this is limited to contracts under 100,000 that are conducted by electronic commerce, and that's the key.

With the electronic commerce system, we are going to be experiencing, as we should be—we're publicly broadcasting these procurements—tens and perhaps hundreds—literally hundreds of bids when the system gets up and running for individual items, compared to now typically getting three bids.

What that does simply statistically is to increase 20, 30, fortyfold the exposure of the system to bid protests. Its' our view that we need to have a balancing here. The expansion of electronic commerce is in the interest of taxpayers because it will, by improving that competition, lower the price of what we buy.

It's also in the interest of the business community, because it will dramatically increase how easy it is for a small business to learn about government contracts. So it's a win-win solution. We want to make it happen.

If we increase the vulnerability of the system because of this dramatically increased number of bids to bid protests, the streamlining benefits of electronic commerce are going to be lost, and the system will not provide the kind of streamlining that we have promised the contracting people, that we have promised Congress. A lot of our numbers for reducing our procurement workforce are based on electronic commerce being rolled out and so forth.

If we don't get this, in our view, commonsensical tradeoff and balancing on the smaller procurements, only those done by electronic commerce, it's going to hurt our ability to have electronic commerce happen at all.

Mrs. MALONEY. Staff has just given me some numbers on the bid protest for ITs. It says that actually, there are very few and that the number is dropping, that there are 10,000 actions per year; of

that, 214 were protested last year; that's down from 320 in 1992 and 260 in 1993, with a 20 percent drop; 80 percent are resolved immediately, so staff says.

And most of these are lack of communication and are fixed very quickly and that in 1994, only 40 procurements experienced real protest delay that was, by law now, 2 months. So, in effect, what they're saying is that there were only 40 cases in which there was any delay, and it was based on a decision that there was a real reason of merit in the protest. I'm just——

Mr. KELMAN. This probably isn't the best forum to get into these detailed statistical discussions, but let me say a few things. One is, on this small number, 212 or whatever it is, keep in mind, the universe of large information technology procurements over $25 million, which is what we're talking about here, where most of the money is spent, is a very small universe. There aren't that many procurements of that size. And a large fraction of them are protested.

It's true there was a 1-year drop between this year and last year in the number of protests, and that's a positive sign. I think that the questioning by Congressman Davis before indicated that it, unfortunately, is simply not true to say that people only protest because there's some terrible abuse or because there's a lack of communication or a lack of debriefing.

As Representative Davis's observation indicated, it is routinely the case in these information technology procurements that companies bidding on a contract start working on a bid protest even before the contract has been awarded, before they know what's in the debriefing, before they know whether the government has been arbitrary.

This is unfortunate, it's tragic, because we have a whole number of the initiatives in the administration to work on improving partnership between the government and industry. That's a very, very important goal, to increase that partnership.

This plague of excess litigation is working against partnership. It is completely contrary to commercial practice. If I'm Proctor & Gamble, and I'm looking to buy computers and IBM and Compaq bid on the job and I give the job to IBM, the idea that Compaq would take me to court because I made the award to IBM is totally unknown in the commercial world, yet we are forced in the public sector context to put up with this as a routine, everyday matter.

And it's wrong. And it hurts partnership. It hurts reinvention. And that's why we think we need to do something to bring down that excessive level of litigation.

Mrs. MALONEY. I certainly agree with that statement. Yet, according to these numbers—and I look forward to the report—there were only 40 that were considered real protests that resulted in the delay.

I'm deeply concerned about the provision in your draft bill which would permit offerer statements that they will not file a protest. I certainly recognize that your bill indicates that these statements will have absolutely no bearing on the selection process.

But no matter what you say, I certainly believe—and I believe private industry would believe—that waiving their protest rights

are going to be a selection factor. Doesn't this undermine at the very least the perception of fairness in our procurement system?

Mr. KELMAN. We may have already put in the provision—and if we haven't put it in yet, our staff has been working literally around the clock trying to get our bill finalized. But we either have or plan to put in a provision to deal with that, I think, fair objection.

And the provision would be something to the effect that these voluntary statements by industry would go to the general counsel's office or someplace, such that the people making the contract award would not know about them at the time they made the contract award. So I think that's a fair worry, and we are willing to address it in this provision.

Mrs. MALONEY. Thank you.

Mr. HORN. Thank you very much, Representative Maloney.

Let me follow up with one question along that line. What sort of alternatives are you looking at, in terms of trying to cut down any excessive bid protesting? Is it a loser pay solution? Is it a disbarment from a particular bid? If they appeal and lose——

Mr. KELMAN. You're being even more Draconian than we are, sir.

Mr. HORN. Some of this stuff is utter nonsense, and there's no reason you have to put up with it, when you see a pattern and practice, and they're plain incompetent to bid to start with.

So somebody has got to make those judgments in the long run. A court might. But there needs to either be an arbitration set up or some reasonable neutral party that has expertise in the area to make some sort of judgment. I'm just sort of fishing for what's going through your mind. I'm not holding you to it.

Mr. KELMAN. I understand. The goal we're trying to get to is something that resembles the existing system that's working well at GAO, the existing system of looking at bid protests. We believe that system works well.

To try to make the system be similar in GSBCA, there are a number of things we're proposing. No. 1, we now have a situation where legal and expert witness costs on bid protests are allowable costs under government contracts. So if you do cost reimbursement work for the government, you can charge the government for your legal costs even if you have lost the case.

To my knowledge—I'm not a lawyer—this is a unique provision in any judicial system in any forum anywhere in the world. In other words, we are paying contractors even when we win the case, No. 1. So we're proposing——

Mr. HORN. In other words, we're asking for it.

Mr. KELMAN. We are proposing eliminating that. We are also proposing—just very quickly; I don't want to take too long. We're basically proposing putting in statute a uniform standard of review and scope of review for all the protests for GAO, GSBCA, and the Federal courts that corresponds to the current standard and scope of review used in GAO.

So we're trying to put a similar standard in that already exists for GAO into statute and for the other protest forums.

Mr. HORN. To bring legal clarity to the situation, I'm going to yield to the gentleman from South Carolina, Mr. Spratt.

Mr. SPRATT. I can't bring much legal clarity, since I was late arriving. I would like to welcome Mrs. Preston. We enjoyed our relationship on the Armed Services Committee.

Let me ask you if any of the procurement reform spending deal at all with program management.

Ms. PRESTON. None of the provisions in last year's bill did. But, in fact, in this year's submission that we hope to make as part of the DOD authorization bill, we have a large number of provisions that deal with major systems acquisition. It's not quite as regulated as some of the other areas, in terms of distinct regulation or legislation.

Mr. SPRATT. You remember the Packard Commission, of course. And there were recommendations there about incentive pay and flexibility of employment that would have permitted more innovation in personnel practices among procurement managers. And the Packard Commission, I think, felt constrained by the art of the possible here in Congress.

And what I'm suggesting is that it may be possible, since we now have civil service and procurement consolidated here in this committee, to make some changes that weren't possible in the past.

Ms. PRESTON. Well, I can tell you that we are definitely struggling with metrics and how to establish performance-based measures of success. For example, I will typically—going out to the Defense Systems Management College, I will ask the new program managers out there, "How do you measure success on your program?"

And virtually every one of them will say, "If I bring it in under cost within schedule," these sorts of things. And I say, "But how much control do you have over that?" And when you look at the external environment, it turns out that you have very little control as a program manager over such things as your cost or your schedule or performance, because performance is going to be driven by the ability of the contractor to develop technology.

Cost often is impacted by that, but it's just as often impacted by Congress changing the budget or by the Comptroller having to come up with money to fund some other necessary need and taking an across-the-board hit against all contracts, including the program managers' program.

So it's difficult to find a good performance measure. And I'm not sure that we ever would. But I can certainly tell you that there is probably no one in the Pentagon I know today that doesn't think that we need to change the personnel system.

Mr. SPRATT. Let me give you an idea, namely, that we would enact a dispensation for each of the military departments to have one pilot program for program management for a major or somewhat major—I don't know what the definition would be. It would be over a billion dollars, probably, acquisition program.

And the concept for program management here would be that in each of these pilot programs, the department could hire both civil service and noncivil service personnel. It would effectively budget a sum of money for program management. And it would hire a very capable manager either from its own ranks in the civil service or going outside.

Frequently, this could be destructive. It could be too adversarial, on occasion. But you can go to other competitors. You've got people who have worked on the bid procedure who are quite familiar with the system. You could hire them for program management.

And this would require some portability of pension plans and flexible personnel practices. But basically, you would budget it, and then you would let a small group of people put together a budget team, go get the engineers they wanted, the cost accountants they wanted, the management types they wanted, and put together a complete management team to run that particular acquisition.

It would be partly in the government, partly out of the government. Certainly, it would have a linkage to the program element. They would be linked into the service. But it's just a way to reach out and get better people, let them come in. Some would stay in the government. You might even introduce some to government procurement work through this route. Others would go on to something else.

Ms. PRESTON. I'm not aware that that has ever been tried, all of the components together. But as you're aware, there have been a number of experiments with respect to China Lake, for example, where they went to the pay bands and various different pay scales and test programs that have been run over time. And we can't seem to get past the pilot programs with respect to personnel changes.

There is no way to provide any reward to an individual in the system right now. You can promote people, at least civilians. You cannot promote them. You have to compete every job. It is impossible, therefore, to reward anyone for good performance. The reward that they get is to get a job somewhere else, and you lose them if they want to get a grade increase.

The other thing you mentioned, though, however, is something that in terms of picking your own management team, that we do have some ability to affect. And we will certainly look at that.

Mr. SPRATT. It's largely within the civil service and the procurement types within your own department. So what I'm suggesting here is not to dismiss these people, but to broaden the scope of your possible recruitment, so that you could go out and get a few first-rate engineers, really bushy-tailed types who would be clever, aggressive program managers and good cost accountants.

There have been government programs like Polaris program. They invented PERT cost analysis in the Polaris program. And you could use these programs as attractive opportunities to recruit people to come work on fairly exciting assignments.

Ms. PRESTON. We do, as you know, as part of the Defense Acquisition Workforce Improvement Act created an internship program. And we are providing scholarships to people who are in school. The biggest impediment to getting anyone from industry to come into the Department of Defense right now are the procurement integrity statutes.

And I can guarantee you that facing a 5-year ban if you're a senior official in contacting the Department is not something that will entice anyone to come in and share the benefit of their expertise. Until we can overcome that hurdle, we are unlikely to get anybody from the private sector to come into government unless they're ei-

ther independently wealthy, don't have to rely on their salary when they get out of the job, or are ready to retire.

Mr. SPRATT. The reason I raise it is that when we talk about procurement reform, we always talk about rules. And it seems to me the way to get good management is to get good people. And the rules are a guideline to them. But if you get good people, you're going to have better management. That's one lesson I learned from running small business is, you can put down all kinds of rules and regulations.

If you've got bad people or—not "bad" people—if you have mid-level, mediocre people, you're always working around them or through them. So this is a way to expand the recruiting scope of the government, at least try a different route to program management.

I know from talking to Mr. Packard that they would have liked to have been bolder, but they didn't really think that what they proposed—they had to go back and get a precedent. They took China Lake, and they tried to model what they were proposing after China Lake. But they really saw a need for going much further than that.

Mr. HORN. I agree with the gentleman.

The gentleman from Pennsylvania, Mr. Fox.

Mr. FOX. Thank you, Mr. Chairman.

I would ask Dr. Kelman, if you would, currently, the procurement system is set up with authority for certain decisionmaking placed at fairly senior levels and many layers of review for lower level decisionmaking.

It seems that it's the administration view to reverse this by increasing the authority at lower levels, where possible, while at the same time decreasing layers of review within the procurement process. What effect do you think this might have on the procurement process? And is this just for streamlining sake, or do you think we're really going to get some meaningful change that we all can embrace?

Mr. KELMAN. Congressman Fox, I think what we're trying to do is learn from the experience of successful private corporations that have worked to reengineer themselves. And I once read in a book on business process reengineering a story that came from the private sector that sounds a little bit like government, but it's actually a private sector story of a document that had to go through four or five levels of review within the organization.

And they did a little test to see did this add any value to the process. So they put the decision memo on the front, all of the signatories and then appended to it, 50 sheets of blank paper. Well, the result was, it got all the sign-offs it needed. There wasn't much value added at those different levels.

And anybody who has seen the in-box of a senior government official, just like a senior corporate official, knows it's a pretty big in-box. And a lot of times, there's not a lot of value added at those higher levels. So what we're really trying to do is to learn from the successes and the models in private sector reengineering efforts that have said, "This is a sensible way of doing business."

Mr. FOX. I appreciate that. I have no further questions.

Mr. HORN. I thank you, and I thank the panel. If there are any further questions, we're going to have to submit them in writing. We just lost one of our witnesses from the second panel who had to catch an overseas flight. Please bear with us.

[The information follows:]

FOLLOW-UP QUESTIONS ANSWERED BY STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

COMPETITIVE RANGE

Question. Mr. Kelman's testimony indicates that contracting officers tend to include offerors in competitive ranges that have no chance to be awarded contracts, in order to avoid protests. Please produce any evidence you have to support this contention.

Answer. I have been told that this is the case from countless contracting officers. To gather empirical data, however, I have asked the Treasury Department to research their last 15 contracts in excess of $10 million and to determine which, if any, were awarded to offerors that were not one of the three highest technically rated after initial evaluations. In only one instance was a contract awarded to other than one of the top three technically rated offers following initial evaluation.

Also, a review of protest cases at the GSBCA shows that while there were several cases where an offeror was admitted back into the competitive range after lodging a successful protest, we found none since 1989 (with the exception of a settlement agreement) where the protester successfully challenged being left in the competitive range too long, thereby incurring additional, wasted expense. With that kind of legal precedent, it is logical to conclude that contracting officers would rather leave an offeror in the competitive range (safe from protests) than kick the offeror out and risk a protest.

Question. Mr. Kelman's testimony asserts that the practice of including inappropriate offerors within competitive range "causes the government to expend extensive resources evaluating large numbers of proposals that may be marginal in quality." Please quantify the amount of resources expended on these offerors, and how you determined the marginal quality of the offers.

Answer. We believe that an evaluation of offers that have no realistic chance of award is a waste of resources. In order to obtain empirical information, in addition to the above question we have asked the Treasury Department to determine the average time it takes to evaluate a proposal, and how many evaluators are involved. According to the Department, it takes four to five evaluators from one to six months depending on the complexity of the procurement to review each proposal. Therefore, assuming it takes four evaluators three months each (a conservative estimate) there is an entire person-year wasted on each offeror unrealistically left in the competitive range.

TWO-PHASED SELECTION PROCEDURES

Question. Have two-phase selection procedures been used previously by any Federal agency? If so, which agencies have used this process, and is there any data indicating that this approach is more efficient?

Answer. No agency has used the two-phase selection procedures described in section 1014 and 1064 of the Administration's legislative proposal entitled the "Federal Acquisition Improvement Act of 1995." The General Services Administration (GSA) has, however, used a two-phase selection procedure that is similar to the process described in the Administration's proposal. GSA developed the two-phase approach after using a single phase approach to contract for the design and construction of a building under one contract, commonly referred to as "design-build." Industry was very critical of the single phase approach because of the high cost to contractors to compete. GSA found that when such an approach was used, competition was very limited. In response to industry concerns, GSA developed a two-phase selection approach which more closely parallels the approach used by state and local governments and the private sector when awarding design build-contracts. The two-phase approach has produced an increase in competition for contracts and has addressed many of the concerns expressed by industry. GSA has, however, been constrained by current law in structuring the two-phase selection process and its approach has not been totally satisfactory to industry or to GSA. The Administration's proposal is a product of the experience of GSA, the Corps of Engineers and other Federal agencies, and represents a consensus of both Government and industry on the "best

practice" or preferred approach to use when acquiring the design and construction of a public building, facility or work under one contract.

PROCUREMENT INTEGRITY

Question. What is the Justice Department's opinion on the legal consequences of eliminating the certification requirements?

Answer. The Justice Department has taken the position that the only legal consequence of eliminating the certification requirement for procurement integrity is that the individuals who had to certify previously would not need to certify in the future.

SMALL BUSINESS SIMPLIFIED ACQUISITION THRESHOLD

Question. Mr. Kelman testified that "burdensome procedures for competing individual requirements encourage agencies to aggregate their requirements into larger task order contracts that may be more expensive to the government." Exactly what "burdensome procedures" are you referring to?

Answer. Agencies report that it takes one year to 18 months to award a competitively negotiated contract due to the burdensome procedures that have been levied on the procurement system. Some of these burdensome procedures pertain to the CBD public notice requirements, the justification and approval requirements, the Truth in Negotiation Act requirements, debriefing requirements, protest rules, and any other procedures that could cause the contracting officer to delay the contract award decision. Rather than compete their requirements on a contract-by-contract basis, agencies award long term task order contracts with broad statements of work and issue task orders for specific requirements.

With the enactment of the Federal Acquisition Streamlining Act of 1994, several reforms were made to eliminate some of these burdensome procedures for procurements under $100,000. The Administration's new procurement reform bill seeks to streamline and reduce burdensome procedures for procurements over $100,000.

Question. How did you determine that these procedures were encouraging agencies to aggregate their requirements?

Answer. Agencies have cited the burdens during the development of the Administration's legislative proposals. Concerns have been expressed by the small business community that agencies were bundling their requirements and awarding long term task or delivery type contracts, which reduced their contracting opportunities. Further, the "Section 800 Panel" report cites concerns about the abuse of indefinite delivery, indefinite quantity contracts for advisory and assistance services. The concerns were based on findings in audit reports about the award and administration of these contracts.

Question. What percentage of contracts are aggregated into large task order contracts because of "burdensome procedures?"

Answer. We are unable to determine from information available in the Federal Procurement Data System (FPDS), the percentage of contracts that were aggregated into large task order contracts due to burdensome procedures. (The FPDS is the government-wide data base of information on federal contracting.) However, based on FY 1994 FPDS data, agencies awarded about $25 billion in orders under indefinite delivery contracts and federal schedule contracts. This represents about 15% of the contract actions over $25,000.

EMPOWERMENT

Question. Please quantify on an agency by agency basis, how much time would be saved by eliminating the levels of review you refer to in your testimony. *Question.* On an agency by agency basis, what layers of review would be eliminated?

Answer. Given the various delegations each agency has put in place, it is very difficult to determine which layers of review would be eliminated, much less how much time would be saved. As an example, however, we have asked the GSA to examine the effect the legislation would have on its delegations. A chart summarizing GSA's finding is in attachment A.

Question. How would the decisions of line officials be given greater deference before the various protest bodies?

Answer. Greater deference would be given by changing the standard and scope of review for protests at all protest fora. The Administration's proposal would provide for a review of an agency's decision on the agency record and provide for a determination that the decision is unlawful only if the disappointed bidder established substantial prejudice and either (i) that the decision was obtained in violation of procedures required by law or regulation, or (ii) that the decision was arbitrary or capricious.

BID PROTESTS

Question. Our statistics indicate that the number of protests before the GSBCA has steadily declined over the last three years. For each of the last three years please inform us how many protests have been filed, how many were granted and how many were denied?

Answer. Information regarding overall protest activity during the last three fiscal years is summarized in the table below. It is taken from data contained in the GSBCA's annual reports on its activities.

	Fiscal year		
	1994	1993	1992
No. of Protests Filed	179	287	347
No. of Protests Disposed	180	295	329
No. of Protests Granted (in whole or part)	11	26	69
No. of Protests Denied	28	43	55
No. of Protests Dismissed	141	226	205

You might note that according to data furnished to OFPP by the agencies, approximately 28 percent of non-Warner Amendment exempt IT procurements over $25 million awarded during fiscal years 93 and 94 were protested to the GSBCA. This suggests that a significant percentage of the government's largest IT procurements continue to be subject to protest at the GSBCA.

Question. For each of the last three years, list the amount of time the following categories of protests before the GSBCA have been delayed:

a. denied/pre-award
b. denied/award
c. granted/pre-award
d. granted/pst-award

Answer. Agencies do not generally compile data in the manner envisioned by your question. However, it should be pointed out that while some protests may be settled or withdrawn in a matter of weeks, this does not necessarily mean that protests have little or no impact on a procurement. A quick sampling of recent GSBCA protests that were either withdrawn or settled in the last 10 months indicates that the story does not always end with the settlement or withdrawal. Some examples of what was found are in attachment B for your information.

Question. In 1994, for IT procurements over $25 million how much time did it take to award procurements from initiation?

Answer. The data you seek is not available.

ATTACHMENT A

Approval Requirements for Use of Other Than Full and Open Competition (Civilian Agencies)

Current Justification Thresholds	Current Approval Level	Proposed Justification Threshold (Civilian Agencies ONLY)	Proposed Approval Level
Between $25,001–$100,000	Contracting Director	Under $500,000	None
Between $100,001–$1 million.	Contracting Activity Competition Advocate*.	$500,000 or more but less than $10 million.	Contracting Activity Competition Advocate
Between $1 million–$10 million.	Head of the Contracting Activity**.	$10 million or more but less than $50 million.	Head of the Contracting Activity
Over $10 million	Senior Procurement Executive***.	$50 million or more	Senior Procurement Executive

* 1–3 levels (management chain of command) of review between the Contracting Officer and the Contracting Activity Competition Advocate. Add 5 days for reviews.

** Approximately 5 levels (management chain of command) of review between the Contracting Officer and the Head of the Contracting Activity. Add 10 days for reviews.

*** Approximately 7 levels of review (management chain of command) between the Contracting Officer and the Head of the Contracting Activity. Add 15 days for reviews.

ADoes not necessarily mean the procurement lead time would be extended because other actions may be going on at the same time as the justification is being processed.

AWithin GSA the regional administrators are the head of the contracting activity of contracting offices within their region. In Central Office the Service Commissioners and the Associate Administrator for Acquisition Policy are the heads of contracting activities for Central Office contracting offices. The Associate Administrator for Acquisition Policy is the Senior Procurement Executive for GSA.

ADuring FY–94 GSA has 253 actions (1.2%) over $25,000 that were not competed with a total value of $62,085,000 (1.3%).

ASince GSA would meet the performance criteria for obligating more that 75 percent of its contract dollars and more than 95 percent of its actions through competitive procedures under the Administration's proposal (sec. 1052) justifications would continue to be prepared by contracting officers but they would not have to be reviewed by other management levels.

Based on Section 1051 of the Administration's proposal

Determination/Decision	Current approval level	Proposed Level in Administration's Proposal	No. Layers Eliminated	Time Saved*
Determination to exclude a particular source from a contract action in order to establish or maintain an alternative source for supplies or services under 41 USC 253(b)(1).	Agency head (in law) GSA has delegated authority to the head of the contracting activity.	Head of contracting activity.	None (Based on GSA's delegation of authority).	None (Based on GSA's delegation of authority)
Determination that it is in the public interest to use procedures other than competitive procedures under 41 USC 253(c)(7).	Head of the executive agency (in law) Administrator of GSA (authority has not been redelegated).	Head of contracting activity (may not be redelegated).	3 or 4 (Typically the Procurement Executive, General Counsel, Service Commissioner, and Deputy Administrator would review before Administrator signs).	10 days (Based on eliminating the 3 or 4 levels of review)
Various determinations and decisions regarding the evaluation and award of contracts under 41 USC 253b.	Executive agency and head of executive agency (in law) GSA has delegated authority to the contracting officer.	Contracting Officer	None (Based on GSA's delegation of authority).	None (Based on GSA's delegation of authority)
Determinations to establish or enforce qualification requirements under 41 USC 253c.	Head of executive agency or agency head (in law) GSA has delegated authority to heads of contracting activities.	Contracting Officer	Approximately 5 (Those in the chain of command between the contracting officer and the head of the contracting activity).	10 days (Based on 5 levels of review)
Waiver authority in 41 USC 253c(c)(2).	Head of procuring activity after considering competition advocates comments (in law) GSA has delegated authority to heads of contracting activities.	Head of contracting activity.	None (Based on GSA's delegation of authority).	None (Based on GSA's delegation of authority)
Waiving the requirement for submission of cost or pricing data under 41 USC 254a(b)(1)(B).	Head of procuring activity without delegation (in law) GSA has delegated authority to heads of contracting activities.	Contracting Officer	Approximately 5 (Those in the chain of command between the contracting officer and the head of the contracting activity).	10 days (Based on 5 levels of review)
Determination for price reduction for defective cost or pricing data under 41 USC 254a(b)(1)(B).	Head of the executive agency (in law) GSA has delegated authority to contracting officer.	Contracting Officer	None (Based on GSA's delegation of authority).	None (Based on GSA's delegation of authority)

* Does not necessarily mean the timeframe for conducting the procurement would be extended because other actions may be going on which the determination/decision is being processed.

AWithin GSA the regional administrators are the head of the contracting activity for contracting offices within the region. In Central Office the Service Commissioners and the Associate Administrator for Acquisition Policy are the heads of contracting activities for Central Office contracting offices.

ATTACHMENT B

RECENT SETTLEMENTS AND WITHDRAWALS OF GSBCA PROTESTS

Some allege that GSBCA protests have little impact because matters raised are quickly resolved. A quick sampling of recent GSBCA protests that were either withdrawn or settled in the last 10 months or so was undertaken to find out from the agencies if the "story always ends" with the settlement or withdrawal. Here are some examples of what was found:

- As the result of a protest to a $150 million maintenance contract, one agency signed an extension with the incumbent at a cost considerably higher than that which would have been paid if a contract was entered into with the awardee. If the protest had proceeded the full 64 calendar days, the interim contract would have cost the agency 4 million dollars in excess of the awardee's proposal. The protester and the awardee were able to agree on sharing the contract. Although reluctant to go along with this arrangement, the agency did not object because of the enormous costs that would have ensued, even if it prevailed in its protest.
- In a protest of a procurement for an automated system to warn more quickly of life-threatening weather conditions such as tornadoes and flash floods, the board ruled that even a showing that lives could be saved was insufficient to successfully overcome a suspension. Although the agency believed that it could successfully defend against the protest, it entered into a settlement with the protester under which it agreed to pay the protester $65,000 to withdraw the protest so that it could proceed with the procurement.
- One agency found itself facing ongoing protest activity on a contract for support services and disruption to the mission of its various program offices as the result first of a protest by an incumbent to a new award and then a protest by the awardee to the extension of the current contract while corrective action was being taken in response to the original protest. A settlement was reached where the original protester became a subcontractor on the awardee's contract and will receive about half of the work. Although the agency believes the costs of the settlement are reasonable, the originally awarded contract would have been less costly. The settlement, however, enabled the agency to continue its mission without further and inevitable interruption and litigation.
- One protester withdrew its protest on a $500 million multiple award contract for personal computers after reaching a settlement with the awardee. The awardee indicated that it had incurred approximately $125,000 in legal costs associated with its intervening in the protest on behalf of the government and undertaking settlement negotiations with the protester. The prospect of having to incur as much as $600,000 in legal costs alone if the protest went its full course motivated the awardee to enter into a settlement. The awardee also entered into a settlement with a second protester who had intervened on behalf of the original protester. Legal costs to the awardee associated with the second protester were nearly $100,000. Although the overall delay was not excessive, little value was gained by the government for the cost it was forced to incur in having to devote four attorneys full time to a protest which was settled without any effect on the original award decision but was well into discovery by the time the settlements occurred.
- As a result of a protest by four disappointed offerors (including the incumbent provider) challenging a $230 million systems and support contract, one agency settled the case by agreeing to document more fully its original best value analysis and review other aspects of the procurement. After considering the offerors' written comments and ideas proposed at an offeror forum, the agency decided to move forward on the basis of new price proposals. This course of action was protested by four offerors (including the incumbent provider), but those protests were later withdrawn. Next, two offerors (one of whom was the incumbent provider) challenged the agency's subsequent decision to reinstate the original award. These protests were denied by the board, who found no impropriety in proceeding with the award to the initially-selected contractor. Finally, one protester (the incumbent provider) appealed the board's decision to the Court of Appeals for the Federal Circuit, where the case is now in the briefing stage. More than seven months have elapsed from the filing of the first protest to the board's decision denying the last of the follow-on protests, during which time the agency was denied the benefit of more efficient, less costly technology and was forced to incur $7 million in system maintenance costs to shore up the incumbent provider's aging installed systems.

• As a result of a preaward protest, one agency entered into a settlement agreement that extended the dates for the protester to conduct a live test demonstration (LTD) of its proposed integrated system by approximately 2 months. Coupled with delays attributable to two earlier protests, contract award has been delayed by 6–8 months. The agency noted that technology and government standards have changed considerably during the interim period. After incurring the delay of extending the time for conducting the LTD, the agency determined that the protester's proposal did not meet technical mandatory requirements, and excluded the protester from the competitive range—an action that was not protested.

• One agency settled a preaward protest challenging exclusion from the competitive range on a procurement for mission support data services in order to avoid delay and the time and expense of litigation. Up to the point of the settlement, the delay in awarding the contract has created the need to extend 3 other contracts by formal justifications and approvals for limited competition. Negotiating the time extensions was time consuming and the lack of competition has probably caused the government to pay more money for the services during the 3–4 month delay.

• Rather than delay a procurement by defending a protest, one agency settled a matter by readmitting a protester into the competitive range although there was real doubt as to whether the protester stood a reasonable chance of receiving an award.

• A protester withdrew its protest after an agency terminated an award and awarded the contract to the protester and another vendor. The customer and program manager were not satisfied with the protester and other vendor's performance under the reawarded contract.

Mr. HORN. Will panel 2 come forward; Mr. Turner, Mr. Custer, Mr. Schweizer, and Mr. Guerreri.

[Witnesses sworn.]

Mr. HORN. Thank you very much. The three witnesses affirmed it. You may be seated.

We will start with Mr. Turner of Computing Devices, Inc., speaking on behalf of the Acquisition Reform Working Group, otherwise known as "ARWG," should those initials be used. Or is there a short—"ARWG" or whatever?

Mr. TURNER. How about "the group"?

Mr. HORN. "The group." OK. It's all yours, Mr. Turner.

STATEMENT OF RON TURNER, COMPUTING DEVICES, INC., FOR THE ACQUISITION REFORM WORKING GROUP; JOHN C. CUSTER, MASON & HANGAR, MASON-SILAS, INC., FOR ARWG; AND CARL GUERRERI, ELECTRONIC WARFARE ASSOCIATES, FOR ARWG

Mr. TURNER. Thank you, Mr. Chairman, ladies and gentlemen. And good afternoon. Thank you for the invitation to testify on additional measures that will further streamline our government's procurement system.

Today, I am pleased to testify, as was indicated, on behalf of nine associations, which let's refer to as "the group," in the interest of 5 minutes. These organizations are listed at the end of my statement. Together, we represent tens of thousands of individuals and companies, a large number of which are small businesses.

We are pleased that this committee is interested in pursuing additional legislation, since your chairman, Representative Clinger, was the principal advocate of acquisition reform in the last Congress. These efforts culminated in the successful passage, as you know, of the Federal Acquisition Streamlining Act of 1994.

The principal objective of FASA is to strike a more equitable balance between the multitude of government unique policy require-

ments imposed on Federal procurements and the need to lower the Federal Government's cost of doing business.

Acquisition reform is an issue of central importance to the Congress's goal of achieving a more efficient government and getting more from the budget dollar. To that end, the group firmly believes that further legislation is necessary to fully effect the fundamental reforms needed to ensure the efficient and effective conduct of Federal Government contracting. The group recommends that these remaining key issues be addressed in the 104th Congress.

The group's recommendations encompass several broad categories. The first is additional streamlining and simplification measures, to include certification elimination, elimination of nonstandard clauses, streamlining of contract close-outs, and simplified solicitation.

For example, action is needed to eliminate the hundreds of statutory and regulatory certification requirements, most of which are not really necessary to ensure the lowest price for quality products. Certifications generally are a way of providing government contracting personnel with a comfort factor or a double check on information that is otherwise available, but they lay contractors open to severe statutory penalties for inadvertent misstatements.

Second item, global and international measures. In this area, we're proposing several changes that will enhance the acquisition process. A prime example is the elimination of the recoupment of nonrecurring costs. In the highly competitive global marketplace, recoupment can often mean a 20 to 30 percent competitive disadvantage for U.S. companies. With such a disadvantage, U.S. companies can lose sales opportunities which result in losses of jobs for U.S. citizens, less U.S. defense capability, and a higher cost to U.S. taxpayers for defense products.

No. 3, additional commercial item procurement measures. The Congress enacted many significant commercial product reforms in FASA. A few important issues remain. There are two additional areas we believe should be addressed in additional acquisition reform measures.

First, a comprehensive list of statutory exemptions for commercial prime contracts. We believe that no government unique terms and conditions should apply to the purchase of commercial products. When the government acts as a player in a larger commercial marketplace, it enjoys already the same protection as other buyers and needs no unique protection.

Competition ensures that the prices and terms are fair and reasonable and that product quality meets the contractual requirements. Statutes of greatest importance to commercial industry that were not clearly exempted last year include laws related to rights in technical data and Truth in Negotiation Act.

And the other item is the elimination of postaward audits for commercial product procurements. We believe the government can audit price reasonableness prior to reaching an agreement on the price of a commercial product. We want to make clear, however, that if a company commits fraud, the government should and will have full rights to impose the penalties under current commercial

commerce law. Fraud simply cannot be tolerated in any marketplace.

Attached to my written statement is a list of the individual items which fall into these broad categories. A copy of the complete group package has been submitted to the committee for inclusion in the record.

And once again, I would like to thank you, Mr. Chairman, for including industry and comments on this important subject. Thank you very much.

[The prepared statement of Mr. Turner follows:]

PREPARED STATEMENT OF RON TURNER, COMPUTING DEVICES, INC.

Good afternoon, Mr. Chairman. My name is Ron Turner and I am President of Computing Devices, International. Headquartered in Minneapolis, Minnesota, Computing Devices is a leader in signal processing, digital image manipulation, ruggedized subsystems for harsh environments and real-time software systems. Its products and services are an integral part of systems for avionics, communications, intelligence, surveillance and other defense and aerospace applications.

Thank you for the invitation to testify on additional measures that will further streamline our government's procurement system. Today, I am pleased to testify on behalf of nine associations which have formed the "Acquisition Reform Working Group" (ARWG). These organizations are listed at the end of my statement. Together, we represent tens of thousands of companies and individuals, the overwhelming majority of which are small businesses, majority and minority-owned businesses, companies which do business with the Department of Defense only, with the civilian agencies only, and with both. We also have members of all sizes who refuse to do business with any federal agency, in part because of the very acquisition laws which are the focus of today's hearing.

We are pleased that this Committee is interested in pursuing additional legislation since your Chairman, Representative Clinger, was the principal advocate of acquisition reform in the last Congress. Those efforts culminated in the successful passage of the Federal Acquisition Streamlining Act of 1994 (FASA).

BACKGROUND

FASA is the result of a four-year bipartisan effort (beginning with the Section 800 panel review of Defense Department acquisition laws) to streamline and reform the existing costly and complex Federal procurement process. It represents the most comprehensive government-wide acquisition reform effort in over a decade. The principal objective of FASA is to strike a more equitable balance between the multitude of government-unique policy requirements imposed on Federal procurements and the need to lower the Federal Government's cost of doing business. The Act accomplishes this objective by making it easier for the government to acquire commercial goods and services and to use commercial practices; by streamlining the rules and regulations for high-volume, low-value Federal procurements; and by improving access by small business to Government contracting opportunities. The Act also created, in most cases, a uniform government-wide acquisition policy.

The government spends approximately $200 billion a year on the procurement of goods and services. This volume of expenditures evokes an understandable concern about ensuring that the interests of the taxpayer are protected. This, in turn, has led to redundant controls, certifications, etc., which unnecessarily complicate the process, and also increase the cost of goods and services which the government buys. The result is a system overloaded with controls to guard against "fraud, waste and abuse"—controls which shortchange the taxpayers because of the higher prices caused by non-value added costs. The workforce is so challenged just to cope with the proliferation of regulations and procedures that there is little time or incentive to be innovative or to exercise judgement and there is little or no individual accountability. Indeed, under the current system where judgements are routinely second-guessed and challenged and often result in charges of criminal conduct, few responsible contracting officials are willing to exercise flexibility at the risk of shortening their careers. This must be changed.

Other acquisition requirements enacted over the years such as second-sourcing and spare parts break-out resulted from an effort to inject a measure of competition into a market that is essentially a monopsony.

Two comprehensive reviews—the Acquisition Law Advisory Panel on Streamlining and Codifying Defense Acquisition Law (the so-called Section 800 panel review) and, more recently, the National Performance Review—have documented the need to streamline procurement procedures to increase access and competition in Federal procurement, and save the government money. The studies also indicated that current trends must be reversed as the first step to instituting a cultural change in the acquisition workforce.

Both studies concluded that the procurement system has evolved into a complex maze of laws and regulations that makes the process too cumbersome and fails to provide sufficient incentives for suppliers to deliver quality products and services at reasonable prices, or to allow government personnel to exercise prudent discretion and good business judgement. Furthermore, the studies showed that the current system discourages companies—especially commercial companies—from wanting to do business with the government.

As we moved toward addressing the barriers to a streamlined process, however, we remained cognizant of the reasons—i.e., concerns over fraud, waste and abuse—that created these barriers in the first place. FASA seeks to address the barriers to streamlined, efficient purchasing and, at the same time, remains sensitive to those concerns.

FEDERAL ACQUISITION STREAMLINING ACT OF 1994

With the passage of the Federal Acquisition Streamlining Act of 1994, Congress took a significant step toward reforming the way in which the government procures goods and services. The Act addresses a wide range of issues and concerns relative to the essential public-private relationship and establishes a framework for new, more productive business relationships.

In particular, critical improvements were made in areas related to commercial item procurements, the Truth in Negotiations Act (TINA) requirements for cost and pricing data and the simplified acquisition threshold.

- Commercial items. Facilitating the procurement of commercial products and services is perhaps the single most important issue to be addressed in acquisition reform. It is, therefore, a major focus of FASA and is addressed in Title VIII.

  This section is based on the premise that the forces of the commercial marketplace can be relied upon as much by the government as they are by all of us when we spend our money—to ensure that product quality meets our requirements and that the prices and terms are fair and reasonable. The Act establishes a specific preference for procurements of commercial items. It also exempts such procurements from a number of statutory requirements, including several that currently are "flowed-down" to subcontractors.

- Truth in Negotiations Act (TINA). Current TINA requirements result in some of the more onerous burdens on industry due to the amount of financial information that a contractor is required to submit to the government.

  Revisions to TINA are covered in Title I of FASA. The Act permanently increases the threshold, government-wide, to $500,000 (adjusted for inflation), below which certified cost or pricing data is not required. It also creates an exception for certain commercial item procurements.

- Simplified Acquisition Threshold (SAT). Title IV of FASA raises the SAT threshold from $25,000 to $100,000 for agency use of simplified contracting procedures. Such procurements would be exempt from a number of statutory requirements. This simplified process is also available to contractors for subcontract purchases under $100,000.

IMPLEMENTATION

It should be noted that in 1994 all parties agreed that the real test of FASA would be in the implementing regulations. ARWG would like to commend the Government Reform and Oversight Committee for taking an active role in the oversight of the implementation process. Acquisition reform is at a very critical point, and we certainly hope the Committee will continue carefully monitoring the regulatory process. Otherwise, all of the potential gains that FASA represents could be lost.

The Council of Defense and Space Industry Associations (CODSIA) has expressed great concern with the quality of the draft regulations to date and will provide the Committee with detailed comments on the implementing regulations as they are published. ARWG, too, believes that the draft implementing regulations fall short of the congressional intent to streamline the process. Indeed, as we move through the implementation phase, it may be necessary to consider additional legislation to

clarify congressional resolve in a number of areas. These proposals, if necessary, will be developed once the Administration concludes its regulatory drafting this spring.

FUTURE LEGISLATION

ARWG KEY ISSUES

Acquisition reform is an issue of central importance to the Congress's goal of achieving a more efficient government and getting more from the budget dollars. The degree to which the government is able to acquire better quality and less costly sources of goods and services (e.g. by removing costly non-value added requirements) clearly will be a benefit to the American taxpayer and a step toward greater efficiencies in the government buying process.

To that end, the Acquisition Reform Working Group firmly believes that further legislation is necessary to fully effect the fundamental reforms needed to ensure the efficient and effective conduct of Federal Government contracting. ARWG recommends that these remaining key issues be addressed in the 104th Congress.

The ARWG recommendations encompass four broad categories:

(1) Additional streamlining and simplification measures. These include:

- certification elimination,
- elimination of non-standard clauses
- contract close-out streamlining
- simplified solicitation

Each of these issues applies across the entire range of government procurement actions. While an "average" contract generally doesn't get the attention that a major weapons system does, the added cost on each individual contract in terms of extra paperwork, cost-of-money and inefficiency totals up annually to many millions of dollars in taxpayer money. For example, legislative action is needed to provide sufficient monies to streamline contract closeout without having to shift funds from current programs and also to prohibit non-value added paperwork and oversight steps; this would enable government buyers and contractors to concentrate their energies on the goods and services that have not yet been delivered.

Legislative action is also needed to eliminate the hundreds of statutory and regulatory contractor/offeror certification requirements, most of which are not really necessary to ensure the lowest price for a quality product. Certifications generally are a way of providing contracting personnel with a "comfort factor," or a double-check on information that is otherwise available but they subject contractors to severe statutory penalties for inadvertent misstatements.

(2) Global and international related measures. In this area, we are proposing legislative changes that will improve and enhance the acquisition process. An example is the elimination of recoupment of non-recurring cost. In the highly competitive global marketplace, recoupment often can mean a 20–30 percent competitive disadvantage to U.S. companies. With such a disadvantage, U.S. companies can lose sales opportunities which results in a loss of U.S. jobs, less U.S. defense capability and, with reduced volume due to the loss of sales, a higher cost to U.S. taxpayers for defense products.

(3) Additional commercial items procurement measures. The Congress enacted many significant commercial product reforms in FASA. A few important issues, however, remain—issues that, despite last year's reforms, may continue to keep commercial companies from selling to the government. There are two additional areas we believe should be addressed in additional acquisition reform measures:

- A comprehensive list of statutory exemptions for commercial prime contracts, including TINA.

The benefits gained by purchasing a commercial product are greatly reduced with the introduction of only a few government-unique terms and conditions. A commercial item purchased by the government cannot, as a practical matter, be treated differently than items sold to commercial customers. Therefore, to accommodate the government-unique terms and conditions, new systems must be established, causing increases in costs and delayed schedules—and the company becomes less competitive as a result. Piecemeal commercial products reform simply will not reap the cost savings and efficiencies the government needs in this critical budget environment. Statutes of greatest importance to commercial industry that were not clearly exempted last year include laws relating to Rights in Technical Data and the Truth in Negotiations Act.

We believe that no government-unique terms and conditions should apply to purchases of commercial products. When the government acts as a player in a larger commercial marketplace, it enjoys the same protection as other buyers and needs no unique protection. Competition ensures that the prices and terms are fair and reasonable, and that product quality meets contract requirements.

Also, I would like to emphasize the need for statutory relief rather than simple waiver authority for the executive branch. We have found that where waiver authority has been available to the Defense Department, for example, the department has been reluctant to use it, particularly when the procuring activity is required to elevate approval to the Agency Head or above. It can take years to secure waiver authority.

• Elimination of post-award audits for commercial product procurements. FASA, on commercial contracts, grants post-award audits for two years after award of a commercial contract. We believe that a competitive price for a commercial item can be established by market research techniques, surveys and the like. When this information is not available, the vendor can support the price of the commercial item through other objective evidence, such as customer orders and invoices and purchasing agreements with other customers. We believe the government, therefore, can audit price reasonableness information prior to reaching an agreement on the price of a commercial product. We want to make clear, however, that if a company commits fraud, the government should, and will, have full rights to impose the penalties under current commercial commerce law. Fraud simply cannot be tolerated in any marketplace.

(4) Small business and other items. ARWG supports programs that encourage and assist small businesses (including small disadvantaged and women-owned businesses) to obtain a "fair share" of federal procurement opportunities. FASA included many significant benefits and protections for small businesses in federal contracting. ARWG believes that more can be done by making permanent the Defense Department's pilot mentor protege program and extending it to all government agencies; expanding the Defense Department's comprehensive subcontracting test program and providing clearer authority to civilian agencies for their own subcontracting programs.

ARWG also believes that attention should be given to addressing the information technology acquisition process. In addition, legislation should be enacted that authorizes sales by the Defense Department of low value plant equipment to incumbent contractors.

Attached is the list of the individual items which fall into these broad categories. A copy of the complete ARWG package has been submitted to the Subcommittee for inclusion in the record. Also, copies have been provided to all the offices of the Committee Members. ARWG recognizes that this package does not encompass all of the many issues that industry is interested in pursuing. Indeed, there are several coalitions working on additional legislative proposals.

Now is the time to enact additional acquisition reform initiatives that will bring us one step closer to the streamlining goals we all share.

CLINGER/SPENCE PROPOSAL

Turning to the bill recently introduced by Chairman Bill Clinger and Chairman Floyd Spence (House National Security Committee), ARWG applauds this proposal which encompasses revisions to the numerous procurement integrity statutes and the repeal of recoupment charges in the Arms Export Control Act.

ARWG's associations and member companies have fully supported initiatives both within the government and industry to enhance the ethical and efficient functioning of the acquisition process. Over the years, however, too many overlapping statutes have been enacted, aimed at preventing the same kinds of abuse but with different restrictions. The Clinger/Spence proposal is based on an initiative developed during the Bush Administration and adopted by the National Performance Review. It would further promote understandable government-wide standards that are not only rigorous, but readily understood and enforceable. Replacing the existing patchwork of complex, overlapping rules with a simpler, less burdensome structure is long overdue.

ARWG also commends the Committee's efforts to repeal the section of the Arms Export Control Act requiring a recoupment charge on government-to-government sales of major U.S. defense equipment. This requirement raises the price of our defense products in a competitive international marketplace, results in a loss of sales and U.S. jobs and accelerates the loss of industrial capability which may be vital to national defense.

The Pentagon, through regulations, had extended the recoupment policy to include major defense equipment (MDE) sold commercially, all other defense equipment and spare parts and civil items which were directly derived from military products and technology. This regulatory extension of recoupment was terminated by the Bush Administration. Repeal of the statutory requirement in the Arms Ex-

port Control Act is a key ARWG recommendation and we are pleased that the Clinger/Spence bill proposes to repeal this statutory requirement as well.

As you and the full Committee proceed with your deliberations on the Clinger/Spence bill, we would like to assure you of our desire to cooperate with you and assist you in any way possible.

ADMINISTRATION PROPOSAL

Last Friday, ARWG received a briefing by the Administration on its own follow-on legislation. In as much as we are still analyzing their proposal, it is difficult for us to weigh in with specific comments at this time. Having said that, we would be pleased to provide comment to the Committee once we have completed our review of the proposal.

We understand, however, that the Administration has expressed an interest in pursuing proposals that would eliminate the jurisdiction of the federal district courts to adjudicate protests. Last year, ARWG opposed this type of proposal, and it is unlikely that this sentiment will change. We encourage this Committee to look very carefully at the issue before altering a judicial system that, to date, has worked very well for all parties involved.

CONCLUSION

Again, the Acquisition Reform Working Group would like to thank the Subcommittee for this opportunity to testify. We recognize that it would be easy to rest on last year's laurels—especially since this Committee did yeoman's work. More, however, remains to be done in order to promote an acquisition system that can move the government and industry into the 21st Century.

We appreciate the willingness of the Subcommittee and Committee Members to reach out to industry in developing acquisition streamlining measures. We look forward to continuing this dialogue.

1995 ARWG AGENDA

1. Contract Close-Out Streamlining
2. Simplified Solicitation
3. Certification Elimination
4. International Competitiveness
5. Additional Commercial Item Waivers
6. Amend Post-Award Audit
7. Elimination of Non-Standard Clauses
8. Domestic Source Restrictions
9. Waiver of Ethics Provisions
10. Information Technology Review
11. Increased Small Business Opportunities
12. Sale of Government Property

ACQUISITION REFORM WORKING GROUP

Aerospace Industries Association; American Defense Preparedness Association; American Electronics Association; Contract Services Association; Electronic Industries Association; National Security Industrial Association; Professional Services Council; Shipbuilders Council of America; U.S. Chamber of Commerce

[NOTE.—Due to high publication costs, the 1995 Agenda of the Acquisition Reform Working Group can be found in subcommittee files.]

Mr. HORN. Thank you, Mr. Turner. We appreciate your coming down from Minneapolis and getting out of the cold for a while.

Mr. TURNER. Thank you for inviting me.

Mr. HORN. Next is Mr. John Custer, who is the chairman of the board of Mason & Hangar, Silas-Mason Co. from Lexington, KY. And you represent the Acquisition Reform Working Group. Mr. Custer.

Mr. CUSTER. Mr. Chairman, members of the committee, I'm honored to have the opportunity to appear before you today.

Mason & Hangar, Silas-Mason is a diversified technical operations management, logistics, security and environmental services

company founded 168 years ago. We're headquartered in Lexington, KY. We employ 5,500 people under technical and services contracts in 9 States and Puerto Rico.

I also serve on the board of directors of the Contract Services Association of America, and my company is a long-standing member of the American Defense Preparedness Association. Both of these associations are active members of ARWG, the multi-association coalition on behalf of whom I'm appearing today.

My role is to discuss just a couple of acquisition reform issues of particular importance to the services industry. Others on this panel will talk about acquisition reform as related to commercial products, major systems, and small business.

Let me start by addressing the issue in a fairly broad perspective. It is time for the Congress to make a strong and unequivocal statement of support for private sector performance of government services. The record documents clearly that the outsourcing of government services saves money and often improves the quality of services.

We know, as well, that growing jobs in the private sector is the key to our Nation's economic well-being. As such, a course of aggressive outsourcing serves the interests of the government and its citizen taxpayers. The National Performance Review tacitly acknowledged this reality when it recommended that the Department of Defense outsource its noncore activities.

Moreover, it's our understanding that the administration will be proposing in its defense authorization package statements of policy and specific steps that are geared to reach that goal.

We applaud these efforts but believe that they must go further and be directed to a governmentwide rather than DOD-specific basis.

As well, Congressman John Duncan has introduced legislation that would effectively require that the Federal Government be more aggressive in its use of outsourcing. We hope this committee will take the lead in that area.

The impact of an aggressive outsourcing initiative would be significant. The Wall Street Journal has reported that the government saves an average of 25 percent per contract. Additionally, OMB estimates that there are as many as 500,000 Federal positions that could be contracted out.

OMB and others also indicate that for each Federal position converted to contract, the government saves an estimated $10,000. Thus, it is easy to see how an aggressive outsourcing initiative could result in cost savings in the billions of dollars annually.

Moreover, private performance of government services brings with it flexibility, technology, and innovations typically not seen within the government. Furthermore, we must ensure that all barriers to outsourcing are removed. Indeed, barriers to outsourcing are barriers to efficient management, since they deny government managers the freedom and, in some cases, the incentives to consider alternative means of providing a service.

For instance, we must recognize that the continuing requirement that decisions to contract existing functions be supported first by extensive public/private cost comparison, is simply not an effective means of making informed management decisions.

The reality is that the government simply does not have the type of accounting system that enables an accurate accounting of government's full costs. That reality, combined with our belief that the marketplace and competition are the keys to efficiency and innovation, causes us to question the wisdom of requiring costly and time-consuming studies.

However, we also recognize it's also unlikely that the requirements for cost comparisons will be repealed any time in the near future. Thus, in order to make the process work better and cost less, we strongly recommend at the very least Congress do two things:

First, Congress should authorize the creation of an independent, high-level panel perhaps based at a major American graduate school of business to study the cost comparison process as it now exists and make recommendations as to how that process can be made more effective.

Our goal is to develop a methodology for cost comparisons which is simpler, more streamlined, and less costly, but which also includes a set of factors that can be used to account for those items existing systems do not include. If we're going to continue to utilize cost comparisons, then we should ensure that they are fair and accurate.

Second, Congress should require that when a cost comparison study is initiated, it is completed in a timely manner, no more than 12 months for a single function, 24 months for a multiple function study, and that it is not interrupted either through congressional intervention or for other reasons.

This would further streamline the process, reduce costs, and serve as an incentive to government managers to utilize the management and performance options available to them.

On another front, ARWG is also proposing that Congress deal with the issue of contract close-out lag time, one of the most vexing problems facing government contractors. When a contractor completes performance on a contract for the government, the final payments due the contractor are withheld by the government until the government can audit the contractor's billings and negotiate final payment rates.

Very often, this process can take as many as 7 or 8 years. At CSA, we had one member company that waited 12 years for final payment. This is intolerable. It would never be allowed to occur in the private sector and should not be allowed in the public sector.

Last year, the House did include language in a version of FASA I designed to deal with the problem. The language was, however, dropped by the conference committee. This year, ARWG is supporting for the record a new proposal and ask for your support of it.

Mr. Chairman, as you are well aware, the American people are looking to Congress to do something truly significant about the Federal budget. In addition, public opinion polls continue to show that real government reform, the real reinvention of government, ranks very high on the list of the public's priorities.

I want to thank you for your time. I would be happy to answer any questions.

[The prepared statement of Mr. Custer follows:]

PREPARED STATEMENT OF JOHN C. CUSTER, MASON & HANGAR, MASON–SILAS, INC., FOR ARWG

Mr. Chairman, members of the committee, I am honored to have the opportunity to appear before you today. My name is John Custer and I am the Chairman of the Board of Mason & Hanger-Silas Mason Co., a diversified technical operations, management, logistics, security and environmental services company founded 168 years ago. We are headquartered in Lexington, Ky. and employ 5500 people under technical and services contracts for NASA, DoE, the Army and Navy, in nine states and Puerto Rico. In 1994, our total volume of business was approximately $400 million.

I am also on the Board of Directors of the Contract Services Association of America and my company is also a long-standing member of the American Defense Preparedness Association. Both of these associations are active members of the Acquisition Reform Working Group, known as ARWG, the multi-association coalition on whose behalf I am appearing here today. ARWG has played an integral role in the acquisition reform arena, both with the Congress and the Administration. We commend this Committee for its leadership on the passage of the Federal Acquisition Streamlining Act of 1994, known as FASA I, and for your recognition of the need for additional acquisition reform legislation this year.

My role here today is to discuss with you a couple of acquisition reform issues of particular importance to the services industry. Others on this or other panels will discuss acquisition reform from the perspective of the commercial products, major systems and small business sectors.

However, I do want to stress that among ARWG's most unique features are its breadth and diversity and the degree of unanimity that exists within the coalition on the need for continued vigilance in the acquisition reform arena. Thus, I would encourage the committee to consider all of ARWG's recommendations as a package of reforms that are necessary if our collective goal of major cultural and procedural reform, which in turn will lead to significant budgetary savings, is to be achieved.

Let me start by addressing the issue from a fairly broad perspective. It is time for the Congress to make a strong and unequivocal statement of support for private sector performance of government services. Driven by severe budgetary pressures, cities, counties and states across the nation are rapidly turning to the private sector to provide services of every conceivable kind, recognizing as they do that the outsourcing of government services saves money and often improves the quality of services.

These governments have also recognized that there are scores of functions performed by the government that government simply doesn't need to perform, that the private sector could provide. And since we know that growing jobs in the private sector is the key to our nation's economic well being, it only follows that a course of aggressive outsourcing serves the interests of the government and its citizen taxpayers.

I was pleased to note that the National Performance Review tacitly acknowledged this reality when it recommended that the Department of Defense outsource its noncore activities. Moreover, it is our understanding that the Administration will be proposing in its Defense Authorization package, statements of policy and specific steps that are geared to reach that goal.

We applaud those efforts but believe they must go farther and be directed on a government-wide, rather than DoD specific basis. This committee can and should take the lead in this area. After all, the impact of an aggressive outsourcing initiative would be significant. As the Wall Street Journal reported, various government studies agree that the government saves an average of 25% per contract.

Additionally, OMB estimates that there are as many as 500,000 federal positions that could be contracted out. Studies at OMB and elsewhere indicate that for each federal position converted to contract the government saves an estimated $10,000. Thus, it is easy to see how an aggressive outsourcing initiative could result in cost savings into the billions of dollars annually.

We also applaud the administration's proposal to repeal several DoD-specific statutes which previously have served as barriers to outsourcing, and urge your support for those proposals. Again, however, we must remove all barriers to outsourcing governmentwide.

Indeed, barriers to outsourcing are barriers to efficient management, since they deny government managers the freedom, and in some cases, the incentives, to consider alternative means of providing a service. Therefore, the degree to which those barriers can be removed will have a real effect on the cost and quality of those services.

To make that statement of policy a reality, however, there are several specific barriers to efficient management and/or outsourcing that we recommend be addressed

in FASA II. For instance, we must recognize that the continued requirement that decisions to contract existing functions be supported first by extensive public/private cost comparisons is simply not yielding the kind of data necessary for truly informed decision-making.

The reality is that the requisite accounting system that would enable a truly accurate accounting of government's full costs, one that includes all overhead, capital, direct and indirect costs of the type contractors must account for, simply does not exist in the government.

That reality, combined with our belief that the marketplace and competition are the keys to efficiency and innovation, causes us to question the wisdom of requiring what can be a costly and time consuming comparative study process in advance of awarding a contract for an existing function.

However, we also recognize that it is unlikely that the requirements for cost comparisons will be repealed anytime in the near future. Thus, in order to make the process work better and cost less, we strongly recommend that the Congress do two things:

First, Congress should authorize the creation of an independent, high level panel, perhaps based at a major American graduate school of business, to study the cost comparison process as it now exists, particularly under OMB Circular A–76, and make recommendations as to how that process can be made more effective. Our goal here is not to create new, complex layers of study requirements. Indeed, since the requisite accounting systems do not exist in government, there is no use in trying to invent them now.

Rather, our goal is to develop a methodology for cost comparisons which is simpler, more streamlined and less costly, but which also includes a set of factors that can be used to account for those items existing systems do not include. If we are going to continue to utilize cost comparisons, then we should ensure that they are fair and accurate and that their execution is not overly time consuming and costly.

Second, Congress should require that when a cost comparison study is initiated, it is completed in a timely manner—no more than 12 months for a single function and 24 months for a multiple function study—and that it is not interrupted, either through Congressional intervention or for other reasons. This would replace the current 24/48 months statute and will thus further streamline the process, reduce costs and, frankly, serve as an incentive to government managers to utilize the management and performance options available to them.

In addition, ARWG is also proposing that Congress deal with the issue of contract close-out lag time, one of the most vexing problems facing government contractors. When a contractor completes performance on a contract for the government, the final payments due the contractor are withheld by the government until the government can audit the contractor's billings and negotiate final payment rates. Typically, this process takes four or five years and, very often as many as seven or eight years. At CSA, we even have one member company that waited 12 years for its final payment—not because there was any dispute over the funds; but because the government just didn't get around to completing the audit.

This is intolerable. It would never be allowed to occur in the private sector and should not be allowed in the public sector. Last year, the House did include language in its version of FASA I designed to deal with this problem. That language was, however, dropped in conference committee. This year, ARWG has submitted for the record a new proposal that would require the timely negotiation of provisional payments as soon as performance under a contract is complete. The proposal would also place under the Prompt Payment Act, those payments due the contractor after all final negotiations and audits are complete.

As a company executive I can tell you that for me, and many of my colleagues, Congress's willingness and ability to deal with this issue will be as important as anything else you do in the services arena.

Mr. Chairman, I commend to the committee the full text of ARWG's recommendations, which has been submitted for the record, and will close with one final thought.

We are in an era where there appears to be more commitment and more willingness than ever before to do something truly significant about the federal budget. In addition, to the surprise of some, public opinion polls continue to show that real government reform, the real reinvention of government, ranks very high on the list of the public's priorities.

This political reality gives us a rare opportunity to pursue significant change in both areas. This committee can substantially aid that effort by moving aggressively forward on the issue of outsourcing and clearing away any impediments that might

exist. Our collective ability to take additional steps to further reform the acquisition process will result in substantial budgetary savings and, in turn, lead to other efficiencies. In the simplest of terms, we cannot afford to stand pat.

Thank you for your time. I would be happy to answer any questions you might have.

Mr. HORN. We thank you for your time. Mr. Custer, you certainly get a resounding bell from me when you talk about late payments from any government. I ran into that when I returned to the State of California and headed an institution there where they weren't paying their bills. But we put a Comptroller on 30-day notice of every single bill he hasn't paid over 30 days and we cleaned it up pretty rapidly. But I think we definitely want to get to that in round two.

Our last speaker on this panel, since Mr. Schweizer had to leave for an overseas trip, I regret to say, is Mr. Carl Guerreri, president/CEO of Electronic Warfare Associates, and also representing the Acquisition Reform Working Group.

Mr. Guerreri.

Mr. GUERRERI. Thank you, Mr. Chairman and distinguished members of the subcommittee. I would like to ask for a correction of a factual error in my written testimony on page 4. There's a number, $113,000. It should read "$113."

I'm chairman and CEO of EWA. We're a small business 18 years old, primarily DOD-based, 80 percent; 20 percent commercial. And we're trying to diversify. So we're very interested in the acquisition reform problems here, because we're highly involved in acquisitions.

Acquisition reform isn't easy. It requires great effort, and it really has to go forward. So we applaud your efforts in this behalf. Today, I want to try and give you small business's view. And at the end, I'll make some very specific suggestions.

I think the whole thing goes to the issue of culture. We have to try and change the culture of the acquisition process. The 1994 FASA started momentum in that direction.

I think we have to capitalize on that momentum. And Congress can do a great deal toward that end by demonstrating aggressive leadership. We have to force the bureaucracy to turn law into practice. Industry large and small supports these efforts.

The issues I'm going to discuss today fall into three broad categories. Those categories are reducing the regulatory strangulation of small business and large businesses; contract streamlining and contract close-out streamlining; and the encouragement of small business development.

With regard to regulatory strangulation, there are so many rules that we have to comply with, and a lot of them don't mean anything. I would like to give one specific example of what happened to us. In an effort to diversify, we thought we would start a contract manufacturing facility to build boards, circuit boards.

We built a facility, about 12,000 square feet with our own money. It was specifically designed to do DOD work. We started doing a lot of proposals. It would take a year to go from proposal to award. Half of the proposals would be canceled before they were awarded. Then, if you were awarded something, you had all kinds of audits and regulations to put up with.

We finally got out of the business. The straw that broke the camel's back was that we received $136,000 contract to produce some cable assemblies. All of a sudden, my plant manager got a call 1 day. "Hi. We're the government. We're here to help you. We're going to send down four auditors and inspectors, and we're going to spend a week at your plant just to make sure you conform with our regulations."

We had to almost close down senior management to take care of them. That was the last government job we did. We turned that plant into a commercial plant. We became ISO–9000 registered. And I want to tell you, we're making a profit and producing good products right now; and we don't do a bit of government work. We would like to. We can't afford to.

It's a problem for other companies. And one of the problems we have and they have because of regulations, we cannot do government work on the same plant floor that we produce military products for. So we chose commercial products. We need to change that, because there's a lot of good capability there that the government isn't taking the advantage of.

Certainly, in June 1994 when they eliminated 30,000 mil specs, that helped.

The compounding of regulations—typically when Congress passes a law, OFPP puts a regulation in effect, but then it doesn't end there. The service will put their own interpretation into the regulation, a subcommand will put another interpretation, and then the local command will do it.

By the time you're done, small business doesn't have any idea what the heck they're dealing with. We have to change that. I think we need to eliminate agency supplements.

Contract streamlining and close-out—I'm hurrying because we have 5 minutes—gaps in contracting for small business are a big problem. We have incrementally funded projects. We got through the first part, and all of a sudden, the funding is there, but the paperwork for phase 2 hasn't made it through.

I have a choice. I have to either lay off people, or I have to find them another job, or I have to eat the cost. A lot of times, you can't do that. You wind up laying people off. It destroys the team.

Slow payments. It's terrible, especially as it affects small business and delays in contract close-outs. I think that the solution to slow payments is to require contracting officers to use what's there. They can award precontract costs. They don't want to do it because they have to report to a commander as to why they did.

Congress should help by maybe requiring them to do it in the case of small businesses, unless they can show why it shouldn't happen.

In terms of slow payments, I'll just give a couple of quick examples. Right now, we have cases where it takes 150 days for an invoice to go through because of the route that the contracting officer says we have to use to submit our invoices. In terms of contract close-out, it takes forever.

Right now, EWA is owed $186,000 by the U.S. Government from 1986. We're owed $696,000 from 1988. And these are contracts where the audits have been complete, the government agrees they

owe us the money, but they haven't gotten around to doing it. And this takes up about 20 percent of my line of credit.

I have to pay for that. It's hurting cash-flow. It's decreasing my profit. It's basically really tough for a small business.

I've made a series of recommendations in my written submission, nine of them which if implemented, will reduce the impact on small business. Thank you very much.

[The prepared statement of Mr. Guerreri follows:]

PREPARED STATEMENT OF CARL GUERRERI, ELECTRONIC WARFARE ASSOCIATES, FOR WRWG

Thank you Mr. Chairman and distinguished members of the Subcommittee. My name is Carl Guerreri and I am President and Chief Executive Officer of Electronic Warfare Associates, Incorporated, also known as EWA. EWA is eighteen years old and we employ approximately three hundred people. We provide products and services to the Department of Defense and commercial customers. About eighty percent of our business is with the Department of Defense and the rest is commercially oriented. We are continually working to diversify our business base due to the decreasing defense budget. Therefore, I am personally interested in savings that can be gained from acquisition reform.

I know reform of the acquisition process is not easy and will take a great effort on everyone's part; however, it is important and it must move forward. I applaud you for your efforts in that regard and the American Electronics Association as part of the Acquisition Reform Working Group looks forward to working with you and your Committee on future efforts to streamline the acquisition system.

Today, I would like to give you a small business' view of what true acquisition reform should be. It is important to recognize that some of what I have to say has to do with the "culture" or mindset of those involved in the acquisition process. Momentum has been created from Congress' excellent work and passage of the Federal Acquisition Streamlining Act of 1994 (FASA). Congress should use this momentum along with the current regulatory reform efforts underway to change this "culture". A continued demonstration of aggressive leadership will be required if the spirit of acquisition reform, as well as FASA is to be properly implemented from law and into practice.

Industry remains committed to seeking opportunities for increasing awards to small and historically underutilized businesses. As such, we have worked closely with Congress in support of programs such as the DoD Section 1207 Program, the Mentor-Protege Program, and the Comprehensive Subcontracting Plan Test Program. This long-range industry commitment is evident upon review of the membership roster of the Association Members of the Acquisition Reform Working Group (ARWG) which includes not only large firms, but thousands of small and medium-sized businesses. While progress has been made to date, there are actions, some of which Congress has already taken, which can redefine the acquisition system in a way that will result in an increasing role for small businesses. These actions generally relate to three broad areas. The first is reducing the regulatory stranglehold on small businesses, the second is contract closeout and streamlining, and the third is related to programs which encourage the development of small businesses.

REGULATORY STRANGULATION

The government acquisition process and associated regulations have literally driven EWA's manufacturing operation out of government business. Five years ago, we wanted to diversify by entering into the business of supplying the Department of Defense (DoD) with electronic products. We built, with our own money, a facility specifically designed to produce electronic subassemblies to DoD specifications for DoD applications. Once the facility was completed, we began bidding on government contracts. We found the process stifling. It took forever to amass the detail necessary for audits and it took an inordinate amount of time for the proposals to be evaluated. During the stretched out period, a number of solicitations were cancelled, some while we were in the process of preparing the bid package. In addition, we were struggling with trying to get our "Quality Assurance Program" approved by DoD. It seemed that we were forever being bogged down by regulations, policy or bureaucracy.

The straw that broke the camel's back, the single item which caused us to get out of the DoD manufacturing business, occurred after we were awarded a $136,000 contract and were told the government was sending four auditors and inspectors to

our manufacturing facility and that they would be on-site for approximately one week to ensure that we complied with all military specifications and standards. We couldn't afford the time or the money needed to provide the information they requested. When that happened, we made the decision not to do any more military work in our manufacturing plant and instead pursue commercial type assembly. DoD's recently-released process action team report on oversight and review clearly recognizes the non-value added burden of much of the historic DoD on-site oversight. My concern is how many of the recommendations will be implemented.

Another obstacle to doing business with DoD are the current rules that make it almost impossible for a manufacturing facility to produce both military and civilian products on the same factory floor without having to worry about violating federal regulations, statutes and/or accounting rules. We have not seen the new commercial products regulations from the FASA legislation to be able to comment on the substance and hopeful improvements that should be realized from the legislation. If the new draft Truth In Negotiations Act regulations are any indication of the pending Commercial Products regulations, we should not get our hopes up as to the elimination of barriers that prevent companies from manufacturing both military and commercial products on the same production floor. These regulations would enable companies, especially small ones, to limit their operating costs by having less government unique oversight requirements and be able to simultaneously produce both military and commercial products, such as, microelectronics.

We made the transition to a commercial facility and we now have a factory that is producing substantial amounts of electronic products at a profit. We decided to become an ISO–9000 registered facility so we could deal in the international marketplace. In July 1993 we were notified that we met all the international standards for ISO–9000 registration and were officially registered. We find it much easier to produce high quality goods at a competitive price for the commercial market.

During 1994, DoD made two significant regulatory moves on their own to enhance their access to commercial technologies and processes. Last February, then Under Secretary of Defense for Acquisition and Technology, John Duetch, moved to implement the ISO–9000 Commercial Quality Standards. In June 1994, then Deputy Secretary of Defense Perry announced the elimination of over 30,000 Military Specifications that should streamline the process. Again, however, the cultural change is the impediment to implementing this commercial quality process. From this experience, I suggest that your subcommittee embrace this year's ARWG package recommendations to further increase the government's ability to buy commercial products on commercial terms. FASA created a new system for commercial product acquisitions and waived a number of statutes that were identified as barriers to the commercial marketplace. The statute, however, did not remove many of the significant barriers at the prime contract level. While greater flexibility was provided for subcontracts, much was left to the regulation writers—and we may need future legislation depending on the extent to which the Administration takes advantage of the FASA flexibility.

Another problem for small businesses is the compounding of regulation upon regulation. For example, Congress will pass a law which will result in the development of a new acquisition regulation or acquisition policy by the Office of Federal Procurement Policy. After this is done, each service or agency develops a rule or regulation which is their interpretation of the federal policy. Their subordinate commands do the same. These agency supplements to the FAR enable the contracting officers to impose unique agency requirements which the private sector do not have access to for review. Elimination of these agency supplements would be a major improvement which I feel many government Contracting Officers would also welcome. By the time this flows down to the small business trying to do work with the government, we have absolutely no idea of the total extent of the regulations that are being applied to us.

CONTRACT STREAMLINING AND CLOSE-OUT PROBLEMS

Major contracting problems are faced by all companies, but especially small companies because of the high risk investment currently associated with defense contracting. We live with gaps in the contracting process, slow payment of invoices, and the piling on of regulations by agencies. In some cases, solutions exist but agencies are unwilling to implement them. In conjunction with industry's recommendations to reform contract financing, Congress could help small businesses by enacting appropriate legislation which would encourage/require government contracting officers to use the tools available to them when working with small businesses.

A contract-related problem for small businesses is what could best be called lapses in the contracting cycle. By this I mean a scenario whereby a small company is

under contract to provide a product or service. The work is such that it will span more than one fiscal year and is incrementally funded or takes the form of a basic ordering agreement with multiple tasks. Because of the flow of money and the delays in the processing of contracts, there are gaps of weeks or months between the end of one task and the beginning of the new one. Even though we know there is going to be follow-on work, and that the money is available and contract instruments are in process, we cannot start work. We must lay people off because small businesses cannot afford to carry individuals on overhead. This highly disruptive to companies and for the customer alike and does not keep a team together for the project. Small business strongly endorses legislative changes made by the ARWG for the government to implement commercial financing practices.

One solution appears to be fairly simple. Require contracting officers to fully utilize part 31.109 of the Federal Acquisition Regulations ("Advanced Agreements"). This clause allows the contracting officers to authorize precontract costs for work that is going to be performed. The problem is, almost no contracting officer will use this clause because there is reluctance on the part of higher echelon commanders to authorize its use. The proper application of this clause could solve many small business problems. These issues are mainly administrative in nature, but the "culture" will not give the small contractor a break. We encourage Congress to force changes in the acquisition culture by recommending administrative and regulatory chances be implemented government-wide.

Getting paid for completed work in a reasonable amount of time is also a serious problem for small businesses. In the past, we would get paid in 30 to 45 days; now it is taking 120 to 150 days on some projects.

The invoice approval process is the problem. In the past, you submitted an invoice to the Defense Contract Audit Agency who would then forward it to the payment office for payment. This process worked fine. However, in some cases now we must submit the invoice to our Contracting Officers Technical Representative (COTR) for review; he or she sits on it for 90 days or disagrees with a minor change and we are stuck with the additional delay. When the COTR finally forwards the invoice, we then have to go through the regular 30 to 45 day payment process. For example, in one case we submitted an invoice for $300,000. The COTR disagreed with a $113 charge on the invoice and held up the $300,000 payment for 90 days. We finally threw in the towel during the dispute just to free up the invoice. We still think we were correct on the charge but we could not afford to be right. This awkward process should not to continue. The COTR does not have audit authority nor should they be acting as one.

Another aspect of this issue is contract close-out delays. These delays create severe cash flow problems and long-term, burdensome accounting documentation, especially for small businesses. It seems to take forever to close out contracts which results in long overdue final payments for work we have completed. I am currently waiting for $186,000 from a contract completed in 1986 and for $696,000 from a contract completed in 1988. While seven and nine years are unacceptable and by no means short, it is not as extreme as some cases which I have heard about companies waiting for as long as 14 years. These are poor business practices for the government to follow, however, I have no recourse. As a business, I must wait for final payment and during that time pay interest on the money. These practices dramatically effect our profits which are either reduced or over time, totally eliminated. To correct these problems, I feel that your Committee should review for serious consideration the ARWG's proposal for Contract Close-Out.

DEVELOPMENT OF SMALL BUSINESSES

EWA is a mentor in the Pilot DoD Mentor-Protege Program. I believe we may be the only small business that is a mentor. As such, I can assure you that the Pilot Mentor-Protege Program is a good program that helps small, emerging companies. We have three proteges and they all seem to be benefiting greatly from the program. I believe you would get even more mentor companies into the program if there were a program whereby a few contracting opportunities were set aside solely for the Mentor-Protege teams. With that type of incentive, I do not believe you would have any problems getting companies to enter the program.

RECOMMENDATIONS

The ARWG has several recommendations for expanding small business participation in the Federal Procurement System.

First, we recommend that as part of the culture change and less government oversight, Congress take another look at the post-award audit provisions of section 1204 and 1251 of FASA. Commercial oriented companies, particularly small businesses

and those that are trying to diversify out of defense work, cannot afford the costs nor loss of time associated with government auditors reviewing records and attempting to "second guess" a contracting officer's judgement. It is difficult to run a small business in a profitable manner and simultaneously try to meet these oversight requirements.

Second, pending the publication of the FASA Commercial Products Regulations, we recommend additional changes to existing regulations that facilitate the use of the same production lines for both military and commercial items.

Third, we recommend that unnecessary duplication of regulations be eliminated. There should be only one interpretation of a rule or policy, not multiple agency procurement supplements.

Fourth, we recommend that there be some correction to the delays in contract close-out by accelerating the close-out process. The ARWG has made detailed recommendations in our proposal which include a 60 day close-out provision for both contacting parties. Optimally, all administrative and financial milestones should be completed at the end of one year.

Fifth, a means of contract payment acceleration needs to be achieved. I would personally recommend that the Prompt Payment Act be extended to small businesses operating under any type of contract and that the time clock start when the invoice is delivered to the government, not just the payment office.

Sixth, we recommend something be done to minimize the instances of contract/task order lapses that disrupt small business operations. We recommend that the laws and/or regulations be modified such that when a small or small disadvantaged business request precontract costs, and certain conditions are met (e.g., funds are available and work package is awaiting signature only), the precontract costs are automatically granted unless the contracting agency can show why this should not be.

Seventh, we recommend that the statutory pilot DoD Mentor-Protege Program be made permanent and be appropriately tailored and made available for the civilian agencies.

Eighth, we recommend that some procurements be set aside specifically for competition between Mentor-Protege teams.

Ninth, we recommend that Congress continue support for Secretary Perry's and Deputy Secretary Deutch's efforts to acquire commercially available items when practical. We also strongly approve of DoD's adoption of ISO–9000 commercial quality assurance standards.

Mr. HORN. We thank you. The testimony of the three presidents, and CEOs is right to the point. And you obviously got our attention.

I would like to suggest to the staff that if the three witnesses have audited accounts that have not been paid that the staff pursue this as to what's the reason for it and we get this as an example of what's wrong with the system. Let's find out in detail who sat on what when, because it's irritating.

While I realize the administrations, regardless of party, seem to use trust funds of the Federal Government for balancing the deficit, I didn't know that nonpayment to companies who did work for the government was another way to balance the budget.

Representative Maloney, may I ask you to lead the questioning?

Mrs. MALONEY. First of all, I would like to congratulate you on following up on a problem that they have pointed out, that of prompt payment of a ridiculous, burdensome nature.

I would like to ask you, how much do you estimate that you and others add to your bid for government work because of the fact that you may be waiting 12 years to be paid? I find it unbelievable that there have been cases where you've waited 12 years, 4 to 5 years that some of you testified.

How much do you think it's costing taxpayers? And I'm sure that contractors are building that expense into their bids. Wouldn't you say?

Mr. GUERRERI. I guess since I brought it up, we really have no way of building that in to our expenses, because the cost of interest isn't an allowable cost. When I'm carrying the government, that comes out of my profit. And at best, what we're doing is reducing my profit. And my profit has already been set by statute. I say "statute"—by the regulations or guidelines that the contracting officer has.

I can tell you right now, our average profit on a job is probably running about 6½ percent. That's what we negotiate. That's before nonallowable costs and taxes. We're lucky to do 2 percent after taxes. We have no way of building that in.

Mrs. MALONEY. Mr. Turner, you mentioned your concerns with the Truth In Negotiations Act, TINA, and commercial items under FASA. What exemptions from TINA do you think are appropriate, and why?

Mr. TURNER. Well, as I indicated, I think commercial products should be treated as commercial products. And if the government is going to purchase a commercial product, it should be treated just as that, with no application of any other terms and conditions. It should withstand in that process its cost prerogative, and it should, by virtue of being there and being selected, meet the quality standards.

Mrs. MALONEY. I would like to ask all of you if you would like to comment on the previous testimony; if you were here on the proposed new piece of legislation that would attempt to limit bid protests. Do you feel that the bid protest system is—what are your comments on those proposals and signing waivers that you would not protest bids?

Mr. TURNER. Let me just introduce that, if I may, quickly. First, I am not acquainted with the level of protest that was indicated in the previous testimony. I think in the last 2 years, my company—and we have probably 1,500 government contracts—has had 2 protests that we have been involved in. One of those was initiated with someone else.

I certainly can speak that we are not a company that stands back and prepares for a protest before an award is announced. I think that's a waste of money. I have to state, then, from my perspective, it's an issue, but not an overwhelming issue, as indicated.

Mrs. MALONEY. The administration's draft bill would permit agencies to amend evaluation factors or specifications at any time up to the best final offers. Is this a good proposal?

Mr. CUSTER. Let me take that. I think that's very tough, because you have people working on a proposal, planning it, organizing it aimed at a certain set of criteria. It's very difficult to come and change the factors late in any kind of a mission or a project like that and expect to get good results.

I think that's the kind of—even an innuendo of that kind of change is what does lead to protests sometimes, that the original criteria were not followed.

And also, commenting on the protests, I think some of the biggest costs involved in protests are involved in the lengthening of the proposal period because the procurement agencies don't want the protests and work very hard and include a number of hurdles

to be leaped in order to avoid that. And it adds a great deal of effort, which ultimately, of course, gets back to the public.

Mrs. MALONEY. The administration's draft bill also suggests that there would be a reduction of the competitive range to, "as few as the three highest qualified firms." Again, is this a good proposal?

Mr. CUSTER. Let me introduce that one. And I'm speaking now not for CSA but from my own experience. And it is—maybe 3 is the right number, but certainly less than 90 percent—having been in the position of resubmitting the best and final and spending a great deal of effort and then, in the debriefing finding that in order for us to have won, we would have had to have leapt over 5 other companies.

And the odds of increasing your position that much in a best and final is really very remote. So again, it added costs to the system. And so I wouldn't be opposed to the limitation.

Mrs. MALONEY. That's interesting. Also, there was a proposal of limiting notice. And I don't have it in front of me, but right now, it's the 30-day notice before the specs then come out for you in which to respond. And they were proposing cutting that time down again. What's your response on that?

Mr. CUSTER. I don't really object to it. There are times even if you had 60 days' notice when you fail to find the notice in the Commerce Business Daily. And I think with the electronic media, it's probably going to be easier to find what you're looking for.

Mrs. MALONEY. Thank you for your comments.

Mr. HORN. Thank you.

The gentleman from Pennsylvania, Mr. Fox.

Mr. FOX. Thank you, Mr. Chairman.

Mr. Turner, Chairman Horn referenced earlier about the Acquisition Reform Working Group proposal to eliminate the nonvalue-added certifications from the government contracting process. And as he also noted, in Chairman Clinger's proposed legislation, it deals with this issue as it relates to the procurement integrity provisions.

How can Congress help you solve this problem, when by the data presented here today, the problem stems from administratively imposed certifications?

Mr. TURNER. Well, to the best of my knowledge, it's not uncommon that we have to engage 100 certifications with the signing of a contract. Some of them are redundant, overlapping, and I think are, in many cases covered, at least by implication, when you sign the contract. So I think what should be done is we should limit those things that aren't statutorily required.

Mr. FOX. What do the certifications involve, in most cases?

Mr. TURNER. The list is very large. And I think you will find in my formal submittal the entire list. And it's from small business to environmental to cost in pricing to, I think, just about any subject you could come up with. And it's very overwhelming in terms of the spread of content.

Mr. FOX. And the ultimate is that it discourages you from doing business with the government?

Mr. TURNER. Well, it makes it very difficult to do business. And it's very costly. It requires a lot of administrative support. And when you sign a certification, you have to take it seriously.

Mr. FOX. Mr. Guerreri said it didn't even make sense to deal with the government because it was so expensive. I'll let him answer when I get to him, I guess.

Mr. TURNER. I think that the cost of doing business with the government is very high, obviously, as has been stated before and is known by all of you. In my particular case, we're still primarily a defense contractor. And you may find this odd, but our strategy is to stay that way.

And we are going to hang with the system and hope that the procurement practices become more conditional and help us together do the business, because it's still a requirement to do the work that we do.

Mr. FOX. Mr. Chairman, if I could just ask one more question. That would be to Mr. Guerreri, whose testimony was quite poignant, as well.

Mr. HORN. Yes.

Mr. FOX. To the extent your testimony couldn't get to some other points you might have wanted to say but you had 5 minutes to say it, what other kinds of comments could you give to this committee and our chairman as to how the government can improve its procurement process, so that you would want to enter it or others like you?

Mr. GUERRERI. Sure. I want to clear something up. When I said we got out of government business, we're still 80 percent DOD. But that was in the manufacture of circuit boards. The oversight was just overbearing, and we just couldn't make a profit at it.

But in terms of changes, one of the things that I was going to suggest a change in is the Prompt Payment Act. Everybody thinks of that as a good thing, and it is. But it doesn't apply to very much. Why don't we take it and make it apply to all small business no matter what kind of a contract they have? Right now, the clock on the Prompt Payment Act starts when the invoice is received at the payment office.

Most of the delay occurs from the time it's submitted to DCAA or to the contracting officer's technical representative for payment. Let the clock start when the invoice first hits the government. That will tend to make things move faster. I think that another thing we can do is certainly close out a contract within a year. I mean, there's really no reason why that can't be done.

That will free up a lot of cash for a lot of companies and encourage them to know that they're going to be treated fairly, so they don't have to say, "Look, do I really want to bid this or not?" Sometimes, we look at jobs that the government gives us, and I think somebody made a comment about doing away with statutory limits on profit and let each case decide itself.

We don't go after some jobs because we know where it's coming from and that they're going to offer a 5 percent profit. If they start at 5 percent or 5½ percent, by the time we get done, if we make 1 percent if everything goes right. We don't go after jobs like that. So I think that removing weighted guidelines and let the contracting officer have a little more freedom is a good idea. I think that encouraging small business—the mentor-protege program is a good idea. We happen to be probably one of the few small businesses

that's a mentor under the mentor-protege program. We have three proteges. That system really works.

I've heard that the government would like to get more large companies involved. I have a suggestion. If you want to get companies involved, take a few contracts and set them aside only for participants in the mentor-protege program. As soon as you do that, you watch all the people line up to get into the program. They'll do it. So I think those are the——

Mr. FOX. Speaking briefly, how does the mentor-protege program work, in two sentences or less?

Mr. GUERRERI. Two sentences or less, a big company or a larger company agrees to take a small company and show them how to do business with the Federal Government. It holds their hand and walks them through everything from how do you comply with the accounting rules to how do you deal with security.

And you basically do that. And the government reimburses some costs associated with doing that.

Mr. FOX. Very good. Thank you.

Mr. HORN. The gentleman from Virginia, Mr. Davis.

Mr. DAVIS. Thank you very much. I want to take the opportunity to thank all of you gentlemen for testifying. And to my friend, Carl Guerreri, whose business is in Northern Virginia, it's good to have you here.

Let me, if I could, make a few comments. And Mr. Guerreri, I would like to take your testimony, if I could and just focus on a few of the comments you made. Because I think they need to be amplified here before the committee.

You noted that about 80 percent of the business that you do is with the Department of Defense, and the rest is commercially oriented. Without giving up any trade secrets or anything, is your markup for the commercial sector, private sector much higher than you get with the government, as a practical matter?

Mr. GUERRERI. Yes, sir. Typically, as I said, in the government sector, by the time we negotiate a contract, 7 percent, 6½ to 7 percent is the best you're going to do as a——

Mr. DAVIS. That's because costs are disallowed down the way?

Mr. GUERRERI. That's before disallowed costs. That's just going into the contract. In the commercial sector, it's probably safe to say you're looking at 15 percent as a floor for the work you're doing. And it's a lot easier to work with them. You can negotiate with them. You can find out what they need, and you can provide them with the product they're looking for.

Mr. DAVIS. I thought everyone's comments, in terms of the payment situation, were excellent and need to be highlighted. Carl, you talked about the invoice approval process is the problem, that the Prompt Payment Act's great as far as it goes, but the fact is that you can complete a contract and still have money withheld, and you don't know when the auditors are going to get around to coming back and auditing this, what they're going to raise.

And I think you gave some very concrete examples of what were some fairly trivial amounts holding up large payments and what that can do to a small business. I thought that was excellent.

The issue goes just beyond the 30 days, Mr. Chairman. It really goes to the way this is conducted and the way the current law

reads. And I would like to examine ways where we put more of an onus on the government to be a little more timely about some of these ways or make a presumption of greater payment.

I'm not sure the best way to get around that, and it will take some discussion. But I think you've highlighted, this is a major problem for small companies that don't have the cash to carry forward. Any comment on that?

Mr. GUERRERI. Yes, sir. I think there has to be something to accelerate that. As I think I said earlier, we're undergoing right now—we had $113 difference, we thought we were owed the money and the government guy didn't think we were. It held up a $300,000 invoice for us for 90 days before it even got into the payment process. And finally, we said, "Take your $113. We need our $300,000." It's little things like that cost——

Mr. DAVIS. You don't get interest on that or anything else?

Mr. GUERRERI. No, sir. We pay interest. And that, as I said, is not an allowable expense. My single largest nonallowable expense or 90 percent of my nonallowable costs are interest costs.

Mr. DAVIS. Let me go to one other issue you raised that I think needs to be highlighted here, and that's lapses in the contracting cycle. You're a small business. You're trying to complete a project.

And usually because of problems with internal funding either within that department or sometimes with Congress itself in bridging the funding levels, the money is not available, and you have 3 weeks or 2 months before the next funding cycle, which everybody knows is going to kick in before it actually kicks in.

And you've got your people that have worked on the first phases of the project not being able to carry on. Larger companies—I know it's probably illegal, but I know that larger companies from time to time will look to find other vehicles for these individuals with the same agencies to fund. And either the COTR or the contracting officer will, if not formally, at least informally say, "Well, you can charge to this vehicle and do this work, and we'll get it straightened and out of the way."

But for a small company that does not have a large number of vehicles to move your people off, as you note, you have to lay your people off, or you end up eating a lot of costs and carrying them at a time you can't afford to carry them.

I'm not sure of the best way to get at these funding gaffes, but what you suggest is that we give the contracting officers—or maybe it's the COTRs, whoever is in charge in this case—give them a little more leeway to go ahead with bridge funding?

Mr. GUERRERI. Yes, sir. You've hit the nail on the head. We have an office in Tyson's Corner right now. They had a project that was incrementally funded. Their funding ran out on the 31st of December. There were 12 or 15 people involved. The system saw the money for the next increment.

They knew it was there, and it was working its way through the system, yet the contracting officer wouldn't give us the go-ahead to work until he actually had the money. And that happened last week. So for almost 2 months—first, I carried the people on overhead; and then, I finally had to put them on leave without pay, and we laid off a few.

Everybody knew the money was coming, and they had the wherewithal to tell us to go ahead and start by authorizing precontract costs, but they wouldn't do it because the culture of the system is such that contractors——

Mr. DAVIS. If something happened, then the contracting officer is stuck.

Mr. GUERRERI. Then they would be responsible. That's right.

Mr. DAVIS. And that's an issue that if the funding doesn't go though, and you're charging up and burning up time, you can imagine the embarrassment that that contracting officer is going to have. But that is a real problem for small businesses, through no fault of their own; basically, through government inertia, in terms of getting these vehicles in line.

And I would like any suggestions you have on how—without jeopardizing the government's role in terms of funding items that may not get funded, but how we can help bridge those gaps, particularly to small businesses. I would be very, very interested in it, and I think the committee would, as well. And I think if either of you have a comment on that, I would be interested.

Mr. TURNER. It's also a problem for large business.

Mr. DAVIS. It just sells better for small business.

Mr. TURNER. Yes, it does.

Mr. DAVIS. We can write it to include everybody. Thank you very much. I yield back.

Mr. HORN. The gentleman from Illinois, Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman.

And I want to thank the panel for coming today. It's truly a distinguished collection of smart guys in an area in which government is not always very smart.

I have just one question, Mr. Chairman. Title V of the original FASA had as a centerpiece a very important portion concerning management attention given to performance goals, costs, and scheduling. Have we seen enough of an improvement in that area? What can we do better?

And perhaps even in the case of Mr. Custer, considering your remarks, is privatization a little better? I ask this question in the light that it is an ongoing debate out loud and quietly amongst us as to the level of oversight and management, particularly as we take many of the shackles off of smaller purchases, "smaller" being in the range of half a million dollars or less, and how that will influence through there. And has FASA I done what it's supposed to do?

Mr. CUSTER. I don't pretend to know that much about what has happened with FASA since October when it went into effect. I would tend to believe that there hasn't been much time to see effect.

I think that as you simplify procurement and simplify statements of work and relate the work to performance-oriented goals, you will improve management because you now have a clear statement of what's to be accomplished. It allows the contractor and the government to work toward a common goal.

I think that's really what we're trying to do, to partner in the limited way that we can between the two sides. So I think it helps in that direction.

Mr. FLANAGAN. Before the other gentlemen answer the question, if that were adequately addressed to a level of satisfaction with which you are comfortable, does that change at all your comments about privatization of many of the functions of government?

Mr. CUSTER. No. I think that the idea is to establish the most efficient, productive way we can perform—we in total can perform services and that through competition, through privatization, if you will, you create the competition that brings about this efficiency. I think it's almost a given in industry now that that's the way to accomplish those goals.

Mr. FLANAGAN. Thank you.

Mr. HORN. The gentleman from Pennsylvania, Chairman Clinger.

Mr. CLINGER. Thank you, Mr. Chairman.

And I, too, want to thank the panel for appearing here today. I'm sorry I was not here to hear your testimony presented in person, but I had to a chance to review it. I just had a couple of comments.

I think you, Mr. Guerreri, stated that the straw that broke the camel's back was when DOD wanted to send in a bunch of auditors and lawyers to spend a week making sure that you were complying with all the specifications and so forth. Tell us how that exerts a tremendous hardship on a business to entertain that kind of company.

Mr. GUERRERI. Yes, sir. Well, the first thing you do, of course, is prepare. You've got to understand, we have a plant manager who also works on the factory floor, since this isn't a big organization. I think right now, we have 35 employees in that plant. At that time, we probably had 12.

When those people come in, it really takes the plant manager to be with them the whole time, plus one or two support people who are running in and out meeting their requirements. They ask for information, and it's your job to produce it. So you basically tie up your senior people for that week, because they're the customer.

You have to take care of the customer, whatever kinds of demands he's making. You can't tell him, "Goodbye. We don't want to talk to you." We, in effect, did that when it was over by not doing any more work like that. But it ties up the senior management and workers to accumulate the data and explain it and answer any follow-up they may have.

Mr. CLINGER. So it has a direct impact upon productivity, then?

Mr. GUERRERI. Yes, sir. Absolutely. While you're doing that, something may be happening on the plant floor, they can't make the changes to the machinery. In all probability, it's slowing down your proposal process, so you can't get proposals out. There might be some administrative delays because your administrative people are meeting the requirements of your visitors. So it's a ripple effect that works all the way through the plant.

Mr. CLINGER. Thank you.

Mr. Turner, Truth In Negotiations Act has always been cited as a burden and something that has caused problems for commercial companies trying to do business with the Federal Government. The argument is that the companies don't prepare and keep the kind of data that would be necessary to comply with it. We thought we had tried to address that in FASA. Is it still going to be a burden,

do you think, or have we addressed the principal problems that were connected with TINA?

Mr. TURNER. I think it is approaching the problem. And I think it's a move in the right direction. One of our concerns, of course, as Carl mentioned here, is implementation and how we can get the word down to the contracting officers, if you will, the intent of the legislation. And I think our prime concern is the culture change.

Again, as was mentioned, it's a very difficult process to go from here with this enabling legislation to regulations that are actually going to implement after it goes through DOD, the respective services, and the respective commands. That is one of our concerns.

Mr. CLINGER. Thank you.

Thank you, Mr. Chairman.

Mr. HORN. The gentleman from New Hampshire.

Mr. BASS. No questions, Mr. Chairman.

Mr. HORN. Thank you.

One last question. Mr. Custer, you've made a rather impassioned plea for the government's reliance on the private sector for needed services. And we're very sympathetic to that. We're going to be holding some hearings on privatization, and we would welcome your suggestions.

But you noted that cost comparisons between the public and private sectors are not really the way to determine when to use the private sector. If there were not any cost comparisons, how would the government make the determination to use the private sector for a particular service and be assured that contracting out that particular function makes sense?

Mr. CUSTER. I wish I had the answer to that. We believe there has to be some kind of analysis. I am sure that a cost comparison using accounting that doesn't and can't take into account the difference between the government and the industrial side seldom really solves the problem. I think you could look at it philosophically and say, "We know that more competition will result in better performance," but I don't think that's going to fly.

So we have proposed that some high-level panel take a look at it and try and evolve some criteria that can be used and I think used quickly is one of the determining factors, so that there's not a long lag that some commanding officer doesn't tie up his whole staff for a long period of time trying to make a decision, which could close him down.

Mr. HORN. Representative Maloney has a question.

Mrs. MALONEY. Very briefly following up on the chairman's question, he had stated that you had said that you didn't feel that comparing the costs between the private sector and the public sector to do the job was a good comparison. Why not? Hasn't that been the basis of most privatizing?

Mr. CUSTER. Yes. There are so many variances in the costs. The government doesn't use an activity-based accounting system. So it's hard to tie all the levels of government into that specific operation or that specific set of functions that are going to be studied for contracting out.

So it's hard to get a consensus and a good understanding, a good, solid feeling, that yes, those are the costs that are involved and should be included.

Mrs. MALONEY. Thank you.

Mr. CUSTER. I think that's the biggest problem.

Mr. HORN. I thank all of the panel. It has been excellent testimony. We're going to stand in recess 15 minutes while we vote. Thank you all for coming.

[Recess.]

[Follow-up questions and answers follow:]

FOLLOW-UP QUESTIONS ANSWERED BY RONALD L. TURNER, COMPUTING DEVICES, INC., FOR THE ACQUISITION REFORM WORKING GROUP

COMPUTING DEVICES INTERNATIONAL
May 30, 1995

The Honorable Stephen Horn, Chairman
Subcommittee on Government Management, Information and Technology
2157 Rayburn House Office Building
Washington, D.C. 90513–6143

Dear MR. CHAIRMAN: I am happy to provide the following information for the record of the acquisition reform hearings held on February 28, 1995, in response to your letter of May 1, 1995:

1. I believe it is important that Congress provide a clear and concise statutory foundation for the Federal government's reliance on the private sector for its needed goods and services. There is very little in the way of government requirements that cannot be supplied by the private sector, and at lower cost than the government can. The government cannot perform manufacturing and other industrial operations as efficiently as the private sector, and as procurement budgets continue to shrink, particularly in defense, it is important that the government get the most for its scarce dollars. A simple "preference" for commercial goods and services, with many exceptions, is not enough, and the resulting competition for scarce resources is not only wasteful, but does little to help preserve a viable defense industrial base.

2. This question, i.e., whether current policy allows the Federal government to determine annually how to receive the maximum benefit from acquiring goods and services, appears to address the policy of "contracting out." I will answer it in the context of commercial/-industrial activities, since I believe the issue of core logistics functions, such as depot-level maintenance, is being considered separately.

In my view, the policy is not working as intended, in part because of the problems inherent in performing the cost comparisons—and in part because of statutory provisions enacted from time to time which "protect" certain installations or classes of employees. The Section 800 Panel, in its January 1993 report to the Congress, included an analysis of these statutes, which are codified in Chapter 146 of Title 10, and recommended modifications or repeals to facilitate contracting out. The following paragraphs from the 800 Panel report are pertinent:

"The statutory provisions in Chapter 146 of Title 10 present a confusing and contradictory set of rules regarding the DOD's contracting-out process. The tension among these sections clearly reflects the diversity of interests at stake in this area. For example, 10 U.S.C. § 2461, prohibiting conversion to private contractor performance of an in-house function unless extensive notice to the Congress has occurred, serves generally to protect in-house performance by maximizing congressional and community input before a decision to contract 2462 requires the Secretary of Defense to procure a supply or service related to a DOD function from the private sector if that source is less expensive.

"The Panel's goal in this area was to consolidate and streamline these conflicting rules into a coherent statement of basic and essential principles that eliminates, as far as possible, unnecessary detail. The Panel also attempted to balance these competing interests into a proposed set of rules that affords the Department managerial flexibility while preserving meaningful congressional oversight and executive community input. To that end, the Panel proposes a single section, 24XX governing traditional A–76 contracting procedures for the Department. A second section, 24XY, sets forth the basic principles regarding identification and competition for core logistics functions by DOD. The Panel developed these proposed sections based on its analysis of the legislative histories of the extant laws, and based on extensive comments from affected parties within the DOD acquisition community, including relevant federal employee labor organizations. The Panel achieved a high degree of consensus of support within that community on these proposals."

The Federal Acquisition Streamlining Act of 1994 did not include any of the recommended amendments or repeals. Thus, the policy of contracting out to the private

sector cannot be fully implemented. Declining budgets make it more important than ever that agencies seek the most efficient method of performing commercial/industrial activities. To the extent that statutory restrictions prevent this, Congress should revisit the recommendations of the Section 800 Panel.

3. I support giving contracting officers authority to limit the number of offerors in the competitive range. This will save time and money for both the government and those offerors who do not have a reasonable chance of receiving a contract. It is an area that will bear watching to ensure that it is not abused. As to debriefing those who are determined to be out of reach for the consideration, I would favor debriefing them immediately, rather than waiting until after contract award. Earlier and better debriefings should eliminate many bid protests, and this should be true whether it is done in connection with a competitive negotiated contract or a scaled bid procurement where factors other than price were considered in selecting the successful offeror. If there is any risk of a protest from a disappointed offeror who was excluded from the competitive range, it seems to me better to have that protest filed as early as possible, rather than going through the whole award process and then have performance held up.

4. Again, I appreciate the opportunity to amplify the record of the hearings on this very important area. Please let me know if I can be of any further assistance. Best Regards,

RONALD L. TURNER

FOLLOW-UP QUESTIONS ANSWERED BY CARL N. GUERRERI, ELECTRONIC WARFARE ASSOCIATES, FOR ARWG

Q. Should reasonable time limits be placed on audits? If so, do you have any suggestions for time limits?

A. Incurred cost audits need to be performed in a more timely manner. Contractors are required to provide incurred costs submission within ninety (90) days after the end of each fiscal year. The Government has just audited incurred costs at Electronic Warfare Associates, Inc. (EWA) for fiscal years 1989 and 1990 in July 1994. Suggest that audits be performed within a year from Contractor's submission of incurred costs.

Q. Should the parties involved in a dispute during an audit resolve their differences through Alternative Dispute Resolution (ADR)?

A. ADR is an expedient, less costly, and better method of dispute resolution and should be used in resolving audit disputes.

Q. Do you support a proposal which provides authority to contracting officers to limit the competitive range? Should those offerors determined to be out of reach of consideration for award be provided a debriefing either immediately or after contract award? Will this decrease the risk of protest being filed?

A. Limiting the competitive range would eliminate unqualified sources and encourage higher quality proposals. Unsuccessful offerors who request debriefings should be debriefed within a reasonable time (ten working days) after contract award. Debriefings, regardless of the time they are provided would have little effect on decreasing protests being filed.

Mr. HORN. If you would stand and raise your right hand.

[Witnesses sworn.]

Mr. HORN. Let the reporter note all affirmed "yes."

Thank you so much for coming. We're sorry we're running a little late. This is the problem with constant votes off and on. But we're delighted to see you here.

We'll go down the line in terms of how I have them on the list. Mr. Bernard McKay, vice president of Federal systems emerging markets of AT&T is testifying, as I understand it, on behalf of the Computer Communications Information Association. Mr. McKay is chairman of the procurement committee of that association.

Welcome, and please proceed. You know the ground rules. The statements of all of you will go into the record after the introduction, and we would like you to summarize it in 5 minutes. And then we'll go down the line. Everybody will do the same thing, and

then we'll have alternating Democrats, Republicans, 5 minutes of questioning by each Member who's present.

Mr. McKay.

STATEMENT OF BERNARD F. McKAY, AT&T, FOR THE COMPUTER AND COMMUNICATIONS INFORMATION ASSOCIATION; RANDALL I. COLE, HFSI, FOR THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; BRUCE E. LEINSTER, IBM CORP., FOR THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL; AND DENNIS COSSEY, INNOTEK CORP.

Mr. McKay. Thank you, Mr. Chairman. Chairman Horn and members of the subcommittee, I am pleased to be before you today on behalf of the Computer and Communications Industry Association.

CCIA is a trade association comprised of computing and communications companies with combined annual earnings in excess of $190 billion a year. CCIA has worked closely with this committee for many years in support of constructive public policy for Federal procurement. I am summarizing CCIA's detailed written statement which has been submitted for the record.

Prior to the early 1980's, Federal procurement had been a closed process, dominated by government unique cost accounting methodologies, where contracts were routinely awarded as sole source deals to favored vendors and companies.

Over time, Federal contracting scandals became a staple of the evening news and a subject of taxpayer anger. Accordingly, in the early 1980's, Federal procurement was targeted for major reform by President Ronald Reagan and by Congress. As a result of a bipartisan drive against waste, fraud, and abuse, the Competition in Contracting Act was enacted in 1984.

The Competition Act adopted a new standard for public procurement driven by the natural forces of the free marketplace. This standard is known as "full and open competition." And this 1984 reform created another bold innovation, as well.

It comes as no news that over the years, the government has frequently sought to regulate the forces of the competitive marketplace. However, under the Competition Act, this principle was reversed, creating a mechanism where the natural forces of the free marketplace would actually regulate the government for a change. This was known as the "bid protest system," and it was empowered for information technology procurements to provide an oversight forum which could protect the public interest against waste, fraud, and abuse in the government's buying activities.

However, it is well to remember that these accountability reforms were originally opposed by the permanent Federal procurement bureaucracy. And over this past decade, they have waged a long, twilight struggle seeking their repeal in whole or in part. And this is no coincidence.

To the dismay of its opponents, the truth is that the Competition Act has done its job very well. In particular, the General Services Board of Contract Appeals has compiled a remarkable record of service to the Nation as a guardian of fairness and public integrity.

In 1991, David Packard wrote to this committee regarding information technology procurement. And I think that's particularly noteworthy, given Mr. Spratt's observation earlier about the work that David Packard did. Having chaired President Reagan's Commission on Defense Management and Procurement Reform, Mr. Packard wrote to the then-ranking Republican member of this committee, Frank Horton, and offered the following observation: "The General Services Board of Contract Appeals is a critical check and balance in the ADP procurement system."

In another letter, this time to the Senate in 1990, Mr. Packard offered the following advice: "An open, competitive market with a level playing field is in everyone's interest. Likewise, having an objective forum where due process can resolve legitimate procurement disputes in a fair and balanced manner is also not an impediment to buying commercial products.

"To the contrary; since the customer is also the sovereign, the potential for unchecked exercise of arbitrary executive authority could severely lessen the attractiveness of the government as a customer for commercial companies." Indeed, I would suggest the last panel demonstrated amply exactly that kind of condition.

Mr. Packard concluded with the words, "So before sweeping changes were ever to be voted, I would hope that the Congress would cautiously consider the true objectives and likely effects of such changes." And to date Congress has acted constructively and with care.

Indeed, 1994 was the 10th anniversary of those 1984 reforms against waste, fraud, and abuse. And Congress marked that milestone by thoughtfully evolving procurement reform to its next logical level, moving the buying process even closer to the competitive forces of the free marketplace. Chairman Clinger was one of the principal bipartisan authors of the Federal Acquisition Streamlining Act of 1994, the ink on which is not yet dry.

As such, we believe that rather than tearing down the 1984 reforms, Congress should preserve and protect them and focus on ensuring that the 1994 reforms are rigorously implemented.

In the final analysis, Dave Packard was right. The public policy turning point of which he spoke is at hand. Now, it will be up to this Congress, here, to determine whether valued market-driven reforms will be allowed to continue. The public trust is truly in your hands.

[The prepared statement of Mr. McKay follows:]

PREPARED STATEMENT OF BERNARD F. MCKAY, AT&T, FOR THE COMPUTER AND COMMUNICATIONS INFORMATION ASSOCIATION

The Computer & Communications Industry Association is pleased to submit this testimony regarding procurement reform in 1995. CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly $190 billion and have substantial involvement in the Federal marketplace. CCIA has strongly supported the important procurement reforms passed by this Committee, including the Federal Acquisition Streamlining Act (FASA).

THE NEED TO CONCENTRATE ON FASA IMPLEMENTATION

Any discussion of future procurement reforms must begin with the comprehensive reforms enacted last year in FASA. Both industry and Government have hailed FASA is the most important piece of procurement reform legislation in the last ten

years. Indeed, Office of Federal Procurement Policy Administrator Steven Kelman recently testified that "FASA has become the cornerstone of the Administration's procurement streamlining program." Dr. Kelman also acknowledged that most of the law's benefits cannot be realized until implementing regulations are issued. The Administration is moving quickly to complete the FASA regulations because, as Dr. Kelman put it, "We do not want to lose even a single day of the benefits this law provides to the taxpayer."

The desire for speed must be tempered by the enormity of the task. FASA impacts more than 225 provisions of law. Numerous regulations must be drafted to spell out these massive changes. The procurement community will need many months to modify existing processes to the new, FASA procedures. This Committee, and other committees of jurisdiction will need to devote oversight resources to insure that the FASA regulations properly implement Congressional intent. If Congress does not provide needed oversight, it runs the risk that portions of FASA will fail because of regulations that do not properly implement Congressional intent.

Given the enormity of this task, CCIA believes that we should not commence a new, major procurement reform effort this year. Such an effort will only distract scarce resources from the difficult implementation that lies before us. It is foolish to devote considerable energies to enacting new reforms before we have properly implemented the reforms legislated last year.

The Administration appeared to agree with this point last year. OFPP Administrator Steven Kelman told Federal Computer Week that "It could be very easy instead of holding our nose to the grindstone . . . [to be] diverted to a legislative battle that might generate a lot of heat and not light" (FCW, November 7, 1994, p.6). Now the Administration, including Dr. Kelman, is hotly drafting, circulating and reviewing new legislation to revamp federal procurement again. Many of the ideas proposed were rejected during the FASA debate. Some of the draft proposals would seriously diminish the accountability and fairness of the procurement system. And any new package of comprehensive procurement changes will distract Congress and the Executive Branch from properly overseeing the regulatory implementation of the laboriously crafted FASA reforms.

CURRENT PROCUREMENT REFORM INITIATIVES

Although we are opposed to the enactment of new comprehensive procurement legislation this year, we welcome the opportunity to work with this Committee on more modest objectives, and we will comment on some of the proposals that may be presented to this Committee. Late last week, we became familiar with the latest draft of a new proposed piece of procurement policy legislation which the Administration apparently intends to present to this Congress. The working title of the bill is "The Federal Acquisition Improvement Act of 1995." We have had only a very brief and entirely informal opportunity to examine this proposed legislation prior to our appearance today. No broad-based industry dialogue or input was sought or received to our knowledge.

The central thrust of the proposed legislation is an apparent effort to roll back the procurement reforms of the 1980s signed into law by President Reagan. The draft bill would

- Roll-back the fairness and openness of federal procurement competitions by enhancing the ability of the Government to make sole source procurements to favored vendors, expending millions or billions of taxpayer dollars. Without competition, these new multi-million dollar procurements could be entered into on the basis of bureaucratic opinions. Even when competitions would take place, in the name of latitude and discretion in public functions, the bill could be used to legally enable procurement bureaucrats to limit competition to the vendors they favor and authorize other arbitrary restrictions on full and open competition.
- Concurrent with the above change, the bill would also roll-back the rules and restrictions of the Procurement Integrity Act, which was enacted during President Reagan's second term in direct response to waste, fraud and abuse in Government procurement uncovered during federal investigations at the time. The Procurement Integrity Act imposed rules on both Government employees and contractors, and thereby became one of the few statutory protections to recognize that waste, fraud, and abuse occurs because corrupt Government and private individuals act in concert. Unfortunately, the Administration's draft bill would allow heavier reliance on sole source procurements and enormously increase the discretion of individual Government managers, while also erasing the integrity protections that have been created to shield taxpayers from official abuse of the public fisc.

• The bill would roll-back the checks and balances which have been enacted into law over time to protect the public interest. A legendary Supreme Court justice wrote that in public affairs, "Sunshine is the best disinfectant." However, this bill seeks to put beyond the reach of either sunshine or the law the internal workings and errors of the Government, even to the point of shielding from discovery in bid protest forums the very evidence which could show whether the Government acted with integrity or not in a federal procurement action. Bid protests, which are filed at the General Accounting Office or the General Services Administration Board of Contract Appeals, have become a highly effective method of allowing aggrieved vendors to provide oversight for the procurement system. This bill would roll-back the pubic oversight available today in information technology procurements, with the effect of insulating Government buying actions entirely from public view, strictly limiting public disclosure only to that information which procurement officials could carefully gerry-mander into a formal, limited "administrative record." Further circumscribed would be the standard of review of actions by public procurement officials. And even these limited opportunities for review of federal agency actions could then be further circumscribed because the bill would create interlocutory appeals authority to limit public oversight or disclosure of agency actions, permitting agency officials to delay the resolution of bid protests, and block the Board's ability to prepare a meaningful record that can be reviewed by Congress and the public.

The irony of the Administration's position is that it flows from a concern to reduce the amount of litigation in federal procurement. As we show below, the amount of protest litigation is actually very small—less than 5% of all procurements are protested at either the GAO or the General Services Administration Board of Contract Appeals, the two non-judicial protest forums provided by statute. By allowing interlocutory appeals, and also making it more difficult for the GAO or the GSA Board to stop procurements that have been protested, the Administration is encouraging protesters and protested agencies to seek judicial relief at various stages of the protest process. Current statutes, as modified by FASA, provide a system that must complete its work in 65 calendar days if the protest is filed at the GSA Board or 125 calendar days if the protest is filed at the General Accounting Office. The Administration's proposal encourages multiple judicial proceedings during the course of a protest. Consequently, it will likely produce the precise effect that the Administration decries: the proliferation of litigation that delays procurements for interminable periods.

Like the proposal to "reform" bid protests, some other recent reforms are also contradictory and risk the public interest in the name of change or improvement. One such example is the fixation of some on what is known as "The Canadian Model." Like the Canadian Health Care System, some of the Canadian Model's elements merit consideration in the United States, but to simply abandon the U.S. system in favor of the Canadian approach is not sound policy. There are a number of myths about the Canadian procurement model which Congress must thoroughly understand before rushing to judgment. For example, the Canadian "model" has not been adopted even by the Canadians, but is itself a "pilot" which the Canadian government is using experimentally, and for which results have yet to be judged. Moreover, the Canadian experiment with what they call "Common Purpose Procurements" includes essential changes to acquisition practices, which the Executive Branch procurement bureaucracy has vehemently opposed to date. Perhaps the most prominent of this sort of fundamental reform is one which this House Committee itself proposed in legislation three years ago, to require that procurement legislation "should provide a complete evaluation scheme and clearly indicate the relative weightings, points or other considerations that will be applied to each element of the evaluation."[1] Indeed, this is but one of the elements of openness and sunshine which characterize the Canadian pilot. This sort of open disclosure is absolutely essential in any system change which would increase the Government's subjective discretion in decision-making. The American proponents of the Canadian Model generally ignore these features, and promote significant reductions in procedures that provide for openness and accountability in the procurement process. Bureaucrats thereby receive virtually complete discretion in their decisions, and public procurement thereby becomes, in effect, a secret society.

In sharp contrast, the Reagan Administration sought to attack waste, fraud and abuse in public practices. Full and open competition was established in public procurement as the law of the land. Information Technology acquisition policy was updated to recognize the convergence of computing and telecommunications. The General Services Board of Contract Appeals was empowered as the check-and-balance

[1] Common Purpose Procurement Framework, Government of Canada, 1991, p.12.

in the Information Technology procurement process to ensure oversight, integrity and fairness. And these waste-fraud-and-abuse reforms worked. Today Information Technology procurements are serving the Government and the public in new and innovative ways, scandals are rare, and major acquisitions are saving the taxpayers billions of dollars.

The legacy of these procurement reforms, enacted on a bipartisan basis over the past decade, would now be eviscerated by enactment of the Administration's proposed legislation. If these so-called reform proposals were to actually advance, not only would there be a wholesale throwback to earlier eras in Government performance which were marked by scandal, a lack of basic accountability, and public outcry, but that very public interest would now be abandoned to allow total discretion for federal employees in their buying decisions.

In an era of constricted budgets and limited taxpayer dollars, rigorous stewardship and scrutiny of the Government's procurement process is fundamental to the public trust. Apparently, now it's up to the Legislative Branch to hold the Executive Branch to ensure that the sunshine remains the best disinfectant in the conduct of the public business in its Government. It is essential that Congress preserve and protect the principles of openness, competition and accountability in public procurement.

THE FUNDAMENTALS OF CURRENT LAW

Those who attack the current system for acquisition and management of information technology often portray a system that has little relationship to the realities of today's federal marketplace. It is important to remember that the current law creates an oversight and management structure, not a detailed set of rules and regulations. Essentially, existing law creates a tripartite division of labor to organize the management and acquisition of ADP resources. The Brooks Act directs the General Services Administration to procure, manage and oversee the Federal acquisition of computers and telecommunications equipment and services, referred to as "ADP." GSA may either procure those ADP requirements that a user agency specifies or delegate the authority to an agency under such restrictions and conditions as GSA specifies (40 U.S.C. 759 (a)–(c). The Office of Management and Budget (OMB) is required to set clear and concise fiscal and policy guidelines regarding government-wide acquisition of ADP (40 U.S.C. § 759(e)). The Act also requires the National Institute of Standards and Technology (NIST) to promulgate standards and guidelines regarding Federal computer systems to ensure interoperability across the Government (40 U.S.C. § 759 (d)).

The objective of current law and policy is the economic and efficient expenditure of public funds in the procurement and use of ADP resources for the Federal Government. Volume purchasing achieves tremendous savings for the Government. GSA helps achieve these savings through its schedules program and its Government-wide acquisitions of telecommunications services and equipment. In the latter case, there have been repeated studies by Congressional committees, GAO and the Executive Branch which demonstrate the value and cost-effectiveness of highly successful programs such as FTS 2000. In addition, GSA's Federal Computer Acquisition Center provides a center of expertise for agencies who lack sufficient resources to conduct complex ADP acquisitions on their own.

The need for effective, centralized management oversight of Federal data processing and telecommunications is as important today as it was in earlier years. There are at least four reasons why the Government plainly needs some meaningful form of central oversight of its acquisition and management of information resources.

First, the Government has a continuing need to select and implement standards for software, hardware and telecommunications. The Federal Government has frequently led the private sector in supporting the use of standards for data processing and telecommunications. Without standards, the computer devices that the Government acquires will not interoperate either physically or electronically. It cannot be assumed, for example, that a disk drive acquired from manufacturer A will operate off the central processing unit built by manufacturer B unless both A and B adhere to physical and electronic standards that define the interfaces of their respective devices. Similarly, software written in one data processing environment will not operate in another data processing environment unless standards are enforced to make both systems open. Network interoperability is increasingly critical as the marketplace for telecommunications goods and services becomes more even more intensively competitive. Finally, the Government has taken enormous steps to achieve openness in its automated systems. It needs to take even more in order to reduce the cost of system development and maintenance.

The Government has an increasing need to communicate electronically across agencies and with the public. Without central coordination and management oversight, the Government's efforts to increase its use of electronic communications will create little more than an automated Tower of Babel. The general public would prefer not to see a multiplicity of procedures for communicating with different Government agencies. The need to establish communications conventions across agencies can best be achieved by utilizing central authorities which have the power (through a delegations process or otherwise) to insure that communication standards are followed, and that disparate acquisitions for communications requirements fit into a strategic approach for the Government, assuring not only interoperability but cost-effectiveness for the taxpayer.

The Government has had and will continue to have a chronic shortage of qualified personnel to manage complex automation problems. Centralization helps the Government utilize scarce human resources effectively. By leveraging expertise in central organizations such as GSA's Federal Computer Acquisitions Center, the Government can support ADP procurement requirements across numerous agencies and avoid duplication and waste. Similarly, it makes no sense to require each agency to establish its own ADP training program. For years, GSA's Trail Boss Program has done an excellent job of training personnel to conduct ADP acquisitions.

The public fisc has to be protected with effective management mechanisms, especially in an era of scarce taxpayer dollars. The legitimate criticisms which can be levied on GSA for failure to most effectively execute their management oversight responsibilities with the rigor and discipline needed is not a reason to abandon essential protections in the expenditure of taxpayer dollars. What is needed, as CCIA has long argued, is actual assurance of the protection of the public interest through meaningful management reforms: assuring that individual ADP acquisitions will truly provide for full and open competition; that individual ADP acquisitions will be cost-effective and are not duplicative; that such acquisitions are written with functional need requirements, not design and technical specifications; that the statement of functional requirements represent the Government's actual user needs; that market research will have been thoughtfully utilized so as to optimize the eventual success of the procurement to most effectively meet the Government's needs and to assure rigorous commercial market-driven competition in the acquisition process; and finally, that the intended evaluation and award process in the individual acquisition ensure openness and integrity between the Government and vendors, so that those competing for a contract understand in an equal fashion what is truly important to the Government and how it intends to make its award decision.

For these and other reasons, the Government's interests would be ill-served by abandoning central management oversight for ADP and telecommunications. Management weaknesses that are evident in some procurements need to be resolved through effective oversight, not the removal of oversight. To further decentralize management and decision-making by blanket discretion to agencies would only exacerbate the situation and make acquisition of ADP more difficult, and cause horror stories to proliferate.

It is also doubtful that abolishing current management oversight would shorten the ADP procurement process. A General Accounting Office report studied whether ADP procurements under the Warner Amendment took less time than those conducted under the Brooks Act. The Warner Amendment (10 U.S.C. § 2315) exempts certain Defense procurements of ADP resources from GSA's management oversight. The Amendment's supporters claimed that it would enable Defense to streamline its acquisition process and reduce the time required to procure ADP resources.

The GAO found that the Warner Amendment has not reduced Defense's acquisition time. "On the basis of our review, we believe that Defense's implementation of the Warner Amendment has not resulted in more expeditious acquisition of computer resources for critical military missions. Therefore, we do not believe the use of acquisition time provides a basis for justifying the extension of the Warner Amendment to exempt all Defense ADP procurements from the requirements of the Brooks Act." (General Accounting Office, "ADP Procurement: Warner Amendment has not Reduced Defense's Acquisition Time," Report No. IMTEC–86–29, July 1986, p.1).

A recent study by Federal Sources, Inc. shows that Government procurements of information technology occur more quickly than many critics admit. For example, in 1994, the Air Force awarded 20 information technology contracts in an average time of 8.11 months from the issuance of the solicitation or RFP to award. The Army conducted 16 acquisitions of information technology resources in an average time of 6.91 months from RFP to award. The Department of Health and Human Services required an average of 10.60 months from RFP issuance to award 23 contracts. On a Government-wide basis, Federal Sources found that even large con-

tracts are awarded without undue delay. For example, Federal Sources reported that programs with a value greater than $100 million have an average procurement cycle of 13.1 months.

Thus, it is erroneous to claim, as some critics charge, that the procurement cycle is hopelessly mired in red tape and delay. The Government is able to spend approximately $25 billion a year on information technology resources. This far exceeds the expenditures of any private company known to us.

Rather than pursuing major, structural changes, reformers should concentrate on problem areas in federal procurement that have long been recognized by industry and Government alike. Two of the original principles embodied in FASA are the concepts of using market research, and acquisition based on functional requirements. Both of these principles are central to the reform recommendations of every major procurement study or task force undertaken over the last thirty years, including the Procurement Commission of 1972, the Packard Commission of 1986, and the more recent Section 800 Panel. Unfortunately, up to now, very little progress has been made in achieving meaningful reforms in these two critical areas.

FASA takes major strides towards correction of these systemic problems in Federal procurement. Likewise, FASA provides meaningful reform for two other chronic problems in Federal acquisition: the excessive and unnecessary insistence on submission of cost or pricing data in competitive acquisitions for commercial goods and services, and the frequent publication of RFPs with uninformative bid evaluation sections (i.e., "Section M" of Requests for Proposals).

Taken together, these four critical issues are, CCIA believes, the root causes of many of the problems discussed in your report. These four necessary acquisition reforms can be summarized simply:

- the meaningful utilization of market research;
- the writing of requirements in functional terms;
- the reliance on market-driven competition rather than cost or pricing data, and
- the publication of evaluation sections in RFPs which honestly describe the Government's real intentions for its eventual buying decisions.

CCIA believes that any reform effort should focus on these problems, and not throw up distractions in the form of structural changes that are little more than change for change's sake. Furthermore, because CCIA believes these issues are so important, we respectfully suggest that the Committee closely monitor the translation of FASA from law to regulation.

THE PROTEST SYSTEM AT THE GSA BOARD OF CONTRACT APPEALS

Meaningful checks and balances are critically important to the long-term success of the Federal acquisition system. CCIA is deeply concerned by proposals to eliminate or weaken the bid protest authority of the GSA Board of Contract Appeals (GSBCA). The protest process at the GSBCA, which was established by the Competition in Contracting Act of 1984, is one of the major safeguards that preserves competition in computer and telecommunications procurements. It allows vendors who are injured by Government procurement decisions to challenge those decisions before a neutral judge, in a forum that allows for reasonable discovery and a hearing on the merits. Under current law, the Board must decide all cases within 45 working days from the date of filing. FASA will modify this period to 65 calendar days from the date of filing. Without the Board, there is simply no effective means of enforcing legal requirements for competition in complex, high technology procurements.

Congress provided the GSBCA with its bid protest authority because the General Accounting Office's bid protest process was ineffective. Congress found that "GAO makes every attempt to give agencies discretion in how and in what timeframe they respond to a protest, and has been hesitant to challenge any but the most blatant agency actions. As a consequence, the current bid protest process does not provide an adequate remedy to those wrongly excluded from procurements." (House Report No. 98–1157, Competition in Contracting Act of 1984," p.23, October 10, 1984). Congress correctly found that the Board's established processes for uncovering facts in procurement disputes were needed in ADP protests, which often turn on complicated technical issues. The usefulness of these processes to bid protests has been confirmed by the General Accounting Office, which has implemented a process for holding hearings and obtaining documentary discovery in GAO bid protests.

Although Congress significantly improved the GAO bid protest process in the 1984 Competition in Contracting Act, it would be a mistake to abolish the Board's jurisdiction, and require all high technology protests to be tried at the GAO. First, the two forums have served as a useful check and balance on each other. The fact

that each forum exists serves as a spur to continued innovation. It is highly doubtful that the GAO would have implemented a hearing process if the GSA Board had not received bid protest jurisdiction.

Second, the Board is generally able to resolve cases more quickly than the GAO. The Board currently operates under a statutory deadline to decide cases within 45 working days. The GAO's deadline is 90 working days. Under the Federal Acquisition Streamlining Act, the deadlines will change to 65 and 125 days, respectively. According to GSBCA, the average protest takes 20 working days to be resolved. The expertise of GSBCA judges enables them to process protests in less time than it typically takes in Federal court for a government defendant to file an answer.

Third, the constitutional limitations on the GAO's role will always compromise GAO's efforts to provide an effective bid protest forum. Since GAO is an arm of the Congress, it cannot order executive branch agencies to take specific actions. This means that agencies can override protest-related suspensions of procurement authority in GAO protests, but not at the Board. It also means that agencies can, and sometimes do, ignore GAO recommendations. The GAO also lacks strong tools to compel agency production of documents.

Finally, the GAO protest process, while significantly improved, is still not sufficiently robust to function as the sole forum for resolving protests of high dollar volume, complex procurements. The GAO process lacks predictability and regularity. The decision to hold a hearing in GAO protests is discretionary with GAO. The ability to get a hearing varies significantly depending on the GAO attorney assigned to decide the case. In addition, the GAO's discovery processes are inferior to the Board's.

The acquisition community has come to understand that GSBCA processes are essential to achieve fairness and integrity, particularly in high dollar volume procurements. Because of the Board's success, the Section 800 panel recommended that Congress consider establishing a "GSBCA-type procedure [that] would be available for all types of procurement," not just procurements for computers and telecommunications. (Report of the Acquisition Law Advisory Panel to the United States Congress, p. 1–204, January 1993).

The Board has been widely praised by both industry and Congress. The National Security Industrial Associates and the Electronic Industries Association strongly supported the Board in House testimony on October 31, 1991, stating that ". . . the record of accomplishment of the GSBCA since the enactment of CICA in 1984 is an extraordinary success story. The GSBCA is one of the most positive mechanisms in the federal procurement process. Its authorities should be firm and clear. . . ." ("Federal Property and Administrative Services Authorization Act of 1991," Hearings Before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives, 102d Cong., 2d Sess., p.279 (1991)). David Packard wrote to Congressman Frank Horton in August, 1991 that "[T]he General Services Board of Contract Appeals . . . is a critical check and balance in the ADP procurement system." As described in a conference report, the GSA Board gives vendors assurance that "the Federal procurement system has treated them fairly and honestly without the agency running slipshod over statute and regulations, while agencies are better able to reap the benefits of competition." (House Conference Report 99–1005, "Making Continuing Appropriations for Fiscal Year 1987," pp. 774–75, October 15, 1986). The Board has also been praised by academic researchers, who note that "protests are an effective means of deterring and correcting agency problems among procurement personnel and, consequently, accomplishing the procurement objectives of the Government."[2] Since the Board has done an

[2] Robert C. Marshall, Michael J. Meurer and Jean-Francois Richard, "The Private Attorney General Meets Public Contract Law: Procurement Oversight By Protest," 20 Hofstra Law Review 1, 2 (1991). These authors also point out that the need for effective oversight is not incompatible with the desire for increased discretion in the procurement system. Indeed, the one requires the other:

> The fundamental issue is that, in many cases, inappropriate discretion is not distinguishable from appropriate discretion, at least not without the intervention of an oversight mechanism, such as a protest. To illustrate this point, consider a procurement in which the RFP clearly favors IBM. Perhaps IBM has provided excellent service on previous contracts, or has posted an innovative solution to a problem confronted by the procuring-agency. Alternatively, the PO [procurement official] may suffer from an appropriability problem. In such situations, how can good discretion be disentangled from bad discretion? This identification issue is not trivial since a PO who is accused of an appropriability problem will naturally plead his case in terms of arguments that reflect sound business concerns. In the current environment, through de novo review,

Continued

excellent job of fulfilling its mission, it makes no sense to diminish or dismantle its role or authority.

The GSBCA is able to achieve these benefits at surprisingly low cost to the Government and the taxpayer. Most protests are resolved in less than half the statutory period of 45 working days. In addition, there is no reliable evidence that the protest process has significantly delayed agency high technology procurements. The Office of Federal Procurement Policy (OFPP), was recently required by the House Appropriations Committee to study whether "repeated protests delay the use of equipment until such time as the equipment is technologically outdated" (House Report No. 103–127 on the Treasury, Postal Service, and General Government Appropriations Bill, p. 49, June 14, 1993).

OFPP was not able to substantiate this assertion. It noted, for example, that the Department of Health and Human Services reported to OFPP that in its experience, the average time between filing a protest and final disposition is 34 days, which it believes "does not represent a significant delay in terms of the total procurement cycle, or in terms of the life cycle of modern ADPE." (Office of Federal Procurement Policy, The Impact of Protest Delay on the Government's Ability to Acquire Current Computer Technology, p.5, March 1994).

The role of the Board has indeed been one of protection of the public interest. When agency procurements are delayed by successful bid protests, the delay occurred because the agency violated the law and needed to take corrective action. Frequently, this corrective action results in far greater savings to taxpayers than the costs of the entire protest process. In fact, one of the procurements used as a success story by Dr. Kelman in his recent testimony ultimately succeeded because the Air Force appropriately implemented a GSBCA decision. The Desktop IV procurement is now considered as a highly successful acquisition that has resulted in the procurement of nearly 300,000 state-of-the art personal computers by numerous Government agencies. The Desktop IV contracts that were originally awarded had an evaluated life cycle cost of $1.2 billion. In response to vendor protests, the Air Force unilaterally terminated the contracts before the case was tried by the GSBCA. The Air Force subsequently awarded a contract to a single vendor. The Board found that the vendor had proposed monitors that did not comply with the Trade Agreements Act, and that the Air Force failed to properly apply the procurement solicitation's provisions that required consideration of dual awards. Finally, the Air Force awarded two contracts with an aggregate evaluated cost of $724 million. Thus, the Air Force saved approximately half a billion dollars as a result of the protests. In addition, the dual awards that were praised by Dr. Kelman, and that have been one of the major reasons for the procurement's success, were the direct result of the GSBCA's protest decision. And it would be fitting if not only CCIA, but someone in government were to express appreciation to the GSBCA judges who guarded the public interest so very well.

The Board's critics also frequently ignore the fact that a relatively small number of procurements that are protested. The GSBCA received 179 protests in FY 94. However, agencies perform thousands of ADP contract actions each year. Indeed, the GAO reported that during a six month sample period, only 4.3% of the 2,475 ADP contracts awarded were protested at either the GAO or the GSBCA. ("Better Disclosure and Accountability of Settlements Needed", GGD–90–13, March 1990, p. 15). This percentage ignored the contract actions performed under GSA schedules during the same period.[3]

To the extent that the possibility of protests makes agencies take greater care to follow the law, the protest process provides significant benefits that far exceed the costs imposed in the relatively few procurements that are actually protested. If, as

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the GSBCA attempts to disentangle bad discretion from good discretion by requiring the PO to provide explicit justification for all challenged decisions.

Id. at 64. (Emphasis added).

The oversight provided through protests is more favorable to the exercise of agency discretion than oversight through audits. The authors note that, "the displacements of audits by protest almost certainly creates incentives for the increased use of discretion by POs. Accusations of malfeasance by an Inspector General are more chilling on the use of discretion because there are no formal channels of appeal." Id. at 67. (Footnote omitted).

Some of the criticism of the bid protest system by the current OFPP Administrator appears to be based on the efficacy of bid protests in reducing sole source awards. The authors state that, "Kelman also points to what we have called overdeterrence as a problem in contract awards. Incumbents, particularly, IBM receive too few awards in the federal market. He believes this problem is caused partly by an overzealous application of CICA." Id. at 63–64 (footnote omitted).

[3] The same GAO report found that the practice of "buying off protesters" or Fedmail, cited in the Report, is an infrequent occurrence. Moreover, Section 1436 of Federal Acquisition Streamlining Act of 1994 contains a provision which requires disclosure of any such payments.

the Report suggests, agencies are now more inclined to define requirements in a manner that will maximize competition, they are doing exactly what the Competition in Contracting Act requires, and acting more faithfully in the public interest.

There has been much made of the fact that the commercial system used by companies to acquire their ADP needs does not include a bid protest process thus throwing into question the need for such a process in the federal arena.[4] There are, however, some distinct differences in the two systems which should be considered in making any judgments about the need for a bid protest process.

Large government ADP procurements once awarded preclude any further involvement by the losing vendors. That part of the federal agency, sometimes the bulk of the agency, is foreclosed to further sales efforts once an award is made. This all or none approach forces much more intense competition and use of every available avenue to avoid losing the bid including the bid protest process. Statutory changes embodied in the Streamlining Act of 1994 to move toward multiple vendor awards with continued task order competition may offer a partial solution in this area and will probably reduce the number of protests.

Finally, education, training and general expertise are often better in the commercial world where higher pay attracts the best people. A higher level of competence in the procurement system results in fewer mistakes and lessen the need for corrective action. A major new emphasis on Government procurement professionalism and IT competence would be a far more systemic reform than elimination of an essential check and balance. The Board's protest work has been praised by Congress, academia and the computer trade press. It deserves Congress' continued support.

DE NOVO REVIEW

Some of the Board's critics have attacked various aspects of the Board's powers, including the Board's use of a de novo standard of review. The Board is required to decide cases "under the standard applicable to review of contracting officer final decisions by boards of contract appeals." 40 U.S.C. § 759(f)(1). This standard, which is set forth in the Contract Disputes Act, calls for de novo review. It is routinely applied not only in GSA Board protests, but also in post-award contract disputes decided by agency boards of contract appeals, including the Armed Services Board.

Under this standard, the Board examines all the facts that are relevant to a protest, and make a reasoned decision based on the entire record. This ability to consider all facts and to take corrective action if the agency violates the law is essential to the Board's ability to keep procurements fair. The de novo review standard also contains important limits that, we believe, are misunderstood by the Board's critics. The de novo standard does not permit the Board to substitute its judgment for agency procuring officials. It does not allow the Board to decide which vendor receives the protested contract. These points are widely known throughout the acquisition community, and were recently confirmed in the report of the Department of Defense Section 800 Commission. An extract from the Commission's report accurately describes how the Board decides its cases:

> On matters committed to agency discretion, the GSBCA requires the protest to show that the agency's decision lacked a reasonable basis. As stated by the GSBCA:
>
> The law vests considerable discretion in the conduct of technical evaluations. Such evaluations will not be overturned unless the protester has demonstrated that the . . . technical evaluation was unreasonable [citations omitted]
>
> The GSBCA has consistently taken the position that "our task is not to decide whether the agency's behavior was ideal—only whether it was legally correct."
>
> Moreover, the GSBCA has taken a reasonable approach towards the section 759 prohibition of an agency violating a law. The mere violation of a regulation by an agency will not result in the GSBCA sustaining a protest unless it has a significant effect on the procurement. [Footnotes omitted] (Report of the Acquisition Law Advisory Panel to the United States Congress, p.1–217, January, 1993).

Thus, the Board has not interpreted, and could not interpret the de novo standard to permit it to ride roughshod over agency judgments. In fact, the current standard permits the Board to uphold agency decisions that might otherwise fall if the scope

[4] It would be a mistake, however, to conclude that federal procurements are significantly less litigious than private information technology acquisitions. Marshall, Meurer, and Richard, supra. cite with approval statistics showing that one out of ten [private sector] transactions involving ADP products or services results in a lawsuit." They conclude that "This fraction is comparable to the rate to the rate of protests in federal computer procurements." Id. at 23.

of the Board's review was limited. Since the Board can decide cases on the basis of all relevant facts, not just those that were in front of the agency decision-maker at the time decisions were made, agencies have been able to salvage defective analyses that justified major awards by showing that the award is still proper if the mistakes in the agency's initial analysis are corrected. The Board has used these corrected analyses to deny bid protests in procurements worth hundreds of millions of dollars. This result makes sense—neither vendors nor agencies should have to present cases piecemeal in multiple proceedings. Based on these benefits, there is simply no reason to discard the established, de novo standard.

The abolition of the de novo standard would also have the undesirable effect of establishing one standard of review for bid protests, and another for claims decided by the GSA and other boards of contract appeals under the Contract Disputes Act. The latter statute's de novo review standard would survive the proposed amendment. But the GSA Board's review standard for protests would change if some proposed reforms are enacted. There is simply no reason to distinguish claims and protests in this manner. And there is no reason to create additional levels of complexity for judges and litigants before the GSA Board of Contract Appeals.

SUSPENSION OF PROCUREMENTS

Critics have also considered weakening protest suspension procedures. Under these procedures, award or performance of contracts is stayed when a protest is filed before award or shortly thereafter, unless urgent and compelling circumstances require the agency to proceed with the procurement. Since GSBCA protests must be decided within 65 days, the amount of the delay is minimal. However, the effect of permitting contracts to proceed pending protest can be catastrophic to the preservation of an effective protest system.

The concept of suspension was introduced in the protest system by the Competition in Contracting Act. Prior to CICA, agencies routinely awarded and performed contracts during GAO protests. As a result, when GAO granted protests, it was often forced to rule that the cost of terminating the illegal contract was too high, and that no corrective action could occur. Because of these problems, in the pre-CICA era, GAO protests rarely accomplished anything. The protester only obtained meaningful relief in approximately 1 percent of all decided cases. And the major reason for this failure was that GAO had no power to stop a contract award or contract performance while a protest is pending. As a result, agencies usually moved forward with their contracts knowing they could preclude any possibility of relief simply by spending money under the contract, and delaying the protest process as long as possible.

Unless vendors can achieve meaningful results in meritorious protests, they will have little incentive to use the system. The bid protest system represents a policy decision to use private companies as enforcers of federal procurement law. This decision has a number of benefits. First, unlike Government auditors, private vendors are almost always "on the scene" when a violation occurs. Second, the protest process provides a mechanism for oversight without establishing cumbersome enforcement bureaucracies. However, the private sector will not assume this enforcement role without some assurance that it will achieve meaningful results in meritorious protests. The suspension process assures that agencies will not be able to spend money under illegal contracts, and then use the high cost of termination as a reason to continue contracts that should never have been awarded.

Mr. HORN. Our next panelist is Mr. Cole. Mr. Cole is the director of government affairs of HFSI, but I'm not quite sure what that stands for, Mr. Cole. What does it stand for?

Mr. COLE. Well, it used to stand for "Honeywell Federal Systems, Inc." And it's now an independent company.

Mr. HORN. And they go by "HFSI"?

Mr. COLE. That's correct.

Mr. HORN. And you're representing the Information Technology Association of America?

Mr. COLE. That's correct.

Mr. HORN. Welcome. Please proceed.

Mr. COLE. Thank you. Good afternoon, Chairman Horn, Congressmen Flanagan and Davis.

I'm here today on behalf of ITAA, companies who build solutions for customers using computer software and communications. ITAA urges you to maintain vigorous oversight as FASA is implemented. And we support your efforts to continue the reform process.

ITAA's agenda for procurement reform includes expanding the definition of "commercial item," reducing the burdens of the Truth In Negotiation Act; decreasing the cost of complying with the Buy American Trade Agreements Act; and, maintaining the competitive benefits of task and delivery order contracts and the GSBCA bid protest forum.

I will address my comments to commercial services and the bid protest issue. Commercial services.

ITAA was very pleased that FASA includes commercial services in the "commercial item" definition. Once FASA is fully implemented, you will have removed many costly and antiquated certification burdens that block market entry and deny agency access to a broad range of competitively priced services.

ITAA is anxious to review the implementing regulations on the "commercial item" definitions once they are issued. We will notify the subcommittee of any concerns.

Regarding bid protests, ITAA believes that the bid protest process at the GSBCA works well, despite increasing concerns expressed in government to the contrary. GSBCA serves the purpose of providing an efficient and unbiased judicial forum for review. ITAA is concerned that bid protests are receiving undue blame for the length of the procurement process.

There are relatively few IT protests, and the number is dropping. According to Federal Sources, Inc., 10,000 significant IT procurement-related actions were made in 1994. Each of these could have been subject to a protest. In fact, only 214 of these decisions were protested, compared to the 10,000 possible decisions susceptible to protest.

We believe that 214 is relatively small and is down from 320 only 2 years ago. After review of the statistics for these 214 protests, 174, or 80 percent, were resolved almost immediately within 2 weeks and as a consequence, with no virtual effect on the time involved in the procurement cycle. And only a mere handful of the 214 involved delays approaching 6 months.

It has also been suggested that protests add significant delays to the procurement cycle. The statistics, again, lead to a different conclusion. A data base was used to study 198 major procurements in 1994. There was only 2.2 months added, or 10 percent, to the time otherwise needed for the procurement.

We can also note that the longest phases of the procurement cycle were those involving initiation and proposal evaluation. These two phases combined to account to two-thirds of the procurement. ITAA recommends that legislative reform should best be directed at streamlining these processes.

In general, then, ITAA concludes that protest trends and statistics are very encouraging. The number of filings is decreasing, and we believe this is due to better communication, more selectivity on the part of the vendor community, and better understanding of regulations and protest case law by the government contracting officers.

We conclude that the benefit derived from the GSBCA protest system outweighs the delay incurred in a very small number of protests and that the threat of protest is having a positive effect on the quality of procurement policy today.

There has also been some concern expressed that the mere threat of a protest has caused contracting officers to be overly cautious in their actions in order to avoid a protest, and that this activity extends the procurement cycle. In fact, there is little evidence showing that there has been any significant extension to the procurement cycle.

We voice strong support for multiple protest venues. In particular, we believe that GSBCA and its independent, de novo standard of review, which allows a fresh look at every procurement that is protested, should be retained. In our view, GSBCA has acquired substantial understanding of, and insight into, our industry.

This extensive expertise, coupled with de novo review and the speed with which a decision is reached, has provided clarity and consistency for resolving contract disputes. We would strongly oppose the substitution of another standard at the GSBCA. Thank you.

[The prepared statement of Mr. Cole follows:]

PREPARED STATEMENT OF RANDALL I. COLE, HFSI, FOR THE INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA

Good afternoon Chairman Horn and members of the Subcommittee. I am Randall Cole, Government Affairs Director for HFSI, here today on behalf of the Information Technology Association of America. ITAA represents over 5700 direct and affiliate members across the country. These are information technology companies who build information-based solutions for customers, using computers, software and communications. We support your efforts to complete the important work of streamlining the federal acquisition process.

I would like to thank the Subcommittee on Government Management, Information and Technology for providing us this opportunity to testify. As an industry group, we applaud the substantial strides government made with last year's Federal Acquisition Streamlining Act. ITAA urges you to maintain vigorous oversight as FASA, as it has come to be known, is implemented. We support your efforts to continue the procurement reforms from the last Congress.

ITAA's agenda for procurement reform includes: expanding the definition of commercial item, reducing the burdens of the Truth-in-Negotiations Act, decreasing the cost of complying with the Buy American/Trade Agreements Acts, and maintaining the competitive benefits of task and delivery order contracts and the GSBCA bid protest forum.

COMMERCIAL SERVICES:

ITAA was very pleased that FASA has taken the first step in including commercial services in the commercial item definition. The federal government is the greatest consumer of services, yet our own laws have limited our ability to gain the full benefit of these services. Once the law is fully implemented, you will have removed many of the costly and antiquated certification burdens that block market entry and deny agency access to a broad range of competitively priced services.

ITAA is anxious to review the implementing regulations on the commercial item definitions once they are issued, and we will notify the Subcommittee after we have had an opportunity to determine if the definitions meet our expectations. If not, we will urge that the full definition of services be included in any procurement reform bill considered by this Congress.

TRUTH-IN-NEGOTIATIONS ACT:

TINA continues to be a major sticking point for commercial vendors—and a very real barrier to a simplified, streamlined government procurement process. We share the goal of making government more efficient and effective; we believe that the way to get there is the adoption of business practices which more closely emulate the

private sector and its cost advantages from using commercial products. TINA imposes requirements which run counter to this purpose.

As you know, TINA forces vendors involved in procurement actions to produce and certify extremely detailed information regarding the actual costs of developing and manufacturing their products—products which have already met the test of competition in the robust commercial marketplace. The government's request for this cost or pricing data fails the test of common sense. TINA adds cost, reduces choice, and creates no value for the government customer or taxpaying public.

While the perception may be that this problem has been adequately addressed by TINA's commercial product exemption, the reality is that proposed regulations have rendered the exemption essentially ineffective. Commercial contractors seeking the exemption must still submit and maintain vast quantities of sales/pricing information. FASA added a new layer of cost and complexity by establishing post-award audit rights for the government. ITAA, like others in industry, has been disappointed by the complex, confusing, and cumbersome proposed FASA/TINA regulations that have been issued to date.

In crafting new legislation, we urge you to:

- clarify that commercial products are clearly exempt from TINA;
- require offerors to provide only information that is readily available in the normal course of their commercial business on prices typically charged for the same or similar products in that marketplace;
- limit audit rights to pre-award examinations; and,
- eliminate the requirement for price reductions and post-award audits.

BUY AMERICAN AND TRADE AGREEMENTS ACTS:

The Buy American and Trade Agreements Acts also pose requirements unique to the federal government marketplace. And like TINA, these Acts add to cost, narrow the government customer's product selection options, and do not increase value. If the government's goal is to gain efficiency and effectiveness by emulating commercial practices, we recommend eliminating these government-specific requirements. Despite industry's requests for relief from these burdensome laws, FASA did not substantially address this issue.

Information technology companies compete in an international marketplace. Companies selling in the federal marketplace must also expend significant resources to track and certify product and component origin information—information that must be developed, carefully retained for governmental reporting, but otherwise has no intrinsic value. In the highly competitive IT marketplace, the origin of components in a piece of equipment is less important to industry than, for example, the components' availability, reliability, and quality. These laws impose significant risks for non-compliance, and the net result is lost productivity and higher prices for government because of these artificial requirements.

ITAA would like to see BAA and TAA rules removed entirely for commercial items. At a minimum, the Rule of Origin for the Buy American Act should be modified to ensure that goods produced in the U.S. with foreign components can compete on an equal basis with foreign-produced goods containing those same components. This is, in effect, the substantial transformation test found in the Trade Agreements Act. This would simplify certifications and remove much of the confusion surrounding these laws. We also believe the latter change could be made administratively without resorting to legislation. We urge these changes to be made immediately in order to modify these burdensome, and costly, requirements, while the Congress considers eliminating the rules entirely.

TASK AND DELIVERY ORDERS:

Open competition is the hallmark of our free market economy and a defining attribute of the federal marketplace. While we draw strength from competition, to achieve full benefits government must work to assure that the competitive process is guided by common sense. Regarding the issue of task order contracts, we found the provisions in FASA to be complex and confusing. Again, since these implementing regulations have also not been published, we are expressing concerns which we hope will be addressed.

Task order contracts are used in many of the larger federal contracts for mission support. In such programs, initial statements of work are drawn up to address mission critical needs; agencies cannot always forecast the full range of products and services that may be required over an extended period of time. Task order contracts allow the user community to acquire products or services on an as needed basis. Competition for these contracts takes place among the vendors seeking the contracts for these services.

The draft implementing regulations on task and delivery orders are not yet published. This issue, however, is very important to ITAA members. We will let the Subcommittee know our views once we have seen the actual text of these regulations.

BID PROTESTS:

ITAA believes that the bid protest process at the GSBCA works well, despite increasing concerns expressed in government to the contrary. GSBCA serves the purpose of providing an efficient and unbiased judicial forum for review. ITAA is concerned that bid protests are receiving undue blame for the length of the procurement process.

Based on statistics we received from Federal Sources, Inc. (an IT market research firm) we believe that a compelling case can be made to demonstrate that this blame is not deserved. There are really few IT protests and the number is dropping. According to Federal Sources, 10,000 significant IT procurement-related actions were made in 1994. Each one of these could have been subject to a protest. In fact, only 214 of these decisions were protested in 1994. Compared to the 10,000 possible decisions susceptible to protest, we believe that 214 is relatively small, and is down from 320 only two years ago.

It may be instructive to examine how long it took to resolve these 214 protests. Exhibit I summarizes the Federal Sources data. As is noted, 174, or 80% of these 214 protests, were resolved almost immediately, within two weeks, and as a consequence, with virtually no effect on the total time involved in the procurement cycle. Most of these protests were due to the lack of communication between the parties. The remaining 40 break into two categories 16 pre-award protests, and 24 post-award protests. Regarding the pre-award protests, these procurements are not necessarily delayed because it is possible to adjudicate the protest while proceeding with the procurement. Regarding the post-award protests, 15 were denied and resulted in a two month delay. This delay resulted from the normal time required to resolve a protest.

Nine of these post-award protests were granted, resulting in delay beyond two months. This additional delay amounts to about 10% of the total time for the procurement. It usually takes three to six months to correct the violations of regulations identified by the GSBCA. In summary, of the 214 protests filed last year out of the 10,000 IT decisions, only 24 caused any real delay.

It has also been suggested that protests add significant delays to the procurement cycle. The statistics, again, lead to a different conclusion. Exhibit II illustrates that for the 198 major procurements studied in 1994, there was only 2.2 months added, or 10%, to the time otherwise needed for the procurement. There was additional time required to correct the nine "flawed" procurements.

Again referring to Exhibit II, we can note that the longest phases of the procurement cycle were those involving Initiation and Proposal Evaluation. These two phases combined account for two-thirds of a procurement. ITAA recommends that legislative reform should best be directed at streamlining these processes.

In general then, ITAA concludes that protest trends are very encouraging. The number of filings is decreasing and we believe this is due to better communication, more selectivity on the part of the vendor community, and better understanding of regulations and protest case law by the government contracting officers. Secondly, agencies are losing far fewer protests. Our sense is they are conducting better procurements because of training and the use of central procurement offices. Thus we conclude that the benefit derived from the protest system outweighs the delay incurred in a very small number of protests and that the threat of protests is having a positive effect on the quality of procurement policy today.

Because of the great attention given to major systems protests by the media, we have an environment where prominent, but unfortunate, exceptions may be causing policy reconsideration.

There has also been some concern expressed that the mere threat of a protest has caused Contracting Officers to be overly cautious in their actions in order to avoid a protest and that this activity extends the procurement cycle. In fact, there is no evidence showing that there has been any significant extension to the procurement cycle since the inception of GSBCA as a protest forum.

As we mentioned earlier, not only are the number of protests declining, but the debriefing provisions contained in FASA will continue this trend. When a vendor understands why it lost, and that it was fairly treated, it will be less inclined to pursue the extremely costly venue of a bid protest.

ITAA voices strong support for multiple protest venues. In particular, we believe the GSBCA and its independent, de novo standard of review, which allows a fresh

look at every procurement that is protested, should be retained. In our view, GSBCA has acquired substantial understanding of and insight into our industry. This extensive expertise, coupled with de novo review, and the speed with which a decision is reached, has provided clarity and consistency for resolving contract disputes throughout the many agencies of government. We would strongly oppose the substitution of another standard at the GSBCA.

Again, ITAA appreciates this opportunity to express our views. We look forward to working with the Subcommittee on future procurement reform legislation. I will be happy to answer any questions you may have.

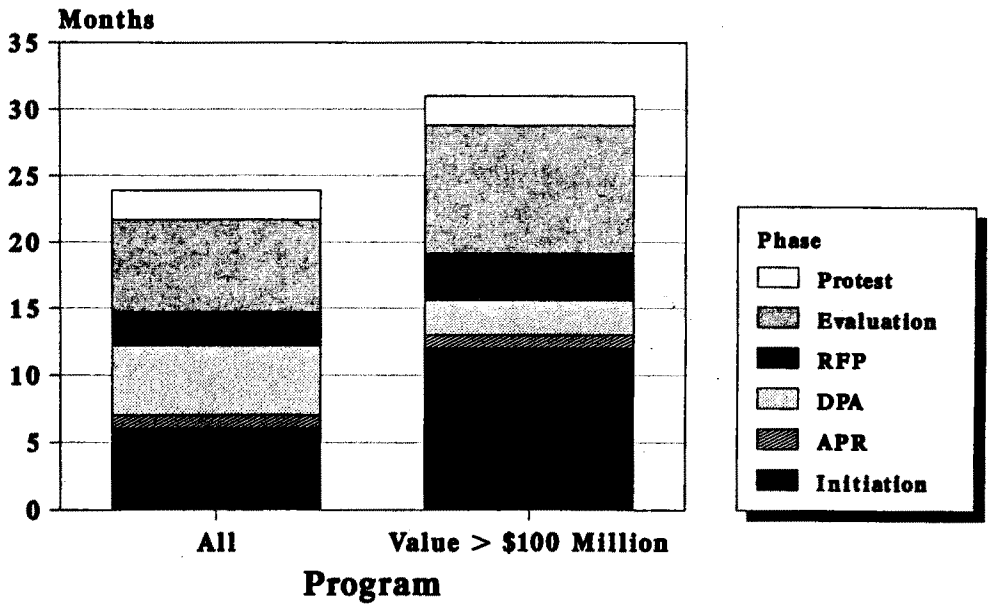
Thank you.

Infotech Procurement Delays Resulting from GSBCA Protests

[Calendar year 1994]

	Number of cases	Percent
Granted Pre-Awd (2–3 Month Delay)	5	2.3
Granted Post-Awd (4–6 Month Delay)	9	4.2
Denied Pre-Awd (1–2 Month Delay)	11	5.1
Denied Post-Awd (2 Month Delay)	15	7.0
Settled (2 week delay)	174	81.3
Total	214	

Federal Infotech
Procurement Process



Federal Sources, Inc.

Exhibit II

Mr. HORN. Thank you very much, Mr. Cole.

Next, we have Mr. Bruce Leinster, program director of the Federal procurement policy for IBM Government Systems of IBM North America.

And you're speaking on behalf of the Information Technology Industry Council?

Mr. LEINSTER. Yes, sir.

Mr. HORN. Welcome.

Mr. LEINSTER. Good afternoon, Chairman Horn, Representative Maloney, and members of the subcommittee.

I am responsible for Federal procurement policy for the IBM Corp. and serve as the chairman of the government procurement committee for the Information Technology Industry Council, the association of leading IT companies. And I appreciate the opportunity to appear before you today.

I am here today to ask you to make three changes to existing procurement laws regarding the way in which the government buys off-the-shelf commercial information technology products.

First, use the "commercial item" definition and only that definition contained in the 1994 Federal Acquisition Streamlining Act, FASA, to exempt any product meeting that definition from the requirement to provide cost and pricing data.

Second, limit the government's right to audit any transactional sales data that might be provided by industry to help the government evaluate its proposed prices to preaward rights only.

And third, waive acquisitions by the government of these products from the requirements of the Buy American and Trade Agreement Acts. Doing this will create a public sector buying environment more closely resembling that of the private sector to which the overwhelming majority of our products are delivered, thereby promoting industry participation in this marketplace.

Let's take a look at the Truth In Negotiations Act, the single largest impediment to industry's providing its products to the government. Over the past 40 years, the real price performance of computing has doubled every 18 months. Today, the average product cycles in our industry range from 6 months to 24 months. Consequently, the commercial marketplace is demanding, competitive, and global.

Private sector buyers, whether buying for their companies or for themselves, have benefited from this phenomenon without the imposition of any artificial rules governing these transactions; yet the government when buying these very same products shackles industry by requiring the submission of either detailed, costly, and burdensome cost and pricing data or, alternatively, transactional sales data.

It then reserves to itself the right to audit this data for up to 2 years after contract award, subjecting industry to penalties ranging from price adjustments to criminal proceedings.

My personal experience with government buyers is they don't believe they need any of this information to do their job responsibly. It is simply a file stuffer, information they are required to get simply because the law requires it, not because they need it.

Industry believes it should never have to provide transactional sales data. To the extent that it does, however, it should not be

subjected to postaward audit requirements that are totally inconsistent with commercial practice. Suggested legislative language is attached to our written statement.

The same is true of the Buy American and Trade Agreement Acts. In short, the requirements of these statutes are intended to provide a preference in the Federal marketplace for American goods. IBM has over 100,000 employees in the United States, where it conducts 90 percent of its research and development. We manufacture virtually all of our full product line of computer systems in U.S. plants.

Yet when selling to the government, unlike when selling the same products to the private sector, we must disclose and certify whether more or less than 50 percent of the parts contained in each and every one of our products was manufactured in the United States.

In a global marketplace where computer parts are globally sourced, this is an increasingly unrealistic and unnecessary requirement.

You have before you two typical personal computer circuit cards. They are the same part number, are functionally identical, and are stored in IBM's inventory in the same place. Yet because the parts that go in these cards are obtained from multiple sources in multiple countries, the number of U.S. parts versus the number of non U.S. parts on these functionally identical cards is different.

Frequently, this results in two functionally identical cards having on the one card greater than 50 percent U.S. parts and on the other card, less. IBM delivers thousands of these cards and products every day, as do my competitors. I'm sure that you can appreciate not only the burden that this imposes on us but also the reality that there is no other requirement to provide this information for the 98 percent of these products that are destined for the commercial marketplace.

Accordingly, we request that the subcommittee add the Buy American Act and the Trade Agreement Act to the list of clauses already identified by FASA as not applicable to the acquisition of commercial items.

Mr. Chairman, resolving these issues will go a long way toward removing the serious obstacles that discourage commercial suppliers from selling its products to the Federal Government. We urge you to seriously consider our recommendations and would welcome the opportunity to work closely with you on these matters.

Thank you. I would be happy to answer any questions.

[The prepared statement of Mr. Leinster follows:]

PREPARED STATEMENT OF BRUCE E. LEINSTER, IBM CORP., FOR THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council ("ITI") appreciates the opportunity to appear before the House Government Reform and Oversight Subcommittee on Government Management, Information and Technology, to present our proposals for additional, much needed statutory reform of the federal acquisition system. We commend the Subcommittee for calling this hearing, and look forward to working with you during the 104th Congress to further streamline and simplify government procurement.

ITI represents the leading U.S. providers of commercial information technology products and services. Its members had worldwide revenues of $259 billion in 1993. They employ more than 1 million people in the United States.

As an industry association comprised solely of commercial manufacturers and suppliers, ITI has been a long-time supporter of streamlining the federal procurement process, and has consistently advocated the adoption of market-tested and proven commercial business practices to accomplish this worthwhile objective. Accordingly, we were an enthusiastic supporter of the Federal Acquisition Streamlining Act of 1994, FASA, passed by this Committee and signed into law by the President last October. Although that legislation established the statutory impetus for making important improvements in the way the federal government interacts with commercial business, a number of issues of critical importance to commercial industry were not fully addressed or were not included in the legislation.

In this statement, ITI will provide an overview of the commercial information technology industry's perspective on federal procurement policy, and then address two specific issues that we believe require further Congressional attention in order to truly create a government that "works better and costs less."

THE COMMERCIAL IT INDUSTRY PERSPECTIVE

Each year, the federal government purchases tens of billions of dollars worth of goods and services from commercial sources. In Fiscal Year 1994, the government spent an estimated $24 billion on commercial information technology. It is important to note, however, that this figure represents only a small percentage of this industry's total annual domestic sales.

The rules and regulations that govern how tax dollars are spent have a significant impact on the government's ability to acquire the most up-to-date commercial information technology, and particularly on the continued participation of a broad array of innovative commercial firms in the federal marketplace. Hence, if the government is going to achieve the worthwhile goals of obtaining the most current technology available in a timely fashion, it is critical that it embrace policies that encourage the commercial industry to continue and expand its interactions with the federal marketplace.

Greater reliance on commercial products and business practices would enable the federal government to take maximum advantage of private sector research and development, to more fully benefit from private sector high technology product application investment and experience, and to realize greater economic benefits from the vigorous competition that is the hallmark of the commercial marketplace. Unfortunately, despite recent sincere efforts to bring about change, the current federal acquisition process is still burdened by a Cold War-era procurement culture, and buying rules and procedures that were designed to facilitate the acquisition of weapons systems on a cost and fee basis. That system's certification and paperwork requirements, as well as other government-unique rules and regulations, all of which may be appropriate for cost-based weapons purchases, are not appropriate for commercial products and services. Rather, they increase the cost and complexity of doing business with the federal government, and ultimately, create a significant barrier to greater commercial business participation in the federal marketplace.

"Commercial items" are different from so-called "milspeced" or cost-based products and services (including so-called "nondevelopmental items"), which are or have been designed and built at taxpayer's expense to conform precisely to a federal agency's specifications. Government-unique missions often require agencies to ask industry to research, design, and develop totally unique products. In order to safeguard tax dollars, the government requires the offeror to reveal those costs directly attributable to the design and manufacture of the product, as well as indirect costs, such as overhead. All cost data submitted by the offeror is subject to government audit. In contrast, commercial products and services are researched and developed primarily at private expense, a universe of customers purchase them "as offered," and their prices are set through vigorous competition with other suppliers in the commercial marketplace. By definition, these characteristics establish the commerciality of such products.

In the American free enterprise system, it is understood and readily accepted that the interaction of all factors in the marketplace—including, and in particular, competition—establishes the fairness and reasonableness of prices for commercial products and services. Nevertheless, buyers (whether business or government) still have an obligation to ensure they are spending their resources wisely, regardless of whether the resource being expended is stockholder equity or tax dollars. Numerous market research tools (e.g., catalogs, advertisements, previous buying experience, databases, etc.) are readily available and utilized in the commercial marketplace to help determine such things as product availability, features, performance and the range of asking prices, information critical to making sound buying decisions. Unfor-

tunately, federal agencies and contract personnel rarely avail themselves of such common resources.

Despite various well-intended attempts to revise and update the way the government buys goods and services, there is still a tendency to rely or fall back on those procedures and methods with which contract personnel are most familiar, i.e., the application of cost-based, government-unique rules and regulations that literally turn the commercial buyer-seller relationship on its head, forcing the seller to "prove" that his asking price is fair and reasonable, or that he indeed is offering a commercial product or service. In our view, this resistance to change remains a significant barrier to achieving genuine procurement reform, and in particular, to the expanded utilization of commercial technology and business practices. We firmly believe that nothing short of explicit statutory guidance will overcome this inertia.

ITI strongly supports the separate and distinct statutory treatment of true commercial products and services, as well as the promulgation of separate procurement rules and regulations that mirror standard commercial business practices. Those rules should appropriately recognize the federal government's limited role in the dynamic, highly-competitive commercial marketplace, and minimize their impact on commercial companies that also sell to the government.

FASA

The enactment of FASA created the opportunity for the government to adopt many commercial-like business practices, and for making important changes in the way the federal agencies acquire commercial information technology. Unfortunately, however, the law still did not go far enough toward effectively insulating commercial manufacturers and suppliers from burdensome, government-unique requirements. Moreover, it created a new burden that has no effective parallel nor practical use in commercial practice, namely, a two year post-award government audit right.

With a few key changes, FASA could have significantly improved the way the federal government acquires goods and services, and could have created greater incentives for expanded commercial business participation in the federal marketplace. To accomplish these essential goals, ITI urges the Subcommittee to address our three primary concerns, outlined below.

1. The Truth in Negotiations Act

"TINA," the Truth in Negotiations Act (10 U.S.C. 2306(a)), is the single greatest impediment to federal acquisition of commercial products and services. When Congress drafted and passed TINA, it recognized that the highly-competitive nature of the commercial marketplace would ensure that prices for commercial products and services would be "fair and reasonable," and therefore it would be unnecessary—indeed burdensome—to expect commercial suppliers to collect and submit "cost or pricing data" to demonstrate how the price was determined. Unfortunately, during the subsequent regulatory implementation of TINA, equally obtrusive and burdensome data submission requirements were created in order for a supplier to "prove" that an offered product or service was truly commercial, thereby effectively negating the commercial exceptions of the original law.

Under TINA, non-competitive procurement actions (e.g., contract modifications) generally require contractors to provide and certify to extremely detailed information regarding the actual costs of developing and manufacturing their products. This "cost or pricing data" requirement is both reasonable and appropriate when procuring government-unique items that have no basis in the commercial marketplace and where a competitive price analysis is not practicable. However, such intrusive data requirements are neither necessary nor reasonable when the desired products are developed at private expense and routinely compete in the vigorous commercial marketplace, and when price reasonableness can be readily established with simple market analysis. Moreover, the vast majority of commercial contractors are unable to provide, much less certify to, such specialized data.

Since no commercial purchaser would abrogate his responsibility for independent market analysis and demand similar information on prior sales to other customers, few commercial manufacturers can readily provide the unique, exhaustive sales/pricing information required by the TINA regulations. Although both the Administration's National Performance Review and the Defense Department's Section 800 Panel recommended greater reliance on market analysis and an expansion of the commercial products exception to TINA, FASA virtually ignored market analysis and failed to effectively end government reliance upon extremely burdensome contractor submittals.

During consideration of FASA, ITI urged Congress to place greater emphasis on developing and utilizing market research capabilities within the federal government. As the single largest buyer of information technology, the federal government has

a substantial store of information regarding the prices it has paid for commercial products and services. Unfortunately, the government has made no real effort to collect and organize that information into a useful and easily-accessible format. The government's ability to conduct effective market research could be vastly simplified and enhanced by organizing and maintaining this data in a standardized, government-wide database. Establishing such a database would curtail the government's dependency on contractor data submissions and paperwork in general, and reduce the non-value-added administrative costs typically associated with selling to the government. The resulting "simplification" would render the federal marketplace more attractive to large and small businesses alike, and lead to even greater competition for government contracts.

2. Post Award Audits

Another serious data-related concern stems from Sec. 1204 of FASA, "Additional Special Rules for Commercial Items." Rather than bring federal procurement practices more in line with those utilized in the commercial marketplace, this section ran completely contrary to common business practice by creating a post-award price adjustment mechanism for perceived deficiencies in government-required data submissions.

Under current law, the sales or pricing data a contractor submits to qualify for the TINA commercial item exception is evaluated for sufficiency and accuracy before the contract is signed. Frequently, a contracting officer will enlist audit assistance in making this determination. FASA altered this practice by enabling the federal government to extend this sufficiency/accuracy determination for up to two years after award of a contract, thereby granting the government an unprecedented post-award audit right into a contractor's commercial operations. It is difficult to conceive of a greater departure from commercial practice or a greater disincentive to participation in the federal marketplace. We urge the Subcommittee to include in new legislation language that strikes this onerous requirement from existing law. Further, we urge you to include language that exempts commercial items form the onerous requirements of the Truth in Negotiations Act (please see attached draft amendment).

3. Buy American Act

Over the years, Congress has extended numerous government-unique laws to federal commercial item procurements. This has created significant problems for commercial suppliers who wish to offer their products and services to the government, since such requirements are totally inconsistent with commercial business practice. Further complications arise when Congress modifies such laws, often rendering them inconsistent with other statutes and regulations or creating additional audit requirements that increase the necessity of collecting even more government-unique data.

The Buy American Act ("BAA"), 41 U.S.C. 10a, et seq., is a prime example. For procurements not covered by the Trade Agreements Act of 1979 ("TAA"), 19 U.S.C. 2501, et seq., a provision of the BAA requires that, for federal procurements of American-made technology under a certain dollar threshold, a "U.S. end product" must contain at least 50 percent U.S. content or it will be subject to an evaluation penalty differential of up to 50 percent of the original asking price.

Commercial product development is planned and carried out with minimal regard to the source of components. Information technology manufacturers acquire components and peripherals from multiple suppliers throughout the world, and may change their sources on a weekly or even daily basis. By and large, commercial suppliers, many of whom sell less than 10 percent of their products and services to the government, are not going to change their sourcing requirements simply to "pass" the arbitrary tests imposed by the BAA. Nevertheless, if they do choose to compete for federal contracts, they have to establish and maintain sophisticated tracking and management systems, the high cost of which places them at a competitive disadvantage when they compete internationally. Clearly, any test requiring restrictions on the sourcing of components and manufacturing is an anachronism, and discourages commercial companies from selling to the federal government.

ITI believes that commercial products should be exempt from the BAA. At a minimum, the federal government should be consistent and adopt a single, government-wide rule-of-origin, namely, "substantial transformation," as contained in the TAA for all federal acquisitions of commercial off-the-shelf technology, regardless of the procuring agency or whether the procurement is covered under the BAA, the TAA, or any other current or future statute or agreement. This would inject much needed consistency into the process and remove a significant disincentive for commercial companies.

Ultimately, if a federal law does not apply to private transactions in the commercial marketplace, it should also not apply when the government enters the same marketplace as a buyer of commercial goods and services. In other words, commercial manufacturers should be able to sell to the government under the same terms and conditions as they do to other commercial customers. Although FASA did provide some relief from government-unique requirements, it did not go far enough. We urge the Subcommittee to include in new legislation language that exempts commercial items from the onerous burdens of the BAA.

CONCLUSION

There are a number of additional improvements ITI could recommend that would further advance genuine procurement reform. Some of them have been advocated by other industry groups here today. Nevertheless, as commercial information technology manufacturers and suppliers, ITI firmly believes that, with implementation of the key changes to existing law that we have outlined in this testimony, significant improvements will be realized, resulting in greater government access to state-of-the-art commercial information technology, and a dramatic expansion of commercial participation in the federal marketplace.

ITI DRAFT AMENDMENT TO THE TRUTH IN NEGOTIATIONS ACT

SEC. XXX. EXCEPTIONS TO COST OR PRICING DATA REQUIREMENTS.

Section 2306a(b) of title 10, United States Code, is amended to read as follows:

"(b) EXCEPTIONS.—(1) This section shall not be applied to a contract or subcontract for—

"(A) commercial items, as defined in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403);

"(B) other than commercial items when the price agreed upon is based on—

"(i) adequate price competition; or

"(ii) prices set by law or regulation; or

"(C) in any case when the head of the procurement activity determines that the requirements of this section may be waived and states in writing the reasons for such determination.

"(2) This section shall not be applied to a modification of a contract or subcontract if—

"(A) the contract or subcontract being modified is one to which this section shall not be applied by reason of clause (i) of paragraph (1)(A): and

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

Mr. HORN. Thank you very much. We appreciate your coming, Mr. Leinster.

Our last witness on this panel is Mr. Dennis Cossey, president of Innotek Corp., from Little Rock, AR.

Thank you very much for coming.

Mr. COSSEY. Thank you, Mr. Chairman. Mr. Chairman, members of the subcommittee, my name is Dennis C. Cossey. I'm chairman/CEO of Innotek, Corp. If I may, let me preface my remarks by thanking you, Mr. Chairman, as well as the committee members, for allowing me to come to you today as a representative of small business.

I want to talk about some reform to the Federal procurement system to rectify a situation that we strongly feel represents a breach of fiduciary responsibility on the part of the Federal Government, a situation that is a serious impediment for small business to successfully participate in the Federal procurement process and jeopardizes a company's commercial future, a situation that is hostile to new innovative technology and development, promotes the waste of taxpayers' dollars, and inhibits competition, all of which further seeks to undermine the integrity of the overall Federal system.

I'm speaking about the acknowledgment, the protection of private property rights by government agencies, as well as their procurement officers, a right that is guaranteed under Article I, Section 8 of the U.S. Constitution.

Millions of Federal dollars are spent annually to support the research and development of new technologies that can provide solutions for government problems, as well as possessing the potential to solve problems for the United States, as well as global industry.

My company is a small business engaged in the development and commercialization of new pollution control and waste disposal technologies. We view the U.S. Government as potentially one of our largest and most valued customers. Therefore, we applaud our government's trend toward a more conservative fiscal policy through downsizing and through the implementation of innovative management practices.

However, should certain individuals within the government choose to manipulate the system for their own purposes, the potential for procurement abuse can result in considerable waste of government assets. We firmly believe that our company, along with many others, have been subjected to such management philosophy involving government procurements in the past.

Although I can provide specifics for each of these occasions, this is not why we're here today. What we hope to accomplish at this forum is to prevent such abuses from continuing in the future, to the detriment of industry and the government.

Intellectual property right is one of the most important assets possessed by corporations and, indeed, nations. Ownership of patents, trademarks, copyrights, and distribution networks is recognized as an asset, creating the means by which superior economic benefits can be derived.

Companies are licensing, selling, joint venturing, and trading intellectual property around the world. U.S. foreign trade policy is often based on these very issues. In fact, at every level of business, intellectual property rights are acknowledged and efforts made to ensure their protection, except in the Federal procurement system.

Many Federal agencies, such as Department of Defense, Advanced Research Projects Agency, and the Department of Energy, regularly fund new technology research and development. Currently, there is no requirement that government contracting officers make any effort to ensure that companies receiving Federal funds for technology development actually have the rights to technology central to the program.

In short, any company that responds to a government advertised and/or sponsored research and development project is not required to make any representations that they own the rights to whatever process or technology that the government funds are being spent to develop. This is a problem for two reasons.

First, millions of Federal dollars could potentially be wasted, due to the fact that government and the company being paid to develop a technology cannot effectively use the end product or process for commercial applications, due to potential patent infringements.

Second, this prevents the rightful owners of the intellectual property from receiving these dollars, requiring them to find funding from other sources. The rightful owner of the intellectual property

could be unaware that a Federal agency is, indeed, funding a potential competitor to develop their technology on a sole-source basis.

The funding agency's contracting officer refused to rectify such a situation, even when notified of these circumstances. And the rightful owner of the intellectual property is prevented from receiving Federal funds because of duplication in programs.

What, then, are the alternatives for small business in these circumstances? Litigate. The legal costs are really prohibitive to litigate. You can file a protest with the offending agency. No government agency is eager to confess that they have made a multimillion dollar error. There's always the General Accounting Office. However, the cost of filing litigation with the General Accounting Office and following through with a protest are still prohibitive to small business. In short, small business cannot compete with the government to develop technologies.

My question is, "Should the situation be allowed to continue where government agencies use Federal dollars to manipulate competition within industry and thus influence who are the winners and who are the losers in the marketplace?"

Mr. Chairman, we're convinced that any reform of Federal procurement practices should include the area pertaining to patent and intellectual property protection. Therefore, I respectfully suggest that new legislation be considered which would require contracting officers to verify the ownership of the intellectual property central to the project they expect to fund.

This could be done by requiring the company to produce proof of the status of ownership of the technology or having a specific agency staff person who is technically competent in the subject technology review this material and conduct a quick patent search and then issue an opinion to the contracting officer, a course of action that can avoid the time and waste involved in legal proceedings, and cut down on protests. And last, we must also have strong oversight and enforcement of these provisions.

Mr. Chairman and members of the committee, I strongly urge you to consider these suggestions for new legislation concerning the protection of intellectual property rights in the Procurement Reform Act. For small businesses, the inclusion of these rights are needed to protect the backbone of our business; indeed, the backbone of any firm, large or small, whose future is dependent on developing and commercializing new technologies.

These rights must be protected if the government is to realize the benefit of its invested dollars over the long term. Thank you.

[The prepared statement of Mr. Cossey follows:]

PREPARED STATEMENT OF DENNIS COSSEY, INNOTEK CORP.

Mr. Chairman, members of the Government Management, Information and Technology Subcommittee.

My name is Dennis C. Cossey, Chairman and CEO of Innotek Corporation. If I may, let me preface my remarks by thanking you, Mr. Chairman, as well as the Committee Members both individually and collectively for allowing us, as representatives of the small business community, to come before you today to discuss what can be done not only to reform the federal procurement system but hopefully rectify a situation that we strongly feel represents a serious breach of fiduciary responsibility on the part of the federal government. A situation that, in our opinion, not only results in a serious impediment for small business to successfully participate in the

federal procurement process, but could jeopardize a company's future from a commercial standpoint. A situation that is hostile to new and innovative technology development, promotes the waste of taxpayers dollars and inhibits competition, all of which further undermines the integrity of the overall federal government system. I am speaking about the acknowledgement and protection of private property rights by government agencies as well as their procurement officers. A right, I might add that is guaranteed under Article I, Section 8 of the U.S. Constitution.

Millions of federal dollars are spent annually to support the research and development of new technologies that we anticipate will be ultimately transfered to the private sector and commercialized under the dual-use concept. Technology that can provide solutions for government problems as well as possessing commercial potential to solve problems for United States industry. If the technology also proves viable for foreign export, this increases the success of the overall technology development program.

My company is a small business engaged in the development and commercialization of new pollution control/waste disposal technologies. We view the United States Government as potentially one of our largest and most valued customers. Therefore, we like the majority of Americans, applaud our government's trend toward a more conservative fiscal policy through down-sizing, balancing budget initiatives, and especially through the implementation of innovative management practices. However, should certain individuals within the government choose to subvert these practices in order to manipulate the system in some praetorian attempt to reshape the world into their own image, the potential for procurement abuse, resulting in the considerable waste of government assets, is inevitable. We firmly believe that our company, along with many others, have been subjected to such a management philosophy involving government procurements. I do not refer here to low profile instances involving unsolicited proposals, but procurements advertised in the Commerce Business Daily by government agencies, some of which new technology development is the sole purpose for their existence. Although I can provide specifics for each of these occasions, this is not why we are here today. What we sincerely hope to accomplish at this forum is to prevent such abuses from continuing in the future, to the detriment of industry as well as the taxpayer.

Intellectual property is one of the most important assets possessed by corporations. Various forms of intellectual property are the foundation of market dominance and continuing profitability. Very often they are the underlying reasons for mergers and/or acquisitions. Ownership of patents, trademarks, copyrights, and distribution networks is recognized as an asset, creating the means by which superior economic benefits can be derived. Companies are licensing, selling, joint venturing, and trading intellectual property around the world. The international banking community considers these assets as loan collateral. Infringement litigation damages are being awarded in the $1 billion range. United States foreign trade policy is often based on these very issues. In fact, at every level of business, intellectual property rights are acknowledged and efforts made to ensure their protection, except in the federal procurement system.

Many federal agencies, such as the Departments of Defense, Advanced Research Projects Agency and the Department of Energy, regularly fund new technology research and development. Currently, there is no requirement that government contracting officers make any effort to ensure that companies receiving federal funds for technology development actually have the rights to the technology central to the program. In short, any company that responds to a government advertised and/or sponsored research and development project, such as Request For Proposals, Cooperative Research and Development Agreements, Broad Agency Announcements, Grants, or Sole-Source awards, is not required to make any representations that they own the rights to whatever process or technology that government funds are being spent to develop. This is a travesty for two reasons.

First, millions of federal dollars could potentially be wasted due to the fact that the company being paid to develop a technology cannot effectively use the end product or process for commercial application due to patent infringement. While it is certainly a significant contribution that the new technology is used to solve a government problem, why needlessly sacrifice commercial potential for no good reason. What then is the justification of funding such companies?

Secondly, this prevents the rightful owner of the intellectual property from receiving these dollars requiring them to find funding from other sources, because

- the rightful owner of the intellectual property could be unaware that a federal agency is funding a potential competitor to develop their technology
- the funding agency's contracting officer refused to rectify such a situation even when notified of these circumstances

• the rightful owner of the intellectual property is prevented from receiving federal funds because of duplication in programs

What then are the alternatives for small business in these circumstances? Litigate? The legal costs are prohibitive. File a protest with the offending agency? No government agency is eager to confess they were involved in a multi-million dollar error. There is always the General Accounting Office (GAO). However, the costs of filing a GAO protest are equal to seeking redress in the federal court system.

In a recent $20 million dollar federal procurement involving my company, we discovered numerous irregularities in the procurement process. We had no choice but to protest the actions of the agency involved, since a significant portion of our company's future income is severely jeopardized. Two Washington law firms specializing in procurement protests quoted fees of $65,000 to $80,000 just to file a protest and prepare for a preliminary hearing at GAO. We finally decided to file a complaint with the Department of Defense's Inspector General, since as a small company, we are not able to absorb the expense of a Washington law firm.

This is the harsh reality in which small business often finds itself when trying to resolve such problems with the federal government. Whether these circumstances occur by design or through error, there is precious little that can be done when the system is so structured that no simple remedy is available to them. In short, small business cannot compete with government to development technologies. My question is: Should the situation be allowed to continue where government agencies use federal dollars to manipulate competition within industry and thus influence who are the winners and who are the losers in the marketplace?

Mr. Chairman, we are convinced that any reform of federal procurement practices should include the area pertaining to patent and intellectual property protection. Any action that could potentially save hundreds of millions of dollars and at the same time, lessen the burden of litigation which is strangling our federal court system would certainly receive high praise from industry, large and small. Therefore, I respectfully suggest that new legislation be considered which would require contracting officers to verify the ownership of the intellectual property central to the project they expect to fund. This could be done by (a) requiring the company to produce proof of the status of the technology or process, (b) having a specific agency staff person, who is technically competent in the subject technology review this material, and/or conduct a quick patent search, and then issue an opinion to the contracting officer. While this may seem like a long and laborious task, it can in reality, be accomplished rather quickly and effectively. Many times our company has found the need to conduct patent searches either in house or through outside vendors. Where the search involved only United States filings, it has never taken more than a few days for a full report to be generated. I cannot imagine any procurement situation where a few days would over-burden normal review functions. A more simplified course of action for handing complaints of intellectual property infringements involving federal procurement is necessary. A course of action that can avoid the time and waste involved in legal proceedings is needed. And last, there must be strong over-sight and enforcement of these provisions.

Mr. Chairman, and members of the Committee, I strongly urge you to consider these suggestions for new legislation concerning the protection of intellectual property rights in any procurement reform. For small businesses, the inclusion of these rights are needed to protect the backbone of our business, indeed, the backbone of any firm, large or small, whose future is dependent on developing and commercializing new technologies. These rights must be protected, if the government is to realize the benefit of its invested dollars over the long term.

Thank you for your time and interest in the views of small business.

Mr. HORN. Thank you, Mr. Cossey.

Let me ask Mr. McKay. Mrs. Maloney asked Mr. Murphy from GAO about changes to the bid protest system before implementation of the new FASA provisions on debriefings and other related changes. This panel's testimony promotes the private sector's right to protest the Federal Government's procurement process.

Do you believe that the changes made in FASA will be significant enough that further changes will not be required? What's your feeling?

Mr. MCKAY. First of all, we strongly supported FASA, not only in its final passage, but in working with both Houses of Congress

and both parties and with the administration in the formulation of what is in that bill. That bill was carefully crafted.

I indicated earlier that one of the things that we have felt is that Congress has been careful to not disturb sound public policy that protects the public interest and, instead, has chartered a thoughtful course to bring about additional refinement reforms to actually improve that system.

The fact of the matter is that in 1986 and in 1989, Senator Carl Levin introduced measures that were added to the Defense Authorization Bills in those years to try to streamline commercial product procurement in the Federal Government. And the fact of the matter is that there was very limited implementation by the executive branch of the provisions of those laws at all.

And it had a lot to do with why the 103rd Congress had to go forward with the administration and enact FASA to try, now in a third legislative attempt, to bring about the same sorts of reforms.

It's interesting. We heard a little bit earlier about some of the computer trade press and some of the articles that appear on page 1. There was an editorial cartoon in last week's issue of Federal Computer Week which demonstrated a scene of a movie marquee that said "FASA" and a huge billboard erected in front of the movie marquee blotting it out, and it said "Comming soon: FASA II." This cartoon amply demonstrates the concern that we have in industry that what Congress tried to do, together with the administration, in enacting FASA is never going to get off the ground if all attention is turned to trying to reform the reforms with new legislation before these 1994 reforms have even taken effect.

The fact is, the track record on implementation of procurement reform isn't the greatest one to brag about historically. The new FASA requirements, the FASA improvements that were so carefully thought through, including debriefings so as to reduce the need for use of the protest forum to find out simple, honest information about what was going on in procurements. The fact of the matter is, if you have the FASA reforms implemented, have better information, more nourishing information presented openly in the competition in RFPs, in the evaluation criteria and what the government says is important to it, and then, in the debriefings, simply be more open and candid about why the decision was made and how, consistent with what the RFPs originally publicly said, you're really going to be eliminating a lot of the reasons for the protests.

The fact is, Mrs. Maloney, the 200-some-odd protests that were heard last year by the GSBCA out of the thousands of IT procurements, of those, the vast majority of them were dismissed or withdrawn, leaving 40 cases to be heard. Of the 40 cases the board heard last year, 14 were upheld. Fourteen were upheld.

It's interesting. If we wanted to take an arbitrary number and suggest that we wanted to look at the statistics for protests in billion dollar procurements—if we found last year that there was one billion dollar contract awarded by the Federal Government, and that contract was protested, we would have a 100 percent protest rate for billion dollar contracts in the Federal Government.

But that statistic wouldn't be very nourishing to the public policy examination that this committee has to make. And the facts of what's really going on: the fact that protests have declined, and the

fact that the FASA bill enacted and signed last year would really deal with significantly improving the system further, and that is what is needed to somehow assure through oversight that these reforms take place.

Mr. HORN. Very helpful.

Representative Maloney.

Mrs. MALONEY. Just following up on your comments, Mr. McKay, how much staff time was eaten up with the 200 protests? Was that a lot of expenditure of Federal dollars to review 200 protests?

Mr. MCKAY. Well, I think it's very interesting. As my colleague indicated, statistics show that most of those were resolved in 2 weeks. And, you know, something else interesting is that the GSBCA Board of Contract Appeals has a 45-day clock even for the cases that it eventually hears.

GAO, which has been lauded today as a better approach, has twice that length of time under law, 90 days. It's a little hard to understand, if the issue is that it's taking too long.

Mrs. MALONEY. I would like to ask all the members of the panel to comment, if they so wish. If the administration's proposed changes to the bid protest system were implemented, what would be the effect on procurement policy, in your judgment? Would it be helpful or detrimental? What would be the effect?

Mr. LEINSTER. Representing a contractor who has just won and lost and won and lost and now, I think, won again a large Forest Service procurement when you ask me today, I would be inclined to say I'm totally in concurrence with Dr. Kelman's or the administration's recommendation.

But I would like to suggest that there's room for dialog. There clearly is room for dialog. I don't disagree with my colleagues. In fact, I support my colleagues. The system has worked well.

Our observation is, if we could try to get the enormous costs of bidding out of the system, either by fixing the actual competitive process up front or by breaking down the procurements into smaller chunks, so that a vendor isn't literally locked out of an agency for 5 years if that vendor should lose, then we might be much more inclined to try to figure out how not to exercise the protest system so aggressively.

But the bottom line is, when you spend so much money going after a bid, knowing full well that you're probably locked out of that agency for a good many years if you lose, you use what means are available to you to—and I can assure you, we have been on both ends. And it's——

Mrs. MALONEY. Do you believe the debriefing system that they're implementing through FASA is going to be effective?

Mr. LEINSTER. I believe that the statutes—I haven't seen the regulations, yet, but I believe that the structure is there. And if the government agencies will exercise the powers given to them, then I believe it will improve the system, yes.

Mrs. MALONEY. I would like to ask Mr. Cole, you argue in your testimony that "cost or pricing data" should not be required for contract modifications. However, with contract modifications, there is no full and open competition to ensure that the commercial prices are reasonable. Some commercial prices are reasonable, and some are not.

How do we ensure reasonable costs without full and open competition? How can we do modifications, or how would the government do modifications without cost and pricing data, since it's no longer a competitive process? And, as you know, a large part of costs in contracts is in the contract modifications. It's a huge amount of the $200 billion that we spend on contracts.

Mr. COLE. There is an element of FASA that, of course, addresses contract modifications. And I think in the process of preparing for this hearing, Mr. Leinster and I agreed that he would handle the TINA questions, and I would handle the bid protest questions. [Laughter.]

Mr. LEINSTER. Having already handled the bid protest question——

Mr. MCKAY. If I could be helpful on the FASA issue, the fact is that FASA provides for not having to submit cost or pricing data on amendments to fully competed contracts as a major reform for commercial product procurement.

Mr. LEINSTER. And that's correct. So what that does is, it takes out of the arena any requirement to provide cost and pricing data. What's important here is——

Mrs. MALONEY. But is that a smart move, when you don't have any competitive process in modifications, and a large portion of the contract cost is the "modifications"? You can become the low bidder by bidding very low on an item and then say, "Oh, by the way, I've got to modify it now and add more and more to the contract." So why is that good to take the cost and pricing data out of it?

Mr. LEINSTER. Because the agency's negotiators are very aggressive. When I bid 35 to 40 to 45 percent to win a contract and then, under contract modification, the government adds additional product, I don't walk in and start to sell that product to them at list price. They hold me to those discounts that were established during the competitive process.

And even if the government wanted cost and pricing data on our commercial products, we don't have data in the manner required by the government standard form 1411 that requests cost and pricing data for our commercial products.

Mrs. MALONEY. What would make the procurement system better? What would you recommend to government?

Mr. LEINSTER. Again, as it relates to commercial items, we would like the government to become more like a buyer in the private sector relying on market data research, rather than data provided by the contractor.

When you and I go buy products at the commercial price, we don't get—the burden of determining whether the price is fair and reasonable is on the buyer, not on the seller. These are off-the-shelf commercial items. There is plenty of data available—including, by the way, the government's data.

They are probably the largest single buyer. They ought to know what they have paid, not only for my products, but for products like mine. They ought to be better armed at the negotiation table than I without any reliance on me to provide data and subject my systems—so the answer is, make it more like a commercial buying environment.

Mr. COLE. And I think one of the major tenets of that commercial——

Mrs. MALONEY. I thought that's what FASA did.

Mr. LEINSTER. FASA started it. A lot didn't get done.

Mr. COLE. And that's why we're very critically interested in the implementation of FASA and the regulations. We're waiting with bated breath to see particularly the commercial items and services and, I would say, a second draft on TINA regulations, also.

Mr. MCKAY. In fact, the President really did just sign that legislation in December, just this past December. There has been no implementation yet. This isn't, I don't think, an oversight hearing on how well it has worked. There has been no chance to see if the reforms that were put into that bill worked.

Market research is something that is essentially foreign today in government buying practices. At CCIA, we had some senior government procurement officials visit a few years ago and we had this very discussion over cost and pricing data and how does the government protect itself, how does the government assure itself that the kinds of prices it's getting, either through competition or through modifications to contracts, are reasonable.

And so we talked about market research that day. And we talked at some length. And finally, the government officials who were there huddled and talked with each other and then finally came back and said, "We have a question we want to ask. You've used a term we're not familiar with. What is 'market research'?" That's a true story.

Mrs. MALONEY. Surely you jest.

Mr. MCKAY. No, ma'am. I wish I did.

Mr. LEINSTER. I would also suggest that with respect to my providing information to the government to support my proposed prices, it would be a whole lot easier if the postaward audit requirement were removed. That's the biggest concern we have.

Mr. HORN. We thank you.

In answer to that question, the gentleman from Illinois, Mr. Flanagan.

Mr. FLANAGAN. Thank you, Mr. Chairman. I won't be but a minute.

Mr. Leinster, I have just a couple of questions here concerning the Buy American Act. In your testimony on page 9, you use the term "substantial transformation." I wonder if you could define that for me, help me out with that.

Mr. LEINSTER. "Substantial transformation" is a term of art associated with the Trade Agreements Act. And it addresses not individual components contained in a product, but rather where the product is "substantially transformed," which means where did it take on its final physical and functional requirements.

So I could have components from anywhere around the world. The key element in substantial transformation is, where were those elements assembled into the product delivered.

Mr. FLANAGAN. At the risk of sounding jingoistic—and I'll take that risk—I believe the underlying premise of the Buy American Act is so that this country could remain without being dependent upon foreign nations or foreign markets for materials that we may need in time of crises or other times.

If we go to a completely open marketplace where the buyer beware and we hand the seller certain powers, particularly as you later discussed, restrictions that government has now on its own procurement its own use that should be removed, because unless Federal law applies, it should be in the marketplace as any other buyer, how can we vitiate that with the underlying premise of the BAA?

Mr. LEINSTER. First, I want to reiterate, I'm talking about standard off-the-shelf commercial products. If you're asking me to build a weapons system or any other unique product for the government and it makes sense, it's in the interest of the government to make sure that there are sources of supplies—remember, there are some things like jewel-bearing requirements and specialty metals and so forth—that's all well and good. Leave those there.

Because if I'm designing a system for you, for the government, I can design into it anything I want. It's when you pull a product off of my product line which is already built whose requirements were not set by the government but rather were set by the very competitive commercial marketplace where we have this rub—did I answer that question?

Mr. FLANAGAN. No, not quite. Let me try again. Perhaps we'll just have to reduce it to the crass discussion of price. At what level are we talking about savings if we permit International Business Machines or any other member of your organization to go out and acquire component parts, for lack of a better term, for these various boards that you passed out for us to look at? What level of savings are we talking about?

Mr. LEINSTER. Again, you are not precluding me from going out and acquiring those boards all around the world.

Mr. FLANAGAN. Let's say we let you make 75 percent of that board from foreign marketplaces or something like that outside of the 50 percent requirement.

Mr. LEINSTER. And your question is, what would the government——

Mr. FLANAGAN. Yes. What benefit does the government have back to that? I would presume it comes in the form of a cost savings of some kind from your manufacturing costs of it, if we did not force you to purchase from American resources the component parts.

Mr. LEINSTER. Right. I guess the key is, if I were forced to make my products with American source parts—or pick any country—that would probably drive my costs up and make my products less than competitive, which would have an enormously negative impact on not only my company, but on the Treasury and my profits, and so forth.

The benefit to the government is the government can't take advantage of these off-the-shelf, state-of-the-art technologies by imposing these requirements on me. I'm not changing my manufacturing plans. I can't. Ninety-eight percent of my product doesn't go to the government. So those requirements are driven by the worldwide commercial marketplace.

Rather than change my manufacturing plans, what in effect you're doing is potentially keeping the government—all other buyers have access. The government doesn't have access. So the sav-

ings is not so much dollar savings, but rather the availability of those products to the fullest extent that the rest of the economy has availability of them.

Would there be savings? Sure. It costs me in excess of a million dollars a year to maintain these systems that I set up just to keep track of these components and so forth for these government purposes. A million dollars across my product line is not going to result in individual product savings.

But in a time when companies like mine and the government, too, are rapidly and significantly downsizing to remain competitive, that's a million dollars' worth of resource I would rather have to help train my users, my customers, on how better to use the products that I sell, rather than to have to address some fairly arbitrary, unique Federal regulation.

Mr. FLANAGAN. Thank you.

I yield back, Mr. Chairman.

Mr. HORN. Thank you very much.

Let me follow up on a few questions Mr. Cossey has raised, because you're presenting a perspective here that other witnesses haven't really dealt with, and that's technology rights of various potential vendors to the government.

If I remember correctly, three decades ago in my service on Capital Hill, we had various provisions put in certain laws, such as the NASA law at that time, by former Senator Long of Louisiana, that anything developed with the use of government money, the government retained title to it and could license it out at its will or whim, as the case may be. Doesn't the government ordinarily retain the right to utilize any technology it funds? What's your experience?

Mr. COSSEY. That's correct, Mr. Chairman, it does. We're not really speaking here of technology that was developed from basic funding by the government. This technology was developed by industry that they're now going to the government to demonstrate.

Certainly, the government would retain any rights to any funds that they put into the developmental process. And we certainly respect that. The problem we have is that a lot of people are using the technology development industry, and there is just an enormous amount of research and development projects going on being funded constantly, with the new initiative to rebuild the technological infrastructure of the United States.

And as such, it's impossible to keep up with all of them going on at the same time. And that's what we're making reference to, is technology that our company or any company has developed at its own cost in the private sector that's going to the government to demonstrate, and then we find out that the case is, in some instances, these practices have been going on.

Mr. HORN. You mentioned some procurement irregularities that your company is currently protesting. Is it appropriate to be more specific on those, or are you bound by some rules where we can't get a feel for what the problem is?

Mr. COSSEY. We have, yes, recently filed a protest, which is the first protest our company has ever been forced into that action. That's with the Advanced Research and Development Project Agency. While it doesn't really reflect on patent infringement or intellec-

tual property rights, we have two other situations that we're now following up on that are directly related to that.

And I would be glad to get you information at a later date or any time concerning that. But I was trying to confine my comments today to the legislative reform on intellectual property rights.

Mr. HORN. I take it your firm has some technologies that are patented that other firms are using, and those firms are being funded by the government?

Mr. COSSEY. Yes, sir. That's correct.

Mr. HORN. Is that accurate?

Mr. COSSEY. Yes, that is correct. We have suspected this has been happening in the past. And we recently through a Freedom of Information request got a permit from a State agency that then, indeed, confirmed that that was the case.

Mr. HORN. What are your options? Do you use the protest forum of the agency doing the funding, or do you simply go to court and sue the firms that are using your technology without either proper license from you, or payments, however arranged?

Mr. COSSEY. It's an interesting situation. Like Ms. Preston talked about earlier today, a lot of these firms are indemnified by the government. So really, we have no standing. So what we're trying to do—and that's more of a remedial approach. We're trying to do the preventive approach, to solve the problems before they become a problem.

It's like the environmental problems we have. It's lot more cost-effective to prevent them than it is to clean them up.

Mr. HORN. How do you solve a problem when somebody's using your technology, which is patented, and they haven't paid for it?

Mr. COSSEY. We have heard earlier that the General Accounting Office is one approach to that. We contacted two Washington law firms that quoted anywhere between 60 and $80,000 to actually prepare the case and take it before a preliminary hearing. Small business really is not able to really absorb those kind of costs, with no absolute guarantee that anything will be done.

What we ultimately did is file a protest with the Department of Defense, Inspector General's Office, and they are now in the process of following up on that. And we hope to get some kind of redress.

Mr. HORN. How large is your firm, in terms of number of employees, gross sales, whatever?

Mr. COSSEY. Well, we're still a developmental company. We're very much dependent on these technologies that we have licensed and paid for. We paid one of the national laboratories right at a million dollars to get these technologies to the point they are.

And, as a matter of fact, we have won some contracts, and some of them, we have not. But we are just not big enough to really take on the government, with the way the system is structured now.

Mr. HORN. Do you have 10 people, or a dozen people?

Mr. COSSEY. We have 4 full-time employees and about 12 part time.

Mr. HORN. So you're saying the really small business——

Mr. COSSEY. We're talking really small, yes.

Mr. HORN. This was mentioned by other members of other panels. You really have a problem when you're fighting a very large

complex, be it a private firm with vast resources, or the Federal Government with vast resources.

Mr. COSSEY. Yes, sir. That's essentially correct.

Mr. HORN. And are you thinking that this should lead to some alternative method of dispute resolution in situations such as this on intellectual property rights, or is GAO the only out that we have sort of formulated to meet this need?

Mr. COSSEY. That is basically the only way, if you're going to actually get some kind of a response to your problem. The agency itself, we filed a protest directly with the agency, and it was basically summarily dismissed. They reviewed it, and they stuck with their original findings.

So with so many irregularities and disconnects involved relevant to the award, we were really forced to go to the inspector general. That's the only alternative we had, not having the wherewithal to litigate. And we're trying to prevent the problems which is what we're here today for, not really solve them from the back end.

That's where the cost goes. It's overburdening the Federal court system. It's a waste of time and money and effort. And we would like to see something put in here to prevent it from happening, versus trying to come back in and solve it from the back end.

Mr. HORN. So no matter what route you take, the GAO experience—and you cited two firms' quote to you about $60,000 just to file a protest before a public agency.

Mr. COSSEY. That's correct.

Mr. HORN. Or suing the individual firms that have these contracts using your technology. In either case, that's a prohibitive hurdle for a small company to advance the money to fight, unless A, you're a lawyer by background and are willing to pursue it yourself, or one of your partners is a lawyer.

Mr. COSSEY. Yes, sir. And that does not, unfortunately, happen to be the case. And again, we can't really go to the company, because the company is, in this case, indemnified by defense for its work it's doing. So we're prevented from doing that even if we had the wherewithal to do it.

Mr. HORN. When you say "indemnified by defense," that intrigues me.

Counsel, have we had any testimony on how that system works?

Ms. BROWN. No.

Mr. HORN. I think we ought to get some.

And you're saying this is under ARPA, essentially?

Mr. COSSEY. Yes, sir. In this particular instance, it is with ARPA, yes.

Mr. HORN. Would you furnish the details to Ms. Brown, who is the procurement counsel for the committee? I would like to follow up on that. The government in its dealings with free enterprise should not be protecting one from suit by another, if some misdeed in violation of the law and property rights has occurred, it would seem to me.

One last question, and we'll round it off here and go to the next panel. Either Mr. Cole or Mr. Leinster, we have been hearing a lot about bringing to our procurement system the changes that people are talking about in some Canadian pilot program. Apparently,

that program is intended to foster more cooperation between vendors and the government. And I gather some like the program.

Mr. McKay seemed to say he didn't think it was appropriate to the U.S. system. I'm just curious if either of you who have decided which side you're going to talk on this program are familiar with it and, if so, would you support the adoption of a similar program as a pilot for the procurement system in the United States?

Mr. COLE. I'll take a shot at that.

Mr. HORN. OK.

Mr. COLE. The Canadian Common Purpose Procurement system, as it has become known to us, offers some very significant advantages within the Canadian procurement system for Canadian procurements.

It is true that Senator Cohen is interested in that particular model and has mentioned that recently in some announcements he has made. And we in industry are also looking at that particular model. We're also looking at recommendations that have come out of various intergovernmental task forces with regard to new mechanisms for enhancing the procurement system.

It's unclear to us yet whether the, for example, advantage of the Canadian system would be totally applicable to the United States. We're having discussions with Canadian representatives at ITAA, for example, have had two such meetings and anticipate a third one early in March.

The Canadian procurement system is somewhat unique from the American system in that, No. 1, it's much smaller. Probably a billion dollars' worth of IT equipment is purchased, versus a $25 billion market in this country.

Second, the Canadians are exceptionally less litigious than we, so they operate in a system of, shall we say, trust and cooperation that perhaps we have not been able to achieve here because of quite often, and appropriately noted, the adversarial nature of a great deal of the procurement that goes on in this country.

So in sum, I think we're interested in the possibility and would certainly like to evaluate that system for the possibility of pilot programs in this country. And that's actively being evaluated.

One last note. I think the Canadian information technology industry is much less broad than our industry is. There are hundreds of systems integrators in this country, and I think there's probably just a handful of major systems integrators in the Canadian market.

So whether, in fact, it's an applicable model to this country, we're very interested in investigating it. It might have some opportunities, but we're still out on that one.

Mr. HORN. Any other comments by any other members of the panel? Mr. McKay.

Mr. MCKAY. If I might, a couple of observations. First of all, the Canadian model that's being discussed is a pilot even in Canada, and they don't have their results or reviews in on what worked and what didn't. Before we rush to adopt a pilot somewhere else as a system of our own, it would be nice to know how well it worked.

In FASA, there were provisions made for the government to be able to conduct pilot programs here. If this is one that has merit,

perhaps it should be being looked at for an American pilot under the provisions of the law Congress has already provided.

But there's a couple of other points to keep in mind about the Canadian model. One, it contains something which this committee proposed in legislation 3 years ago and which the permanent procurement bureaucracy vehemently opposed. And that was the public revealing of the weights of evaluation criteria in RFPs.

I don't know if there's an inclination in the procurement establishment to reverse the position of opposing that kind of public Sunshine during a procurement process, but that's an element that's in the Canadian model which our government's procurement people told this committee 3 years ago they couldn't live with.

The Canadian model also requires negotiation of profits. That's something we have had testimony about here earlier today, with American companies believing that if you're going to buy commercial goods and services, the government shouldn't be involved in the books of private companies but should instead rely on the fruits of full and open competition.

The fact is that the Canadian folks came down and talked to GAO and GSBCA, looking for guidance on how to run their system and how their pilot might be conducted, which is interesting, given the enmity that seems to exist toward the protest system within our system.

So I think there's a lot that's going to have to be looked at to see what about the Canadian system may bear fruit, what would not, how their pilot turns out, and then whether it's fruitful for us to consider it as a pilot here, given the differences in our economies and government.

Mr. HORN. You've all made some very sensible comments on this. And it's something the committee staff will pursue. I have a particular interest in this that goes back at least to the early 1960's, with the experience with Project Mohole, where that very question of weights on the evaluation, unknown to the people bidding on the project, determined who got the project.

The fact is, it was skewed in one direction by putting 60 percent of the weight on management rather than technology and science, which had been the basic criterion in the first project Mohole. And so I'm going to pursue that with interest.

I would ask counsel that somewhere in this Leinster-Cole-McKay exchange at the end on the culture of Canada and the culture of the United States, simply put in the figures of lawyers per capita in the United States versus barristers and solicitors per capita in Canada and let the readers, including the members who read the transcript, draw their own conclusion.

So I thank the panel for coming. It has been very useful testimony by each one of you. And we appreciate your staying this late.

We have one more panel to go, and we hope they haven't all taken planes to go overseas in the meantime. So thank you.

[Witnesses sworn.]

Mr. HORN. Let us begin with John Miller, from Gadsby & Hannah. Mr. Miller serves as chairman of the Section of Public Contract Law of the American Bar Association and is here today in that capacity.

STATEMENT OF JOHN B. MILLER, GADSBY & HANNAH, FOR THE SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION; ROBERT F. TRIMBLE, PROCUREMENT ROUNDTABLE; AND WILLIAM J. MIELKE, RUEKERT MIELKE CONSULTANTS, FOR THE COUNCIL ON FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICES

Mr. MILLER. Thank you, Chairman Horn. And thank you, and other members of the committee, for inviting us.

As the chairman mentioned, I am chair of the Section of Public Contract Law of the American Bar Association, and we appreciate very much the opportunity to appear before the committee today.

The Section of Public Contract Law is not an industry organization. Rather, we are a national organization of attorneys from government, from corporate counsel, from private law firms who represent both public and private sector clients, respectively, on each side of procurement transactions.

The section is governed by a Council with representation from government, from corporate counsel, and from private law firms. The officers in the council act, in effect, as a crucible in which the interests of the government, the public, and the private sector are considered, analyzed and balanced.

All positions taken by the Section of Public Contract Law before Congress and before executive branch agencies are first reviewed and approved by this Council in order to extend our reputation, which we believe is critical to us, for being balanced and reliable professional analyzers and problem-solvers relating to procurement issues pending in Congress and throughout the executive branch.

For example, since 1984 when the FAR was first issued, the section has commented on literally hundreds of changes in the Federal Acquisition Regulation. What I've brought before you just to give you some idea of this—this is just 6 or 7 of the last 11 years of comments.

We have committees that look at every Federal Register that comes out affecting the procurement system. We have substantive committees that look at these changes, that analyze them, that balance those changes between government and industry and private firms and make recommendations and comments on them.

We have also been very active commenting on legislation. We have special authority from the American Bar Association Board of Governors to comment on procurement regulations relating to procurement. But in the legislative area, we have no such authority. We have to go through a more complicated process. Usually, a request from Congress or from the administration is helpful to us in arranging for comments.

We were active in commenting on FASA when it was the Glenn bill, S. 1587. We have commented on every major procurement legislation in the last 30 years.

We have not previously taken a position on procurement integrity regulations or legislation, because prior to completing our comments in that area on procurement integrity, the Section 800 panel was formed, and we deferred to await their results.

We have active, ongoing projects, which is referred to at page 5 of my testimony, in the following areas: commercial items, possible modifications to TINA, possible modifications to the multiple award

schedule contracting program. We have active studies ongoing on the definition of claims and disputes in the bid protest area, in defense industry consolidation, including shrinkage of the defense industrial base, and cost accounting standard coverage and also on information technology procurements.

We have attached to our testimony today copies of all of the section's comments on the FASA implementation regulations that have been produced so far for public comment. We have a special group that looks at each one of these regulations as they come out implementing FASA. We are closely trying to be of assistance to OFPP in implementing that act.

Also attached is a recommendation made by a panel that we created last fall on International Procurements in the Technology Age, which does relate to the Buy America Act and the Trade Agreements Act and some recommendations we have for some administrative solutions to problems under those acts.

Rather than take the committee's time, I just would like to—on the details of that, what I would like to say is that we believe we are a tremendous, balanced resource to the Congress and to the administration, and we would like to continue in this role. We would be pleased to help the committee in whatever capacity that you think is most helpful. Thanks very much.

[The prepared statement of Mr. Miller follows:]

PREPARED STATEMENT OF JOHN B. MILLER, GADSBY & HANNAH, FOR THE SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman, I am John B. Miller, Chair of the Section of Public Contract Law, of the American Bar Association. With me is Rand L. Allen, Chair of the Section's Legislative Coordinating Committee. The Section appreciates this opportunity to appear before the Committee.

The work of the Committee and this Subcommittee is of central importance to the Section of Public Contract Law, because our Section's express Mission

> "is to improve public procurement and grant law at the federal, state and local levels . . . by contributing to developments in procurement legislation and regulations; by objectively and fairly evaluating such developments; by communicating the Section's evaluations, critiques and concerns to policy makers and government officials; and by sharing these communications with Section members and the public."

The Section of Public Contract Law is the only national organization of lawyers and professional associates with members from government, corporations, and law firms that is focused on procurement issues. Because of its unique position, the Section has an extraordinary duty to work for improvements in the procurement process. The Section's goal is simple, yet ambitious: to be a reliable, respected, national resource for balanced, unbiased, analysis and ideas for improving procurement laws at all levels of government.

I. THE SECTION OF PUBLIC CONTRACT LAW

The Section of Public Contract Law is not an industry organization—rather, it is a national organization of attorneys from government, corporations, and private law firms who represent public and private sector clients, respectively, on each side of procurement transactions. The Section is governed by a Council with representation from government, corporate counsel, and private law firms. The Section's Officers and Council act, in effect, as a crucible, in which the interests of the government, the public, and the private sector are carefully considered, analyzed, and balanced. All positions taken by the Section of Public Contract Law before Congress and Executive Branch agencies are first reviewed and approved by the Council, in order to extend the Section's reputation for balanced, reliable, and professional analysis of procurement issues pending in Congress and throughout the Executive Branch.

II. COMMENT ON PROCUREMENT REGULATIONS GENERALLY

For example, since 1984, when the Federal Acquisition Regulation ("FAR") was first issued, the Section has submitted hundreds of written comments upon the FAR and agency supplements to the FAR. Each day, our Regulatory Committee reviews the Federal Register for proposed changes to the FAR system and distributes copies of relevant proposals for independent analysis by Section committees. If written comments appear to be required, our substantive committees prepare draft comments for the Section's Council to review, debate, and revise prior to submission to executive agencies. In the last eleven (11) years, many hundreds of comments on the FAR and its supplements have been submitted by our Council in a continuing effort to improve procurement processes. The Section has been fully supported in this effort by the ABA's Board of Governors, through special delegated authority to submit comments to executive agencies on the FAR system.

These comments are collected periodically and published by the Section. Copies of these publications, which are voluminous, are being separately submitted to the Committee's staff.

III. COMMENT ON FASA'S IMPLEMENTING REGULATIONS

The Section is fully engaged in the review, analysis, and comment upon all regulations issued by the Office of Federal Procurement Policy related to the Federal Acquisition Streamlining Act of 1994. Copies of the comments submitted to date by the Section are attached.

IV. COMMENT ON PENDING LEGISLATION

Since 1965, the Section has regularly submitted comments on significant procurement legislation pending before Congress, through a more elaborate approval process within the American Bar Association called Blanket Authority. This process begins with analysis, debate, and approval within the Section's Council.

V. PRIOR COMMENTS ON RECOUPMENT AND PROCUREMENT INTEGRITY

The Section has previously commented upon regulations issued by the Executive Branch relating to the subject of recoupment and procurement integrity. We are in the process of collecting these materials and will forward a complete set to the Committee's Procurement Counsel.

VI. INTERNATIONAL PROCUREMENT IN THE TECHNOLOGY AGE

The Section Council recently adopted and submitted a report from its Panel on International Procurement in the Technology Age ("PIPTA") to the Administrator of the Office of Federal Procurement Policy. This report relates to procurement regulations under the Buy American Act and the Trade Agreements Act. A copy is attached for the Committee's information. [A separate copy of this report is already on its way to the Committee's Procurement Counsel.]

VII. OTHER ONGOING PROJECTS

The Section is in the midst of a broader review of procurement mechanisms now in use at the federal level, which involves significant work by its substantive committees. This process has not yet reached the stage where recommendations for further procurement reform have been adopted by the Section's Council.

Ongoing projects are listed below, in the hope that the Committee will advise which of these topics are of current interest to the Congress. We would be pleased to adjust our efforts to meet any request of the Committee to address specific topics so that we can be of greatest assistance to the Committee and its staff in its deliberations on procurement reform.

A. Commercial Items
   1. Possible Modifications to the Truth in Negotiations Act
   2. Possible Modifications to the Multiple Award Schedule Program
B. Claims and Disputes
   1. Definition of a "Claim"
   2. Implementation of "Statute of Limitations" for Government and Contractor "Claims"
   3. Jurisdiction of Boards of Contract Appeals and Court of Federal Claims
   4. Concurrent Jurisdiction of U.S. District Courts
C. Bid Protests
D. Defense Industry Consolidation
   1. Shrinkage of the Defense Industrial Base

2. Cost Accounting Standard Coverage of Contracts
E. Information Technology Procurement

VIII. SUMMARY

The basic goals sought by the Committee are those the Section has espoused—improving the FAR [and its predecessors], streamlining acquisition procedures, adapting to commercial buying practices, empowering contracting officers and contract officials. These goals are mainstream concepts in our Section. The Section's interests are fundamentally aligned with efforts by Congress to reform government procurement processes in a more functional, customer-oriented way and we are committed to advancing the procurement law through an open process in which the interests of the government, the public, and the private sector are understood and aligned.

We would be pleased to help the Committee in whatever capacity you believe is most helpful.

Thank you.

IX. ATTACHMENTS

A. Copies of Comments submitted to OFPP to date on FASA Implementation.
B. Copy of Report of the Section's Panel on International Procurement in the Technology Age.

[NOTE.—Due to printing costs, the above mentioned attachments can be found in subcommittee files.]

Mr. DAVIS [presiding]. Thank you very much.

Robert Trimble is next.

Mr. TRIMBLE. Yes. I'm Bob Trimble. I'm here representing the Procurement Roundtable, a nonprofit organization of 39 men and women who formerly served in the Federal Government with duties related to the procurement process. We serve pro bono as private citizens with the objective of advising and assisting the government in making improvements in this procurement process.

I'm pleased to note that our chairman is Mr. Elmer Statts, the Comptroller General for the United States for 15 years. And we also have as one of our members Mr. Frank Horton, who for 30 years served on this particular committee. These two men are great assets to our organization, but I would also say that the other 37 are outstanding individuals in their own rights.

We have been examining the procurement process since we were formed in 1984, with a view of making recommendations to the Congress and to the executive branch on how the process might be improved. We are deeply concerned that the process has become too bureaucratic and too convoluted to result in economic and efficient procurements for the United States.

We are pleased, however, to note the interest shown in Congress last year and the passage of the Federal Acquisition Streamlining Act of 1994. We believe that this is an admirable start in streamlining or otherwise simplifying the process.

But the Procurement Roundtable believes that much remains to be accomplished if the Federal procurement is to be simplified so as to provide an efficient and economic system for acquiring goods and services for the government. In other words, we believe that more needs to be done.

In the relatively short time that I have, I am going to summarize 5 of the 11 recommendations that we have made in our statement, which has been entered into the record.

First, we urge Congress to adopt a multiyear, rolling budget so that procurement programs can be managed more efficiently. The

Procurement Roundtable is convinced that the advantages of such budgeting by the Congress are significant in both dollar savings and in program management efficiency of the contracts that are awarded.

Second, we recommend that Congress analyze all socioeconomic statutes that affect procurement and repeal those that are not fulfilling the purpose for which they were intended or are interfering with stated goals to simplify the procurement process.

Third, we believe that the ethics rules should be greatly simplified. It is our view that Congress overreacted to the fraud, waste, and abuse problems of the 1980's and that the ethics statutes are now so delimiting that it is affecting the ability for the agencies of government to attract the outstanding people that should be attracted to them.

Fourth, we find the procurement of automatic data processing equipment to be among the most protracted and inefficient of all purchasing efforts, and we recommend that the Brooks Act provisions and the entire regulatory system created to implement that statute be updated and streamlined.

Fifth, we encourage open discussion on the long-standing debate regarding in-house versus private sector performance of federally funded activities. We believe that Congress should take a lead role in this inquiry. This subject came up earlier this afternoon, and it is sometimes referred to as "contracting out."

We're looking at this issue from a Constitutional standpoint to attempt to determine what is inherently government and what belongs in the private sector. It is our interpretation of the Constitution that things belong in the private sector if not specifically designated for performance by the Federal Government.

Time does not permit me to go into detail on all of my recommendations, 11 in number, nor of other projects that we have in process within the Procurement Roundtable. I have, however, attempted to summarize five of the more important ones, and I thank you for the opportunity to appear before your committee at this time.

[The prepared statement of Mr. Trimble follows:]

PREPARED STATEMENT OF ROBERT F. TRIMBLE, PROCUREMENT ROUNDTABLE

Good afternoon Mr. Chairman and Members of the Subcommittee. I am Robert F. Trimble, a former federal acquisition official and now a member of the Procurement Round Table, an organization dedicated to assisting the Government in making improvements in the procurement process. I am pleased to testify before your committee and thereby have the opportunity to provide you with Procurement Round Table views on additional initiatives to reform the procurement process.

HISTORY OF PROBLEMS

Criticisms of federal procurement started with the first expenditure of taxpayer funds for goods and services. In modern times such criticisms have become so severe and frequent as to shake the confidence of the public in the ability of the Government to perform its critical buying functions. Special commissions and numerous studies during the last thirty years have examined problems and made many recommendations for improving the procurement process.

An unfortunate reaction to publicized problems and deficiencies and indeed to many recommendations flowing from various government and private studies has been for Executive branch officials to write new regulations and Congress to pass new legislation to "solve" procurement problems. While such actions are understandable, even commendable in some circumstances, the layering of special purpose statutes and regulations have become a significant part of difficulties being experienced

by the current Federal procurement system. As far back as 1972, the Congressionally appointed "Commission on Government Procurement" cautioned that a multitude of statutes and regulations threaten a breakdown in the procurement process. However, in the intervening 23 years literally hundreds of new rules, regulations and laws have been added, yet practically none eliminated.

RECOGNITION THAT SOMETHING MUST BE DONE

There is an almost universal recognition that the procurement process has become far too complex to permit Government agencies to acquire goods and services in an efficient and effective manner and for all but the most sophisticated contractors to offer goods and services to the government. In Section 800 of the FY 1991 National Defense Authorization Act Congress mandated a detailed study on how to streamline and better codify acquisition laws affecting the Department of Defense. The resulting "Section 800 Panel" Report was submitted to Congress in January 1993.

During 1993, the Executive Branch under the leadership of Vice-President Gore conducted its own National Performance Review of ways to "reinvent" government including the procurement process. A principal recommendation of that review was to "streamline procurement" by rewriting federal regulations, bringing federal procurement laws up to date, using simplified purchase procedures for purchases under $100,000, and relying more on the commercial market place to meet government requirements.

RECENT REFORMS

Responses to concerns and recommendations identified in these reports have been commendable. The DOD established a new position of Deputy Under Secretary of Defense, Acquisition Reform, with the strongest possible mandate from Secretary of Defense Perry to streamline or otherwise simplify the Department's procurement process. The 103rd Congress made acquisition reform a major legislative objective, and in a rare degree of consensus the Legislative and Executive branches worked closely to craft a procurement reform bill. Industry, primarily through a multi association effort, also played a constructive role in the formulation of legislation known as the Federal Acquisition Streamlining Act of 1994 (PL 103–355), signed into law by President Clinton on October 13, 1994.

MORE NEEDS TO BE DONE

The Procurement Round Table has evaluated these steps to improve procurement in an effort to determine whether they are sufficient to achieve the shared goals for acquisition streamlining. While admirable progress has been made, the PRT believes that much remains to be accomplished if federal procurement is to be simplified so as to provide an efficient and economic system for acquiring goods and services for the Federal Government. In other words, more needs to be done.

This statement provides PRT's recommendations for improving the procurement/acquisition system by additional legislative and by additional administrative initiatives.

PART I ADDITIONAL LEGISLATIVE INITIATIVES FOR REFORM

1. Enact a Single Procurement/Acquisition Statute. While PL 103–355 has some good provisions, it does not correct the problem of a statutory framework that is too detailed, technical and complex. A single government-wide statute oriented to policies with authority granted to acquisition executives to exercise good business judgement in contract planning, awards and administration is essential to the establishment of an efficient and economical system. PRT's Model Federal Procurement Act Report (January 1994) offers a starting point for achieving this objective.

2. Adopt a Multiyear Rolling Budget. Over the past ten years, the Conference Board, the Packard Commission, an Ernst & Young survey, and special reports by the Secretary of Defense and the National Academy of Public Administration have all strongly recommended that Congress adopt multiyear budgeting as a way to deal with the turbulence associated with annual budgets. The PRT is convinced that advantages of such budgeting are significant in both dollar savings and program management efficiency.

3. Repeal of Certain Federal Socio Economic Statutes. The Congress made an important step at procurement simplification by raising the threshold for small purchase procedures to $100,000 and creating a "micro purchase" program in PL 103–355. Unfortunately, statutes such as the Davis Bacon Act and the Service Contract Act are applicable on all procurements above $2,000 and $2,500 respectively, thus offsetting some of the advantages of the higher small purchase threshold. As a mini-

mum, the thresholds for application of all "socio economic" provisions should be raised to $100,000. Serious consideration should be given to the outright repeal of those laws that are not fulfilling the purpose for which they were enacted or are interfering with the stated objective of the Federal Government to move toward commercial practices and products.

4. Readjustment of Ethics Rules. In the past Congress and the Executive Branch went further than necessary in imposing restrictive rules to protect against conflict of interest in the procurement process. These rules have unnecessarily restricted procurement and harmed the government's ability to attract and retain some of the nation's most competent people for Government jobs. The Section 800 Panel made numerous recommendations on ethics rules that were not adopted in the Federal Acquisition Streamlining Act. Redundant statutes on standards of conduct in Government procurement should be repealed and the Procurement Integrity Act should be greatly simplified.

5. In-house Versus Private Sector Performance. This is a controversial area with many political overtones. Reliance on the private sector is critical to procurement efficiency especially for services, and it has an important bearing on industrial preparedness. Statutes should be amended to state that it is the policy of the Government to rely on the private sector to the greatest extent feasible. Agency procurement procedures should be tailored to meet this policy goal.

6. Improve Procurement Professionalism. The importance of a highly qualified professional workforce cannot be overstated, especially in view of the complexities of Government procurement. Congress should take the necessary action to assure that civilian agencies are given the resources and tools to promote professionalism in their procurement workforces. Similar action was taken for DOD in 1991.

PART II ADDITIONAL ADMINISTRATIVE INITIATIVES FOR REFORM

1. Streamline the Competitive Negotiation Process. The current competitive negotiation process takes far too long to complete before the award of a contract: from six months to two years. Also, the preparation of elaborate proposals is too expensive for companies attempting to reduce costs and remain competitive (these costs can consume multi-millions of dollars). The entire competitive negotiation process must be simplified and shortened; and bid protest procedures should be examined for the purpose of adopting ways to reduce the incidence of protests. The PRT suggests a goal of 90 days from the issuance of an RFP to contract award.

2. Restructure Procurement of ADPE. The Brooks Act requires federal agencies to follow a separate procurement system for purchasing computer and other automated data processing (ADP) equipment. The General Services Administration has a virtual "monopoly" on issuing regulations covering these procurements, and on granting case-by-case delegations to agencies to conduct specific acquisitions. However, these ADPE procurements have been among the most protracted and inefficient of all federal purchasing efforts. PRT recommends that the Brooks Act provisions, and the entire regulatory system created to implement that statute, be updated and streamlined. Particular attention should be paid to (1) changing the way buying agencies and GSA define ADPE requirements; (2) substantially increasing existing regulatory thresholds; (3) reducing the time from solicitation through negotiation to contract award; and (4) minimizing the need for and ability to protest ADPE procurements.

3. Reduce or Eliminate Government Unique Data Requirements. An excessive number of reporting systems are required by DOD and the military departments in the acquisition of major defense equipment. Data accumulated by these systems is expensive and time consuming for both government and industry and is frequently not used. The requirement for extensive data collection inhibits many commercial firms from dealing with the Government because they do not have procedures in place to supply the data or they do not wish to expose their cost and technical data to potential competitors. The ultimate goal should be to manage all contracts by using data that each contractor collects in its own format rather than imposing additional government unique data systems on industry.

4. Use Pilot Programs and Pilot Industries. Executive Branch agencies should aggressively pursue all possible approaches to the development of simplified procedures that can be tested under pilot programs in an effort to reduce the cost of federal procurement. Agencies should use their best personnel and innovative techniques to break out of established ways of doing business. The Federal Acquisition Streamlining Act of 1994 authorizes experimentation by several Federal agencies with pilot programs, and the Defense Science Board has strongly recommended using specially designated industries for the development of new procedures.

5. Rewriting the FAR. The PRT does not agree with the National Performance Review recommendation to rewrite the FAR into "guiding principles". Such an effort would be unduly long and expensive and most likely counterproductive. It most likely would result in each agency developing and writing more detailed instructions of their own which would add further to the lack of uniformity in procedures followed by the different agencies. The time and effort could be better spent on clarifying or simplifying existing regulations.

This concludes my statement. I will be glad to answer your questions.

Mr. DAVIS. Thank you. The last witness is Mr. Mielke.

Mr. MIELKE. Good afternoon. Thank you, Mr. Chairman.

My name is Bill Mielke, and I am chairman of the Council on Federal Procurement of Architectural and Engineering Services, better known as "COFPAES." I would like to thank the subcommittee for the opportunity to appear before you today and share the views of the architectural and engineering community.

COFPAES is an umbrella organization of design professionals representing seven associations which are listed in my written testimony. Before summarizing the views of COFPAES, I would, however, like to take this opportunity to congratulate Chairman Clinger and this committee for their leadership in streamlining and simplifying this Federal procurement process.

COFPAES shares the committee's interest in developing a more efficient, economical, and effective acquisition system.

I would like to briefly address four following areas: No. 1, the qualifications-based selection procedures for architectural and engineering related services; two, the practical issues that surround the design-build approach to Federal projects; three, the repeal of the small business competitiveness demonstration program; and four, some of the regulatory language issued by the administration to implement the next round of procurement reform.

First, let me begin with an issue of preeminent importance to our professions, that being the selection of design professionals based on their qualifications and experience. COFPAES strongly opposes any effort to narrow the scope of the existing qualifications-based selection legislation.

We understand and are pleased to find out that as of this morning, based on information received from the Office of Federal Procurement, that the administration will not be forwarding modifying language of the QBS process.

Let me turn my attention to design-build. This is an issue that has been the subject of extensive discussions within our industry, the Congress, and the administration. While COFPAES has had a long-standing preference for QBS in acquiring design services as a normal part of the traditional design bid build process, we do recognize that various Federal agencies have begun to use design-build as an alternative project delivery strategy.

When it is appropriate that design-build be used, COFPAES supports this alternative project delivery process, providing that it protects the interest of the government agency, the design professional, the contractor, and the public.

Mr. DAVIS. Sorry to interupt, but there will be a brief recess while we vote.

[Recess.]

Mr. HORN [presiding]. The recess will be over at 6:35. Where were we when we stopped? Mr. Mielke. Very well.

Please proceed.

Mr. MIELKE. Thank you, Mr. Chairman. I was beginning to talk about design-build, which we feel is an issue that has been the subject of extensive discussion within our industry, the Congress, and the administration.

While COFPAES has held a long-standing preference for QBS in acquiring design services as part of a traditional design bid build process, we recognize that various Federal agencies have begun to use design-build as an alternative project delivery strategy.

When it is appropriate that design-build be used, COFPAES supports this alternative project delivery process, providing that it protects the interests of the government agency, the design professional, the contractor, and the public. We do not, however, support its use for the construction of roads and bridges.

To be acceptable, the design-build methodology must contain certain elements. First, a registered design professional either in-house or retained by using the QBS procedures must represent the government client throughout the design and constructing process.

Second, the design professional should develop the preliminary design to a sufficient level of detail in order to provide an adequate description of the project's scope and level of quality expected by the government agency from the design-build team.

Last, the design-build team must include registered design professionals who are selected based on their qualifications and expertise. Within the context of those parameters, the design-build team would then be selected, using a two-step selection process in which the teams are short-listed based on their qualifications, and then they compete on a number of predetermined criteria.

Turning to another issue regarding small business, as you know, the AE profession is made up primarily of small firms like my own. For that reason, we have given extensive thought to procurement laws governing small business set-asides.

According to published drafts of the administration's FASA II proposal, the bill will recommend the repeal of the small business competitiveness demonstration program.

COFPAES would strongly oppose such action. The small business program allows small and large business to compete successfully in the free market. It makes no sense to repeal this program while it is working and before our industry, the AE industry, has been analyzed accurately.

We are dismayed that the administration has failed to count AE subcontracts in an industry where a substantial amount of our work is performed as a subcontractor. Failure to collect this data is a violation of the requirements set out in the 1992 amendment.

Mr. Chairman, if the small business program is repealed, the consequences will be dramatic for many elements of our industry. Agencies would undoubtedly revert to the bad habits which predated the enactment of the demonstration program itself. This is not a free market approach which supports full and open competition.

Before concluding, let me touch on two concerns that we have with the implementation of last year's procurement reform bill. We ask that the committee be vigilant in ensuring that Section 1004, task and delivery order contracts, not be implemented in a manner

that would establish a preference for multiple awards for all task and delivery order type contracts, regardless of the type of service or product provided.

While some types of services may lend themselves to this procurement approach, others such as hazardous waste engineering and remediation, do not. In our view, the unqualified preference for multiple awards will not only make the process unduly costly and time-consuming for the government and for engineers, but it will also endanger achieving the goals of Congress, which is cheaper, faster, better.

We are also concerned about a proposed regulation on travel costs. The proposed rule will impose a significant administrative burden on the private sector and add cost to the government client, without any apparent benefit. It will also require the establishment of a separate accounting system for work on Federal AE contracts that include any travel by people in the AE business.

Such a process will discourage many firms from choosing to compete for Federal business and thereby reduce the government's access to some of the best talent available.

We thank you for the opportunity to present our views before this subcommittee, and we look forward to working with you and your staff to improve the Federal procurement process.

[The prepared statement of Mr. Mielke follows:]

PREPARED STATEMENT OF WILLIAM J. MIELKE, RUEKERT MIELKE CONSULTANTS, FOR THE COUNCIL ON FEDERAL PROCUREMENT OF ARCHITECTURAL/ENGINEERING SERVICESU

Mr. Chairman, my name is William Mielke, and I am pleased to appear today as chairman of the Council on Federal Procurement of Architectural and Engineering Services ("COFPAES") before the Subcommittee on Government Management, Information, and Technology of the House Committee on Government Reform and Oversight.

COFPAES is an umbrella organization of design professionals from the following associations: the American Congress of Surveying & Mapping; American Consulting Engineers Council; American Institute of Architects; ARTBA Planning and Design Division; American Society of Civil Engineers; American Society of Landscape Architects; and NSPE/Professional Engineers in Private Practice.

Among the active participants in the COFPAES leadership are individuals who work within these several disciplines in the public and private sectors.

COFPAES welcomes the opportunity to participate in this hearing and to present its views on the impact of the proposed legislation on the acquisition of the services of design professionals. We will address four areas: (1) the qualifications based selection process of 40 USC 541 et seq.; (2) the practical issues that surround the design build approach to federal projects; (3) the proposed repeal of the successful "small business competitiveness demonstration program"; and (4) some of the regulatory language issued by the administration with respect to FASA I.

QBS PROCEDURES ESSENTIAL FOR DESIGN SERVICES

COFPAES strongly supports the qualifications-based selection of architects and engineers required by 40 USC 541 et seq. Any effort to narrow the scope of the QBS legislation, to limit its applicability—only to certain design contracts related to physical construction, or only to certain contracts performed by a licensed or certified architect or engineer, or only to contracts over the SAT threshold—is severely misguided. Such changes would undermine the policy to protect the public health and safety on which the QBS legislation is focused.

The right of the public to insist on the use of the best qualified design professionals for federal A/E services and related services motivated the Congress in 1972 to codify these special procedures for QBS awards. 40 U.S.C. 541(c).

We have heard that the administration may propose to redefine A/E services to limit the application of QBS procedures to (1) design projects over the SAT threshold, (2) those projects related to real estate construction, or (3) those projects related

to performance by an architect or engineer. With the mandate to protect the public health and safety, by in large our clients have recognized the importance of using QBS procedures for all appropriate design contracts that fall within the current definition of "A/E and related services." Under current law, architectural and engineering services are defined in a manner consistent with the evolution of technology and increasing complexity in the design professions. The definition recognizes that all contracts for architectural and engineering and related services are to be procured through the two step QBS process.

The rationale for this policy was to assure that contracts for design services would be negotiated on the basis of demonstrated competence and qualifications for the services at a fair and reasonable price. The legislative history of this definition clearly encompassed "incidental", "related", and "ancillary" services, such as surveying, mapping, and landscape architecture. See, e.g., Cong. Rec. Daily ed., October 12, 1988, P. 10056 (remarks of Mr. Livingston).

The General Accounting Office confirmed that the 1988 amendments served to clarify the definition of service by identifying those services "of an architectural and engineering nature to which the act applied"—including professional surveying and mapping services. See Whiteshield, Inc., 89–2 CPD § 392 (1989).

The draft FASA II proposal would narrow the scope and usage of QBS procedures by the Federal Government. It is clear that Congress recognized the importance of "related services" including the surveying and mapping professions, as design services in the 1988 amendments. Efforts to narrow the design contracts subject to coverage under the QBS legislation and to rely on simply a price competition would deprive citizens of the protection derived from selection based on qualifications and experience for such services. The House and Senate confirmed the inclusion of non-construction related services, including mapping and surveying in the broad definition of "related-services" to be acquired under QBS procedures. (Pub. L. 92–582).

If Congress were to support any such changes to QBS and, thus, limit the application of the QBS process only to those procurements higher than the simplified acquisition threshold, the result would be disastrous. It is especially troublesome that a $1 million threshold for small business set-asides for construction contracts should be added without any apparent authority or consultation with the design industry. Failure to use QBS on design contracts under the SAT would result in major upheavals for contractors doing small A–E projects, and compromise quality for money in design or design-build projects. Fees of design professionals on substantial jobs can often run less than $100,000.

With reference to the threshold, agencies may well resort to manipulation of needs. In order to avoid the QBS procedures, an agency might break one large procurement into smaller pieces and therefore, place themselves outside the QBS procedures.

DESIGN-BUILD INITIATIVE

Mr. Chairman, let me turn my attention to design-build, an issue that has been the subject of extensive discussion within our industry, the Congress, and the administration. While COFPAES has held a long time preference for QBS in acquiring design services, we recognize that various Federal agencies have begun to use design-build as an alternative project delivery strategy. When it is appropriate that design-build be used, COFPAES supports this alternative project delivery process providing that it is conducted in such a way that protects the interests of the government agency, design professional, contractor, and the public. Many members of our coalition believe that this methodology should not be used for the construction of roads and bridges. COFPAES believes that any acceptable alternative project delivery process should contain certain basic elements:

- a registered design professional (either in-house or retained) Should represent the government throughout the entire project. The design professional, if retained from the private sector, should be selected based on their qualifications and experience according to the requirements of the 40 USC 541 et seq.
- the design professional should prepare the project scope, description, function, standards, design criteria, analyses, reports and cost estimates for the proposed project. A sufficient level of detail should be produced to provide an adequate description of the project scope and level of quality expected by the government agency.
- the design-build team must include registered design professionals who are selected based on their qualifications and expertise.
- the selection of a design-build team should include two steps. Step one, evaluation of the teams, would be based on on the qualifications and experience of the competing teams. Step two would include a detailed evaluation of the pro-

posals from the short-listed teams. The selection of the top design-build team would be based on pre-determined criteria established for the specific project, such as technical expertise, past performance, management capabilities, design quality, approach, schedule and cost.

• Federal agencies should fully develop and disclose their overall procurement process and project decision making process, including any special contractual provisions, all totally integrated to allow participants to fully evaluate the costs, benefits and risk aspects of their participation on individual projects. Those participants selected to submit a detailed proposal should receive a reasonable stipend for their submission. In addition, the selection process should be consistent throughout and applicable to all Federal agencies and departments.

REPEAL OF SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM UNJUSTIFIED

Background

In 1988 Congress created the small business demonstration program (sec. 712 of the Business Opportunity Development Reform Act of 1988, 15 USC 644 note). Its purpose was three pronged

• to determine whether small businesses could compete successfully on an unrestricted basis;

• to determine whether the use of targeted goaling techniques could work in those industries where participation had been traditionally low; and

• to determine whether the use of full and open competition in certain designated industries has an adverse impact on small business participation.

The statute, as amended, and its implementing regulations designated architectural and engineering ("A/E") services as one of the four industry groups for awards based on open competition. Originally, for each of the four industries the objective was to demonstrate that at least 40% of all contract awards in these areas would go to small business on an open competition basis over the period from January 1, 1989 to September 30, 1992.

At the time of the reauthorization in 1992 the program was extended to September 30, 1996, and the goal for A/E services was dropped from 40% to 35%. Congress mandated this reduced goal in recognition of reporting difficulties and inconsistency in agency data. In addition the 1992 amendments called for the establishment of a subcontractors reporting system for A/E subcontracts awarded under the qualifications-based selection process of 40 U.S.C. 541 et seq. To better measure the level of A/E participation in Federal contracts.

Proposed repeal of SBCDP Ignores the Success of the Program

Ironically, the proposal to eliminate this program comes at a time when the demonstration has been generally quite successful. In each participating agency significant increases exist in small business awards to three of the categories. Yet, problems continue to plague the A/E services arena. The 35% goal for A/E firms has not been met for several reasons. The most egregious of these has been the failure to exclude certain awards which were clearly not QBS solicitations from tabulation as A&E services. This resulted in a distortion of the agencies' tally. In addition, inconsistent reporting, incomplete, and inaccurate information proved less than useful in attempting to calculate the true level of A/E participation.

Repeal of SBCDP Program Undermines Full and Open Competition

In the wake of data that show that small business firms can compete successfully in the free market, it is absurd to propose repeal of this program while it is working and before the A/E industry has been analyzed accurately.

In particular, the design community is dismayed that the administration has failed to count A/E subcontracts in an industry where a substantial amount of work performed by our member firms is performed on a subcontract basis. This is especially true for the small businesses. Failure to collect this data was a blatant violation of the requirement set out in the 1992 amendment.

Mr. Chairman, I would add, moreover, that counting dollars rather than actions also minimizes the true value of small A/E firms. For many of our members the number of jobs that they win determines the ability of the firm to remain competitive.

Mr. Chairman, we are compelled to ask what is the motivation of those who wish to terminate the SBCDP program? Having demonstrated that open competition produces positive results for small business, we believe that the SBCD program should be maintained and not repealed by the Congress.

Mr. Chairman, if the SBCDP program is repealed, the consequences will be dramatic for many elements of our industry. Agencies would undoubtedly revert to the

bad habits which pre-dated the enactment of the demonstration program. Basically, agencies would exclude large businesses from any participation in Federal A/E contracting and would rely on the "rule of two" to make awards only to small business. This is not a free market approach.

Ease of Administration is Insufficient Justification for Repeal of the SBCDP

The administration's apparent rationale for the proposed change is to "reduce the labor intensive monitoring and reporting burden on the agencies".

Mr. Chairman, this argument is disingenuous and dishonest. If the proposers believe that the program is a success, why change it. Since the SBCDP confirms the ability of the free market to establish a high participation rate among small businesses, is it not appropriate that it be praised rather than rejected?

The suggestion that reinstitution of set asides for A/E firms will be helpful fails to recognize that the heart of the problem in this industry category continues to be the erroneous classification system used by many agencies. Moreover, the principal focus of the SBCDP is to allow the free market to operate in the selection of qualified firms. It provides for natural competition among firms and belies the need for the artificial barriers of set-asides.

As further justification, the proposers assert that there is no damage to other small business programs such as the 8(a) program, the SDB set-asides, and the simplified acquisition threshold with its small business reserve—for all contracts under $100,000.

Mr. Chairman, the proposers fail to recognize that the programs, aimed at supporting the minority small business community, were already exempted from the scope of the SBCDP itself.

Next, the proposers argue that the rule of two would not be applicable to the three designated industries where the 40% goals had been reached.

The fact that over 40 percent of the contracts were awarded under the SBCDP to 3 categories of small businesses does not mean that, in the absence of the program, the award levels would continue. With respect to architectural and engineering services, the current use of set asides has not produced any significant rise in the numbers of contracts awarded. There is no indication how the proposed effort will differ.

Finally, the proposers suggest that a less onerous program could be developed to support A/E contracts. Based on the legislative history of the original bill and the reauthorization legislation, it is clear that Congress intended for the free market to operate to the maximum extent possible in sorting out contract awards among companies of varying sizes in industries dominated by small businesses. Simplification of the reports as opposed to repeal of the program certainly would meet this objective without throwing away the entire program.

Mr. Chairman, COFPAES opposes this repeal legislation and respectfully suggest that these issues need more careful analysis before any action is taken. For example, an alternative approach might be combine repeal of the SBCD program with repeal of all the provisions with respect to small business set-asides. Under these circumstances, the repeal of both statutes would level the playing field and permit market forces to sort out the relative merits of each competitive proposal without artificial procedural restraints.

With the elimination of set asides, acquisition of these services could move forward on the basis of full and open competition.

Other elements of the FASA II Legislation Repeal 6% Limit Fees

Mr Chairman, another provision of the draft FASA II bill would repeal the 6% limit on fees for architects and engineers. Under current law fees for a-e services are limited to 6% of the total project price. By lifting the cap on such fees, the level of fees on a negotiated contract would revert to the test of reasonableness in the Federal acquisition regulation.

COFPAES approves this provision and welcomes the opportunity for each project to be judged on its merits as to the appropriate level of fees. It is likely that, if this provision is enacted, regulations will need to clarify the appropriate guidelines for calculating the reasonableness of such fees. Although it is useful to see the administration take a lead on this aspect of the proposal, COFPAES still holds serious reservations about the remainder of the provisions discussed above.

Orders Regulation on Task and Delivery to Distinguish Routine and Extraordinary Services

Mr. Chairman, before concluding let me focus on some of the regulatory language proposed by the administration to implement FASA I. Our interpretation of section 1004, task and delivery order contracts, is that it establishes a preference for multiple awards for all task and delivery order type contracts, with follow-on

recompetition for all items delivered, regardless of service or product provided. While some types of services and products (e.g., off-the-shelf hardware, day-to-day administrative services) may lend themselves to this procurement approach, others do not. Specifically, in hazardous waste engineering, remediation and construction associated with remediation, substantial uncertainty exists throughout the cleanup definition and remedy execution phases. Both cost and level-of-effort often are not specifically quantifiable until at or near completion of the remediation. In fact, early fixed-price approaches were discarded in favor of cost-plus-award-fee contracts with segmented task or delivery orders to address specific job requirements. Rather than being a contract approach with shortcomings, the task and delivery order approach to environmental remediation evolved as an innovation to address the undefinable nature of the work. This contracting approach facilitates appropriate site-specific actions and efficient program management. Consequently, funds are wisely applied and unnecessary expenditures are eliminated. This procedure has been used by both defense and civilian agencies.

Depending on how the implementing guidance and accompanying regulations are drafted, the original intent of FASA I to streamline the process and make the best use of an already strained and diminishing government resource (people and dollars) may not be realized. In our view, the unqualified preference for multiple awards will not only make the process unduly costly and time-consuming for the government and for engineers, but it also will endanger achieving stated environmental program goals of "cheaper, faster, and better".

Mr. Chairman, let me strongly urge you to review section 1004 of FASA in light of these expressed concerns. Several mechanisms were built into the statute that, with proper implementing guidance, would allow Federal agencies to continue what has been a very successful approach to contracting for environmental remediation. When it makes sense to award multiple contracts, by all means do so. But, when conditions are such that the process becomes contractually more difficult, more expensive, and more time-consuming with no improvement in quality, perhaps one should question the value of a blanket "preference" for one contracting approach.

Travel Cost Regulation Creates Unnecessary Duplicative Recordkeeping

We are also concerned about a proposed regulation on travel costs. We are quite concerned that implementation of the proposed requirement for a contracting officer to approve of a separate procedures for tracking travel costs will impose a significant administrative burden on A/E firms and add costs to the customer without any apparent benefit to the government. It will also require the establishment of a separate accounting system for work on Federal A/E contracts that include travel.

In summary, challenges to the QBS legislation focus on the very essence of contracting for A/E services. The procurement community is unanimous in its commitment to maintaining the QBS selection procedures for all A/E services and related-services, and to assuring its application at all contract levels irrespective of dollar amount.

Mr. Chairman, we thank you for the opportunity to present our views before the subcommittee. We look forward to working with you and your staff to improve the Federal procurement process. We are prepared to respond to any questions that you or members of the subcommittee may have.

Mr. HORN. Thank you very much for all of your comments. I had a chance to glance through some of them before the hearing began and a little since coming back.

Let me ask one or two questions. Mr. Trimble, you've got a very rich procurement experience that you bring to this hearing, as well as you and your colleagues in the Procurement Roundtable, of which you are vice chairman. And Elmer Statts, who I've known, I think, for 35 years, former Comptroller General, deputy director of the budget, as chairman brings a rich experience.

I wonder given that background—and you heard maybe the exchange with Mr. Spratt and some of the people of the previous panel—what are your views on the professionalism of the acquisition workforce in the Federal Government? Do you have a specific proposal as it relates to them and the upgrading, training, or anything else, perhaps, the Roundtable has been concerned about?

Mr. TRIMBLE. Yes. The Roundtable believes that the professionalism with the procurement workforce is one of the most important aspects.

As I told the Secretary of the Air Force when I was working for him in the early 1970's, I could take a poor contract and use a good contracting officer and come up with an outstanding procurement. But I could have the most outstanding contract in the world and a relatively poor person, and I would have a relatively poor procurement.

I think that the professionalism of people is extremely important. Now, having said that and having served in procurement as a procurement contracting officer for approximately 36 years, I come away with pride believing that the Federal Government has a large number of outstanding, capable, dedicated people.

Part of the real problem, however, is that of having to overcome the many rules and regulations. Back in the 1950's and 1960's, I prided myself with running the contracting function based upon good, solid business judgment. Today, it's very difficult for these men and women to do that because they are restricted by so many statutes and rules and regulations.

And furthermore—and this is particularly important—they have been criticized so much by the press and by Congress and others for faults and mistakes that they have made that they are gun-shy. I think that we have to overcome that.

The Department of Defense has a good program for advancing the professionalism of the people in defense. We are encouraging from the Roundtable that Congress provide for the same provisions for the civil agencies to have a well-structured program to add to the professionalism of the people in these agencies.

Mr. HORN. That's very helpful and very well put. You worked, I take it, for the Air Force for a good number of those years?

Mr. TRIMBLE. Yes. I was in the Air Force for 30 years, and I ended up as the director for procurement policy, the highest position of procurement in the Air Force, when I retired from there in 1975. I later went to the Office of Federal Procurement Policy. I served 4 years in the Office of Secretary of Defense in procurement, and I served 8 years with Martin Marrietta Corp. as their vice president for contracts.

Mr. HORN. You've seen it from both sides.

Mr. TRIMBLE. I've seen it from both sides.

Mr. HORN. Very good.

Representative Maloney.

Mrs. MALONEY. Thank you for your testimony. And we are fortunate to have so many professionals who really understand the system here.

I would just like to ask you, Mr. Trimble and others, if you have any comments on the administration's draft changes to the bid protest system or the current bid protest system.

Mr. TRIMBLE. I will defer to the attorney first.

Mr. MILLER. I think you should never defer to an attorney first. That's the very first rule. But I appreciate it. Thank you.

We have not taken a position on the administration bill because how we're structured, we have to go through our council structure. We have government people and——

Mrs. MALONEY. What do you think of the current bid protest system? Do you think it's working? Is it cumbersome? What is your feeling about the current system?

Mr. MILLER. We filed comments in support of FASA's amendments to the bid protest procedures before GSBCA and GAO. And we believe that all of our recommendations—a lot of our recommendations were already in the statute. We're very pleased with the statute. We have not analyzed the new bill.

Mr. TRIMBLE. May I respond from the Procurement Roundtable? We have discussed this. We are of the opinion that the changes were good in FASA. We believe that the General Accounting Office is doing an outstanding job. However, we believe that the government must work to reduce the incentives for contractors to protest.

Mrs. MALONEY. How do you suggest we do that?

Mr. TRIMBLE. We are not real clear right now. I wish I could give you a good answer to that, but we are encouraging the Federal Government to look into and see if there aren't ways that we can encourage a better working relationship between government and industry, so that there will be fewer bid protests.

Mrs. MALONEY. You spoke very movingly about the professionalism and the need for professional contracting officers and how they have been sort of attacked and this, that, and the other. How do we build these officers up and make them stronger so they'll make better—and be willing to take risks to stand up for what they think is right in the system and become better contracting officers?

Mr. TRIMBLE. Very difficult. First of all, we think that we need college graduates as a minimum. And we are concerned that a number of the people are promoted up through the system, and they don't have the prerequisite education.

Having had a number of people working for me, I found out that lawyers made good contracting officers. But I also found one time that one of my best was a historian. So it is more of a function of the individual.

But after you get good people, you need to train them well and then—very important—the top managers and the headquarters have to back up their people. They have to say, "Unless you make a heinous mistake, we are going to defend and protect you."

I felt that I had this type of backing when I was working in the field. And I do believe that the support of the higher headquarters or the upper structure of management is very important to give these people the confidence that they can make the decisions that are necessary.

Mrs. MALONEY. Mr. Trimble, given your vast knowledge in procurement, how would you suggest we should improve the system?

Mr. TRIMBLE. How to improve the system? Our basic premise is that of simplification. And we think that the government is moving in the right direction.

I just wish that when I was in the Office of the Secretary of Defense back in the 1978 to 1982 time period, that I had had the backing that Secretary Bill Perry is giving to those people over there and the backing of Congress. I believe that the climate is ripe now, and I believe that we are moving toward a more efficient system.

Mrs. MALONEY. Thank you very much.

Mr. MIELKE. If I might just add in response to your question, the architectural and engineering community is not subject to the bid protest rule because of a system for selection and procurement in that industry that has existed since 1972.

And that is that you select engineers and architects based on their competence and experience, you develop a scope with the best qualified architect and engineer, and then, the selection of that person is made.

There are very few bid protests in that industry because of the fact that you finally have defined what the person is going to do for you, and you've picked the most qualified person.

Mrs. MALONEY. Mr. Chairman, may I request that ranking member Collins' testimony be submitted for the record?

Mr. HORN. Certainly.

Mr. HORN. Thank you.

Mr. HORN. This is her opening statement?

Mrs. MALONEY. Yes.

Mr. HORN. Yes. Very well.

[The prepared statement of Hon. Cardiss Collins follows:]

PREPARED STATEMENT OF HON. CARDISS COLLINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, as you know less than six months ago we passed the Federal Acquisition Streamlining Act of 1994 (FASA), which all of us would agree is the most comprehensive government-wide acquisition reform effort in over a decade. This Act struck a critical balance between the need for government-unique policy requirements imposed on Federal procurement and the need to lower the Government's cost of doing business. We accomplished this by increasing the Government's use of commercial practices; by creating a new category of high-volume, low value Federal procurement through streamlining rules and regulations; and by improving access of small business to Government contracting opportunities.

I realize some people view the new political realities up here as a green light to rush headlong into more sweeping procurement reform. But I would urge caution, Mr. Chairman. First of all, much remains to be done by this Committee, if FASA is to become the historic procurement reform bill we envisioned last year. There are very important and controversial issues that FASA regulations must address and which this Committee should oversee.

For example, the FASA regulations should address what constitutes a "commercial end item" under the bill. This definition will have profound consequences for government procurement. Under FASA, contracting officials in the Federal government have sweeping discretion for selecting commercial end items, under $100,000. The scope of that discretion is bounded almost entirely by how we define "commercial end item."

This is just one example of literally thousands of critical issues that must be decided over the coming months if FASA is to work. I believe this Committee should spend most of its time working with the Office Of Federal Procurement Policy, Federal agencies and private businesses to ensure this legislation works.

While I applaud the Administration for its speed in getting out regulations, I would note that quick regulations do not necessarily mean good regulations.

Second, with FASA we are now asking Federal agencies to undertake a sea change in the way they perform Federal acquisitions. To add additional responsibilities on top of the sweeping changes that are now being implemented should be done with the utmost caution and care.

I know there are those who see this as an opportunity eliminate the Brooks Act, and to gut the GSA Board of Contract Appeals. Many are looking to cripple our procurement integrity statutes. Such approaches are shortsighted and dangerous. Have we forgotten so soon about the procurement scandals of "Operation Ill-Wind" and Wedtech? Have we forgotten about the Federal government's responsibility to ensure a level playing field and to ensure fair and open competition for the receipt of Federal dollars?

Mr. Chairman, over the next 10 years, 85 percent of all new jobs in this country will come from small businesses. If we establish procurement policies which lock out

our small businesses in favor of speedy procurement, we will significantly undermine our nation's competitiveness.

I come to today's hearing with an open mind, and a willingness to discuss serious proposals to streamline our procurement process. However, I have seen some draft proposals which quite honestly do not pass the laugh test.

One proposal I have read would prohibit protests below the simplified acquisition threshold of $100,000. Besides the obvious injustice to small businesses, it would severely damage "full and open competition" for smaller contracts. It would also put additional pressure on contracting officers to artificially break up a procurement into separate smaller procurements in order to fall below the threshold. The percentage of federal procurement below the simplified acquisition is about 75–80 percent, so the majority of Federal procurements would be protest-proof.

Where a vendor in a small procurement has been wronged in some way and feels strongly enough about it to protest, that vendor should have the ability to do so. In addition, where protests are filed over small procurements, the protests tend to be small in scope, so that they can be litigated quickly and with minimal expense.

Another poorly conceived proposal is one to permit a pledge from businesses not to protest. Despite lip service to the contrary, the purpose for this proposal can only be to make offerors think that such pledges will enhance their chances of receiving Federal contracts.

Such a coercive proposal would undercut the integrity of our procurement system. It will be impossible for agencies to convince unsuccessful offerors that their unwillingness to waive their protest rights did not play a role in an agencies failure to award them a contract. Thus, the perception would be created that cost and technical expertise no longer determines the award of contracts. Such a system fosters abuse and undermines the public trust.

Mr. Chairman I hope that today's hearing will focus on several serious proposals to streamline our process system. I look forward to the testimony.

Mr. HORN. Let me just say in conclusion, there's a number of questions we would like to ask you. We have a problem on the floor, and I'm very conscious of people's time. The counsel, Ellen Brown, will furnish you those questions. We would be most grateful if you would take the time to respond.

For example, I'm interested, Mr. Trimble, in what you feel are the characteristics of the effective procurement acquisition official. And I don't want to ask you to respond to that now, or I'm going to miss a vote for the first time this year, and I don't intend to do that.

I would certainly welcome the comments of all of you on some of these questions. A number of them have come up from Members over the years, and it certainly is relevant to see if there's any further action that's needed on the FASA proposal.

I want to thank you for waiting this late at night. And if you come before us again, we'll put you on the first panel so you can catch whatever plane you need. But we're very grateful for the wisdom and the thoughtfulness you've brought to this hearing, and we thank you for staying with us this long. It's going to be very beneficial to our colleagues, who we will force to read every word of the record. Thank you very much.

[The information referred to follows:]

FOLLOW-UP QUESTIONS ANSWERED BY ROBERT TRIMBLE, PROCUREMENT ROUNDTABLE

Question. Some in industry have claimed that certification requirements necessary for contracting with the Federal government are a major burden, add significant non-value added costs, and over-criminalize the procurement system. Do you agree? Do you believe these requirements, both administrative and statutory, should be eliminated?

Answer. Yes, they are a burden. I generally favor elimination, but believe we need professional judgement before all are eliminated. Some could be retained.

Question. In order to make the government purchasing system more efficient, it is important that agencies make smart "make or buy" decisions. Should Congress

provide a statutory foundation for the Federal government's reliance on the private sector for its needed goods and services?

Answer. Yes

Question. Included in Vice President Gore's National Performance Review is the following statement: "It is an odd fact of American life that we attack monopolies harshly when they are business, but embrace them warmly when they are public institutions." Does the current administrative policy allow the Federal government to determine annually how to receive the maximum benefit from acquiring goods and services? If the policy so provides, is it being done? If it is not being done, why not?

Answer. I believe that there is an adequate "make or buy" policy at the contracting officer level, but contracting officers cannot enforce the policy. There are too many vested interests at much higher levels, even the Congress, that result in protection for the public institution, not the private sector. This subject needs greater Congressional attention.

With that, this hearing is adjourned.

[Whereupon, at 6:50 p.m., the committee meeting adjourned, subject to the call of the Chair.]

[Additional information submitted for the hearing record follows:]

PREPARED STATEMENT OF PAUL H. SCHWEIZER, SCHWEIZER AIRCRAFT CORP.

I. INTRODUCTION

Schweizer Aircraft is pleased to have the opportunity to present its ideas on how government contracting can be improved for small business in the aerospace community. Although dominated by giants such as Lockheed, Boeing, and United Technologies, we are convinced there is an important niche for small business in this industry. Unfortunately, because of bitter experiences on two recent military aircraft procurements, Schweizer Aircraft will look long and hard before it again pursues another competitively bid military aircraft program. If our experience is typical, it is a sad loss because I believe small businesses such as Schweizer can provide an innovativeness, enthusiasm, and entrepreneurial spirit that simply does not exist in large corporations.

I understand that my purpose in being here today is to provide recommendations on how the system can be improved. To understand how my Company's perspective has evolved, however, it is necessary to summarize our experiences on two recent military aircraft procurements.

II. BACKGROUND—SCHWEIZER AIRCRAFT CORP.

Schweizer Aircraft is the last of the family owned aircraft companies that were started before World War II. We take pride in our capability to design, tool, and manufacture a wide range of aerospace products. Schweizer has a skilled, dedicated work force of 430 employees and produces high quality and cost competitive fixed wing aircraft, helicopters, and subcontracted components.

The story of Schweizer Aircraft is the story of America—sons of immigrant parents become enamored with aviation after Lindbergh flies across the Atlantic; in 1930 they design and build a glider in their garage and teach themselves to fly; they build a second, a third, etc.; Company incorporates in 1939; war effort provides opportunity for diversification and expansion; Company continues to grow and develop despite ups and downs of the industry; Company transitions to second generation of Schweizers; new development programs (and large investments) posture Company for growth in a difficult and changing market place.

Between 1950 and 1980, Schweizer Aircraft established itself as a world leader in the manufacture of sailplanes and agricultural aircraft. Schweizer Aircraft's business has never remained static and today our principal products include piston and turbine-powered helicopters, special purpose reconnaissance aircraft, and subcontracted components for the major aerospace companies. Since its inception, the Company has produced in excess of 5,500 aircraft and they are now operated in more than 70 countries around the world.

III. EXPERIENCE WITH RECENT PROCUREMENTS

There are two military aircraft procurements that need to be explained in order to understand Schweizer's recommendations. The first is the US Air Force EFS (Enhanced Flight Screener) program that was competed in 1992. The objective of this program was to select a replacement for the Cessna T–41 as an abinitio training

aircraft. Eleven companies from around the world competed. Schweizer Aircraft bid a highly modified derivative of the Saab Safari, an aircraft that is operated as a military trainer in many countries. Without going into the details, final selection came down to Schweizer and a team composed of Slingsby Aviation Ltd of Kirbymoorside, England and Northrop. Schweizer's proposed aircraft (the SA 2–39) had exceptional flying qualities; was modified with a larger engine so that it met (or exceeded) every requirement; received blue and green ratings in all evaluation categories; provided a more aggressive delivery schedule; and had a bid price 8% lower ($4.5 million) than the Slingsby/Northrop quotation. An intangible factor that we felt to be important is that Schweizer would manufacture the SA 2–39 totally in the United States whereas Slingsby would manufacture its aircraft in England.

Upon losing, Schweizer protested to the GAO. After spending approximately $1.0 million on bidding the program, another $200,000 was spent on the protest. Schweizer felt certain that its SA 2–39 was a better training aircraft with superior performance; we received a better management/company evaluation than Slingsby; we had fifty years of credibility of building and supporting training aircraft for the USAF; all production and product support would be accomplished in the United States; and we were significantly lower in price. How could we lose? Well we did and it was appalling to learn that our loss occurred because the USAF's final selection did not have to follow the evaluation criteria that were listed in the Request for Proposal. The GAO concluded that because this was a Best Value Contract, as long as the winning bidder was qualified and met the RFP requirements, the Air Force was within its rights to make a subjective decision based upon its perception of Best Value. Figure 1 summarizes the basis of our protest and the problems that have subsequently occurred with the Slingsby aircraft.

FIGURE 1: ASSESSMENT OF THE US AIR FORCE EFS PROGRAM RESULTS

A. Basis of Schweizer Protest:

- Had the USAF followed the announced evaluation criteria, Schweizer Aircraft would have been awarded the contract.
- Schweizer's proposed EFS aircraft met or exceeded every requirement and specification of the USAF Request for Proposal and contained many enhancement features which exceeded USAF goals.
- Schweizer's price for both aircraft acquisition and logistics support was significantly lower than Slingsby's. The USAF selected Slingsby despite Schweizer's $4.5 million (8.2%) lower price.
- Slingsby was selected with no apparent consideration of American jobs and taxpayers' money (if Schweizer were selected 100% of the aircraft manufacturing jobs would be in the US).

B. Slingsby Problems Since Contract Award:

- Production schedule is eight to ten months behind schedule. By February 1995, the contract required delivery of 100 aircraft; only 60 have been delivered.
- The USAF increased the price to Slingsby's contract price by at least $2.6M.
- The Slingsby T–67 Firefly was demonstrated to the USAF with a much smaller engine (300 HP vs 540 HP). After one year of operation, the fleet experienced in excess of ten engine failures and continues to have problems with the engine installation and operation.
- Additional hangars are being constructed for the T–67 aircraft. No additional hangars were required for the SA 2–39 proposed by Schweizer. The cost of the new hangars were not figured into the bid evaluation costs.
- The USAF has acknowledged that financial solvency of Slingsby is of concern. This negatively impacts their ability to impose penalties or recover costs associated with Slingsby's schedule delays and technical deficiencies.

Our second bitter experience was the US Army's NTH (New Training Helicopter) program. As background, the helicopter used by the US Army for primary training between 1964 and 1988 was the TM–55A. In 1983, Schweizer purchased this product line from Hughes Helicopters. Over 3,200 of these helicopters have now been manufactured and they have been used for military training by 24 governments around the world. In 1987, the US Army informed Schweizer that they intended to convert their helicopter training program from the piston-powered TM–55A to the turbine-powered UH–1 helicopter. This decision was a blow to Schweizer Aircraft. Upon consideration, however, we felt it might prove to be a blessing in disguise if it could lead to a next generation training helicopter. Five years and $15 million later, Schweizer received FAA certification on the Model 330 helicopter and began series production.

It is important to understand that it was Schweizer that initially worked with the Army helicopter community to determine requirements for an optimized, turbine-

powered military training helicopter. Once the concept was in place, we helped develop support for the program through the various Army commands. The overriding NTH objective, to train two students at the same time and to do it in an optimized aircraft at 25% of the cost of training in the UH–1, was outstanding. Once the foundation had been laid for the NTH program, most of the "big" helicopter manufacturers came out of the closet to compete the program. When this happened, their lobbying strength was sufficient to influence the RFP specifications/requirements and the timing of the flight evaluation program in such a way as to basically eliminate Schweizer from the competition before it began. Bell Helicopter was awarded a $132M contract to produce 157 NTH aircraft. Except for final completion work, these helicopters were manufactured entirely in Canada.

The bottom line for Schweizer on the NTH program was that we materially contributed in the development of an innovative training concept; we spent $15 million to design, manufacture and FAA certify an exceptional, point designed helicopter; we spent over a million dollars in bidding the program; and we lost. The Army selected an aircraft that cost 50% more to purchase and 50% more to operate than the Schweizer 330; an aircraft that is manufactured in Canada; and an aircraft that was clearly the worst of the four competitors in supporting the NTH training concept. Schweizer chose not to protest this award because the futility of the EFS protest was too fresh in our minds and too painful to repeat. Figure 2 summarizes the basis of Schweizer's complaint to the Army and problems that have subsequently occurred with Bell's TH–67 helicopter.

FIGURE 2: ASSESSMENT OF THE US ARMY NTH PROGRAM RESULTS

A. Basis of Schweizer Complaint on NTH Program:

- To promote competition, the Army reduced the original requirement for an optimized training cockpit with three sets of controls to simply require all crew members be in a cockpit environment. They then further modified the requirement to allow Bell Helicopter to bid with a TV in the back seat for the second student. After a two months user evaluation, the Army selected the Bell TH–67 as the NTH winner. Three months after going into service, the Army concluded the TV approach did not work and they scrapped the two student training concept which was the pivotal design requirement of the NTH program.
- Schweizer's proposed NTH aircraft met all critical Army requirements.
- Schweizer's NTH aircraft had the highest training effectiveness of any of the competitors.
- Operational and acquisition costs of the Bell TH–67 were 40–50% higher than the Schweizer NTFT aircraft.
- The Army imposed arbitrary specifications and conducted the user evaluation in a manner that biased the competition and unfairly penalized the two small business competitors.

B. Bell TH–67 Deficiencies Since Contract Award:

- The Army concluded the TH–67 cockpit design does not enable a second student to achieve vicarious learning through observation. Students in the back seat trying to watch a TV picture of the instrument panel suffered from spatial disorientation and invariably became air sick.
- The Army discovered the TH–67 could not be flown with doors off in hot weather due to high noise levels in the cockpit. The cockpit, hence, became unbearably hot which required each aircraft to be modified with an expensive air conditioner. The cost of this modification was paid by the Army.
- A series of maintenance problems associated with the training environment have reduced the flight readiness of the TH–67 fleet. The cost of structural modifications has been paid by the Army.

IV. RECOMMENDATIONS FOR IMPROVING THE SYSTEM

A. Level Playing Field—First and foremost, what industry wants is fair competition. We would like contract awards to be based upon factors like meeting requirements, providing lower risk, past performance, and evaluations of relevant considerations such as product support and delivery schedules. Price then should be the final decision variable. These selection criteria seem rather obvious but our experience proves that the procurement system does not always work that way.

What does exist is a system in which requirements and selection criteria are heavily influenced by industry. The infamous "old boy" network does exist. Whichever company has the most clout will most likely win the competition because they can influence government decision makers in ways that will favor their products. This influence is usually sufficient to eliminate small business competition. We are

not against communication between industry and the government, that is vital. But when the playing field begins to tilt, there is no place for small business to turn.

B. Buy American Policy—When it comes to government contracts, most would assume that preferential treatment is given to companies that will create jobs in the United States versus those that will manufacture in foreign countries. We have all heard about the Buy American Clause which goes into most government contracts. On the two contracts that Schweizer lost, the military selected an aircraft with less training effectiveness relative to the requirements; ones that cost significantly more than Schweizer's offerings; and ones that sent many hundreds of jobs to foreign countries.

In both procurements, FAR Clause 252.225–7001 (Buy American Act and Balance of Payment Program) was included in the contract. What this clause actually says is that the government gives equal preference to products made in 25 other qualifying countries as it does to products made in the United States. Since the government is spending taxpayers' money, doesn't it make sense to show at least some preference to supporting manufacturers in this country? Wouldn't this help create jobs and reduce our balance of trade deficit?

C. Best Value Contract—Again, the name sounds like Motherhood but the reality is Best Value Contracts are a disaster. Best Value Contracts give the government free reign to be subjective in selecting a winner. It provides the vehicle for an arbitrary decision and to do things which conflict with the spirit of the Competition in Contracting Act. It enables "other factors" (typically not defined) to creep into the decision process and creates an umbrella under which outside agencies (such as GAO) cannot question the military's decision in any but the most blatant cases.

IV. Small Business Set Asides—Schweizer Aircraft's experience is that despite all of the programs we have competed and all of the subcontracts received from major aerospace companies, we have never once received anything that was set aside for small businesses. Although we have no facts to back it up, it seems that these set asides lead to more game playing by the government and/or major prime contractors. Small businesses have inherent cost advantages over large companies. We don't seek special privileges; just a level playing field upon which to compete.

D. Cost of Bid and Proposal Effort—Schweizer Aircraft bid and lost two procurements for aircraft classified as "commercial, off-the-shelf." In both cases, over one million dollars was spent by Schweizer to bid the programs. If the government is going to purchase commercial, off-the-shelf equipment, they should be able to accomplish it in a manner that doesn't require industry to spend one million dollars to compete for a contract.

E. Purchase of Commercial, Off-The-Shelf Equipment—In the two aircraft programs that Schweizer bid, what the government actually did was buy specialized, unique military equipment which they called commercial, off-the-shelf equipment. No commercial, off-the-shelf aircraft could meet their minimum requirements and/or specifications. Industry was asked to produce (and in the Army's case, FAA certify) an aircraft that met these requirements before it was even allowed to demonstrate an aircraft. All development expenses were borne by the bidders.

The government did not buy commercial, off-the-shelf aircraft. It simply forced industry to absorb all of the risk and expense of developing a product that was unique to the military's requirements. This was the ante required to play the game and the losers were left with a product without commercial value. That is especially onerous for small business.

F. Accountability—Perhaps the aspect of the procurement system that is most galling is that once a contract is awarded, there seems to be no accountability on the part of the government for their decision. One would think that with the problems outlined in Figures 1 and 2, the Air Force or Army would be subject to some criticism and perhaps even some careers would suffer. Other than a few negative comments in the press and some disparaging comments by industry insiders, no one seems to care.

As an example, the Army is spending $132M to buy new training helicopters. Three months after going into service, the Army concluded that the Bell TH–67 would not support the fundamental training concept which was the key requirement for the whole NTH program.[1] This training concept drove nearly all of the aircraft specification and performance requirements. So Army Aviation scrapped the training concept and reverted to training the way they had been doing it for the past 30 years. The justification for the entire procurement has been flushed and no one seems to care.

[1] Helicopter News, "Army Limits Use of Third Pilot Seat in New TH–67 Trainers", Pg 1, October 14, 1994.

And another example, during the EFS contract pre-award survey, the USAF advised Schweizer repeatedly that their assessment of our ability to meet the delivery schedule was a critical component of their evaluation of Schweizer. This was so because it was essential the new aircraft be in place for the initiation of the EFS Program. All aircraft were to be delivered 20 months after award of the contract. Now, 17 months into the contract, Slingsby has delivered just over 50% of the aircraft. Shouldn't someone, somewhere be accountable?

V. CONCLUSIONS:

The financial hardships that resulted from Schweizer Aircraft's bidding and losing two military aircraft competitions nearly destroyed the Company. The costs to bid coupled with the incomprehensible results have taught my Company a painful lesson. Our experience is shared by dozen of other small businesses that thought they could win if they had a better product at a lower cost. Because the procurement system is so gridlocked by its own inertia, it will be hard to make any substantive changes. The recommendations provided by Schweizer Aircraft can probably never be implemented. Until there is significant changes to the system, however, at least one small aircraft company will not play the US government contracting game again.

Prepared Statement of the Pharmaceutical Research and Manufacturers of America

The Pharmaceutical Research and Manufacturers of America submits the following comments for the official record in connection with the February 21–28, 1995 Committee hearings on implementation of the Federal Acquisition Streamlining Act of 1994. PhRMA is a national trade association representing over 100 research-based companies—including more than 40 of this country's leading biotechnology companies—that discover, develop and produce most of the prescription drugs used in the United States and a substantial portion of the medicines used abroad. Many PhRMA member companies voluntarily and individually contract with the Department of Veterans Affairs for the purchase of pharmaceuticals from the Federal Supply Schedules.

The Federal Acquisition Streamlining Act of 1994 (FASA) was signed into law by President Clinton on October 13, 1994. Section 1555 of that Act states that "the Administrator [of GSA] may provide for the use of Federal supply schedules of the General Services Administration by any of the following entities upon request: (i) A State, any department or agency of a State, and any political subdivision of a State, including a local government." This provision could allow any "governmental" entity to purchase from any of the federal supply schedules once such an entity and the schedule from which the purchase would be made were approved by the Administrator of the GSA.

Pharmaceuticals are currently available on the FSS. Governmental entities which are currently entitled to purchase off the FSS comprise approximately two to three percent of the market for pharmaceuticals. Expansion of access to the FSS to all of the "governmental" entities described in section 1555 of FASA ("FASA entities") would extend FSS pricing to more than one-third of the U.S. (or "domestic") market for pharmaceuticals.

Section 603 of the Veterans Health Care Act of 1992 requires participating pharmaceutical manufacturers to sign an agreement with the Administrator of GSA stating that all "covered drugs" that they manufacture will be made available through the FSS. Covered drugs include brandname inpatient as well as outpatient drugs. Failure to enter into such an agreement precludes a manufacturer's products from being reimbursed under the Medicaid program and paid for by federal purchasers.

The agreement with the Department of Veterans Affairs also requires manufacturers to sell covered drugs to the Department of Defense ("DOD"), the Department of Veterans Affairs ("DVA") and the Public Health Service ("PHS") at no more than seventy-six percent of the non-federal average manufacturer price. Sales to purchasers other than the three agencies described above are not subject to this price in the agreement.

Many state and local governments from whom access to FSS pricing may be expanded by FASA currently negotiate discounted pricing from individual manufacturers or use the services of group purchasing organizations to negotiate on their behalf with manufacturers. The discounts these entities have been able to obtain on the products they purchase, including pharmaceuticals, have been substantial and have resulted in reduced costs for these entities.

GSA is currently developing regulations or guidelines necessary to implement section 1555 of FASA. A broad interpretation of section 1555 could adversely impact private sector pricing negotiations for FASA entities with individual manufacturers being replaced with government administered pricing and collective purchasing. Such a broad interpretation for pharmaceuticals purchased by FASA entities would be unnecessary because the government typically does not and should not intervene and impose government administered pricing when entities have access to competitive, market-based pricing.

Permitting FASA entities access to FSS pricing would arbitrarily disrupt the existing pharmaceutical market and would likely not result in lower pharmaceutical prices for them for several reasons:

First, FASA entities currently benefit from market based pharmaceutical pricing. Individual pharmaceutical manufacturers currently offer discounts to purchasers that perform functions, such as using a formulary or other drug utilization management technique, to increase sales of a manufacturer's products that, but for the performance of such actions, might have gone to the manufacturer's competitors. Those purchasers, such as FASA entities or the group purchasing organizations purchasing on their behalf, that perform such functions effectively can receive discounts from manufacturers. FSS pricing does not reflect such market forces—providing access to FSS pricing for FASA entities would remove these entities from the pharmaceutical market and would replace market prices with government administered pricing. Furthermore, providing access to discounted pricing for purchasers who are able but unwilling to perform such market share movement functions arbitrarily permits those purchasers to be free-riders.

Second, FASA entities would not have access to the discounted pricing available to the DOD, DVA and the PHS through the agreement with pharmaceutical manufacturers required by the Veterans Health Care Act of 1992. The FSS for pharmaceuticals contains dual price lists—one for the agencies listed above and one for all other purchasers. FASA entities would have access only to the price list for all other federal purchasers.

Third, although FASA pricing for pharmaceuticals available to entities other than the DOD, DVA and PHS may in some cases be lower than other pricing available to certain purchasers or available for certain drugs, expanding access to the FSS may remove incentives for individual pharmaceutical manufacturers to continue to offer such low prices. A particular pharmaceutical manufacturer may be willing to offer deeply discounted prices to a limited number of federal purchasers. However, that manufacturer may be less willing to extend such prices to purchasers constituting over one-third of the market for pharmaceuticals—especially since those purchasers may not be performing functions that would merit discounts. As a result, not only could FASA entities not receive the prices currently available on the FSS, those entities that currently purchase pharmaceuticals on the FSS could be faced with paying higher prices.

Fourth, under Section 602 of the Veterans Health Care Act of 1992, over 9,000 "covered entities," many of which are publicly-owned clinics or disproportionate share hospitals, were granted special statutory pricing for their outpatient drugs. Section 602 provided safeguards to ensure that the discounted pharmaceuticals purchased by these covered entities would not be diverted. Extending FSS pricing to these entities would impose another, conflicting, drug pricing requirement and would do so with no protection against diversion and misuse of the drugs purchased.

PhRMA therefore opposes the extension of FSS pricing for pharmaceuticals to FASA entities. The private sector has been extremely effective at negotiating price discounts with individual pharmaceutical manufacturers for the entities covered by section 1555 of FASA. There has been no private market failure necessitating government intervention and government administered pricing and collective purchasing likely would not prove more effective at obtaining discounted pricing for FASA entities than the market. Finally, most of the FASA entities currently benefit from government programs involving pharmaceuticals, including Medicaid's rebate program and section 602 of the Veterans Health Care Act of 1992.

PhRMA supports a narrow interpretation by GSA of Section 1555 in order to avoid unneeded disruption of the private pharmaceutical market. To the extent that Congressional action is necessary to clarify the lack of intent for this provision to apply to purchasers of medical supplies, PhRMA supports such action whether such action includes Congressional communication with GSA during its rulemaking process, the consideration of technical amendments to Section 1555 of FASA or other legislative initiatives to limit the scope of the section.

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